

Select Committee on the provisions of the Election Funding,
Expenditure and Disclosures Amendment Bill 2011

**Inquiry into the provisions
of the Election Funding,
Expenditure and
Disclosures Amendment
Bill 2011**

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Terms of reference

1. That a select committee be appointed to inquire into and report on the provisions of the Election Funding, Expenditure and Disclosures Amendment Bill 2011, and in particular:
 - (a) the constraints imposed by the bill on community and not-for-profit organisations, including unions, community groups, clubs and environment and social justice organisations and their ability to engage in the political process,
 - (b) the impact of the bill on peak organisations, whose constituent entities are themselves membership-based,
 - (c) the impact on community organisations, whose members are voters registered to vote,
 - (d) the impact of the prohibition on the payment of affiliation fees for organisations affiliated to political parties,
 - (e) the impact of donation caps on donations of registered voters and their organisations,
 - (f) the impact of the aggregation of the electoral spending of affiliated organisations under the expenditure cap of the party to which they are affiliated,
 - (g) any amendments necessary to address any adverse impact identified, and
 - (h) the risks of a successful constitutional challenge.
2. That the committee report by 15 February 2012.
3. That the committee consist of nine members as follows:
 - (a) four Government members,
 - (b) three Opposition members,
 - (c) The Hon. Robert Borsak, and
 - (d) Dr John Kaye
4. That the chair of the committee be Dr Kaye.¹

¹ *LC Minutes (23/11/2011) 614-616, Item 22.*

Committee membership

Dr John Kaye MLC	The Greens	<i>(Chair)</i>
The Hon Robert Borsak MLC	The Shooters and Fishers Party	
The Hon Amanda Fazio MLC	Australian Labor Party	
The Hon Jenny Gardiner MLC	The Nationals	
The Hon Trevor Khan MLC	The Nationals	
The Hon Natasha Maclaren-Jones MLC	Liberal Party	
The Hon Dr Peter Phelps MLC	Liberal Party	
The Hon Peter Primrose MLC	Australian Labor Party	
The Hon Steve Whan MLC	Australian Labor Party	

Secretariat

Ms Rachel Simpson, Director

Ms Cathryn Cummins, Principal Council Officer

Ms Shu-Fang Wei, Council Officer

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Chair's foreword

Massive donations from businesses and other organisations to political parties have created the perception, if not the reality, of decisions being made in the interests of the donors at the expense of the community.

After a decade or more of debate, at least three parties went to the 2011 State election with a promise to end the rivers of cash and the damage they do to the political process by limiting election donations to individuals.

Premier Barry O'Farrell's Election Funding, Expenditure and Disclosures Amendment Bill 2011 comes on top of amendments in 2009 and 2010 that limited all donations to \$5,000 to political parties and \$2,000 to candidates, and prohibited money from developers, tobacco and alcohol companies and gambling businesses. Those changes also capped the amount political parties and candidates could spend on electoral advertising.

While the Premier's Bill makes good on his party's promise to end organisational donations to political parties, the proposed restrictions on other bodies that engage in the political process have created substantial controversy.

Effective regulation of the so-called third parties is an essential ingredient of successful donation reform. Without them, any measures that restrict fund raising or spending by political parties would inevitably be subverted. The current US Republican presidential primaries graphically demonstrates the capacity of candidates, and by extension parties, to outsource their advertising to avoid spending caps and donation bans.

However, the constraints that would be imposed by the Bill on the ability of community and environmental organisations and unions to advocate on the issues of importance to their members have challenged those who both support profound reform but are also committed to a diverse and robust democracy.

Fundamental principles such as the right of individuals to collectively express their opinions through the organisations they chose to belong to, freedom of speech and freedom of association have been pitted against the urgent need to end the damage done by organisational donations to political parties.

This inquiry was established with the intention of unravelling some of these conflicting notions and developing amendments to the legislation in order to secure its passage.

Much of the evidence received by the inquiry reinforced concerns that the Bill would have adverse impacts on the ability of not-for-profit organisations to advocate for their members. The ban on donations other than from individuals as applied to third parties would, in the opinion of some of the experts who appeared before the inquiry, stop community and environment groups pooling their money to run issues-based campaigns.

On the other hand, it is important to stop political parties using third parties as their surrogates to get around the legal restrictions on their election activities.

Concerns were also raised about the proposed ban on affiliation fees paid by organisations that join a political party collectively on behalf of their members. Similarly, the proposed aggregation of the electoral communications spending of affiliated bodies with the party's expenditure for the purposes of determining compliance with the cap on such spending was seen by some witnesses as a restriction on the ability of unions affiliated to NSW Labor to advocate for the best interests of their members.

Conversely, it has been argued that affiliation fees are a back door donation that, if allowed to persist, would subvert the intent of the legislation. The Premier suggested to the Committee that the aggregation provisions ensured that NSW Labor does not obtain a substantial advantage arising from their affiliated structure and the legal capacity of unions to each spend approximately \$1.167 million on promoting a vote for the ALP, without affecting the cap on NSW Labor's spending.

While there is argument over the status of affiliation fees as donations, capping them at a modest level that is less than or equal to the costs imposed on the party by servicing the collective membership of the affiliated body would remove any exceptional financial advantage to the party.

The Bill if unamended would certainly have a wide ranging impact on the operation of NSW Labor and its relationship to its affiliated unions. It has been suggested that this is the result of malign intent to secure partisan advantage for the Coalition, while the Premier maintains the provisions do nothing more than create a level playing field.

Witnesses to the inquiry, both from unions and other organisations, and the legal experts, provided a range of views on the impacts of the Bill and the way to address them.

While no consensus emerged amongst either the witnesses or the Committee members, I believe that the Parliament and the public will be well served both by this report and by the evidence the Committee received. The quality of public debate that is essential to advancing the cause of political funding reform will be better informed by both the expert opinion and the views expressed by a range of organisations.

The recommendations of the report provide at least one way forward to untangle the knot created by this legislation. They attempt to balance the fundamental need for this state to end the influence of corporate and organisational funding of political parties' election campaigns while allowing environment and community groups and unions to organise and campaign in the way they choose.

This matter will no doubt be resolved, at least in the short term, by Parliament when the Bill comes before the Upper House.

The history of previous attempts at campaign donation and expenditure reform suggest however that for every step taken by the Parliament, counter-measures will inevitably evolve. Without wishing to be unnecessarily pessimistic, the work of advancing the cause of a political process where every citizen, regardless of their financial capacity, is heard equally is likely to take some time yet.

I would like to thank my fellow committee members who have behaved with good grace and diligence, despite the broad spectrum of opinions and interests they brought to the inquiry.

The Committee held its deliberations over the summer holidays in order to meet the deadline for tabling the report soon after Parliament resumed for its Autumn session. It was the intention of the motion establishing this inquiry to not unnecessarily delay the passage of the Bill.

A number of witnesses interrupted their holidays to provide both written and verbal evidence to the Committee. Their sacrifice speaks to their commitment to their organisations and their members and, in some cases, to the cause of donations reform.

On behalf of the Committee I again express our appreciation to these individuals.

We are also, as always, indebted to the Hansard staff of Parliament whose professionalism ensured that the record of meetings is always accurate.

The inquiry and through it the Parliament and the community were exceptionally well served by the committee staff, Rachel Simpson, Cathryn Cummins and Shu-Fang Wei. Their hard work and dedication were crucial to the successful hearings and the development of this report.

While politicians seek the limelight and praise, the committee staff provide the intellectual heavy lifting and ensure accuracy and relevance. I am personally extremely grateful to Rachel, Cathryn and Shu-Fang for their guidance and advice.

A handwritten signature in black ink that reads "John Kaye". The signature is written in a cursive, slightly slanted style.

Dr John Kaye MLC
Committee Chair

Summary of key issues

In November 2011 the Select Committee on the provisions of the Election Funding, Expenditure and Disclosures Amendment Bill 2011 was established to inquire into and report on the provisions of the Election Funding, Expenditure and Disclosures Amendment Bill 2011 (the Bill). The terms of reference for the inquiry required the Committee to consider a number of factors, including the constraints imposed by the Bill on community and not-for-profit organisations, and the risks of a successful constitutional challenge to the Bill if it were to be enacted.

The Committee wishes to express our appreciation to all inquiry participants for their contributions to this inquiry. We acknowledge that the time frame for this inquiry was shorter than is usual practice. However, this short time frame has allowed us to table our final report at the commencement of the 2012 parliamentary session, meaning that the progress of the Bill through the Legislative Council, either with or without amendments, has not been unnecessarily delayed.

The Committee indicates from the outset that we strongly believe that the NSW electoral funding, expenditure and disclosure scheme should be fair, equitable and transparent. We further believe that the scheme should minimise the risk and perception of undue influence or corruption distorting democracy in NSW.

However, the Committee considers that steps should be taken to ensure that any reforms not disproportionately restrict the ability of individuals or groups to engage in the political process. Managing the tension between these aims – minimising the appearance or risk of undue influence and corruption, while facilitating equitable involvement – is the balancing act of electoral regulation.

This summary outlines the key issues raised during the inquiry and discussed in this report.

NSW electoral funding, expenditure and disclosure scheme

There has been a long history of electoral reform in NSW, commencing with the enactment of the *Election Funding Act 1981* which legislated for the first comprehensive election finance scheme in Australia. Since its introduction, the *Election Funding Act 1981*, now known as the *Election Funding, Expenditure and Disclosures Act 1981* (the Act) has been scrutinised a number of times by NSW parliamentary committees, most notably by the Legislative Council's Select Committee on Electoral and Political Party Funding and the Joint Standing Committee on Electoral Matters.

The Act has also been amended a number of times, with the current proposals to further amend the Act contained in the Bill.

The Bill

The Bill proposes to amend the Act in two main areas:

- providing for the aggregation of the electoral communication expenditure of parties and their affiliated organisations, through inserting new provisions into section 95G of the Act, and
- limiting the ability to make political donations to individuals only, through replacing section 96D of the Act.

There were conflicting views among inquiry participants on the merits of the Bill. While some inquiry participants considered that the Bill would improve the fairness and transparency of electoral regulation in NSW, others were concerned that the Bill may have detrimental consequences for democracy in NSW. The examination of these conflicting views throughout this report will assist to inform the forthcoming debate in the NSW Legislative Council on the Bill.

Aggregation of electoral communication expenditure

Under the proposed amendments to section 95G, electoral communication expenditure incurred by a party would be aggregated with the electoral communication expenditure incurred by an affiliated organisation, within the applicable cap for the party.

The opinions of inquiry participants on the proposed amendments to section 95G of the Act were divided. Premier O'Farrell argued that the amendments, which would aggregate the electoral communication expenditure of parties and their affiliated organisations, were necessary to close a loophole in the existing electoral funding, expenditure and disclosures regime which allows parties and affiliates to jointly campaign with no impact on the electoral communication expenditure cap for either entity.

However, other inquiry participants argued that the proposed amendments would unfairly restrict the political voice of affiliated organisations during election campaigns, and that the amendments failed to take into consideration of instances where an affiliated organisation may advocate against the party to which it is affiliated.

The Committee believes that it is important to ensure that all participants in the political process are able to exercise an independent voice. As currently drafted, the proposed amendments may have the effect of diminishing the voice of affiliated organisations, or unfairly aggregating the expenditure of parties and affiliated organisations in instances where an affiliate is campaigning against the party.

Accordingly, the Committee recommends that proposed section 95G be amended to provide for the aggregation of the electoral communication expenditure of a party and its affiliated organisations into the cap of the party only where the expenditure incurred by the affiliated organisation has the effect of directly advocating a vote for, or is incurred at the request of or in co-operation with, the party to which it is affiliated.

This would allow affiliated organisations to exercise their independent political voice through the conduct of issues-based campaigns, whilst simultaneously reducing the risk of parties and their affiliates engaging in co-ordinated electoral campaigns that directly advocate for the party.

Prohibition on donations other than by individuals

Under the proposed new section 96D, it would be unlawful for a party, elected member, group, candidate or third-party campaigner to accept a political donation unless the donor is an individual who is enrolled on the roll of electors for local government, State or Federal elections.

This proposal received mixed support from inquiry participants. It was argued that the ban would vest the power to make political donations solely in the hands of those able to vote, thus reducing the risk and perception of undue influence or corruption. Conversely, it was argued that the ban would eliminate the ability of citizens to engage in collective political action, and skew the political system

towards individuals who could afford to make an individual donation. It was further suggested that the ban may disadvantage both smaller political parties and individuals not on the electoral roll.

On balance, the Committee considers that the principles of fairness and transparency, together with a reduced risk of corruption and undue influence, will be best served by banning political donations from all but individuals on the electoral roll.

However, the Committee considers that the principle of restricting political donations as defined in the Act to individuals, when strictly applied to not-for-profit membership-based third-party organisations, may have possibly unintended adverse consequences. Firstly, a coalition of third-party campaigners would be unable to pool campaign expenditure into another third-party, even when the money is used only to promote an issue of concern to their members. Secondly, the payment of modest amounts in annual or other subscriptions to a party by an entity for affiliation requires further consideration.

The Committee therefore supports the application of proposed section 96D, in addition to the changes advocated by the Committee to address the abovementioned concerns.

Affiliation fees

The proposed new section 96D expressly prohibits the payment of annual or other subscriptions to a party by an entity (including an industrial organisation) other than a citizen on the electoral roll for affiliation with the party.

The Committee considers that preventing parties from collecting monies to cover the administrative costs of maintaining its membership would be to prohibit a valid organisational structure. However, the we also consider that the current cap on affiliation fees of \$2,000 per member is set at an unreasonably high level that exceeds realistic administration costs, and could led to a perception that affiliation fees are being used to circumvent donation limits to the advantage of the party receiving the fees.

The Committee recommends that proposed section 96D be amended to permit the payment of tightly capped annual or other subscriptions to a party by a person or entity for affiliation with the party. The affiliation fee should be set at a reasonable limit, which appropriately reflects the administration costs for imposed on the party by the affiliation.

Third-party campaigners

The impact of the Bill on third-party campaigners was one of the key concerns identified by a number of inquiry participants. Under section 4(1) of the Act, a third-party campaigner is defined as being an entity or other person who incurs electoral communication expenditure during a capped expenditure period that exceeds \$2,000 in total. This definition could potentially capture a range of organisations, including sporting associations, trade unions and community groups.

It is clear that the provisions in the Bill relating to the ban on donations from all but individuals on the electoral roll have provoked considerable consternation and confusion among third-party campaigners. Inquiry participants expressed a number of concerns, relating to the ability of third-party campaigners to undertake their advocacy role both independently and jointly with other third-party campaigners, and the administrative burden of having to accurately account for the sources of donations.

The Committee considers that the vibrancy of democracy in NSW would be diminished if third-party campaigners were deterred from engaging in public debate because of the provisions of the Bill. However, we also recognise the importance of ensuring that third-party campaigners are not allowed to become surrogates for political parties in an attempt to subvert the current restrictions in the Act.

The Committee has recommended that not-for-profit, membership-based third party campaigners be allowed to pool their funds for the purposes of conducting an issues-based campaign, subject to the existing provisions of the Act that restrict third-party campaigner donations and expenditure. We believe that the proposed ban should only apply where a third-party campaigner is either a for-profit entity, or the funds are to be spent on promoting the interests of a particular political party, candidate or group of candidates.

The Committee further considers that in order to increase clarity among third-party campaigners about their rights and responsibilities under the Act, provisions relating to third-party campaigners should be consolidated into a stand-alone section of the Act.

The definition of ‘electoral expenditure’

The Committee notes the Government’s belief that the Bill will not impact on the ability of third-party campaigners to undertake genuine issues-based campaigns, and that it is possible to draw a distinction between issues-based campaigning and ‘electoral expenditure’. At present, ‘electoral expenditure’ is expenditure that is used for the purpose of promoting or opposing, directly or indirectly, a party or election of a candidate(s), or influencing, directly or indirectly, the voting at an election.

However, the Committee was concerned by the level of anxiety among inquiry participants about the interpretation of ‘electoral expenditure’. This perceived lack of clarity could discourage third-party campaigners from engaging in public debate due to concerns that the campaign may be classified as a political, rather than issues-based, campaign.

The Committee has recommended that the definition of ‘electoral expenditure’ in the Act be amended to more clearly distinguish what constitutes an issues-based campaign. The Committee acknowledges the difficulty in crafting an unambiguous definition of ‘electoral expenditure’, and encourages the Government to examine definitions used in other jurisdictions, both in Australia and internationally, to identify if there is a more appropriate definition currently in use.

Constitutional implications of the Bill

The Committee has considered whether the High Court may find the provisions of the Bill to be in breach of the implied freedom of political communication and the related freedoms of political association and political participation.

We believe that, if the Bill was to be enacted without amendment, there is a risk of a constitutional challenge being brought before the High Court. However, the Committee is not in a position to determine the likely outcome of such a challenge. Ultimately, any decision about the constitutionality of the legislation will rest with the High Court.

Notwithstanding that the Committee does not form any definitive conclusion regarding the Bill’s constitutionality, if the changes recommended in this report were implemented, the Committee believes the likelihood of a successful constitutional challenge to the Bill would be diminished.

Summary of recommendations

Recommendation 1

38

That Schedule 1[1] of the Election Funding, Expenditure and Disclosures Amendment Bill 2011 amending section 95G of the *Election Funding, Expenditure and Disclosures Act 1981* be amended so that the electoral communication expenditure of a party and its affiliated organisations is aggregated into the cap of the party only where the expenditure incurred by the affiliated organisation:

- has the effect of directly advocating a vote for, or
- is incurred at the request of, or in co-operation with, the party to which it is affiliated.

Recommendation 2

50

That Schedule 1[2] of the Election Funding, Expenditure and Disclosures Amendment Bill 2011 amending section 96D of the *Election Funding, Expenditure and Disclosures Act 1981* to prohibit political donations other than by individuals on the electoral roll be agreed to, in addition to the changes advocated by the Committee in Recommendations 3 and 4.

Recommendation 3

59

That Schedule 1[2] of the Election Funding, Expenditure and Disclosures Amendment Bill 2011 amending section 96D of the *Election Funding, Expenditure and Disclosures Act 1981* be amended to permit fees to be paid by bodies to the party to which they are affiliated, provided the fees are capped to a very modest level, which is equal to or not greater than the administration costs imposed on the party by the affiliation, and the consent of their members to do so has been obtained.

Recommendation 4

75

That Schedule 1[2] of the Election Funding, Expenditure and Disclosures Amendment Bill 2011 amending section 96D of the *Election Funding, Expenditure and Disclosures Act 1981* be amended to allow not-for-profit membership-based organisations that are third-party campaigners to pool their money in another not-for-profit organisation for the purpose of undertaking issues-based campaigning during an election period, subject to the existing caps on donations to, and expenditure by, third-party campaigners.

Recommendation 5

75

That the NSW Government seek to amend the *Election Funding, Expenditure and Disclosures Act 1981* to consolidate provisions relating to third-party campaigners into a separate part of the Act.

Recommendation 6

87

That the NSW Government seek to amend the *Election Funding, Expenditure and Disclosures Act 1981* to clarify the definition of 'electoral expenditure' by clearly defining what constitutes an issues-based campaign, and providing that an issues-based campaign does not constitute electoral expenditure.

Key terms

The Act	<i>Election Funding, Expenditure and Disclosure Act 1981</i> (NSW)
The Bill	Election Funding, Expenditure and Disclosure Amendment Bill 2011 (NSW)
Affiliated organisation of a party	Defined in Sch 1[7] of the Bill to be a body or other organisation, whether incorporated or unincorporated, that is authorised under the rules of that party to appoint delegates to the government body of that party to participate in pre-selection of candidates for that party (or both)
Capped expenditure period	Defined in s 95(H)(b) of the Act to be the period from 1 October of the year before an election is to be held to the end of polling day for the election
Electoral communication expenditure	Defined in s 87 of the Act to be expenditure on: Advertisements, how-to-vote cards and other election material Production and distribution of election material Internet, telecommunications stationery and postage Employing staff engaged in election campaigns Office accommodation for staff and candidates
Electoral expenditure	Defined in s 87(1) of the Act to be expenditure: for or in conjunction with promoting or opposing, directly or indirectly, a party of the election of a candidate or candidates or for the purpose of influencing, directly or indirectly, the voting at an election
Political donation	Defined in s 85(1) of the Act to be a gift made to or for the benefit of: a party, elected member, candidate or group of candidates or an entity or other person used or intended to be used to make, or to reimburse the person or entity for making, a political donation or incurring electoral expenditure
Third-party campaigner	Defined in s 4(1) of the Act to be any entity or other person (not being a registered party, elected member, group or candidate) who incurs electoral communication expenditure during a capped expenditure period that exceeds \$2,000 in total

Chapter 1 Introduction

This chapter provides an overview of the inquiry process and the structure of the report.

Terms of reference

- 1.1 The Select Committee on the provisions of the Election Funding, Expenditure and Disclosures Amendment Bill 2011 was established by resolution of the Legislative Council on 23 November 2011.²
- 1.2 The terms of reference require the Committee to inquire into and report on the provisions of the Election Funding, Expenditure and Disclosures Amendment Bill 2011 (the Bill), including the constraints imposed by the Bill on community and not-for-profit organisations, and the risks of a successful constitutional challenge to the Bill if it were to be enacted.
- 1.3 The terms of reference are reproduced in full on page iv.
- 1.4 The Bill is reproduced in full in Appendix 5.

Submissions

- 1.5 The Committee called for submissions through advertisements in *The Daily Telegraph* and the *Sydney Morning Herald*.
- 1.6 The Committee also wrote to key stakeholders inviting them to participate in the inquiry.
- 1.7 The Committee received 32 submissions and one supplementary submission to the inquiry from a range of stakeholders, including the Sydney Alliance, the Democratic Audit of Australia, NSW Cancer Council, legal experts and trade unions.
- 1.8 A full list of submissions is contained in Appendix 1. These submissions are available on the Committee's website: www.parliament.nsw.gov.au/electionfunding.

Public hearings

- 1.9 The Committee held two public hearings at Parliament House over the course of the inquiry. The Committee heard from a number of stakeholders, including the Premier, the Hon Barry O'Farrell MP, Unions NSW, the Sporting Shooters Association of NSW (Inc), Professor Anne Twomey and Dr Graeme Orr.
- 1.10 A list of all the witnesses who appeared is provided in Appendix 2 and transcripts of the hearings are available at the Committee's website.

² LC Minutes (23/11/2011) 614-616, Item 22.

- 1.11** A list of documents tendered by witnesses at the hearings can be found at Appendix 3. A list of witnesses who provided answers to questions taken on notice during hearings is at Appendix 4.
- 1.12** The Committee would like to extend its thanks to the individuals and organisations that participated in this inquiry, whether by making a submission or appearing at a hearing.
- 1.13** The Committee acknowledges that the inquiry was conducted over a short time frame during a period when many people would normally be on leave. This truncated timetable was necessary for the Committee's report to be tabled in the House during the first sitting week of the 2012 parliamentary session, meaning that the progress of the Bill through the Legislative Council, either with or without amendments, will not be unnecessarily delayed.
- 1.14** The Committee particularly appreciates the efforts of those individuals and organisations who worked on their submissions over the holiday period, or who interrupted their leave to appear before the Committee.

Previous reports on election funding

- 1.15** There have been a number of reports on election funding schemes, both in NSW and the Commonwealth, over the past five years.
- 1.16** In NSW, the Legislative Council's Select Committee on Electoral and Political Party Funding was established in June 2007 to inquire into and report on the funding of, and disclosure of donations to, political parties and candidates in state and local government elections. The Committee tabled its final report in June 2008, recommending sweeping changes to the electoral funding system.³
- 1.17** In December 2009 the Parliament's Joint Standing Committee on Electoral Matters commenced an inquiry into a public funding model for political parties and candidates at the state and local government levels. The final report, tabled in March 2010, made a series of recommendations to reform the electoral system, including changes to the regulation of donations and the introduction of expenditure caps.⁴
- 1.18** At the Commonwealth level, the Government released the 'Electoral Reform Green Paper: Donations, Funding and Expenditure' in December 2008. The Green Paper identified a number of possible reforms to Commonwealth electoral law.⁵

³ NSW Legislative Council, Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in NSW*, June 2008, accessed 1 February 2012, <[http://www.parliament.nsw.gov.au/Prod/parlament/committee.nsf/0/1ca6d5a89fabd975ca25746d00063640/\\$FILE/Final%20report%20080619.pdf](http://www.parliament.nsw.gov.au/Prod/parlament/committee.nsf/0/1ca6d5a89fabd975ca25746d00063640/$FILE/Final%20report%20080619.pdf)>

⁴ NSW Parliament, Joint Standing Committee on Electoral Matters, *Public funding of election campaigns*, Report 2/54, March 2010, accessed 1 February 2012, <[http://www.parliament.nsw.gov.au/Prod/parlament/committee.nsf/0/82f12c9fc8e2dbdcca2576f200213db6/\\$FILE/Final%20Report%202-54.pdf](http://www.parliament.nsw.gov.au/Prod/parlament/committee.nsf/0/82f12c9fc8e2dbdcca2576f200213db6/$FILE/Final%20Report%202-54.pdf)>

⁵ Commonwealth Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008, accessed 1 February 2012, <http://www.dpmc.gov.au/consultation/elect_reform/docs/electoral_reform_green_paper.pdf>

- 1.19 In May 2011, the Joint Standing Committee on Electoral Matters commenced an inquiry into the system for the funding of political parties and election campaigns.⁶ The final report was released in November 2011, and made a number of recommendations for reform.
- 1.20 These reports are discussed further in Chapter 2.

Report structure

- 1.21 The next chapter, **Chapter 2**, provides a brief overview of the development of the election funding and disclosure scheme in NSW and outlines the relevant provisions of the *Election Funding, Expenditure and Disclosure Act 1981* (the Act). The chapter also provides an overview of the main features of the election funding and disclosures scheme in key international jurisdictions.
- 1.22 **Chapter 3** contains an examination of the provisions of the Bill, and outlines the Committee's perspective on the rationale for reform to the Act.
- 1.23 The provisions pertaining to the aggregation of electoral communication expenditure for parties and affiliated organisations are examined in **Chapter 4**.
- 1.24 **Chapter 5** discusses the prohibition on political donations other than by individuals on the electoral roll, and the ban on the payment of affiliation fees to political parties.
- 1.25 **Chapter 6** discusses the potential impact of the Bill on third-party campaigners, including trade unions, and community, not-for-profit and peak organisations.
- 1.26 **Chapter 7** examines the constitutional issues surrounding the Bill. Specific reference is made to the potential application of the *Lange* test by the High Court in considering the constitutionality of the Bill.
- 1.27 The final chapter, **Chapter 8**, contains concluding remarks.

⁶ Commonwealth Parliament, Joint Standing Committee on Electoral Matters, *Report on the Funding of political parties and election campaigns*, November 2011, accessed 1 February 2012, < <http://www.aph.gov.au/house/committee/em/political%20funding/Report/Final%20report.pdf>>

Chapter 2 Election funding and disclosure in NSW

This chapter outlines the key events in electoral reform in NSW since the enactment of the *Election Funding Act 1981*, which legislated for the first comprehensive election finance scheme in Australia. Since its introduction, the *Election Funding Act 1981* has been amended a number of times, most recently in 2009 and 2010.

The chapter also discusses the current provisions of the Act, now known as the *Election Funding, Expenditure and Disclosures Act 1981* (the Act) that are most relevant to the Committee's current inquiry. Developments in electoral reform at the Commonwealth level are briefly examined, as well as relevant provisions of election funding schemes in four international jurisdictions: Canada, New Zealand, the United Kingdom, and the United States of America.

Election Funding Act 1981

- 2.1 In his second reading speech on the Election Funding Bill 1981 the then Premier, the Hon Neville Wran MP, said of the proposed legislation: 'It removes the risk of parties selling favours and declares to the world that the great political parties of NSW are not for sale'.⁷
- 2.2 The design of the election funding and disclosure scheme was based on the recommendations made by the NSW Parliament's Joint Select Committee Upon Public Funding of Election Campaigns.⁸ The scheme established by the *Election Funding Act 1981* incorporated three main elements:
- public funding for State elections, which can be supplemented by private funds
 - disclosure of political donations by both donors and recipients
 - disclosure of electoral expenditure.
- 2.3 These elements remain as central features of the current NSW election funding and disclosure scheme.
- 2.4 A number of amendments were made to the Act between 1981 and 2006, including:
- local government elections were brought under the disclosure scheme in 1987, following which disclosure requirements were encapsulated in the *Local Government Act 1993*
 - disclosure requirements were strengthened in 1993, through the introduction of disclosure requirements for third parties, implementation of disclosure requirements for fundraising events, reduction of disclosure thresholds, and the banning of anonymous donations over certain values
 - establishment of the Political Education Fund in 1993, which provided annual payments to parties to undertake political education of voters

⁷ *LA Debates* (15/04/1981) 5944.

⁸ NSW Parliament, Joint Select Committee upon Public Funding of Election Campaigns, *Report*, November 1980.

- following the introduction of fixed four-year parliamentary terms in 1999, changes were made to the calculation of the pool of public funding available for elections
- the Election Funding Authority (EFA) was granted increased power to demand information from third parties in 2006, including requiring a third-party to identify someone who the EFA reasonably suspects has incurred electoral expenditure but failed to disclose it.⁹

Recent amendments to the Act

- 2.5** The NSW Legislative Council's Select Committee on Electoral and Political Party Funding was established in June 2007 to inquire into and report on the funding of, and disclosure of donations to, political parties and candidates in state and local government elections. That Committee called for submissions from a wide range of stakeholders and published a discussion paper identifying areas for possible reform. 189 submissions were received from individuals, political parties, local governments, academics and community organisations.
- 2.6** The Committee tabled its final report in June 2008, recommending a number of changes to the electoral funding system, including:
- capping individual donations at \$1,000 per political party per year, and \$1,000 per independent candidate per electoral cycle
 - banning donations from corporations and other organisations
 - exempting party membership and affiliation fees, including union affiliation fees, up to a reasonable limit, from the ban on all but small individual donations
 - setting election spending caps for parties, groups, candidates
 - capping election spending by third parties, and giving consideration to capping spending by associated entities
 - setting the disclosure threshold for donations at \$500
 - requiring disclosure of donations and expenditure every six months, with disclosure returns published on the website of the EFA within one month of lodgement.¹⁰
- 2.7** Following the report of the Select Committee, significant changes were made to the electoral funding and disclosure system in NSW. These changes were achieved through the *Election Funding Amendment (Political Donations and Expenditure) Act 2008* and the *Local Government and Planning Legislation Amendment (Political Donations) Act 2008*.
- 2.8** Since the tabling of the report of the NSW Legislative Council's Select Committee on Electoral and Political Party Funding no public debate or compelling evidence regarding the banning of affiliation fees for political parties has emerged.

⁹ NSW Legislative Council, Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, Report 1, June 2008, pp 35-35.

¹⁰ Select Committee on Electoral and Political Party Funding, Report 1, pp xii-xvii.

- 2.9** The *Election Funding Amendment (Political Donations and Expenditure) Act 2008* made a number of changes to the *Election Funding Act 1981*, including:
- requiring biannual disclosures of political donations and election expenditure, including membership fees and affiliation fees paid by trade unions
 - imposing an obligation to disclose the details of all political donations of or above \$1,000
 - requiring the disclosure of details of membership or affiliation fees of or above \$1,000
 - increasing the penalty for failing to make disclosures, or making false disclosures.¹¹
- 2.10** The *Local Government and Planning Legislation Amendment (Political Donations) Act 2008* amended the *Local Government Act 1993* and the *Environmental Planning and Assessment Act 1979* to require that:
- the general manager of local councils record which local councillors voted for or against each planning decision of the council
 - matters relating to political donations in connection with local councillors be referred to the Pecuniary Interest and Disciplinary Tribunal
 - when any relevant planning applications are made to the Planning Minister, Department or local council, the applicant is to disclose political donations and gifts made within the two years before the application is made.¹²
- 2.11** Further changes to the electoral system were made in 2009, with the prohibition of donations from property developers.¹³
- 2.12** In December 2009 the NSW Parliament's Joint Standing Committee on Electoral Matters commenced an inquiry into a public funding model for political parties and candidates at the State and local government levels. The final report of the Committee was tabled in March 2010 and made a series of recommendations to reform the electoral system. These recommendations included:
- capping donations from individuals at \$2,000 per political party, group or independent candidate per financial year, with the cap to be adjusted according to the Consumer Price Index
 - restricting donations from individuals to individuals on the NSW and/or Australian electoral roll
 - capping donations from entities at \$2,000 per political party, group or independent candidate per financial year, with the cap to be adjusted according to the Consumer Price Index

¹¹ NSW Parliament, Joint Standing Committee on Electoral Matters, *Public funding of election campaigns*, Report 2/54, March 2010, p 50.

¹² Joint Standing Committee on Electoral Matters, Report 2/54, p 51.

¹³ *Election Funding and Disclosures Amendment (Property Developers Prohibition) Act 2009*.

- entitling ‘entities’ that include companies with an Australian Business Number, registered trade unions and incorporated associations which carry out the majority of its activities in NSW, to make political donations
- exempting party membership fees and party compulsory levies on parliamentarians from the cap on political donations
- introducing expenditure caps for political parties, candidates and groups contesting state elections, and that advertising and communication by third parties also be regulated.¹⁴

2.13 These recommendations were enacted by the *Election Funding and Disclosures Amendment Act 2010*, although the applicable caps on political donations set by the Act was \$5,000 to a registered party or group, and \$2,000 to non-registered parties, elected members, candidates, or third-party campaigners.¹⁵

2.14 The Act was further amended in 2010 to prohibit donations from tobacco industry business entities and liquor or gambling industry business entities.¹⁶ The 2010 amendments also introduced the regulation of third-party campaigners into the election funding and disclosures regime.¹⁷

2.15 Another important element of the Election Funding and Disclosures Amendment Bill 2010 was a significant increase in the level of public funding available to political parties.

2.16 The regulation of third-party campaigners is discussed at paragraph 2.29.

Current provisions relating to donations and expenditure

2.17 This section outlines the key provisions of the Act that are most relevant for an examination of the Election Funding, Expenditure and Disclosures Amendment Bill 2011 (the Bill). These provisions relate to political donations, electoral communication expenditure and the regulation of third-party campaigners.

2.18 An understanding of these definitions, and the inter-relationships between them, is critical to facilitate an understanding of the Bill and its implications for the future operation of the Act.

¹⁴ Joint Standing Committee on Electoral Matters, Report 2/54, pp x-xviii.

¹⁵ *Election Funding, Expenditure and Disclosures Act 1981*, s 95A.

¹⁶ *Election Funding, Expenditure and Disclosures Act 1981*, s 96GAA and 96GB. In relation to liquor or gambling industry business entities, section 96GB(2B) of the Act stipulates that the corporation must be engaged in these activities for the ultimate purpose of making a profit.

¹⁷ A number of sections in the *Election Funding and Disclosures Amendment Act 2010* make reference to third-party campaigners, For example, Part 4 Division 2A of the Act deals with the registration requirements for third parties, while Division 2B relates to electoral expenditure communication caps.

Political donations

2.19 Political donations of or above \$1,000 must be disclosed for each annual period ending on 30 June.¹⁸ The Act defines a political donation as being:

- (a) a gift made to or for the benefit of a party, or
- (b) a gift made to or for the benefit of an elected member, or
- (c) a gift made to or for the benefit of a candidate or a group of candidates, or
- (d) a gift made to or for the benefit of an entity or other person (not being a party, elected member, group or candidate), the whole or part of which was used or is intended to be used by the entity or person:
 - (i) to enable the entity or person to make, directly or indirectly, a political donation or to incur electoral expenditure, or
 - (ii) to reimburse the entity or person for making, directly or indirectly, a political donation or incurring electoral expenditure.¹⁹

2.20 Sections (d)(i) and (ii) of the above definition are most relevant to third party campaigners. As a consequence of these requirements, the impact of the ban proposed by section 96D in relation to ‘political donations’ on third-party campaigners will be dependent on the type of income that third-party campaigners use to incur ‘electoral expenditure’. This issue will be discussed further in Chapter 6.

2.21 The Act also stipulates that the following are to be considered political donations:

- an amount paid by a person as a contribution, entry fee or other payment to entitle that or any other person to participate in or otherwise obtain any benefit from a fund-raising venture or function
- an annual or other subscription paid to a party by a member of the party, or a person or entity (including an industrial organisation) for affiliation with the party
- a disposition of property to a NSW branch of a party from the federal branch of the party, from another State or Territory branch of the party, or disposition of property from a party to another associated party
- uncharged interest on a loan to an entity or other person.²⁰

2.22 The applicable cap on political donations is:

- \$5,000 to a registered party or group
- \$2,000 to non-registered parties, elected members, candidates, or third-party campaigners.²¹

2.23 The Act restricts the making of donations to individuals on the local government, State or Commonwealth electoral roll, and to entities that have an Australian Business Number or any

¹⁸ *Election Funding, Expenditure and Disclosures Act 1981*, s 88(2) and 89(1).

¹⁹ *Election Funding, Expenditure and Disclosures Act 1981*, s 85(1).

²⁰ *Election Funding, Expenditure and Disclosures Act 1981*, s 85(2)-(3B).

²¹ *Election Funding, Expenditure and Disclosures Act 1981*, s 95A.

other number allocated or recognised by the Australian Securities and Investments Commission.²²

2.24 Donations from property developers, tobacco industry business entities and liquor or gambling industry business entities are expressly prohibited by the Act.²³

Electoral communication expenditure

2.25 Caps on election communication expenditure apply from 1 October in the year before an election is to be held to the end of polling day for the election.²⁴

2.26 The Act defines ‘electoral expenditure’ as:

Expenditure for or in connection with promoting or opposing, directly or indirectly, a party or the election of a candidate or candidates or for the purpose of influencing, directly or indirectly, the voting at an election.²⁵

2.27 ‘Electoral communication expenditure’ is defined as being electoral expenditure of any of the following kinds:

(a) expenditure on advertisements in radio, television, the Internet, cinemas, newspapers, billboards, posters, brochures, how-to-vote cards and other election material

(b) expenditure on the production and distribution of election material

(c) expenditure on the Internet, telecommunications, stationery and postage

(d) expenditure incurred in employing staff engaged in election campaigns

(e) expenditure incurred for office accommodation for any such staff and candidates (other than for the campaign headquarters of a party or for the electorate office of an elected member)

(f) such other expenditure as may be prescribed by the regulations as electoral communication expenditure.²⁶

2.28 The applicable caps for election communication expenditure for a party in the 2015 State Election is both:

- the overall cap, which is \$111,200 multiplied by the number of Legislative Assembly electorates contested by the party

²² *Election Funding, Expenditure and Disclosures Act 1981*, s 96D.

²³ *Election Funding, Expenditure and Disclosures Act 1981*, s 96GAA, s 96GA and s 96GB.

²⁴ *Election Funding, Expenditure and Disclosures Act 1981*, s 95(H)(b).

²⁵ *Election Funding, Expenditure and Disclosures Act 1981* s 87(1).

²⁶ *Election Funding, Expenditure and Disclosures Act 1981* s 87. This section also describes types of expenditure which are not considered to be ‘electoral communication expenditure’, such as expenditure on travel and travel accommodation and expenditure on research associated with election campaigns.

- the separate cap for expenditure in each electorate, which is \$55,600.²⁷

Regulation of third parties

2.29 Expenditure caps also exist for third-party campaigners. Under the Act, ‘third-party campaigner’ is defined as:

... an entity or other person (not being a registered party, elected member, group or candidate) who incurs electoral communication expenditure during a capped expenditure period that exceeds \$2,000 in total.²⁸

2.30 As mentioned at paragraph 2.25, the capped expenditure period applies from 1 October in the year before an election is to be held to the end of polling day for the election.

2.31 The applicable cap for electoral communication expenditure by a third-party is:

- \$1,166,600 if the third-party campaigner was registered with the Election Funding Authority prior to the commencement of the capped expenditure period for the election, or
- \$583,300 in any other case, and
- the separate cap for expenditure in each electorate, which is \$22,300.²⁹

2.32 In addition to expenditure caps on electoral donations, the *Election Funding, Expenditure and Disclosures Act 1981* also imposes a cap on political donations of \$2,000 to third-party campaigners.

2.33 The next chapter, Chapter 3, examines the most recent changes proposed to the election funding regime as specified in the Bill.

Commonwealth developments

2.34 The reforms to the NSW election funding and disclosure scheme are occurring in the context of discussion and possible broader reforms at the Commonwealth level.

²⁷ *Election Funding, Expenditure and Disclosures Act 1981* ss 95F(2), (12); Election Funding Authority, *Fact Sheet: Electoral Expenditure – 2015 State Election caps on electoral communication expenditure*, p 3, accessed 7 February 2012, <http://efa.nsw.gov.au/__data/assets/pdf_file/0006/91536/Fact_Sheet_Electoral_Expenditure_v2.pdf>

The caps for the 2011 State Election were \$100,000 multiplied by the number of Legislative Assembly electorates contested by the party, plus the separate cap for expenditure in each electorate of \$50,000.

²⁸ *Election Funding, Expenditure and Disclosures Act 1981* s 4(1).

²⁹ *Election Funding, Expenditure and Disclosures Act 1981* s 95F(10) and s 95F(12).

These figures represent the caps for the 2015 State Election. The caps for the 2011 State Election were \$1,050,000 if the third-party campaigner was registered with the Election Funding Authority prior to the commencement of the capped expenditure period for the election, or \$525,000 in any other case, and the separate cap for expenditure in each electorate of \$20,000

- 2.35** Reforms to the Commonwealth election funding and disclosure scheme have been under consideration since December 2008, when the Commonwealth Government released the ‘Electoral Reform Green Paper: Donations, Funding and Expenditure’. The Green Paper identified a number of possible reforms to Commonwealth electoral law, and discussed the advantages of a nationally harmonised approach to electoral funding.³⁰
- 2.36** In May 2011, the Joint Standing Committee on Electoral Matters commenced an inquiry into the system for the funding of political parties and election campaigns. The terms of reference for the inquiry required the Committee to consider matters including issues raised in the Electoral Reform Green Paper, the role of third parties in the electoral process and limiting the escalating cost of elections.
- 2.37** The Joint Standing Committee released its final report in November 2011. The report made a number of recommendations to reform the funding of political parties and election campaigns, including:
- reducing the disclosure threshold for donations to \$1,000
 - requiring single donations of \$100,000 to be disclosed to the Australian Electoral Commission within 14 days of the receipt of the donation
 - banning anonymous donations of above \$50, and prohibiting foreign donations
 - requiring detailed disclosure of campaign expenditure above the current threshold of \$11,500
 - that third parties be subject to the same disclosure threshold as political parties, Independents candidates, Senate groups, associated entities and donors.³¹
- 2.38** No recommendations were made in regards to capping either third-party expenditure, donations to third parties or banning affiliation fees.³²
- 2.39** The Government response to the Joint Standing Committee report had not been received at the time of publication of this report.

International approaches to electoral regulation

- 2.40** This section briefly outlines the approaches to political donations and the regulation of campaign expenditure pursued in four international jurisdictions: Canada, New Zealand, the United Kingdom and the United States of America. It should be noted that these jurisdictions differ from Australia in that they do not have compulsory voting and have not introduced legislative change with regard to affiliation fees or affiliated organisations as proposed in this

³⁰ Commonwealth Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, green paper, December 2008, p 24.

³¹ Mr Daryl Melham MP, Committee Chair, Joint Standing Committee on Electoral Matters, ‘Report on political funding’, *Media Release*, 9 December 2011; Commonwealth Parliament, Joint Standing Committee on Electoral Matters, *Report on the funding of political parties and election campaigns*, November 2011, p 161.

³² Commonwealth Parliament, Joint Standing Committee on Electoral Matters, *Report on the funding of political parties and election campaigns*, November 2011, pp 165-169.

Bill. Some inquiry participants referred to the approaches followed in these jurisdictions throughout the course of this inquiry.

2.41 Dr Graeme Orr, Democratic Audit of Australia noted that each of these four jurisdictions have pursued different approaches to electoral regulation:

Canada is the most highly regulated. The United Kingdom and New Zealand focus on expenditure caps rather than donation caps; the United States focuses on donation caps rather than expenditure caps.³³

Canada

2.42 Canadian political parties and third parties are all subject to controls under the *Canada Elections Act 2000*. A citizen or permanent resident of Canada may donate up to \$1,100 in total per year to a political entity which is:

- a registered political party
- registered electoral associations, nomination contestants and candidates of a registered party
- leadership contestants of a registered party
- independent candidate in a particular election.³⁴

2.43 Corporations and trade unions may not make any contributions to political entities.³⁵

2.44 Election expenditure is subject to limits for candidates, registered political parties and third parties. The limits for candidates and parties are calculated using a formula based on the number of names on the lists of electors for each electoral district or, for a party, on the electoral district in which the party has endorsed candidates.³⁶

2.45 The *Canada Elections Act* regulates third parties that engage in election advertising, which is defined as an advertising message that promotes or opposes a registered party or the election of a candidate. This includes messages that take a position on an issue with which a registered party or candidate is associated.³⁷

2.46 A third-party that spends more than \$500 on election advertising must register with the Chief Electoral Officer, and report its election advertising expenses no later than four months after an election day. Third parties that spend less than \$500 are not required to register with the Chief Electoral Officer.³⁸

³³ Dr Graeme Orr, Member, Democratic Audit of Australia, Evidence, 18 January 2012, p 61.

³⁴ Elections Canada, *The Electoral System of Canada*, 2nd Edition, 2007, p 39.

³⁵ Elections Canada, *The Electoral System of Canada*, 2nd Edition, 2007, p 39.

³⁶ Elections Canada, *The Electoral System of Canada*, 2nd Edition, 2007, p 41.

³⁷ Elections Canada, *The Electoral System of Canada*, 2nd Edition, 2007, p 43.

³⁸ Elections Canada, *The Electoral System of Canada*, 2nd Edition, 2007, pp 43-44.

- 2.47** A third-party is not permitted to incur election advertising expenses of more than \$150,000 during an election period in relation to a general election.³⁹ For a by-election, the limit is \$3,000 in a given electoral district during the election period of a by-election.⁴⁰
- 2.48** The election period is the period beginning with the issue of the writ and ending on polling day.⁴¹

New Zealand

- 2.49** There are a number of regulations relating to political donations in New Zealand. Party donations and contributions to donations of more than \$15,000 must be annually declared. A return must be filed with the Electoral Commission within 10 working days of receipt of a donation that exceeds \$30,000, or when added to all the donations received from the same donor in the preceding 12 months exceeds \$30,000. Anonymous donations and donations from overseas persons, organisations or companies are restricted to \$1,500.⁴²
- 2.50** Total election expenses, including advertising, are subject to caps for both candidates and parties. Section 3A of the *Electoral Act 1993* (New Zealand) defines an ‘election advertisement’:
- (a) means an advertisement in any medium that may reasonably be regarded as encouraging or persuading voters to do either or both of the following:
 - (i) to vote, or not to vote, for a type of candidate described or indicated by reference to views or positions that are, or are not, held or taken (whether or not the name of the candidate is stated):
 - (ii) to vote, or not to vote, for a type of party described or indicated by reference to views or positions that are, or are not, held or taken (whether or not the name of the party is stated); and
 - (b) includes -
 - (i) a candidate advertisement; and
 - (ii) a party advertisement.⁴³

- 2.51** For candidates in a general election, total election expenses for the regulated period must not exceed \$25,000.⁴⁴ For parties, the total election expenses of that party in respect of any

³⁹ *Canada Elections Act 2000*, s 350(1).

⁴⁰ *Canada Elections Act 2000*, s 350(4).

⁴¹ *Canada Elections Act 2000*, Definitions, p 3.

⁴² Elections New Zealand, *Party Donations Disclosures – An Overview*, accessed 21 December 2011, <<http://www.elections.org.nz/rules/parties/donations/donations-disclosure-overview.html>>

⁴³ *Electoral Act 1993* (New Zealand), s 3A.

The Act also details what is *not* considered to be an election advertisement, including the editorial content of a periodical, radio or television program, or publication on a news media Internet site; any transmission of proceedings in the House of Representatives; and any publication on the Internet, or other electronic medium, of personal political views by an individual who does not make or receive a payment in respect of the publication of those views.

regulated period must not exceed \$1,065,000, plus \$25,000 for each electoral district contested by a candidate for the party.⁴⁵

- 2.52** The *Electoral Act 1993* was amended in January 2011 in relation to the obligations and requirements on third-party promoters. The Act requires individuals or organisations that spend, or intend to spend, more than \$12,000 on election advertising during the regulated period⁴⁶ for each election must register as a registered promoter with the New Zealand Electoral Commission.⁴⁷
- 2.53** An unregistered promoter's advertising expenses must not exceed \$12,000 in relation to election advertisements published during the regulated period.⁴⁸
- 2.54** A registered promoter's election expenses during the regulated period for the general election must not exceed \$300,000. Election expenses include any advertising expenses incurred in any medium that are published, or continue to be published, during the regulated period, and are promoted by the registered promoter.⁴⁹

United Kingdom

- 2.55** The electoral scheme in the United Kingdom (UK) is primarily regulated by the *Political Parties, Elections and Referendums Act 2000* and the *Political Parties and Elections Act 2009*.
- 2.56** There is no cap to the amount an individual or organisation can donate or lend to a political party. However, if the donation is over £500, the donation must come from a permissible source. The *Political Parties, Elections and Referendums Act 2000* provides a list of permissible donors that includes:
- an individual registered in a UK electoral register
 - a UK registered company which is incorporated within the European Union and carries on business in the UK
 - a Great Britain registered political party
 - a UK registered trade union
 - a UK registered building society

⁴⁴ *Electoral Act 1993* (New Zealand), s 205C.

⁴⁵ *Electoral Act 1993* (New Zealand), s 206C.

⁴⁶ For the 2011 General Election, the regulated period commenced on 26 August 2011 and ended on 25 November 2011.

⁴⁷ Elections New Zealand, *Third Party Handbook – Election Expenses*, accessed 20 December 2011 <<http://www.elections.org.nz/rules/thirdparties/third-party-handbook-2011/part-5-election-expenses.html>>

⁴⁸ Elections New Zealand, *Third Party Handbook – Election Expenses*, accessed 20 December 2011, <<http://www.elections.org.nz/rules/thirdparties/third-party-handbook-2011/part-5-election-expenses.html>>

⁴⁹ Elections New Zealand, *Third Party Handbook – Election Expenses*, accessed 20 December 2011, <<http://www.elections.org.nz/rules/thirdparties/third-party-handbook-2011/part-5-election-expenses.html>>

- a UK registered limited liability partnership that carries out business in the UK
 - a UK registered friendly society
 - a UK based unincorporated association that carries on business or other activities in the UK.⁵⁰
- 2.57** There are bans on donations from foreign persons and corporations, and restrictions on the donation practices of trade unions and corporations. Both unions and corporations must seek the authorisation of their members to make political donations. This authorisation to make political donations is attained in the case of trade unions by balloting members every ten years, while corporations must seek authorisation of their shareholders every four years.⁵¹
- 2.58** All candidates and parties contesting an election are subject to limits on campaign expenditure incurred in the regulated period in advance of an election. For elections to the UK Parliament, parties can spend £30,000 per constituency contested; with a maximum spend of £18.96 million in Great Britain and £540,000 in Northern Ireland.⁵²
- 2.59** The UK Electoral Commission defines third parties as individuals or organisations other than political parties or candidates which campaign at an election. Third parties may campaign for or against individual candidates, or for or against political parties or issues.⁵³
- 2.60** Regulations apply to the amount of ‘controlled expenditure’ that can be incurred by a third-party. Controlled expenditure is defined as ‘expenditure that is spent on election material to promote/disparage a party or issue during the regulated period’.⁵⁴
- 2.61** ‘Election material’ is defined as ‘any material that has the intention to procure electoral success for a party or group of candidates (also including disparaging a party or group of candidates). It is irrelevant whether the material expressly mentions the names of the party or candidate’.⁵⁵
- 2.62** There are strict limits on candidate-based campaigning by third parties. These are:
- £500 at a UK Parliamentary, Scottish Parliamentary, Northern Ireland Assembly or Welsh Assembly election
 - £5,000 at a European Parliamentary election (in reference to an independent candidate only)

⁵⁰ *Political Parties, Elections and Referendums Act 2000* (UK), s 54.

⁵¹ Select Committee on Electoral and Political Party Funding, Report 1, p 27.

⁵² The Electoral Commission (UK), *Party Campaign Expenditure*, accessed 21 December 2011, <<http://www.electoralcommission.org.uk/elections/election-spending/party-campaign-expenditure>>

⁵³ The Electoral Commission (UK), *Third Parties*, accessed 20 December 2011, <<http://www.electoralcommission.org.uk/party-finance/legislation/third-partiespermitted-participants/third-parties>>

⁵⁴ The Electoral Commission (UK), *Fact Sheet - Third Parties*, September 2006, p 2, accessed 3 February 2012, <http://www.electoralcommission.org.uk/__data/assets/electoral_commission_pdf_file/0016/13273/0906thirdparties_23251-6143__E__N__S__W__.pdf>

⁵⁵ The Electoral Commission (UK), *Fact Sheet - Third Parties*, September 2006, p 2, accessed 3 February 2012, <http://www.electoralcommission.org.uk/__data/assets/electoral_commission_pdf_file/0016/13273/0906thirdparties_23251-6143__E__N__S__W__.pdf>

- £50 plus 0.5 pence per elector in the electoral area for local elections.⁵⁶

2.63 Third parties may also campaign for or against a political party or issue. In this instance, third parties must register with the Electoral Commission if they plan to spend more than £5,000 in Scotland, Wales or Northern Ireland, or more than £10,000 in England during the regulated period for a relevant election. The third-party expenditure limits are:

- £793,500 for England
- £108,000 for Scotland
- £60,000 for Wales
- £27,000 for Northern Ireland.⁵⁷

2.64 The regulated period applies to the 365 days preceding a UK parliamentary general election, and the four months preceding all other regulated elections.⁵⁸

2.65 After an election, each recognised third-party must submit a spending return. The return is due within three months of the election for spending up to £250,000 and within six months of the election for spending over £250,000.⁵⁹

United States of America

2.66 There are a number of prohibited sources of donations under electoral funding law in the United States of America. Donations may not be received from foreign parties, or from persons or corporations with contracts with the Federal Government. Labour unions and corporations are also prohibited from making donations directly to candidates or parties.⁶⁰

2.67 Individual donations to candidates are restricted to US\$2,100 in each election cycle. Individual donations to parties are limited to US\$26,700 to each national party committee.⁶¹

2.68 There are also limits to the amount that individuals can donate to political action committees (PACs). Individuals can donate US\$5,000 to each PAC, up to a limit of US\$61,400 for all PACs over an election cycle.⁶²

⁵⁶ *Representation of the People Act 1983* (UK), s 75.

⁵⁷ The Electoral Commission (UK), *Fact Sheet - Third Parties*, September 2006, p 2, accessed 3 February 2012, <http://www.electoralcommission.org.uk/__data/assets/electoral_commission_pdf_file/0016/13273/0906thirdparties_23251-6143__E__N__S__W__.pdf>. These limits are for national elections. Different limits apply for European Parliament elections.

⁵⁸ The Electoral Commission (UK), *Fact Sheet - Third Parties*, September 2006, p 2, accessed 3 February 2012, <http://www.electoralcommission.org.uk/__data/assets/electoral_commission_pdf_file/0016/13273/0906thirdparties_23251-6143__E__N__S__W__.pdf>.

⁵⁹ The Electoral Commission (UK), *Third Parties*, accessed 20 December 2011, <<http://www.electoralcommission.org.uk/party-finance/legislation/third-partiespermitted-participants/third-parties>>

⁶⁰ Select Committee on Electoral and Political Party Funding, Report 1, p 29.

⁶¹ Select Committee on Electoral and Political Party Funding, Report 1, p 28.

⁶² Select Committee on Electoral and Political Party Funding, Report 1, p 28.

- 2.69** All PACs must be registered with the Federal Election Commission, and may only receive donations from individuals.⁶³
- 2.70** PACs can either be a separate segregated fund or a non-connected committee. Separate segregated funds are established and administered by corporations, labour unions, membership organisation or trade associations, with contributions given by individuals associated with a connected or sponsoring organisation. Non-connected committees can seek donations from the general public, and are not sponsored by, or connected to, any of the above entities.⁶⁴

⁶³ Federal Election Commission (US), *Quick Answers to PAC Questions*, accessed 6 February 2012, <http://www.fec.gov/ans/answers_pac.shtml>

⁶⁴ Select Committee on Electoral and Political Party Funding, Report 1, p 29.

Chapter 3 Election Funding, Expenditure and Disclosures Amendment Bill 2011

This chapter outlines the provisions of the Election Funding, Expenditure and Disclosures Amendment Bill 2011 (the Bill), enabling a thorough examination of the potential impact of the Bill in later chapters of this report. The chapter also highlights two potential issues with the Bill as identified by the NSW Parliament's Joint Legislation Review Committee, namely freedom of communication and commencement by proclamation. The chapter concludes by discussing the rationale for further reform to the NSW election funding, expenditure and disclosure scheme.

Overview of the Bill

3.1 The Bill was introduced into the Legislative Assembly on 12 September 2011 by the Premier, the Hon Barry O'Farrell MP. The Bill seeks to amend the *Election Funding, Expenditure and Disclosures Act 1981* (the Act) in relation to caps on electoral communication expenditure and prohibitions on political donations other than by individuals on the electoral roll.

3.2 The Bill achieves these objectives by:

- providing that electoral communication expenditure incurred by a party for a State election campaign is to be treated as expenditure that exceeds the applicable cap if that expenditure and any other electoral communication expenditure incurred by an affiliated organisation exceed the applicable cap for the party, and
- prohibiting political donations from corporations or other entities.⁶⁵

3.3 In introducing the Bill, the Premier said of the proposed reforms:

These reforms are a reasonable, measured and fair way to inject more transparency and accessibility into the State's political processes. It will invest the power to donate solely in those who have the power to vote, those with the greatest stake in the system.⁶⁶

3.4 During debate in the Legislative Assembly on the Bill, a number of members spoke both in support of and in opposition to the Bill. For example, Mr John Barilaro MP, speaking in support of the Bill, argued that restricting donations to individuals would mean that '... families and individuals will have a stronger voice in the real political process'.⁶⁷

3.5 Some members argued that the measures proposed in the Bill would result in greater public confidence in the system of government. Mr Jonathan O'Dea MP contended that the proposed reforms would '...promote greater political accountability, integrity and honesty and they will help restore the community's confidence in government in NSW'.⁶⁸ This view was echoed by Ms Clover Moore MP, Independent, who said, in part:

⁶⁵ Election Funding, Expenditure and Disclosures Amendment Bill 2011, Explanatory note, p 1.

⁶⁶ *LA Debates* (12/09/2011) 5432.

⁶⁷ *LA Debates* (12/10/2011) 6037.

⁶⁸ *LA Debates* (12/10/2011) 6035.

This reform will prevent undue influence being exercised over the political process or the perception of it, and that is welcome. Limiting donations to individuals who are enrolled to vote in New South Wales parliamentary elections will help to achieve that.

Currently party campaigns can be topped up with campaigns run by affiliated third party organisations to give that party an unfair advantage over other candidates. What the former Government did with that legislation was really quite cynical and I opposed that move at the time. The inclusion of campaign expenditure of affiliated organisations, such as unions, in the legislated expenditure cap of a political party also will assist to level the playing field. That is particularly important for Independents, who do not have the advantage of state-wide campaigns. I welcome these latest changes and recent moves in New South Wales to improve what not very long ago was a lax donations regime. I commend the bill to the House.⁶⁹

- 3.6** In contrast, members opposed to the Bill argued that it would restrict the ability of people to collectively organise to participate in the political process, and may infringe on the constitutional right to free speech. Mr John Robertson MP, the Leader of the Opposition, articulated his perspective on the Bill:

It has hidden provisions that stop not-for-profit organisations, member-based organisations and sporting groups from participating in the political process. This Bill's hidden provisions will stop organisations such as Unions NSW, the Council of Social Service of New South Wales, the Australian Industry Group or Clubs NSW from collecting funds from their members to run coordinated campaigns on issues that matter to them and to their members. It is these hidden provisions that are an attack on the basic right of all Australians to freedom of speech ...⁷⁰

- 3.7** Further during the debate, Mr Robertson stated:

There is no doubt that this bill is designed to fundamentally undermine the Labor Party's structures, decision-making processes and day-to-day operations. It seeks to insert provisions in the electoral funding laws which will not impact on the Liberal Party, The Nationals or even The Greens but which will affect the Labor Party. This bill seeks to stop the union movement from affiliating with the Labor Party – the very union movement that banded together to form the Labor Party 120 years ago.⁷¹

- 3.8** The Bill was passed without amendment by the Legislative Assembly on 12 October 2011, and introduced into the Legislative Council on the same day.⁷²
- 3.9** The Bill has not yet passed the first reading stage in the Legislative Council.⁷³ Four amendments to the Bill have been circulated by the Greens NSW.
- 3.10** On 23 November 2011, this Committee was established by the Legislative Council for the purpose of inquiry into and report on the provisions of the Bill.⁷⁴

⁶⁹ *LA Debates* (12/10/2011) 6051.

⁷⁰ *LA Debates* (12/10/2011) 6033.

⁷¹ *LA Debates* (12/10/2011) 6033-34.

⁷² *LA Votes of Proceedings* (12/10/2011) 376-378, Item 5 and *LC Minutes* (12/10/2011) 479, Item 14(2).

⁷³ NSW Parliament, *Current Session Bills - Election Funding, Expenditure and Disclosures Amendment Bill 2011*, accessed 1 February 2012 <<http://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/131a07fa4b8a041cca256e610012de17/ef0fa9bfab5141eeca2578b80024329d?OpenDocument>>

Provisions of the Bill

3.11 The Bill proposes to amend the Act in two main areas:

- providing for the aggregation of electoral communication expenditure, through inserting new provisions into section 95G of the Act, and
- limiting the ability to make political donations to individuals only, through replacing section 96D of the Act.⁷⁵

3.12 There are also a number of consequential amendments proposed to the Act.

Aggregation of electoral communication expenditure

3.13 Schedule 1[1] of the Bill proposes to amend section 95G of the Act, and provides that electoral communication expenditure incurred by a party is to be treated as expenditure that exceeds the applicable cap if that expenditure and any other electoral communication expenditure incurred by an affiliated organisation exceeds the applicable cap for the party.⁷⁶

3.14 The Bill defines ‘affiliated organisation’ as:

An affiliated organisation of a party means a body or other organisation, whether incorporated or unincorporated, that is authorised under the rules of that party to appoint delegates to the governing body of that party or to participate in pre-selection of candidates for that party (or both).⁷⁷

3.15 As outlined in Chapter 2, the applicable caps for election communication expenditure for a party in the 2015 State Election is both:

- the overall cap, which is generally \$111,200 multiplied by the number of Legislative Assembly electorates contested by the party
- the separate cap for expenditure in each electorate, which is \$55,600.⁷⁸

3.16 The amendments proposed to section 95G of the Act are discussed in Chapter 4.

⁷⁴ *LC Minutes* (23/11/2011) 614-615, Item 22.

⁷⁵ Election Funding, Expenditure and Disclosures Amendment Bill 2011, Explanatory note, p 1.

⁷⁶ Election Funding, Expenditure and Disclosures Amendment Bill 2011, Explanatory note, p 2.

⁷⁷ Election Funding, Expenditure and Disclosures Amendment Bill 2011, schedule 1(7).

⁷⁸ *Election Funding, Expenditure and Disclosures Act 1981* s 95F(2) and 95(12); Election Funding Authority, *Fact Sheet: Electoral Expenditure – 2015 State Election caps on electoral communication expenditure*, p 3, accessed 7 February 2012, < http://efa.nsw.gov.au/__data/assets/pdf_file/0006/91536/Fact_Sheet_Electoral_Expenditure_v2.pdf>

The caps for the 2011 State Election were \$100,000 multiplied by the number of Legislative Assembly electorates contested by the party, plus the separate cap for expenditure in each electorate of \$50,000.

Prohibition on donations other than from individuals

- 3.17** Schedule 1[2] of the Bill proposes to insert a new section 96D into the Act to prohibit political donations from corporations or other entities to a party, elected member, group, candidate or third-party campaigner.
- 3.18** The effect of this amendment is that political donations may only be made by individuals on the electoral roll in NSW or the Commonwealth. An offence would therefore be committed if:
- a donation from a corporation or other entity is accepted
 - an individual makes a political donation on behalf of a corporation or entity
 - a corporation or other entity makes a gift to an individual for the purpose of the individual making a donation.⁷⁹
- 3.19** As a result of these amendments, it would be unlawful for a corporation or other entity, including an industrial organisation, to pay annual or other subscriptions to a party for affiliation with the party. This prohibition does not include transfers between branches of parties or between associated parties.⁸⁰
- 3.20** The proposed new section 96D is discussed in Chapter 5.

Consequential amendments

- 3.21** Under Schedule 2 of the Bill, consequential amendments are proposed to the Act. Schedule 2[1]-[9] proposes minor amendments as a consequence of the restriction on donations from corporations or other entities.⁸¹
- 3.22** Schedule 2[10] proposes to clarify that a person cannot be punished twice for an offence under the Act that constitutes a breach of the proposed prohibition on donations by corporations and a breach of the existing prohibition on donations by property developers, and tobacco, liquor or gambling industry business entities, their directors and other associates.⁸²
- 3.23** Schedule 2[11] would enable savings and transitional regulations to be made. Schedule 2[12] contains transitional provisions.⁸³

Examination of the Bill by the Legislation Review Committee

- 3.24** In its examination of the Bill, the NSW Parliament's Joint Legislation Review Committee identified two key areas of concern. These concerns related to freedom of communication and commencement by proclamation.

⁷⁹ Election Funding, Expenditure and Disclosures Amendment Bill 2011, Explanatory note, p 2.

⁸⁰ Election Funding, Expenditure and Disclosures Amendment Bill 2011, Explanatory note, p 2.

⁸¹ Election Funding, Expenditure and Disclosures Amendment Bill 2011, Explanatory note, p 2.

⁸² Election Funding, Expenditure and Disclosures Amendment Bill 2011, Explanatory note, p 2.

⁸³ Election Funding, Expenditure and Disclosures Amendment Bill 2011, Explanatory note, p 2.

Freedom of communication

- 3.25** The proposed Bill will limit the amount that political parties can spend on election expenditure through the inclusion of campaign expenditure by affiliated organisations in the aggregate total amount allowed to be spent by the parent political party.
- 3.26** The Legislation Review Committee observed that these proposed restrictions on campaign expenditure ‘... could affect the ability of political parties (or their advocates) to advertise their credentials, promote their policies, and generally engage with voters’.⁸⁴
- 3.27** In this regard, the Legislation Review Committee made reference to the *Lange* test in discussing the potential constitutional implications of the Bill. The *Lange* test is discussed in Chapter 7.
- 3.28** The Legislation Review Committee drew no conclusion as to the potential constitutional implications of the Bill. However, the Committee did observe that the Bill ‘may’ restrict the freedom of political communication:
- As the provisions of this Bill further restrict the scope of affiliated organisations to incur political expenditure on behalf of a political party, as well as limiting the making of political donations to all but individuals on the electoral roll, it appears that the Bill may further restrict the constitutionally implied freedom of political communication.⁸⁵
- 3.29** The Legislation Review Committee noted similar concerns about restricting freedom of speech in relation to the Election Funding and Disclosures Amendment Bill 2010.
- 3.30** The potential constitutional implications of the Bill are explored in Chapter 7.

Commencement by proclamation

- 3.31** The Legislation Review Committee noted that the Bill provided that the Act is to commence on a day or days to be appointed by proclamation. The Committee always notes instances where the commencement of an Act is delegated to the Executive, once a Bill has been passed by the Legislature.⁸⁶

Rationale for reform

- 3.32** As mentioned at paragraph 3.3, the Premier considers that the reforms proposed by the Bill ‘... are a reasonable, measured and equitable way to put in place a system of political participation in NSW that is more transparent and more accessible’.⁸⁷

⁸⁴ NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No. 5 of 2011, 11 October 2011, p 10.

⁸⁵ Legislation Review Committee, *Legislation Review Digest*, No. 5 of 2011, p 11.

⁸⁶ Legislation Review Committee, *Legislation Review Digest*, No. 5 of 2011, p 11.

⁸⁷ Submission 11, Office of the Premier, p 3.

- 3.33** Many inquiry participants expressed strong support for a fair and equitable election funding, expenditure and disclosure system that seeks to limit undue influence and corruption. For example, Unions NSW noted its support for periodic reviews of the election funding scheme as a way to ensure the scheme's integrity and fairness:

Unions NSW support reforms to electoral funding laws that enhance the integrity of our democratic system of government. The dynamics of our political system are continually evolving and as a consequence the laws supporting our electoral process need periodic review. Any review has to ensure the system remains open and transparent and, in a pluralist society, that the interests of a particular group or individual do not have a dominant influence over the political process.⁸⁸

- 3.34** Mr David Penn argued that '[t]he purpose of this Bill should be to level the playing field between the power of corporations and the rights to free speech of the ordinary citizens of this State'.⁸⁹

- 3.35** The Cancer Council NSW emphasised its support for better regulation of lobbyists in any electoral reform process:

Cancer Council NSW strongly supports reforms to electoral funding and disclosure laws, and regulation of lobbyists, that are designed to improve the integrity, fairness and transparency of our democracy.⁹⁰

- 3.36** Mr Chris Maltby, Registered Officer, The Greens NSW, highlighted the importance of ensuring that any reforms to the electoral system serve to improve the functioning of democracy in NSW

Our interest is in the furtherance of democracy. As a small party in this sphere but nevertheless one that has growing success we do not necessarily recognise that we are the be all and end all in the political sphere. We are also mindful of not imposing difficulties on further parties that might come along to replace us or to replace existing parties or to inject new voices as other issues emerge ...⁹¹

- 3.37** In the Greens NSW submission to the inquiry, Mr Maltby highlighted the need for electoral funding reform to be comprehensive, stating:

...we believe that backdoor donation paths must be closed but without inflicting damage on the fabric of democracy. Allowing corporate or union money to be funnelled into separate bodies that then campaign for candidates or parties would undermine any ban on corporate donations.⁹²

⁸⁸ Submission 24, Unions NSW, p 3.

⁸⁹ Submission 6, Mr David Penn, p 1.

⁹⁰ Submission 32, Cancer Council NSW, p 3.

⁹¹ Mr Chris Maltby, Registered Officer, The Greens NSW, Evidence, 20 January 2012, p 36.

⁹² Submission 25, The Greens NSW, p 2.

3.38 Mr Maltby said of donations to peak bodies by affiliated organisations:

We accept that allowing peak bodies to receive money and then spend it on advocating a vote for a party or candidate would create a backdoor campaign financing mechanism that would undermine the intent of the legislation.⁹³

3.39 However, some inquiry participants argued that the Bill may not assist to enhance the integrity and robustness of electoral regulation in NSW. For example, the Hon John Tingle, Vice-Chairman of the Shooters and Fishers Party, questioned whether or not the Bill would, in practice, achieve the aim of reducing the risk of corruption and undue influence:

The Bill has been touted by the Government and by the Premier as designed to ‘rid this State of the risk, reality and perception of corruption and undue influence’. Obviously, that is a highly desirable and laudable aim but I would suggest that the big question is whether this Bill actually has the capacity to achieve that end...⁹⁴

3.40 Ms Jennifer Diamond, General Secretary, NSW Teachers Federation, echoed the concerns of Mr Tingle, stating that while the NSW Teachers Federation supports transparency in electoral regulation, ‘... we do not believe that these amendments are the way to provide transparency and clarity’.⁹⁵

3.41 Professor Anne Twomey, Professor of Constitutional Law, University of Sydney Law School, observed that ‘[p]ersonally I find this legislation extremely complicated and difficult’.⁹⁶ Dr Joo-Cheong Tham, Associate Professor, Melbourne Law School, similarly noted that the Bill ‘... raises complex questions of principle and practical application’.⁹⁷

3.42 Dr Tham continued, observing of the Bill: ‘If enacted, its provisions will effect significant changes to the *Election Funding, Expenditure and Disclosures Act 1981* (NSW). This inquiry provides a vital opportunity to comprehensively examine the Bill’.⁹⁸

Committee comment

3.43 This chapter has outlined the provisions of the Bill, and noted the concerns of the Legislation Review Committee with regard to the Bill.

3.44 The chapter has also highlighted that there are conflicting views amongst inquiry participants on the Bill. While some inquiry participants consider that the Bill will improve the fairness and transparency of electoral regulation in NSW, other inquiry participants are concerned that the Bill may have unintended, and detrimental, consequences for democracy in NSW. The

⁹³ Submission 25, p 4.

⁹⁴ Hon John Tingle, Vice-Chairman, Shooters and Fishers Party, Evidence, 18 January 2012, p 33.

⁹⁵ Ms Jennifer Diamond, General Secretary, NSW Teachers Federation, Evidence, 20 January 2012, p 60.

⁹⁶ Professor Anne Twomey, Professor of Constitutional Law, University of Sydney Law School, Evidence, 20 January 2012, p 16.

⁹⁷ Submission 27, Dr Joo-Cheong Tham, p 1.

⁹⁸ Submission 27, p 1.

Committee's inquiry has provided an important opportunity for public debate on the potential impact of this complex Bill.

- 3.45** The Committee strongly believes that the NSW electoral funding, expenditure and disclosure scheme should be fair, equitable and transparent. The Committee further believes that the scheme should minimise the risk and perception of undue influence or corruption distorting democracy in NSW.
- 3.46** The Committee considers that any reforms must not disproportionately restrict the ability of individuals or groups to engage in the political process. Managing the tension between these aims – minimising the appearance or risk of undue influence and corruption, while facilitating equitable involvement – is the balancing act of electoral regulation.
- 3.47** In the remaining chapters of this report, the Committee explores the issues relating to the potential impact of the Bill on the electoral funding, expenditure and disclosure scheme as identified by inquiry participants, including the possible impact of the Bill for political parties and third-party campaigners, and the constitutional implications of the proposed amendments. This rigorous examination of the issues arising from the Bill will also inform the forthcoming debate in the NSW Legislative Council on the Bill.

Chapter 4 Aggregation of electoral communication expenditure

This chapter examines the amendments proposed to section 95G of the *Election Funding, Expenditure and Disclosures Act 1981* (the Act), contained in Schedule 1[1] of the Election Funding, Expenditure and Disclosures Amendment Bill 2011 (the Bill). These proposed amendments relate to the aggregation of electoral communication expenditure of parties and affiliated organisations into the expenditure cap of the party. The chapter begins by outlining the proposed amendments, before discussing the opinions of inquiry participants as to the relative merits of the amendments. The chapter concludes by examining suggested amendments to regulating electoral communication expenditure other than the method proposed by the Bill.

The proposed amendment

- 4.1** The proposed amendments to section 95G mean that electoral communication expenditure incurred by a party is to be treated as expenditure that exceeds the applicable cap if that expenditure and any other electoral communication expenditure incurred by an affiliated organisation exceeds the applicable cap for the party.⁹⁹
- 4.2** The Bill defines an ‘affiliated organisation’ of a party to be:
- ... a body or other organisation, whether incorporated or unincorporated, that is authorised under the rules of that party to appoint delegates to the governing body of that party or to participate in pre-selection of candidates for that party (or both).¹⁰⁰
- 4.3** The Act stipulates that ‘electoral expenditure’ can be for the purpose of:
- promoting or opposing, directly or indirectly, a party or election of a candidate(s), or
 - influencing, directly or indirectly, the voting at an election.¹⁰¹
- 4.4** Under the Act, ‘electoral communication expenditure’ encompasses a range of electoral expenditure, including:
- advertisements in radio, television, the Internet, cinemas, newspapers, billboards, posters, brochures, how-to-vote cards and other election material
 - the production and distribution of election material
 - the Internet, telecommunications, stationery and postage
 - employing staff engaged in election campaigns
 - office accommodation for any such staff and candidates, other than for the campaign headquarters of a party or for the electorate office of an elected member.¹⁰²

⁹⁹ Election Funding, Expenditure and Disclosures Amendment Bill 2011, Explanatory note, p 2.

¹⁰⁰ Election Funding, Expenditure and Disclosures Amendment Bill 2011, schedule 1(7).

¹⁰¹ *Election Funding, Expenditure and Disclosures Act 1981* s 87.

¹⁰² *Election Funding, Expenditure and Disclosures Act 1981* s 87. This section also describes types of expenditure which are not considered to be ‘electoral communication expenditure’, such as

- 4.5 Electoral communication expenditure is capped from 1 October in the year before which the election is to be held to the end of polling day for the election. The applicable cap for election communication expenditure for a party in this period is both:
- the overall cap, which is generally \$111,200 multiplied by the number of Legislative Assembly electorates contested by the party
 - the separate cap for expenditure in each electorate, which is \$55,600.¹⁰³
- 4.6 Affiliated organisations engaging in electoral communication expenditure would be classified as third parties if they incur more than \$2,000 in electoral communication expenditure during the capped expenditure period.¹⁰⁴ Once classified as a third-party campaigner, the applicable cap for election communication expenditure in the capped period is \$1,166,600.¹⁰⁵

The potential impact of the proposed amendment

- 4.7 Opinions were divided among inquiry participants as to the potential impact of the aggregation of electoral communication expenditure between parties and affiliated organisations.
- 4.8 It was argued that the amendments were necessary to ensure equity in the electoral communication expenditure capabilities of all parties.
- 4.9 Conversely, other inquiry participants were concerned that this provision unfairly linked the electoral communication expenditure of parties and affiliated organisations, particularly given that not all electoral communication expenditure undertaken by affiliated parties will accord with the policies, or advance the electoral interests, of the party to which they are affiliated. Some inquiry participants also argued that, were it to be implemented, this amendment would have a significant and disproportionate impact on the party structure of NSW Labor.

Rationale for the aggregation of electoral communication expenditure

- 4.10 The Government posited that amendments to the current electoral communication expenditure provisions were necessary to ensure that no political party was advantaged during the campaign period. For example, the Premier, the Hon Barry O'Farrell MP, argued that the proposed section 95G amendments would eliminate an 'unfair loophole' in the existing electoral funding, expenditure and disclosures regime which allows parties and affiliated

expenditure on travel and travel accommodation and expenditure on research associated with election campaigns.

¹⁰³ *Election Funding, Expenditure and Disclosures Act 1981* s 95F(2) and 95(12); Election Funding Authority, *Fact Sheet: Electoral Expenditure – 2015 State Election caps on electoral communication expenditure*, p 1.

These figures represent the caps for the 2015 State Election. The caps for the 2011 State Election were \$100,000 multiplied by the number of Legislative Assembly electorates contested by the party, plus the separate cap for expenditure in each electorate of \$50,000.

¹⁰⁴ *Election Funding, Expenditure and Disclosures Act 1981*.

¹⁰⁵ *Election Funding, Expenditure and Disclosures Act 1981* s 95F(10) and s 95F(12). This figures represents the cap for the 2015 State Election. The cap for the 2011 State Election was \$1,050,000.

organisations to jointly campaign on issues with no impact on the electoral communication expenditure cap for either body:

The Bill also ensures that ‘electoral communication expenditure’ incurred by political parties and their affiliated organisations must be added together for the purposes of determining whether a party has exceeded the relevant statutory limits on its expenditure. This avoids organisations intimately involved in the governance of the political party – sometimes even with office bearers in common – campaigning on behalf of a party, with no corresponding limits on the party’s own ability to spend. The Government believes that this is an unfair loophole that undermines the integrity of the whole scheme.¹⁰⁶

- 4.11** Premier O’Farrell contended that, due to the intimate ties that affiliated organisations share with the party affiliate, the proposed 95G amendments were necessary to ensure that the electoral communication expenditure caps could be fairly applied across all political parties:

... you cannot treat an affiliated body, whether it is a union to the Labor Party or if there were an affiliated enterprise to the Liberal Party, in the same way that you treat a church organisation or the RSPCA. Clearly, a church organisation or the RSPCA is by its very nature a broad church, a diverse organisation that does not have a political agenda. But an organisation like an affiliated union that not only sits in the peak policy-making body of the ALP, not only influences preselections, but also chooses office bearers, as so often is seen, is clearly different from a genuine independent third-party group ... They should have the right to represent their members but they should not have the right to rort a cap that is meant to apply equally to all political parties. Parliament is meant to make laws equally without fear or favour.¹⁰⁷

- 4.12** The Premier further stated that it would be up to political parties to ensure that any expenditure incurred by their affiliates did not breach the relevant expenditure caps:

The aggregation provisions of the Bill are designed to create a level playing field between all participants in the electoral process, and to ensure that campaigning undertaken by affiliated entities of political parties does not undermine the purpose of existing caps on electoral expenditure. It is a matter for political parties to ensure that expenditure incurred by their affiliated organisations does not result in a breach of the caps that apply to them.¹⁰⁸

- 4.13** Dr Joo-Cheong Tham, Associate Professor, Melbourne Law School, supported the principle that limits on electoral communication expenditure should seek to level the expenditure playing field. However, Dr Tham observed that while limits on communication expenditure are designed to ‘promote fairness’ in electoral campaigns, in practice these limits can be circumvented through the co-ordination of election campaigns undertaken by separate entities involved in the campaign:

The general rule that the limits on ‘electoral communication expenditure’ under the Act apply separately to each candidate and political party is informed by the understanding that these limits seek to promote fairness in electoral contests and

¹⁰⁶ Submission 11, Office of the Premier, p 2.

¹⁰⁷ Hon Barry O’Farrell MP, Premier, Evidence, 20 January 2012, p 12.

¹⁰⁸ Answers to questions on notice lodged after the hearing, 20 January 2012, Hon Barry O’Farrell MP, Premier, Question 3, p 1.

amongst electoral contestants and that for such purpose, contestants, whether as candidates or political parties, should be treated as separate entities as they should be presumed to be competing with each other.

This rule does not apply when there is clearly a co-ordinated electoral campaign between the candidates and the party or between parties ... When there is a co-ordinated electoral campaign, the candidates and the party or the parties can legitimately be treated as one for the purposes of the 'electoral communication expenditure' limits.¹⁰⁹

- 4.14** Premier O'Farrell suggested that under the current regime, NSW Labor could benefit from an additional \$23 million of election campaign expenditure, undertaken by its 22 union affiliates, as compared to other political parties:

The fact is, under Labor's current electoral laws unions affiliated to the Labor Party, unions who by that affiliation want Labor elected, get to spend \$23 million more than any other group, whether affiliates to The Greens, to The Nationals or to the Liberal Party, ever get to do.¹¹⁰

Restricting the political voice of affiliated organisations

- 4.15** A number of inquiry participants argued that rather than levelling the playing field, the proposed amendments to section 95G would unreasonably restrict the political voice of affiliated organisations during an election campaign. For example, Unions NSW noted that its affiliated organisations had '... expressed their objection in the strongest terms' to the amendments, arguing that the amendment would be 'an unconscionable restraint on their ability to speak publicly on their members' behalf.¹¹¹

- 4.16** The Greens NSW expressed concern that the amendments would reduce the ability of affiliated organisations to undertake issues-based campaigns, such as the Better Services for a Better State campaign, on behalf of their members during an election period:

The aggregation of the spending of organisations that are affiliated to a political party into the spending of that party for the purposes of the caps on electoral communication expenditure would undermine the right of those organisations to conduct campaigns on issues of concern to their members ... This legislation would directly affect the rights of affiliated unions to run issues-based campaigns during election campaign, such as opposing electricity privatisation and Better Services for a Better State.¹¹²

- 4.17** United Voice, an affiliate to NSW Labor, contended that the amendments would be a 'severe' impediment on its ability to campaign on behalf of its' members:

... this provision unjustly and inaccurately would aggregate electoral expenditure by United Voice under the applicable cap for the ALP ... This restraint on United Voice's

¹⁰⁹ Submission 27, Dr Joo-Cheong Tham, pp 5-6.

¹¹⁰ Mr O'Farrell, Evidence, 20 January 2012, p 12.

¹¹¹ Submission 24, Unions NSW, p 15.

¹¹² Submission 25, The Greens NSW, p 2.

right to exercise the collective will and resources of the membership would be severe as well as absurd.¹¹³

4.18 The Australian Manufacturing Workers' Union, NSW Branch similarly argued that the amendments '... would have the practical affect of limiting the union's freedom to participate in the political process, impeding its ability to pursue the needs of its membership and violating its right to political communication'.¹¹⁴

4.19 The Electrical Trades Union of Australia, NSW Branch noted that, as an affiliate of NSW Labor, the proposed amendments would place the Union 'at a significant disadvantage'.¹¹⁵ The Union continued to suggest that the amendments may hamper political debate in NSW:

This is will have a negative impact for ETU members by limiting the union's ability to properly represent the interest of members and promote relevant policies. These reforms will effectively reduce or eliminate political debate through the elimination of differing policy view points.¹¹⁶

4.20 Mr Geoff Derrick, NSW/Act Secretary, Finance Sector Union Australia, NSW Branch, an affiliate of NSW Labor, contended that the amendments were an 'absolutely unfair' restriction on the activities of affiliated organisations, particularly as affiliated organisations are separate entities to the Labor Party:

... it is absolutely unfair to the extent that the Bill in its current form assumes that anything that we do that is captured by the Bill as electoral communications expenditure would automatically be aggregated with the ALP expenditure regardless of whether we were campaigning on an issue that had any relevance to the ALP or its candidates ... we certainly have the view that aggregation has no role to play in this process, because we are a separate, independent entity. We do not control what the Labor Party does; they certainly do not control what we do. We are affiliated for a purpose, to try to seek change.¹¹⁷

4.21 The independence of affiliated organisations was also noted by Mr Andrew Norton of the Grattan Institute, who stated: '[a]s a matter of principle, no person or political organisation in NSW should have their electoral spending capacity reduced by the actions of organisations or individuals over which they have no direct control'.¹¹⁸

4.22 NSW Labor argued that the amendments would have negative consequences for both the party and its affiliated organisations by 'unreasonably' restricting the ability of each to undertake its own electoral communication expenditure:

The Bill treats electoral expenditure incurred by affiliated organisations as if it were incurred by the political party itself. In other words, it equates the voice of the

¹¹³ Submission 8, United Voice, pp 7-8.

¹¹⁴ Submission 13, Australian Manufacturing Workers' Union, NSW Branch, p 10.

¹¹⁵ Submission 23, Electrical Trades Union of Australia, NSW Branch, p 4.

¹¹⁶ Submission 23, p 4.

¹¹⁷ Mr Geoff Derrick, Secretary, Finance Sector Union Australia, NSW Branch, Evidence, 18 January 2012, p 27.

¹¹⁸ Submission 20, Mr Andrew Norton, p 16.

affiliated organisation with that of the political party, and denies the affiliated organisation the right to speak with its own voice. This unreasonably restricts both the political party, which has no direct control over expenditure by its affiliated organisations, and the affiliated organisation, which has an independent right to participate in the political process in NSW.¹¹⁹

- 4.23** NSW Labor also refuted the suggestion from the Premier that NSW Labor had the ability to benefit from an additional \$23 million of election campaigning, through the electoral communication expenditure of its 22 union affiliates. In its submission to the inquiry, NSW Labor noted that the electoral expenditure of its affiliated unions for the 2011 State election was only \$194,824.95. This was ‘substantially less’ than expenditure incurred by other third-party campaigners such as the NSW Business Chamber, which spent \$354,211.62 during the same period:

According to disclosures made to the NSW Election Funding Authority, total electoral communication expenditure on third-party campaigns by unions affiliated to NSW Labor in the 2011 NSW Election campaign amounted to \$194,824.95. This is less than 1 per cent of the amount being quoted publicly by the Premier to justify the aggregation of expenditure by political parties and affiliated organisations.

Expenditure by unions affiliated to NSW Labor was substantially less than the \$879,238.17 incurred by third-party groups other than unions. The \$354,211.62 incurred by the NSW Business Chamber on its ‘NSW Deserves Better’ campaign alone exceeded expenditure on third-party campaigns by unions affiliated to NSW Labor.¹²⁰

- 4.24** Unions NSW similarly noted that of the \$594,067.71 spent by unions on third-party campaigns during the 2011 NSW election campaign, only \$194,864.95 represented third-party expenditure from unions affiliated to NSW Labor.¹²¹

Non-partisan campaigns by affiliated organisations

- 4.25** The proposed amendments contain no provisions which allow for the fact that not all campaigns run by affiliated organisations accord with the policy or position of the party to which they are affiliated, or seek to promote its electoral prospects.
- 4.26** Some inquiry participants questioned the appropriateness of aggregating the expenditure of parties and affiliated organisations when, in certain instances, an affiliated organisation may in fact campaign against the party to which it is affiliated. For example, Dr Tham observed in regard to the Australian Labor Party (ALP) and its affiliates:

It is true, of course, that the Australian Labor Party (‘ALP’) and its affiliated trade unions can - and do - engage in co-ordinated electoral campaigns. But by always aggregating the expenditure of ‘affiliated organisations’ to the ALP, proposed sections 95G(6) and 95G(7) assume that the ALP and its affiliated trade unions are necessarily engaged in co-ordinated electoral campaigns. This is a deeply problematic assumption

¹¹⁹ Submission 26, NSW Labor, p 10.

¹²⁰ Submission 26, p 9.

¹²¹ Submission 24, p 14.

– it does not hold simply because the policy views and agenda of the ALP and its affiliated trade unions do not always coincide.¹²²

- 4.27** The Community and Public Sector Union noted that campaign expenditure incurred by affiliated organisations against the ALP platform would be captured under the proposed amendment, thereby reducing the ability of the party to promote its own policies:

The proposed changes assume that all union campaigns are partisan. They do not reflect any acknowledgement that unions will campaign against any political party, including one to which they are affiliated, if it is their view that a political party is not making decisions or advocating policies that are in the best interests of their members ... This would impose on the ALP in particular, an unrealistic and most likely legally impossible set of arrangements whereby they would need to be able to control the activities and decisions of affiliated unions in an election campaign, rather than the union and its members making those decisions ... It is essential that we retain the ability to campaign in our own right in our members' interest regardless of the stance of the organisation to which we are affiliated.¹²³

- 4.28** Mr Derrick outlined a potential scenario where the Finance Sector Union Australia, NSW Branch, could campaign against the ALP, thus reducing the party's ability to promote its own policies:

We have a different policy position to the ALP on a number of issues. A total hypothetical is we support the view of the construction unions that the Australian Building Construction Commission [ABCC] should be abolished. It has not been Labor Party policy to abolish it so, speculating about what might happen in the next Federal election, it is possible that we would go out alongside a number of other unions and campaign for the abolition of the ABCC. To the extent that that was contrary to ALP policy then I see it as being unreasonable that any expenditure we might put into that sort of campaign should be pooled with the cap of the ALP even though the message we put out there might be totally contrary to the message of the ALP.¹²⁴

- 4.29** The Electrical Trades Union of Australia, NSW Branch, an affiliate of NSW Labor, provided examples of instances where it had conducted campaigns against NSW Labor on matters of policy:

While the ETU maintains political affiliation this does not stop the ETU from voicing free and frank opinions in the policy arena. The ETU in NSW has actively campaigned against Labor Governments on issues such as workers compensation (Unsworth Government 1987, Carr Government 2001) and electricity privatisation (Carr Government 1997, Iemma Government 2007, Rees/Keneally Government 2010).¹²⁵

¹²² Submission 27, p 7.

¹²³ Submission 17, Community and Public Sector Unions, p 7.

¹²⁴ Mr Derrick, Evidence, 18 January 2012, p 26.

¹²⁵ Submission 23, p 3.

4.30 Mr Derrick highlighted that under the amendments, the Finance Sector Union Australia (NSW) could potentially reduce the expenditure cap of NSW Labor if the Union were to campaign for an entirely different political party or candidate:

If we were to choose to campaign for the Shooters and Fishers Party in Balmain as an ALP affiliate every cent we spent on the campaign for the Shooters and Fishers Party candidate would be aggregated with the ALP's campaign and there would be a net reduction, as I understand it, on the ALP's total expenditure available to support their own candidate.¹²⁶

4.31 Concern was also expressed about the different impact of the proposed amendment on the electoral communication expenditure of affiliated and non-affiliated unions. The Finance Sector Union of Australia, NSW Branch, noted the 'curious circumstance' whereby an affiliated union would have their expenditure restricted under the amendment, but a non-affiliated union would be free to undertake a campaign on a similar issue without impacting on the ALP's expenditure cap.¹²⁷ In evidence to the Committee, Mr Derrick, further explained this situation:

... if there were a scenario where our union as an affiliated entity engaged in a campaign during the election period and another union that was not affiliated engaged in a parallel campaign around the same issues and same materials any money that we spent, as I understand the Bill, would be accumulated into the ALP's cap, yet money spent by the unaffiliated union is uncapped. We see that as a particular disadvantage for us simply because we have taken the choice to openly and transparently affiliate to the ALP and seek to influence the ALP's direction.¹²⁸

4.32 Dr Tham suggested that the proposed section 95G amendments were both under and over inclusive in application, rendering the amendments 'unfair in their operation'¹²⁹:

They are *over-inclusive*: 'electoral communication expenditure' spent on campaigns by trade unions affiliated to the ALP *against* the ALP would perversely count towards the ALP's spending limits ... Proposed sections 95G(6) and 95G(7) are also *under-inclusive*. They clearly fail to capture all co-ordinated electoral campaigns: they do not cover electoral campaigns co-ordinated between:

- a political party and its candidates, and other individuals (including those who are office-bearers in the party);
- a political party and its candidates, and groups other than affiliated organisations; and
- third-party campaigners.¹³⁰

Impact on decision to affiliate

4.33 Some inquiry participants argued that the amendments may force affiliated organisations to disaffiliate from the ALP. For example, the Public Service Association of NSW suggested that

¹²⁶ Mr Derrick, Evidence, 18 January 2012, p 26.

¹²⁷ Submission 22, Finance Sector Union of Australia, NSW Branch, p 10.

¹²⁸ Mr Derrick, Evidence, 18 January 2012, p 22.

¹²⁹ Submission 27, pp 7-8

¹³⁰ Submission 27, pp 7-8

the potential loss of ability for affiliates to independently engage in electoral communication expenditure could lead to organisations disaffiliating:

The amendment to Section 95G creates a significant limitation on organisations wishing to affiliate with a political party. This is because the affiliated organisation will lose its capacity to campaign independently from the party to which it is affiliated. The effect of affiliation under this proposed provision will be to make affiliated organisations wholly subservient to the parties to which they are affiliated in terms of their electoral activities.

The massive risks associated with uncoordinated campaign activities between affiliated organisations and the party to which they are affiliated would force impractically close coordination between parties and affiliates. Given the consequential loss of independence the more likely result would be to force affiliated organisations to sever their ties to the party.¹³¹

- 4.34** The Public Service Association of NSW continued to argue that such an outcome would have a significant impact on the traditional party structure of the ALP:

It is evident that the primary party constituted on the basis of organisational affiliates is the Australian Labor Party (ALP) with its historic structure based on affiliated trade unions. As a result the principal effect of this amendment will be to disrupt the structure of the ALP ... The legislature should not impose a restriction on how political parties are constituted and who can constitute them. The practical consequence of this proposed provision is to discourage party structures based on collectivist approaches such as through affiliation of organisations.¹³²

- 4.35** Mr Norton of the Grattan Institute similarly observed:

If passed, this law would presumably force the unions to disaffiliate from the ALP. There is of course a debate about the relationship between the unions and the ALP. However, this issue should be resolved by those involved. A Liberal government should not force this change on its main rival.¹³³

Suggested amendments

- 4.36** A number of suggested amendments to the proposed provisions in section 95G of the Bill were identified by inquiry participants.
- 4.37** The Christian Democratic Party supported an expanded definition of affiliated organisations to ‘include all these “external” organisations and include their funding and expenditure under the relevant Party donation and expenditure caps’.¹³⁴
- 4.38** The Greens NSW, having acknowledged the risks that electoral communication expenditure by affiliated organisations could ‘undermine’ the expenditure caps on political parties,

¹³¹ Submission 29, Public Service Association of NSW, p 3.

¹³² Submission 29, pp 3-4.

¹³³ Submission 20, p 16.

¹³⁴ Submission 21, Christian Democratic Party, p 3.

suggested that affiliated bodies should be restricted to running issues-based campaigns that did not advocate for a party or candidate:

The Greens therefore recommend that the Bill be amended to allow affiliated bodies to spend on issues-based campaigns but to ensure there is no loophole that effectively increases the cap on electoral communication expenditure by allowing for de-facto election spending ... Affiliated organisations should be allowed to run issues-based campaigns, without affecting the expenditure of the party to which they are affiliated, provided they do not advocate a vote for a party or candidate.¹³⁵

4.39 The Greens NSW argued that such an amendment would allow affiliated unions to conduct campaigns such as Better Services for a Better State without impacting on the ALP's electoral communication expenditure caps, 'provided that the campaign did not advocate a vote for a party or candidate'.¹³⁶

4.40 Professor Anne Twomey, Professor of Constitutional Law, University of Sydney Law School, observed that the intent of the proposed amendment, namely to 'prevent the exploitation of expenditure caps through parties hiving off part of their operations to separate entities', is 'dealt with to some extent' in section 4(8) of the current *Election Funding, Expenditure and Disclosures Act 1981*.¹³⁷ Section 4(8) of the Act provides:

For the purposes of this Act, where anything is done by, on behalf of or for the benefit of, or any property is held by, or in trust for or for the members of, a body or organisation, incorporated or unincorporated, being a body or organisation that:

- (a) forms part of a party;
- (b) is established by or under the constitution of a party, or
- (c) has functions conferred by or under the constitution of a party,

the thing shall be deemed to be done by, on behalf of or for the benefit of that party or the property shall be deemed to be held by that party, as the case may be.¹³⁸

4.41 Professor Twomey argued that the intent of the section 95G amendments could be achieved in a 'safer' fashion through simply adding additional words to section 4(8) of the Act, rather than inserting the proposed 95G amendments:

The primary difference between s 4(8) and s 95G(6)-(7) is that the former tends to apply generally while the latter appears to be directed at a particular party and a particular form of relationship which does not affect other political parties. In my view a safer approach would have been to clarify the scope of s 4(8) – perhaps by adding the words 'rules or' to 'constitution', if necessary.¹³⁹

¹³⁵ Submission 25, p 5.

¹³⁶ Submission 25, p 5.

¹³⁷ Submission 5, Dr Anne Twomey, pp 1-2.

¹³⁸ *Election Funding, Expenditure and Disclosures Act 1981* s 4(8).

¹³⁹ Submission 5, p 2.

4.42 An alternative approach was identified by Dr Tham, who suggested that the amendments as proposed by the Bill should be rejected altogether, and replaced with an alternative amendment that aggregated election communication expenditure where there was a ‘co-ordinated’ campaign between a party and a third-party campaigner:

A provision should be inserted into the *Election Funding, Expenditures and Disclosures Act 1981* (NSW) that aggregates the ‘electoral communication expenditure’ of political parties, candidates and third-party campaigners (whether they be individuals or groups) when there is a co-ordinated campaign for the purpose of New South Wales State elections.¹⁴⁰

4.43 Dr Tham continued to identify factors that could be considered when determining if there was a co-ordinated campaign between a political party and a third-party campaigner including:

- whether the third-party campaigner is an office bearer of the political party, and
- whether the third-party campaigner is a member of the political party, either as an individual or as an organisation.¹⁴¹

4.44 Dr Graeme Orr, from the Democratic Audit of Australia, suggested additional factors that could be considered when determining if there was a co-ordinated campaign based on questions on campaign content and personnel, such as prohibiting:

- use of the same advertising company
- internal discussions about the campaign
- people from working in the two organisations simultaneously.¹⁴²

Committee comment

4.45 The opinions of inquiry participants on the proposed amendments to section 95G of the Act were divided. Premier O’Farrell argued that the amendments, which would aggregate the expenditure of parties and their affiliated organisations, were necessary to close a loophole in the existing electoral funding, expenditure and disclosures regime which allows parties and affiliates to jointly campaign on issues with no impact on the electoral communication expenditure cap for either entity.

4.46 However, most inquiry participants argued that the proposed amendments would unfairly restrict the political voice of affiliated organisations during election campaigns, and that the amendments failed to take into consideration instances where an affiliated organisation may campaign against the party to which it is affiliated.

4.47 The Committee considers that the regulation of electoral communication expenditure should aim to promote fairness and equality during election campaigns through ensuring that each party and candidate has a similar opportunity to inform the electorate of their policies. The Committee also acknowledges that there are instances where electoral communication

¹⁴⁰ Submission 27, p 12.

¹⁴¹ Submission 27, p 12.

¹⁴² Dr Graeme Orr, Member, Democratic Audit of Australia, Evidence, 18 January 2012, p 58.

expenditure regulations may be circumvented, such as if parties and affiliated organisations jointly campaign on issues, with separate electoral communication expenditure caps applying to each entity, and that this should be prevented where possible.

4.48 The Committee believes that it is important to ensure that all participants in the political process are able to exercise an independent voice. As currently drafted, the proposed amendments may have the effect of diminishing the voice of affiliated organisations, or unfairly aggregating the expenditure of parties and affiliated organisations in instances where an affiliate is campaigning against the party.

4.49 Accordingly, the Committee recommends that proposed section 95G be amended to provide for the aggregation of the electoral communication expenditure of a party and its affiliated organisations into the cap of the party only where the expenditure incurred by the affiliated organisation has the effect of directly advocating a vote for the party to which it is affiliated. The Committee also notes that the definition of directly advocating for a party is crucial if this legislation is to operate in an equitable fashion.

4.50 This would allow affiliated organisations to exercise their independent political voice through the conduct of issues-based campaigns, whilst simultaneously reducing the risk of parties and their affiliates engaging in co-ordinated electoral campaigns that directly advocate for the party. This recommendation is also consistent with the Premier's stated aim of permitting 'genuine issues-based campaigns', while concurrently limiting the ability of parties and their affiliated organisations to benefit from separate expenditure caps.

Recommendation 1

That Schedule 1[1] of the Election Funding, Expenditure and Disclosures Amendment Bill 2011 amending section 95G of the *Election Funding, Expenditure and Disclosures Act 1981* be amended so that the electoral communication expenditure of a party and its affiliated organisations is aggregated into the cap of the party only where the expenditure incurred by the affiliated organisation:

- has the effect of directly advocating a vote for, or
 - is incurred at the request of, or in co-operation with,
- the party to which it is affiliated.
-

Chapter 5 Prohibition on political donations other than by individuals

This chapter examines the amendments proposed to section 96D of the *Election Funding, Expenditure and Disclosures Act 1981* (the Act), contained in Schedule 1[2] of the Election Funding, Expenditure and Disclosures Amendment Bill (the Bill). These proposed amendments relate to the prohibition on political donations other than by individuals on the electoral roll, and the ban on the payment of annual or other subscriptions to a party by a person or entity (including an industrial organisation) for affiliation with the party. This chapter examines the contrasting views of inquiry participants on these proposed amendments.

The potential impact of the proposed section 96D amendments on third-party campaigners is discussed in Chapter 6.

Background

- 5.1 As a result of the amendments enacted in the Election Funding and Disclosures Amendment Bill 2010, there are in place significant restrictions on the making of political donations to political parties and candidates.
- 5.2 Section 95A of the Act presently limits donations to:
- \$5,000 to a registered party or group;
 - \$2,000 to non-registered parties, elected members, candidates or third-party campaigners.¹⁴³
- 5.3 The 2011 Bill does not amend these expenditure caps.

The proposed amendment

- 5.4 Under the proposed new section 96D, it would be unlawful for a party, elected member, group, candidate or third-party campaigner to accept a political donation unless the donor is an individual who is enrolled on the roll of electors for local government, State or Federal elections.
- 5.5 The proposed section would also make it unlawful for:
- an individual to make a political donation to a party, elected member, group, candidate or third-party campaigner on behalf of a corporation or other entity
 - a corporation or other entity to make a gift to an individual for the purpose of the individual making a political donation to a party, elected member, group, candidate or third-party campaigner
 - annual or other subscriptions to be paid to a party by a person or entity (including an industrial organisation) for affiliation with the party.¹⁴⁴

¹⁴³ *Election Funding, Expenditure and Disclosures Act 1981* s 95A.

- 5.6** Proposed section 96D(5) states that dispositions of property between branches of parties or between associated parties are not prohibited.
- 5.7** Professor Anne Twomey, Professor of Constitutional Law, University of Sydney Law School, outlined the practical application of the proposed section:

This provision prohibits political donations by anyone other than individuals who are on the electoral roll. This would exclude political donations from foreigners (other than those British subjects with continuing voting rights in Australia), residents who are not citizens, minors, people of unsound mind and some prisoners. It would also prohibit donations from corporations, associations, trusts, partnerships, unions, churches, statutory bodies and lobby groups.¹⁴⁵

The potential impact of the proposed amendment

- 5.8** There was mixed support for the proposed new section 96D. Some arguments supported the ban on all but individual donations, while others suggest that the ban would eliminate the ability of citizens to engage in collective political action. There was also concern that the reforms would skew the political system towards individuals who could afford to make an individual donation, and may disadvantage smaller political parties. It was also suggested that the ban on donations from individuals not on the electoral roll is problematic.

Rationale for the ban on all but individual donations

- 5.9** A number of inquiry participants expressed support for a ban on all but individual donations, arguing that restricting the right to make a political donation to individuals would reduce the risk of undue influence and corruption. The Premier, the Hon Barry O'Farrell MP, explained the intent of the prohibition:

What it seeks to do, though, is say that when it comes to the voting process, a voting process where rights are bestowed upon individuals, not entities, not unions, not businesses, that only individuals will be in a position to make a political donation.¹⁴⁶

- 5.10** The Premier advocated that the ban would reduce public perception of corporate donor's wielding undue influence over the political process:

This new limit on political donations other than those made by individual electors will remove the public perception that corporate donors wield undue influence over decision-making in this State. The health of democracy in NSW depends upon voters being able to have confidence in the electoral process.¹⁴⁷

¹⁴⁴ Election Funding, Expenditure and Disclosures Amendment Bill, cl 1[2], proposed s 96D(2)-(4).

¹⁴⁵ Submission 5, Professor Anne Twomey, p 3.

¹⁴⁶ Hon Barry O'Farrell MP, Premier, Evidence, 20 January 2012, p 10.

¹⁴⁷ Submission 11, Office of the Premier, p 2.

- 5.11** The Premier emphasised the effect of the proposed amendments on reducing undue influence in the political process, while retaining an individual's right to donate, during his evidence to the Committee:

The point is this legislation restricts political donations to individuals. If there are 100 members of a church, mosque, temple or some other friends' gathering who want individually to make a donation to a political party or to a candidate of their choice, of course, individual freedom would allow them to do that ... if they do it as an entity other than as an individual it is not allowed as a political donation. Why? Because we are trying to reduce undue influence in the body politic in New South Wales.¹⁴⁸

- 5.12** Consistent with the views expressed by the Premier, that there is a perception (at least) of undue influence of decision-making in this State, is the statement of Mr David Avery, Honorary Secretary, Hunter District Hunting Club, who opined:

Do not forget money is the lifeblood of politics or we would not be here. Our representatives need funding to run a campaign.¹⁴⁹

- 5.13** The Greens NSW noted that the party had '... long campaigned for a prohibition on donations from corporations and other organisations to political parties, candidates, associated entities and elected representatives'.¹⁵⁰ While supporting this aspect of the proposed amendment, the Greens NSW did express concern about the impact of the amendment on the ability of third parties to engage in the political process.¹⁵¹

- 5.14** Dr Graeme Orr from the Democratic Audit of Australia stated that '... the Democratic Audit is quite sanguine about banning organisational donations particularly to parties and candidates'.¹⁵² Dr Orr observed that a number of jurisdictions currently restrict donations from organisations, which forces organisations to directly engage in the political process if they wish to affect change:

Some jurisdictions, notably Canada and the United States, restrict contributions from organisations. Opinions will differ on whether this, on balance, is a good or bad thing. Whilst it is an impost on absolute freedom, except for token contributions, the mere donating of money for political purposes is not a form of political association or expression.

Such limits effectively encourage organisations to have the public courage of their political convictions: to spend money campaigning directly, rather than by funding political parties or candidates.¹⁵³

- 5.15** Dr Orr, however, noted in evidence to the Committee that it is 'a categorically different thing' to limit donations to third parties.¹⁵⁴

¹⁴⁸ Mr O'Farrell, Evidence, 20 January 2012, p 7.

¹⁴⁹ Mr David Avery, Honorary Secretary, Hunter District Hunting Club, Evidence, 18 January 2012, p 47,

¹⁵⁰ Submission 25, The Greens NSW, p 1.

¹⁵¹ Submission 25, p 1.

¹⁵² Dr Graeme Orr, Member, Democratic Audit of Australia, Evidence, 18 January 2012, p 53.

¹⁵³ Submission 2, Professor Graeme Orr on behalf of the Democratic Audit of Australia, p 2.

¹⁵⁴ Dr Orr, Evidence, 18 January 2012, p 53.

5.16 The NSW Cancer Council ‘strongly supports’ the proposed ban on all but individual donations, specifically commenting that it would limit the ability of organisations with ‘vested interests’ to influence the political process.¹⁵⁵

5.17 The NSW Cancer Council also supported the provisions in the Bill which prevent corporate donations from being passed through other entities, noting that such measures would enhance the integrity of the political process:

In particular, Cancer Council is pleased to see Section 96D(2) which makes it unlawful for an individual to make a political donation to a party, elected member, group, candidate, or third-party campaigner on behalf of a corporation or other entity. Section 96D(3) is also encouraged as it makes it unlawful for a corporation or other entity to make a gift to an individual for the purpose of the individual making a political donation to a party, elected member, group, candidate or third-party campaigner. This move will further protect and enhance the integrity of the NSW political process.¹⁵⁶

5.18 However, similar to Dr Orr and the Greens NSW, the NSW Cancer Council expressed reservations about the impact of the proposed amendment on third-party campaigners.¹⁵⁷

5.19 The impact on third-party campaigners of the proposed prohibition on all but individual donations is discussed in Chapter 6.

Restricting the collective political voice

5.20 As the Committee has previously observed, when considering the impact of clause 96D of the Bill, it should first be noted that following the 2010 amendments to the Act, there are already significant restrictions on donations that can now be made to political parties. These restrictions include:

- \$5,000 to a registered party or group;
- \$2,000 to non-registered parties, elected members, candidates or third-party campaigners.¹⁵⁸

5.21 It can be further noted that restriction have already been imposed on the making of donations to political parties by property developers, the tobacco industry business entities, and liquor or gambling industry business entities.¹⁵⁹

5.22 The 2010 amendments to the Act were made in the context of very significant increases in the level of public funding available to political candidates and registered parties.

¹⁵⁵ Submission 32, NSW Cancer Council, p 3.

¹⁵⁶ Submission 32, pp 7-8.

¹⁵⁷ Submission 32, p 8.

¹⁵⁸ *Election Funding, Expenditure and Disclosures Act 1981* s 95A(1).

¹⁵⁹ *Election Funding, Expenditure and Disclosures Act 1981* s 96GAA.

- 5.23** A number of inquiry participants expressed strong opposition to the proposed new section 96D, arguing that the ban on all but individual donations would restrict the ability of collectives to engage in the political process. For example, Dr Joo-Cheong Tham, Associate Professor, Melbourne Law School argued that the Bill failed to acknowledge a long history of collective political activism in Australia:

Citizens in Australia typically influence the political process through organisations and groups (political parties, companies, trade unions or non-government organisations). Institutions like the media and independent statutory agencies also play an indispensable role in Australian politics. There is little doubt: Australian politics is heavily collectivised and institutionalised. Yet, [the proposed amendment] neglects this reality and advances a problematic individualised understanding of political freedoms and the political process.¹⁶⁰

- 5.24** Mr Andrew Norton, Grattan Institute, also disagreed with the ban on donations from organisations, highlighting that organisations often have their own legitimate political agendas which they wish to pursue:

The distinction between individual citizens and organisations is also weak. Organisations have legitimate interests in the political process in their own right. The NSW government's business.nsw.gov.au website advertises the state's 'political environment' as a reason to invest in NSW. But the Election Funding, Expenditure and Disclosures Amendment Bill would ban donated contributions to that political environment. Restricting their political rights of business organisations adds to the risks of doing business in NSW.¹⁶¹

- 5.25** The Sporting Shooters Association of Australia (NSW) Inc did not support the proposed amendment as it would eliminate the ability of organisation such as the Association to engage in political activity: '[d]enying organisations such as SSAA NSW the opportunity to effectively advance the interests of their members through political activity would, in our view, constitute an unacceptable restriction on one of the freedoms enjoyed by all Australians.'¹⁶²

- 5.26** Mrs Diana Melham, Executive Director, Sporting Shooters Association of Australia (NSW) Inc, highlighted the importance of the Association being able to donate to the political party of their choosing as an effective way for their members to influence the legislative process.¹⁶³

- 5.27** The 'Transport Workers' Union of NSW was concerned that the amendment would be a '...disincentive for any organisation to engage in the public debate',¹⁶⁴ suggesting that:

The individualisation of political funding endorses a system where only those who can afford it can make a contribution to the political process in NSW ... the proposed amendments by the NSW Government will have a detrimental effect on the ability of

¹⁶⁰ Submission 27, Dr Joo-Cheong Tham, p 15.

¹⁶¹ Submission 20, Mr Andrew Norton, pp 14-15.

¹⁶² Submission 18, Sporting Shooters Association of Australia (NSW) Inc, p 1.

¹⁶³ Mrs Diana Melham, Executive Director, Sporting Shooters Association of Australia (NSW) Inc, Evidence, 18 January 2012, p 19.

¹⁶⁴ Submission 14, Transport Workers' Union of NSW, p 2.

our membership to actively engage in the public domain and exert collective power to encourage political change ...¹⁶⁵

5.28 The Shooters and Fishers Party argued that the restricting the right to make donations to individuals on the electoral roll ‘... is undemocratic and undermines the right of likeminded citizens to band together to participate and engage in the political process’.¹⁶⁶

5.29 The Finance Sector Union of Australia, NSW Branch contended that as a result of the prevention of collective activism, ‘our democracy will be weaker’:

By stopping working people from combining their resources via their unions and stopping community members from forming local collective organisations, to the exclusive benefit of those capable of providing significant individual donations, the Bill disaggregates the efforts of many in order to preserve a privileged position for a few. The result will be that our democracy will be weaker.¹⁶⁷

5.30 The Hon John Tingle, Vice-Chairman, the Shooters and Fishers Party, described the restriction on all but individual donations as ‘disingenuous to say the very least’¹⁶⁸, arguing that collective activism was the preferred way for Australians to participate in the political process:

The basic idea of having individuals as the only people who can make donations fails to understand the attitude and the way the Australian individual functions. We are not a politically active people. Therefore, while we might be in an organisation and prepared to contribute through that organisation we are not going to rush cheque in hand and give money to a political party; we are not like that.¹⁶⁹

5.31 Mr Avery, Honorary Secretary, Hunter District Hunting Club, similarly stated: ‘The idea that people cannot operate in groups is anathema to me and I think to many other people. It is why political parties exist: individuals do not want to face that battle on their own’.¹⁷⁰

5.32 Mr Leighton Thew, Acting State Manager, Christian Democratic Party, also highlighted the difficulties of individual action, suggesting that the administrative aspects of the amendments in particular may have the affect of deterring people from donating:

It is a lot easier, I would imagine, for a church or any social club or any organisation – for example, we have mentioned here the Sporting Shooters Association – to say at its committee meeting, ‘I move that we donate so much to the CDP’, and it is seconded and passed and the Treasurer arranges for a cheque to go out, whereas to ask each individual member to make some personal contribution is something that will be more easily forgotten, particularly when it is shared amongst a large number of

¹⁶⁵ Submission 14, p 2.

¹⁶⁶ Submission 28, Shooters and Fishers Party, p 1.

¹⁶⁷ Submission 22, Finance Sector Union of Australia, NSW Branch, p 8.

¹⁶⁸ Hon John Tingle, Vice-Chairman, Shooters and Fishers Party, Evidence, 18 January 2012, pp 33-34.

¹⁶⁹ Hon Tingle, Evidence, 18 January 2012, pp 33-35.

¹⁷⁰ Mr Avery, Evidence, 18 January 2012, p 46.

members and it is \$2 from him and \$1 from her, and so on. It just becomes an administrative nightmare to send it and to process it.¹⁷¹

Individual donations and financial wealth

- 5.33** The proposed section 96D invests solely in individuals the ability to make political donations. It was argued that many individuals would have a limited capacity to make a donation, with inquiry participants suggesting that this would skew the political process towards wealthy individuals who could afford to make individual contributions. For example, the Shooters and Fishers Party stated:

It sets the electoral playing field firmly to the advantage of those individuals on the electoral roll, who through hard work, good luck or family bequest have large monetary resources at their disposal. These resources can then be turned unfairly toward political advantage for their chosen party or cause.¹⁷²

- 5.34** In his evidence to the Committee, Mr Tingle argued that there was not a strong culture of involvement in the political process in Australia, meaning that the people most likely to make donations ‘are the people with something to gain’:

Sure, the minority of Australians who are active members of political parties and who are involved through that in the political process might well put their hands in their pockets, but the individuals who would reach for their chequebooks are the people with something to gain by having a particular party of whatever flavour in power.¹⁷³

- 5.35** Mr Paul McNabb, President, Sporting Shooters Association of Australia (NSW) Inc, highlighted that some people may not have the financial ability to donate to a political party:

The reality is sporting shooters are blue-collar workers. These are people who have not a lot of disposable income and in many cases find it difficult to pay membership fees of \$75 a year. The possibility of them individually donating to political parties is nonexistent.¹⁷⁴

- 5.36** The Australian Manufacturing Workers’ Union, NSW Branch suggested that the Bill would ‘entrench’ the ability of wealthy individuals to influence the political process, while concurrently ‘diminishing’ the ability of others to exert similar influence:

The Bill does nothing to end influence or interference with the political process. It certainly does not create a level playing field - quite the contrary: what it does do is widen and entrench the ability of individuals of means to influence the political process, while narrowing and diminishing the ability of those who do not have sufficient excess individual capital to communicate in their interest.¹⁷⁵

¹⁷¹ Mr Leighton Thew, A/State Manager, Christian Democratic Party, Evidence, 20 January 2012, pp 48-49.

¹⁷² Submission 28, p 1.

¹⁷³ Hon Tingle, Evidence, 18 January 2012, pp 33-34.

¹⁷⁴ Mr Paul McNabb, President, Sporting Shooters Association of Australia (NSW) Inc, Evidence, 18 January 2012, p 13.

¹⁷⁵ Submission 13, Australian Manufacturing Workers’ Union, NSW Branch, p 17.

5.37 Mr Geoff Derrick, Secretary, Finance Sector Union Australia, NSW Branch, contended that the proposed ban on all but individual donations would result in the ability to affect change in the political process being distorted away from the majority of individuals:

... we reject the assumption that all individuals can participate in the political process equally, regardless of their financial situation, regardless of their socioeconomic circumstances, regardless of their geographic isolation. We just do not accept that that is true. We see that particular well-connected individuals and the wealthy have a higher capacity to engage in politics at an individual level, either through the avenue of individual donations or otherwise, than the vast bulk of the working people that our union represents ... It is obvious that if low-income working class people are disenfranchised from the political process then that process will be skewed away from their interests on a regular basis.¹⁷⁶

5.38 The Australian Deer Association Sapphire Coast/Monaro argued that the Bill would ‘... assist in the erosion of our democratic system, allowing donations to be made by well heeled individuals (figuratively speaking), rather than groups of less affluent members of society, whose only platform is as a collective.’¹⁷⁷

Potential impact on smaller political parties

5.39 It was argued by some inquiry participants that the proposed ban on political donations from all but individuals would have a detrimental impact on the ability of small political parties to compete with the larger, more established parties. Mr Tingle of the Shooters and Fishers Party, explained his perception of the Bill:

I believe that the proposed Bill opens a can of worms and I cannot resist the feeling that this can of worms has been opened because in politics in New South Wales and other parts of Australia the political worm – that is, the minor parties, the Independents, the newcomers, the interlopers and brash upstarts – has turned and the major parties are beginning to feel the strain.¹⁷⁸

5.40 Mr Tingle noted that the Shooters and Fishers Party is reliant on donations from associations and clubs whose interests align with the party:

The major part of our finance comes from donations and third-party support from organisations such as the Sporting Shooters Association of Australia, the Hunter District Hunting Club, the Australian Deer Association and various other sporting groups that see us as representing their interests in Parliament and want to make sure we stay there to do it.¹⁷⁹

5.41 Mr Tingle observed that if the Bill were to be enacted, these organisations ‘...will be blocked from providing us with the sort of funds which have been necessary in the last few elections particularly for us to compete’.¹⁸⁰

¹⁷⁶ Mr Geoff Derrick, Secretary, Finance Sector Union Australia (NSW), Evidence, 18 January 2012, p 24.

¹⁷⁷ Submission 15, Australian Deer Association Sapphire Coast/Monaro, p 1.

¹⁷⁸ Hon Tingle, Evidence, 18 January 2012, p 33.

¹⁷⁹ Hon Tingle, Evidence, 18 January 2012, p 35.

¹⁸⁰ Hon Tingle, Evidence, 18 January 2012, p 35.

- 5.42** The Christian Democratic Party also expressed concern about the impact of the amendment on the party's ability to continue to operate, given that a significant proportion of its donations are received from groups:

The CDP receives the majority of its donation funds from individuals, but a significant amount (approximately 15%) comes from churches, companies or other organisations. The current amendment would stop this source of funding which for smaller Parties (such as CDP) would curtail some of their current activities and thereby reduce their ability to promote an alternative viewpoint.¹⁸¹

- 5.43** Mr Ian Smith, Treasurer and Party Agent, Christian Democratic Party, observed that 'we do not believe that by just having donations limited to individuals that necessarily stops the perception of corruption ...'.¹⁸²

- 5.44** The perception that the amendments would have the effect of strengthening position of the major political parties, at the expense of smaller parties was put to the Committee by the Hunter District Hunting Club:

It seems to us that the whole operation of this amendment Bill is to further provide advantage for major political parties at the expense of other contestants for parliament and especially those smaller groups that are gaining in representative strength...¹⁸³

- 5.45** The Australian Deer Association Sapphire Coast/Monaro was similarly critical of the impact of the Bill on smaller parties:

This Amendment Bill is a slap in the face with a cricket bat for democracy ... It is and should always be a fundamental right of all democratic countries, that for an election to be fair and democratic, all would-be participants should have EQUAL access to the election process. We would say that the way funding laws would operate under the proposed Amendment Bill would only be to the advantage of the major parties and this would fail the test.¹⁸⁴

- 5.46** In order to overcome the potential impact of the amendments for smaller parties, particularly in regard to the detrimental effect of changing the status quo and limiting donations to individuals on the electoral roll, both the Christian Democratic Party and the Shooters and Fishers Party proposed changes to the Bill. The Christian Democratic Party suggested that donations from organisations should be permitted if capped at the same amount as individual donations:

Donations from non-individuals should be allowed to the same level as that permitted for individuals; and this should only be allowed by the 'parent' organisation and not any 'subsidiary' organisation(s) in order to prevent funnelling of donations via subsidiaries.¹⁸⁵

¹⁸¹ Submission 21, Christian Democratic Party, pp 4-5.

¹⁸² Mr Ian Smith, Treasurer and Party Agent, Christian Democratic Party, Evidence, 20 January 2012, p 42.

¹⁸³ Submission 7, Hunter District Hunting Club Inc., p 1.

¹⁸⁴ Submission 15, p 2.

¹⁸⁵ Submission 21, pp 4-5.

- 5.47** Mr Tingle suggested a related amendment: that clubs and associations should be granted the same status as individuals, which would allow them to continue to make contributions through the aggregation of donations from members:

In large part our support comes from hundreds of small clubs and associations, incorporated and unincorporated, and we believe that they should be allowed to aggregate contributions from their individual members and then make those donations to a party or apply them in third-party support activities, with each club or association having the status of an individual in the manner proposed by this legislation, if this legislation becomes law.¹⁸⁶

Individuals not on the electoral roll

- 5.48** Some inquiry participants were critical of the proposed ban on donations from individuals not on the electoral roll. It was argued that this aspect of the ban disadvantaged some segments of the population, such as citizens residing overseas or residents who are not on the electoral roll.
- 5.49** Dr Joo-Cheong Tham disagreed with idea that ‘only those on the electoral rolls should be able to influence the political process’, arguing that the proposed amendment ‘... wrongly excludes citizens not on electoral rolls. Outside its scope are some citizens who are residing overseas. Also falling outside its scope are resident citizens not registered under the electoral rolls ...’¹⁸⁷
- 5.50** Dr Tham further argued that although the approach proposed in section 96D ‘... seems intuitively appealing because it invokes the notion of citizenship’, it did not recognise the rights of permanent residents to participate in the political process:

... It implies a citizenship-centred understanding of the right to vote and political freedoms more generally - citizenship being treated as a necessary condition for these rights. Such a narrow understanding, however, fails to appreciate that citizenship should not be the only basis for the right to vote or for political freedoms. There is a persuasive argument that long-term residence and attachment to the country should also result in an entitlement to vote: such a right should extend, for example, to permanent residents ...¹⁸⁸

- 5.51** Mr Norton also disagreed with a ban on political donations from individuals not on the electoral roll, contending that the ‘large, non-citizen population’ should be afforded more political rights, rather than less:

The idea that any sort of donor should be banned is also a problem. The 2010 prohibition on political donations from people not on the electoral roll was a serious backward step. Having allowed a large non-citizen population to live in Australia, we need to be thinking about whether they should have more political rights, such as voting rights, rather than reducing their political rights. These are people living here, paying taxes here, affected in many ways by the decisions of politicians ... Non-citizens need to be given a full opportunity for their views to be heard. Yet under

¹⁸⁶ Hon Tingle, Evidence, 18 January 2012, p 34.

¹⁸⁷ Submission 27, p 14.

¹⁸⁸ Submission 27, p 14.

some circumstances, non-citizen residents may be prohibited by NSW campaign finance law from giving money to their own representative groups.¹⁸⁹

- 5.52** Dr Tham highlighted international approaches to the regulation of donations from individuals, noting that there is ‘equivocal’ support in nations such as Canada, New Zealand and the United Kingdom for prohibiting donations from individuals not on the electoral roll:

It should also be noted that overseas comparisons are equivocal in providing support for a ban on political donations from entities and individuals not on the electoral rolls. Closest to proposed section 96D of the Act is the position in Canada where political donations are restricted to citizens and permanent residents. In the United Kingdom, political donations are restricted to individuals registered on the electoral registers as well as companies registered in the UK and other EU countries and UK trade unions. New Zealand, on the other hand, generally does not ban political donations from organisations or those not on electoral rolls (A NZ\$1,500 donation limit, however, applies to ‘overseas persons’, those residing outside New Zealand who are not New Zealand citizens or registered on the electoral rolls, companies registered or which have their principal place of business outside of New Zealand).¹⁹⁰

- 5.53** As noted in Chapter 2, the United States of America prohibits the receipt of donations from foreign parties.¹⁹¹

Committee comment

- 5.54** The Committee notes that the proposal to restrict the ability to make a political donation to a party, elected member, group, candidate or third-party campaigner to individuals on the electoral roll received mixed support from inquiry participants.
- 5.55** On the one hand, some inquiry participants argued that the ban would vest the power to make political donations solely in the hands of those able to vote, reducing the risk and perception of undue influence or corruption.
- 5.56** On the other hand, others argued that the ban would eliminate the ability of citizens to engage in collective political action, and skew the political system towards individuals who could afford to make an individual donation. It was further suggested that the ban may disadvantage both smaller political parties and individuals not on the electoral roll, such as permanent residents or citizens residing overseas.
- 5.57** The Committee acknowledges the strongly held arguments both in support of and opposition to the proposed section 96D amendments. On balance, the Committee considers that the principles of fairness and transparency, together with a reduced risk of corruption and undue influence, will be best served by banning political donations to parties, elected members, groups, candidates or third-party campaigners from all but individuals on the electoral roll.

¹⁸⁹ Submission 20, p 14.

¹⁹⁰ Submission 27, Dr Joo-Cheong Tham, pp 15-16.

¹⁹¹ NSW Legislative Council, Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in NSW*, Report 1, June 2008, p 29.

- 5.58** However, the Committee considers that the principle of restricting political donations as defined in the Act to individuals, when strictly applied to not-for-profit membership-based third-party organisations, may have unintended consequences. Firstly, a coalition of third-party campaigners would be unable to pool campaign expenditure into another third-party, even when the money is used to promote an issue of concern to their members. Secondly, as will be discussed in the next section of this chapter, the payment of modest amounts in annual or other subscriptions to a party by an entity for affiliation requires further consideration.
- 5.59** The Committee therefore supports the application of proposed section 96D, in addition to the changes advocated by the Committee to address the abovementioned concerns.

Recommendation 2

That Schedule 1[2] of the Election Funding, Expenditure and Disclosures Amendment Bill 2011 amending section 96D of the *Election Funding, Expenditure and Disclosures Act 1981* to prohibit political donations other than by individuals on the electoral roll be agreed to, in addition to the changes advocated by the Committee in Recommendations 3 and 4.

Prohibition on the payment of affiliation fees

- 5.60** As noted at paragraph 5.4, the proposed new section 96D would prohibit a party, elected member, group, candidate or third-party campaigner from receiving political donations from anyone other than an individual who is on the electoral roll for local government, State or Federal elections.¹⁹²
- 5.61** Under proposed section 96D(4), the payment of annual or other subscriptions to a party by a person or entity (including a industrial organisation) for affiliation with the party would be expressly prohibited if this amendment were to be enacted.
- 5.62** Party subscriptions are currently exempt from the existing donations cap.¹⁹³ The Act defines ‘party subscription’ as being:
- (a) an annual or other subscription paid to the party by a member of the party, or
 - (b) an annual or other subscription paid to the party by an entity or other person (including an industrial organisation) for affiliation with the party.¹⁹⁴
- 5.63** The Act also sets maximum permissible subscription amounts, as follows:
- the maximum subscription in respect of membership of a party is \$2,000

¹⁹² Election Funding, Expenditure and Disclosures Amendment Bill 2011, s 96D.

¹⁹³ *Election Funding, Expenditure and Disclosures Act 1981* s 95D.

¹⁹⁴ *Election Funding, Expenditure and Disclosures Act 1981* s 95D(2).

- if the amount of the subscription is not calculated by reference to the number of members of the affiliate, the maximum subscription in respect of affiliation with a party is \$2,000, or
- if the amount of the subscription is calculated by reference to the number of members of the affiliate the maximum subscription in respect of affiliation with a party is \$2,000 multiplied by the number of those members of the affiliate.¹⁹⁵

5.64 The Act prohibits parties from using these affiliation fees for electoral expenditure in the following way:

- section 96(4) requires parties to maintain a separate state campaign account
- section 96(3) makes it unlawful for a party to make payments for electoral expenditure from any account other than its separate state campaign account
- section 96(6) prohibits a political party from paying affiliation fees into its separate state campaign account.¹⁹⁶

5.65 Clause 96D of the Bill will seek to amend the exemption created by section 95D of the Act.

5.66 Section 96(6)(a) states that a party subscription that exceeds the maximum subscription amount is to be treated as a political donation to the party.

Rationale for the prohibition on affiliation fees

5.67 The Premier argued that the proposed prohibition on the payment of affiliation fees was necessary to ensure that parties were unable to circumvent the prohibition on all but individual donations by creating a number of affiliates through which to channel donations:

If we allow a loophole for affiliation fees what will happen? Parties will start to develop other affiliates – corporate affiliates or other affiliates – that will drive a truck through loopholes in the legislation. Keep the legislation as simple as possible ...¹⁹⁷

5.68 The submission from the Greens NSW noted that a perception exists that:

Affiliation fees are seen by many as a backdoor way to allow donations and a mechanism for the continuation of much that is wrong with politics in NSW.¹⁹⁸

5.69 Mr Chris Maltby, Registered Officer, The Greens NSW observed that the size of affiliation currently permitted by the Act seems ‘overly generous in the current environment’¹⁹⁹ and that the current \$2,000 limit on affiliation fees, if multiplied across the total membership of affiliates, ‘... would be very substantial amounts of money, which would only be spent on administration, of course’.²⁰⁰

¹⁹⁵ *Election Funding, Expenditure and Disclosures Act 1981* s 95D(3).

¹⁹⁶ *Election Funding, Expenditure and Disclosures Act 1981* s 96(3), 96(4) and 96(6).

¹⁹⁷ Hon O’Farrell MP, Evidence, 20 January 2012, p 5.

¹⁹⁸ Submission 25, p 5.

¹⁹⁹ Mr Chris Maltby, Registered Officer, The Greens NSW, Evidence, 20 January 2012, p 33.

²⁰⁰ Mr Maltby, Evidence, 20 January 2012, p 41.

5.70 Dr Graeme Orr, Democratic Audit of Australia, when questioned on the issue of affiliation fees stated:

Once the previous Labor Government went down the track of regulating political donations in more ways than disclosure it opened up the question that if you leave it purely to the parties to decide how much they set their membership fees at – and the membership fees or affiliation fees can be unlimited – then effectively it is a backdoor to circumventing any donation limits you might have for the purpose of political equality and integrity.²⁰¹

5.71 Dr Orr reasoned that, if the ban on donations from organisations was enacted, to be equitable contributions from affiliated trade unions must be treated in a similar manner:

You have to decide whether you are essentially wanting to ban or limit contributions from trade unions and corporations altogether or whether you simply want to staunch and limit them flowing into electioneering accounts ... if you do not treat trade union contributions similarly to corporate contributions it does not pass the fairness test that the person in the street might have.²⁰²

5.72 However, the majority of inquiry participants did not support the proposed ban on the payment of affiliation fees to parties. It was argued that the prohibition on affiliation fees was unnecessary because the fees can only be used for administrative, and not electioneering, purposes. It was also argued that the ban would restrict the ability of affiliates to influence the policy decisions of the party, and that the ban would force change to the internal structure of some parties.

Party administration costs

5.73 As the Act prohibits the use of affiliation fees for anything other than party administrative purposes, some inquiry participants argued that the proposed ban on affiliation fees was unnecessary as the funds currently generated by affiliation fees cannot be used for campaign expenditure. NSW Labor explained the current uses of affiliation fees:

Political parties usually charge a membership fee for an individual to join and renew in order to meet the administrative costs associated with that individual being a member. In the same way, NSW Labor charges an affiliation fee for a union to affiliate in order to meet the administrative costs associated with that organisation being an affiliate.²⁰³

5.74 NSW Labor provided the Committee with details of the affiliation fees paid to NSW Labor during the 2011/12 financial year:

- affiliation fees paid to NSW Labor were calculated at \$3.76 per member of the affiliate
- highest affiliation fee paid to NSW Labor by an affiliate was \$208,680.00
- average affiliation fee paid to NSW Labor by affiliates was just over \$50,000.00.²⁰⁴

²⁰¹ Dr Orr, Evidence, 18 January 2012, p 55.

²⁰² Dr Orr, Evidence, 18 January 2012, p 54.

²⁰³ Submission 26a, NSW Labor, p 4.

²⁰⁴ Submission 26a, p 4.

5.75 Mr Derrick reiterated that affiliation fees are only used for administrative purposes:

Our affiliation fees go to the cost of administration for the ALP year in, year out: things like the annual conference, which is a very expensive exercise, the administration of the office from time to time. I do not believe that our contributions add to the war chest of the ALP to any significant extent whatsoever.²⁰⁵

5.76 NSW Labor refuted suggestions that affiliation fees could potentially be used to incur electoral expenditure, or provided the party with any advantage in regard to election financing costs:

Although the Act prohibits affiliation fees from being used to incur electoral expenditure, it has been argued that this may inadvertently occur in practice (the 'leakage' argument). However, the Act contains compliance and enforcement mechanisms to prevent this from occurring ... It has also been argued that NSW Labor derives an unfair advantage in financing election campaigns because using affiliation fees to pay for administrative expenses frees up other funds to pay for electoral expenditure (the 'substitution' argument). This argument could be made with reference to any revenue source.²⁰⁶

5.77 The NSW Nurses' Association suggested that the transparency of the affiliation process distinguished affiliation fees from corporate donations:

Union affiliation with the ALP is an open and transparent process, which everyone is aware of. It is not to be compared with the issues arising from non-affiliated donations or political influence, such as corporate lobbying or donating, which are not always as open and transparent and have, at times, led to corrupt practices.²⁰⁷

Reduced influence on the political process

5.78 Some inquiry participants argued that the proposed ban on affiliation fees would reduce the ability of trade unions to influence the political process, as unions have traditionally been able to do through the payment of affiliation fees. Unions NSW commented on this potential outcome:

While Unions NSW is not affiliated to any political party, both ALP affiliated and non-ALP affiliated unions have equally expressed their concerns with this interference with their internal decision making and with their ability to voice concerns of their members in the political arena.²⁰⁸

5.79 Mr Derrick observed that the Finance Sector Union, NSW Branch chooses to affiliate to the ALP as a mechanism for directly influencing policy development:

We affiliate to the Labor Party because we discovered over the course of our fairly long and we think proud history that politics is very important: politics makes a direct impact not only on our industry but also on the living standards of our members outside of work. For a long time we went as an unaffiliated organisation, but through

²⁰⁵ Mr Derrick, Evidence, 18 January 2012, p 23.

²⁰⁶ Submission 26a, p 3.

²⁰⁷ Submission 19, NSW Nurses' Association, p 39.

²⁰⁸ Submission 24, Unions NSW, p 17.

the process of trying to influence political policy and government policy found that the most effective route for us was through an affiliation process with the ALP.²⁰⁹

5.80 In its submission to the inquiry, Finance Sector Union of Australia, NSW Branch described the potential impact on the Unions if the Union and the ALP ceased to be affiliated:

The proposals to sever formal ties between the FSU and the ALP would severely constrain the union's capacity to fulfil its obligations to 'advance and protect the rights and interests of members'. We would lose all capacity to directly influence the formation of ALP policy on matters of critical importance to FSU members.²¹⁰

5.81 United Voice considered that '[u]nions must retain the basic right to pay for affiliation to a political party' because:

Paid affiliation allows United Voice to take part in the development and implementation of policy. This provision to ban affiliation by unions and membership organisations is designed to remove the right of individuals acting as a group to take an active part in the political process.²¹¹

5.82 The Australian Manufacturing Workers' Union, NSW Branch also commented on the influence on policy development that members of trade unions gain through the payment of affiliation fees:

Affiliation with the ALP allows unions to exercise political as well as industrial power, granting a stronger voice for union members on the issues that matter to them ... Affiliation also grants union members a greater say in the policy direction of the ALP, ensuring that the party remains connected to its founding and fundamental purpose; to improve the lives of working people.

On a practical level, affiliation and affiliation fees allow union members and ordinary working people to collectively resource campaigns for a social democratic voice in parliament much more effectively than would be possible for individuals.²¹²

5.83 Some inquiry participants also discussed the impact of the proposed amendments in terms of their members' democratic rights and freedom of association. For example, the Transport Workers' Union of NSW suggested that the prohibition on the payment of affiliation fees 'violates our members' freedom of association'²¹³ through restricting the ability of the union members to influence policy development:

Affiliation entitles our members to have a say in the policy development and structure of the organisation they choose to affiliate with. By prohibiting and/or restricting affiliation fees this may diminish the relationship built between those organisations and therefore silence the voice of our members.²¹⁴

²⁰⁹ Mr Derrick, Evidence, 18 January 2012, p 22.

²¹⁰ Submission 22, p 9.

²¹¹ Submission 8, United Voice, p 7.

²¹² Submission 13, Australian Manufacturing Workers' Union, NSW Branch, p 12.

²¹³ Submission 14, p 4.

²¹⁴ Submission 14, p 4.

- 5.84** The Public Service Association of NSW contended that '[t]he right to affiliate to any organisation or party should not be infringed', arguing that:

Party political activity is a legitimate means of pursuing public policy change in a free and democratic system. There is no legitimate or compelling reason why this activity should be done solely on an individualised as opposed to on a collective basis ... The advocacy of citizens through associations should not be limited exclusively to advocacy outside the party system. They should be able to advocate within party forums.²¹⁵

Potential impact on internal party structures

- 5.85** Some inquiry participants noted that the proposed prohibition on the payment of affiliation fees would have a particularly acute impact on the internal party structure of the ALP, and questioned the appropriateness of this incursion into internal party processes. For example, Dr Tham observed that the prohibition would have a 'severe impact' on the relationship between the ALP and trade unions:

A ban on organisational membership fees (including trade union affiliation fees) will have a severe impact upon the trade union-ALP link by either prohibiting or severely limiting the amount of money that trade unions can contribute to the ALP ... the question here is whether a ban on organisational membership fees is a legitimate way of dealing with concerns regarding the electability of the ALP (or for that matter, the electability of any party). The answer is 'surely not': these are matters for the ALP and its members to decide, not one for regulation, let alone contribution limits involving a ban on organisational membership fees.²¹⁶

- 5.86** Dr Tham continued to outline the potential impact of the prohibition on affiliation fees for internal party structures:

... the impact of a ban on organisational membership fees on the freedom of party association is quite severe: it will mandate a particular party structure, direct parties and, while not directly banning parties that allow for organisational membership, generally make them unviable unless such parties are able to secure sufficient public funding.²¹⁷

- 5.87** The Committee was advised by Dr Orr that any aspect of the legislation that forced trade unions to disaffiliate from the ALP was not supported by the Democratic Audit of Australia:

We are certainly not in favour of anything or any aspect of any legislation that would in effect force trade unions to disaffiliate from the Australian Labor Party ... It starts to look a little bit like Parliament intruding into the affairs of the associations and over time different unions and their memberships are going to change.²¹⁸

²¹⁵ Submission 29, Public Service Association of NSW, pp 6-7.

²¹⁶ Submission 27, pp 23-24.

²¹⁷ Submission 27, p 29.

²¹⁸ Dr Orr, Evidence, 18 January 2012, p 54.

- 5.88** Dr Tham also suggested that the ban on affiliation fees may be an unjustified limitation on freedom of party association saying:

Is there a compelling justification for such a severe incursion into the freedom of the ALP to organise itself as it sees fit? It is exceedingly difficult to see one. There is firstly, the prima facie legitimacy of membership fees – they are payments made as a condition for participating within political parties Absent an adequate rationale for limiting freedom of party association, it is hard to escape the conclusion that such a ban represents an unjustified limitation on freedom of party association.²¹⁹

- 5.89** NSW Labor argued that the proposed amendment would be an ‘unreasonable restriction’ on the ability of the ALP to organise its internal party structure along traditional lines:

The Australian Labor Party was founded in 1891, making it one of the oldest political parties in the world. For 120 years, Labor has consisted of individual members and affiliated unions. The Bill seeks to prohibit NSW Labor from continuing to operate in this way ... This interference with a political party’s internal structure represents an unreasonable restriction on its members’ right to organise themselves in order to participate in the political process.

The Bill also proposes to interfere with unions’ internal decision making and restrict their voice in the political process. This similarly represents an unreasonable restriction on their members’ right to determine how to participate in the political process. Each union’s decision as to whether or not to affiliate with a political party is made by its democratically elected governing body. Unions should have the right to participate in the political process by affiliating with a political party if they so choose.²²⁰

- 5.90** A number of trade unions expressed similar concerns to that of NSW Labor. For example, the Finance Sector Union of Australia, NSW Branch, argued that the prohibition would ‘fundamentally alter the structure, philosophy and direction of the ALP given that the party would be weakened organisationally and intellectually by the removal of affiliated unions’.²²¹

- 5.91** United Voice suggested that ‘[t]he ALP is the key target of this provision. The internal workings of a political party, coincidentally the political party in opposition in this State, are being interfered with by the Government Bill’.²²²

- 5.92** The Greens NSW commented that it would be ‘highly inappropriate’ for legislation to interfere in the internal structure of a party:

The ban on affiliation fees would undermine the right of parties to have collective membership of the party. While there has been much criticism of the relationship between the Labor party and its affiliated unions, it is highly inappropriate for parliament to use campaign financing and donation legislation to attempt to undermine a party or to make illegal a legitimate internal party arrangement.²²³

²¹⁹ Submission 27, p 30.

²²⁰ Submission 26, NSW Labor, p 6.

²²¹ Submission 22, p 9.

²²² Submission 8, United Voice, p 7.

²²³ Submission 25, p 3.

5.93 The Greens NSW further noted that the banning affiliation fees ‘... imposes an unreasonable cost’ on the party in regard to the administrative burden of servicing its members.²²⁴

5.94 The Transport Workers’ Union of NSW observed that affiliation fees should be an internal matter for parties to determine, and should not be dependent on regulation by external entities:

The TWU believes that affiliation fees are an internal matter and therefore should be dealt with by the internal structure of our organisations. The TWU upholds that affiliation to an organisation and any fees associated with it should be discussed with its members and not subject to stringent regulations by outside bodies.²²⁵

5.95 Unions NSW noted that there appears to be a disparity in the proposed section 96D amendments, with the sharing of campaign finance between parties permissible while affiliation fees are prohibited:

Unions NSW notes with some incredulity that while seeking to render the structure of the opposition party illegal, in introducing this Bill the Government goes to some lengths to ensure that the practice of sharing campaign finances between parties in a formal coalition arrangement is maintained, as in s96D(5).²²⁶

5.96 During public hearings, Premier O’Farrell was asked what was changed from the Liberal submission to the previous election funding inquiry which said ‘our approach is to respect the different traditions of our parties and allow affiliation fees to be retained for non-campaign purposes’.²²⁷ He responded ‘Nothing has changed’.²²⁸

Suggested amendments

5.97 A number of inquiry participants suggested amendments to the regulation of affiliation fees proposed in section 96D(4) that would allow for the payment of an appropriate level of affiliation fees to cover the administration costs of servicing affiliated members.

5.98 In its submission to the inquiry, NSW Labor noted that the 2008 Select Committee on Electoral and Political Party Funding in NSW ‘unanimously recommended that union affiliation fees be permitted, and be exempt from donation caps’.²²⁹ In line with the recommendation of that Committee, NSW Labor recommended that the proposed subsection 96D(4) should be amended ‘... to expressly permit organisations to financially affiliate with a political party’.²³⁰

²²⁴ Submission 25, p 6.

²²⁵ Submission 14, pp 4-5.

²²⁶ Submission 24, p 19.

²²⁷ Mr O’Farrell, Evidence, 20 January 2012, p 4.

²²⁸ Mr O’Farrell, Evidence, 20 January 2012, p 5.

²²⁹ Submission 26, p 7.

²³⁰ Submission 26, p 8.

- 5.99** Dr Orr suggested that affiliation fees should not be subject to an outright ban, but should be set at a ‘reasonable’ limit that was proportionate to membership²³¹:

As a moral principle such membership fees ought not be banned, and as a matter of constitutional law probably cannot be. The Bill should be amended to permit organisational membership fees at a reasonable level to cover the administrative cost of servicing members.²³²

- 5.100** Dr Orr further suggested that a provision could be inserted into the Act to channel the affiliation fees into a separate account that could not be used for electoral expenditure in the six months prior to an election as a way to limit perceptions of undue influence arising from the payment of affiliation fees:

It seems to me it is a question of degree and you must at some point, once you go down the path of regulating political contributions, raise the valid question of whether union affiliation fees are essentially a backdoor mechanism to make political donations and to buy influence. You could say, no, those moneys have to be channelled into a separate account that cannot be used for certain types of expenditure, for example, electoral expenditure in the six-month period prior to an election. That is the Queensland model.²³³

- 5.101** For the reasons he outlined in his submission to this inquiry, Dr Tham recommended the rejection of Section 96D.²³⁴

Committee comment

- 5.102** The Committee notes that the definition of ‘affiliated organisation’ contained in the Bill may constitute a direct attack on the internal structure and organisation of the Australian Labor Party which has many members that fit this definition.
- 5.103** The Committee accepts the position put by the majority of submission authors and witnesses to this inquiry, and with the position taken in previous inquiries, that to ban affiliation fees capped at a reasonable level is an infringement on the right of organisations to determine their own structures.
- 5.104** The Committee considers that preventing parties from collecting monies to cover the administrative costs of maintaining its membership would be to prohibit a valid organisational structure for parties to pursue. In this we concur with the findings of the 2008 Select Committee on Electoral and Political Party Funding, which found that to ban affiliation fees would place unreasonable restrictions on party structures.
- 5.105** However, the Committee also considers that the current cap on affiliation fees of \$2,000 per member is set at an unreasonably high level that exceeds realistic administration costs, and could lead to a perception that affiliation fees are being used to circumvent donation limits to the advantage of the party receiving the fees.

²³¹ Dr Orr, Evidence, 18 January 2012, p 54.

²³² Submission 2, p 2.

²³³ Dr Orr, Evidence, 18 January 2012, pp 55-56.

²³⁴ Submission 27, pp 22-32.

- 5.106** The Committee believes that proposed section 96D should be amended to permit the payment of tightly capped annual or other subscriptions to a party by a person or entity for affiliation with the party. The affiliation fee should be set at a reasonable limit, which appropriately reflects the administration costs imposed on the party by the affiliation. Such an amendment will allow parties to maintain their preferred party structure, while minimising the perception that affiliation fees are being used to circumvent donation limits.

Recommendation 3

That Schedule 1[2] of the Election Funding, Expenditure and Disclosures Amendment Bill 2011 amending section 96D of the *Election Funding, Expenditure and Disclosures Act 1981* be amended to permit fees to be paid by bodies to the party to which they are affiliated, provided the fees are capped to a very modest level, which is equal to or not greater than the administration costs imposed on the party by the affiliation, and the consent of their members to do so has been obtained.

Chapter 6 Third-party campaigners

This chapter examines the potential impact of the Election Funding, Expenditure and Disclosures Amendment Bill 2011 (the Bill) on third-party campaigners such as community, not-for-profit and peak organisations. The Committee has elected to examine the potential impact of the Bill on third-party campaigners in this chapter, rather than in the earlier chapters that examine the individual sections of the Bill, because of the large body of evidence that the Committee received in relation to third-party campaigners.

The impact of the Bill on third-party campaigners was one of the key concerns that a number of inquiry participants expressed about the Bill, with opinions differing as to its potential implications. This chapter examines concerns that the proposed restriction on receiving donations from non-individuals will hamper the ability of third-party campaigners to undertake advocacy work. The chapter also examines the differing interpretations of ‘electoral expenditure’ incurred by third-party campaigners.

Definition of third-party campaigner

- 6.1** Under the *Election Funding, Expenditure and Disclosures Act 1981* (the Act), a third-party campaigner is defined as being an entity or other person (not being a registered party, elected member, group or candidate) who incurs electoral communication expenditure during a capped expenditure period that exceeds \$2,000 in total.²³⁵
- 6.2** This definition could potentially capture a range of community and not-for-profit organisations, including sporting associations, trade unions and groups such as the NSW Cancer Council or the Sydney Alliance. The Committee received submissions from representatives of each of these types of organisations.

Impact on third-party campaigners

- 6.3** Opinions were divided as to the potential impact of the Bill on third-party campaigners. The Government argued that the provisions of the Bill would not prevent third-party campaigners from receiving individual donations from members, or from engaging in genuine issues-based campaigns.
- 6.4** The Premier, the Hon Barry O’Farrell MP, argued that the Bill would have a limited impact on third-party campaigners. The Premier acknowledged the important role that third parties play in the political process, but argued that the ban on corporate donations must extend to third parties in order to be effective:

The Government recognises the importance of third parties in the democratic process and notes that the Bill will not prevent third-party campaigners from receiving donations from their individual members. It is also not designed to prevent peak bodies from levying their member bodies, provided those levies are not used to make a ‘political donation’ or to incur ‘electoral expenditure’ with the meaning of the *Election Funding, Expenditure and Disclosures Act 1981*. In this regard, peak bodies will still have

²³⁵ *Election Funding, Expenditure and Disclosures Act 1981*, s 4(1).

the freedom to undertake issue-based campaigns as provided in the current legislation. The Bill may present third-party campaigners with some new issues to consider but the Government believes a ban on corporate political donations must be extended to them if it is to be effective.²³⁶

6.5 In evidence to the Committee, the Premier stated that the provisions contained in the Bill allowed peak organisations to continue to undertake ‘genuine issues-based campaigns’:

... the Government’s Bill does not prevent third-party campaigners or other peak groups from accepting corporate donations that are used to run genuine issues-based campaigns unconnected to a State or local government election. Such donations are not political donations under section 85 of the existing Act and therefore are not subject to the prohibition on political donations from corporations ... Nothing in this legislation will prevent third-party campaigners or other peak bodies from accepting corporate donations that are used to run genuine issues-based campaigns.²³⁷

6.6 The Premier’s view was queried by Professor Anne Twomey, Professor of Constitutional Law, University of Sydney Law School, who articulated an alternative perspective on the potential implications of the Bill for third-party campaigners:

... the dispute in the last session then largely turned on whether that would prevent third party campaigners running what are described as issues campaigns. Mr O’Farrell was of the view that it did not prevent that. The way I read it and the way some other people, particularly third parties, might read it is that it is just a little bit more uncertain because it talks about promoting or opposing indirectly a party and it also talks about influencing directly or indirectly voting at an election. Any issue that you discuss can be one that might influence the way people vote at an election; that is the whole idea of freedom of political communication, and the High Court has talked about that.

It could be issues such as animal liberation or drinking or road safety or any of those sorts of things, if any particular party, for example, might be proposing policies one way or another on it and if you are advocating in your issues supporting measures of road safety or harm minimisation to animals or whatever it is, potentially then you are either indirectly supporting the party that has a policy that is similar to the issues you are raising or you are doing your advertising and raising your issues for the purposes of directly or indirectly influencing the way people vote. Of course you are. Why would you be doing it otherwise? Really! On my reading of it, the consequence is that it does potentially affect issues campaigns. If I were an issues campaigning person, be it for the Cancer Council or whoever, I would want to be cautious because I would not want to breach the law. To the extent that there is any doubt, of course I would not.²³⁸

6.7 The Premier emphasised that the Bill would not impact on the ability of third-party campaigners, including charitable organisations, from receiving donations from non-individuals, so long as those donations were not used to incur electoral expenditure:

²³⁶ Submission 11, Office of the Premier, p 2.

²³⁷ Hon Barry O’Farrell MP, Premier, Evidence, 20 January 2012, p 3.

²³⁸ Professor Anne Twomey, Associate Professor, Constitutional Law, Faculty of Law, University of Sydney, Evidence, 20 January 2012, p 17.

It is important to note that the ban only applies to ‘political donations’ as defined in section 85 of the *Elections Funding, Expenditure and Disclosures Act 1981*. The Bill does not prevent charitable donations to or from religious or other organisations that are not used or intended to be used to enable the making of a ‘political donation’ or to fund ‘electoral expenditure.’²³⁹

- 6.8** However, the majority of inquiry participants expressed concern that the Bill would have a detrimental impact on the ability of third-party campaigners to represent their members’ interests. Two key elements provoked the most concern among inquiry participants: the ban on donations from all but individuals on the electoral roll, and the impact on electoral communication expenditure.

Ban on donations from all but individuals

- 6.9** Proposed section 96D of the Bill would make it unlawful for a party, elected member, group, candidate or third-party campaigner to accept a political donation unless the donor is an individual who is enrolled on the roll of electors for local government, State or Federal elections.
- 6.10** It should be noted that Section 95A of the existing Act places a cap on political donations of \$2,000 upon various groups, including third-party campaigners. This political donations cap is unaffected by Section 96D.
- 6.11** It should further be noted that the current structure of the Bill, including the regulation of third-party campaigners, arose by amendments introduced in the Electoral Funding and Disclosures Amendment Bill 2010.
- 6.12** Although the Premier argued that encompassing third-party campaigners in the ban was necessary to avoid the possibility of loopholes in the legislation, the majority of inquiry participants expressed considerable concern about the impact of this ban on third-party campaigners in relation to the:
- definition of political donations
 - potential restrictions on third-party advocacy
 - importance of collective action
 - aggregation of funds for joint campaigns
 - administrative burden of the proposed amendments.
- 6.13** In response to these concerns, inquiry participants suggested a number of changes to the Bill, as discussed at paragraph 6.50.

²³⁹ Answers to questions on notice taken during evidence 20 January 2012, Hon Barry O’Farrell MP, Premier, Question 1, p 1.

Definition of 'political donation'

6.14 As the ban on all but individual donations proposed in section 96D of the Bill relates to 'political donations', inquiry participants highlighted that an understanding of the definition of 'political donation' was essential to appreciate the impact of the Bill on third-party campaigners.

6.15 The definition in section 85(1)(d) of the Act as it applies to third-party campaigners was outlined by Dr Joo-Cheong Tham, Associate Professor, Melbourne Law School:

'Political donations' are a type of 'gift'. As it applies to third-party campaigners, a 'political donation' is:

a gift made to or for the benefit of an entity or other person (not being a party, elected member, group or candidate), the whole or part of which was used or is intended to be used by the or person:

- (i) to enable the entity or person to make, directly or indirectly, a political donation or to incur electoral expenditure, or
- (ii) to reimburse the entity or person for making, directly or indirectly, a political donation or incurring electoral expenditure.²⁴⁰

6.16 Dr Tham explained the impact of the definition, and noted that the provisions of the Bill relating to donations would not apply to third-party campaigners in all circumstances:

The restriction proposed by section 96D will have no impact on campaigns funded by commercial revenue as such income does not come within the definition of 'gift' under the Act (and therefore, is not a 'political donation'). Whether funds provided by constituent organisations will be lawful if this restriction is enacted depends on the manner in which such funds are provided. If they are provided largely free of conditions, they are likely to be 'gifts', being funds provided for inadequate consideration. If, however, they are provided conditionally, (for instance, as payment under a contract for the peak organisation to conduct a campaign), they are not likely to be 'gifts' and therefore, will be lawful even if proposed section 96D is enacted.²⁴¹

6.17 Mr Andrew Norton of the Grattan Institute also observed that the impact of the proposed legislation for third-party campaigners partly hinges on the type of payments that are made to organisations, noting that it would be possible for third parties to circumvent the legislation:

... payments to peak bodies would not necessarily be affected by the Election Funding, Expenditure and Disclosures Amendment Bill 2011. General affiliation fees from constituent organisations are paid in exchange for services from the peak body, and are not gifts. This money could be used for political campaigns. Similarly, if appropriate contracts were drawn up to ensure that there was consideration, it would be possible for the peak body to charge its members for a political campaign. However funds given in response to a general appeal are likely to be gifts under the law, and therefore prohibited.²⁴²

²⁴⁰ Submission 27, Dr Joo-Cheong Tham, p 17.

²⁴¹ Submission 27, p 20.

²⁴² Submission 20, Mr Andrew Norton, p 5.

- 6.18** These distinctions in the definition of ‘political donation’ resulted in some consternation among inquiry participants. For example, the members of the Last Drinks coalition²⁴³ were unsure if funds provided to the campaign would be captured by the proposed legislation:

If a member of the coalition for the Last Drinks campaign makes a donation of funds to another member of the coalition for the purposes of e.g. funding a media campaign whose aim is to target politicians and which resulted (directly or indirectly) in influencing voter intention, then that could be interpreted as a political donation under s85(l)(d). It could be interpreted as benefitting that candidate or party that supported the objectives of the campaign. The term ‘for the benefit of’ is not defined in the legislation. The funding donated by the members of the coalition for the maintenance of the Last Drinks website could be caught here.

If it were considered a political donation, then it would be prohibited by virtue of the propose section 96D.²⁴⁴

- 6.19** The NSW Cancer Council also expressed concern about the impact of the definition on its relations with other peak organisations:

‘Political donation’ is defined in section 85 of the Act and the concern here is that funds given to peak organisations could potentially (depending on the exact nature of the particular campaign) be considered a political donation under section 85(1)(d)(i) or 85(1)(d)(ii). Cancer Council is concerned that this could potentially make its financial contributions to peak bodies unlawful.²⁴⁵

Potential restrictions on third-party advocacy

- 6.20** The majority of inquiry participants expressed concern that the Bill, if enacted, would restrict the ability of third-party campaigners to advocate on behalf of their members. For example, the Sydney Alliance, which represents a diverse range of community organisations, unions and religious organisations, was concerned that the proposed changes would ‘substantially limit’ their ability to advocate effectively:

By treating Third-party campaigners in the same way as political parties, the Bill may substantially limit the ability of community organisations like the Sydney Alliance to undertake issue based campaigning during election periods. For instance, our partner organisations would be prohibited from donating to our issue-based campaigns during this period. This is because the Bill restricts donations to individuals on the electoral roll. This could severely limit our ability to make public representations on issues that are important to Sydney. Effective advocacy around new train lines or on social dislocation would be limited because organisations like ours cannot fund this kind of advocacy without donations from our member organisations.²⁴⁶

²⁴³ The members of the Last Drinks coalition are the Police Association of NSW, Australian Medical Association (NSW), NSW Nurses’ Association and the Health Services Union east.

²⁴⁴ Submission 3, Last Drinks coalition, p 4.

²⁴⁵ Submission 32, NSW Cancer Council, p 6.

²⁴⁶ Submission 1, Sydney Alliance, p 2.

6.21 The Asbestos Diseases Foundation of Australia Inc (ADFA) was similarly concerned ‘...in relation to the possible impact the Bill will have on its ability to continue to act as an advocate for asbestos victims, their families and the community’.²⁴⁷ The Foundation stated:

The potential far reaching effect of the Bill would constrain ADFA from participating in the political process ... ADFA has no way of funding its activities without donations and fundraising events. ADFA will be left in a position where it either must remain outside the political process during the prescribed periods before an election or alternatively not receive any donations from companies or organisations...²⁴⁸

6.22 The NSW Cancer Council observed that while it appeared that the key objects of the Bill did not intend to impact on the ability of third-party campaigners to undertake advocacy work, the Council was nonetheless concerned that the Bill ‘...may inadvertently limit the ability of community groups to undertake advocacy campaigns’.²⁴⁹

6.23 Action on Smoking and Health Australia expressed a similar concern:

While we support the closing of loopholes that may allow related third parties to make ‘backdoor’ and/or secret donations, we are concerned that the Bill may restrict the operation of peak organisations or third-party campaigners when they raise issues of concern outside of election periods ... There are many examples of public interest campaigns to improve community health, access and well-being – but they all need funds from members and may be greatly disadvantaged if unable to accept funds from constituents.²⁵⁰

6.24 Mr Norton explained that advocacy was often the only method for interest groups to engage in the political process:

... there is nothing wrong with an interest group purchasing a campaign. This may be the only way it can get its message to the general public. NSW would not be a liberal democracy if it banned interest groups from paying for electoral expenditure to present their views, or only allowed tokenistic sums that prevented third-party campaigns from reaching a mass audience.²⁵¹

6.25 Mr Norton continued to note that, as a consequence of the proposed reforms, ‘public interest third parties’ that are reliant on donor funds may have less resources to participate in the political process than ‘vested interest’ organisations:

Traditionally campaign finance law was intended to moderate the influence of ‘vested interests’ on the political process. However, the practical effect of the law as it stands is that it is tougher on donor-reliant non-government organisations, which typically pursue what they believe are public interest goals, than it is on traditional vested interests such as business and the unions ... cutting donor-reliant third parties off from multiple sources of income – organisations without an Australian business number and people not on the electoral roll in the 2010 reforms, and all organisations

²⁴⁷ Submission 16, Asbestos Diseases Foundation of Australia Inc, p 2.

²⁴⁸ Submission 16, pp 3-4.

²⁴⁹ Submission 32, p 9.

²⁵⁰ Submission 30, Action on Smoking and Health Australia, p 3.

²⁵¹ Submission 20, p 14.

in the 2011 reforms – means that public interest third parties will have less money relative to the direct vested interest campaigns than before the 2010 reforms.²⁵²

Importance of collective action

6.26 Collective action through third-party organisations has traditionally been considered as a legitimate part of the political process that allows individual citizens to band together to highlight issues of concern. A number of inquiry participants were concerned that the Bill would restrict the ability of third-party campaigners to undertake such collective action on behalf of their members, resulting in less vibrant political debate.

6.27 Mr Norton explained the importance of non-government organisations (NGOs) and trade unions in representing collectively held views:

Many people lack the time or ability to identify threats to their interests and/or articulate their concerns. Unions and NGOs provide this service. They should be allowed to make donations in their own right to political parties or other third parties. Third parties are best placed to decide whether donations or their own activities would be the best way of advancing their supporters' interests or views.²⁵³

6.28 Mr Paul McNabb, President, Sporting Shooters Association of Australia (NSW) Inc, similarly highlighted the role of collective organisations as providing a political voice for 'ordinary Australians':

Our members are mostly pretty ordinary Australians who find it very difficult to express themselves. The SSAA gives them a voice to be heard, a freedom of speech, and a way to translate and verbalise the mumblings at rifle ranges and hunting clubs around the countryside and put it into action. That is what the SSAA does. The SSAA sees this proposal as an un-Australian activity that will take away their voice.²⁵⁴

6.29 NSW Labor argued that many individuals would be denied the right to exercise their political voice if non-for-profit organisations were unable to collectively advocate on their behalf:

... non-profit organisations represent defined groups of individuals within the community and openly advocate for their interests without aiming to make a financial profit. Without the ability to organise through non-profit community organisations, these individuals would be left without the capacity to exercise an effective voice in the political process, because as individuals they do not have the resources to make their voice heard.²⁵⁵

6.30 The Electrical Trades Union of Australia, NSW Branch stated that if the Bill were to be passed in its current form, '... the ability of the most vulnerable in society to participate in our political process and have their collective voices heard will be significantly diminished'.²⁵⁶

²⁵² Submission 20, pp 13-14.

²⁵³ Submission 20, p 15.

²⁵⁴ Mr Paul McNabb, President, Sporting Shooters Association of Australia (NSW) Inc, Evidence, 18 January 2012, p 13.

²⁵⁵ Submission 26, NSW Labor, pp 4-5

²⁵⁶ Submission 23, Electrical Trades Union of Australia, NSW Branch, p 5.

6.31 The Australian Manufacturing Workers' Union, NSW Branch contended that the restrictions imposed by the Bill on third parties would have a detrimental impact on democracy in NSW:

... the Union is concerned that rather than increasing accountability for political funding, the Bill instead sharply restricts the ability of 'third-party campaigners' such as unions and other community groups to engage in the political process, potentially preventing any kind of participation. The implications for the long-term health of NSW's democratic institutions are severe.²⁵⁷

6.32 The Finance Sector Union of Australia, NSW Branch, also suggested that the Bill may serve to reduce involvement in the public debate during election periods, which the Union considers essential in a liberal democracy such as Australia:

As is typical in liberal democracies around the world, alongside our system of party based collective electoral activity, and supporting the vibrancy of our democracy is a series organised collective institutions such as special interest groups, trade unions and business associations that are 'integrated' into the system ... there is a real risk that the totality of the Bill will have the distinct impact of severely reducing if not completely curtailing collective engagement in public discourse during the election period for everyone except the political parties directly contesting the election.²⁵⁸

6.33 Mr Mark Lennon, Secretary, Unions NSW, emphasised the importance of maintaining the ability to act collectively in the political systems, rather than creating a system that was focussed on individual participation:

The ability for working people to be able to act collectively to exercise their political voice is vitally important and that right has to be maintained ... We are in a pluralist society: democracy operates in a pluralist society. How we exercise our political voice is mixed and varied. In some cases that will be on the basis of the collective and in others on the basis of the individual. We must ensure with any changes or variation to our legislation that the right to exercise your political voice on a collective basis remains.²⁵⁹

6.34 The NSW Cancer Council also highlighted the essential role that collective advocacy and charitable organisations play in representing the public interest:

Advocacy campaigning is key to a democratic system, particularly advocacy and campaigning by groups representing the public interest and the issues affecting community members as citizens and individuals. Decision makers should have contact with the people they represent and whose interests are affected by their decisions. This means there is a need for mechanisms for dialogue and representation.

There is a specific role for issue-based campaigning by non-government organisations who represent those constituencies who are in need of 'public good'. Charitable enterprises are serving the interests of a general constituency and not the economic self-interest of specific individuals.²⁶⁰

²⁵⁷ Submission 13, Australian Manufacturing Workers' Union, NSW Branch, p 7.

²⁵⁸ Submission 22, Finance Sector Union of Australia, NSW Branch, pp 4-5.

²⁵⁹ Mr Mark Lennon, Secretary, Unions NSW, Evidence, 18 January 2012, pp 2-3.

²⁶⁰ Submission 32, pp 2-3.

Aggregation of funds for joint campaigns

- 6.35** Third-party campaigners frequently collaborate with other like-minded organisations during election periods to highlight issues of joint interest. A number of inquiry participants expressed concern that the ability of organisations to undertake such joint advocacy work would be severely limited by the provisions of the Bill. Unions NSW explained their concerns in this regard:

At election times unions and particularly union peak bodies, along with many other non-profit organisations, routinely pool their finances to place issues of concern to their members on the public agenda. The proposed limitation on donations to ‘third-party campaigners’ to individuals on the electoral roll would prevent this occurring. This is particularly relevant for peak councils such as Unions NSW which only have organisational members rather than individuals.²⁶¹

- 6.36** The Finance Sector Union of Australia, NSW Branch similarly highlighted the restrictions that the Bill may place on third-party campaigners collaborating for administrative or campaigning purposes:

To the extent that alliances are formed by not-for-profit groups and they establish umbrella organisations for administrative or campaigning purposes, it is apparent that these umbrella organisations would be barred from engaging in any activities that led to either ‘electoral expenditure’ or ‘electoral communication expenditure’ as defined in s.87 of the Act because the monies used for this purpose would not ordinarily come directly from a person on the electoral roll.²⁶²

- 6.37** The NSW Cancer Council expressed concern that the Bill ‘... would impinge on the ability of these organisations to aggregate money’.²⁶³ The Council noted that this may prevent organisations from undertaking collaborative public interest campaigns:

Cancer Council has in the past undertaken lobbying as part of an alliance or coalition of groups with similar objectives. Cancer Council is well-placed to bring together science and community concern and act as the ‘organiser’ to help bring voice to issues where there might otherwise not be an active constituency ... Cancer Council is concerned that the proposed limitation on donations to ‘third-party campaigners’ to individuals on the electoral roll may prevent non-profit organisations from pooling their finances and placing issues of concern to their members on the public agenda.²⁶⁴

- 6.38** The members of the Last Drinks coalition also questioned the impact of the Bill on their ability to undertake public interest campaigns, arguing that if the Bill was implemented coalitions of not-for-profit organisations would be ‘disenfranchised’:

The proposed amendment has the potential to stop campaigns like the Last Drinks Campaign, certainly during the lead up to a State election. Groups of not-for-profit organizations that come together in a loose coalition to campaign over any social issue may find themselves disenfranchised because they fall foul of these laws.²⁶⁵

²⁶¹ Submission 24, Unions NSW, p 11.

²⁶² Submission 22, pp 4-5.

²⁶³ Submission 32, p 7.

²⁶⁴ Submission 32, p 6.

²⁶⁵ Submission 3, p 5.

- 6.39** The Australian Medical Association (NSW) outlined a potential scenario whereby the Association, as a third-party campaigner, undertook an anti-smoking campaign in conjunction with other 'like-minded' not-for-profit organisations:

Under this scenario, it is possible that AMA (NSW) would be classed as a third-party campaigner, our expenditure would be classed as electoral communication expenditure and the contributions made by our partners to us would be prohibited political donations. All of this in relation to a public health campaign that we would vigorously argue is very much in the public interest.

We would hope that it is not the intention of the proposed legislation to prohibit public health campaigning such as the scenario described above and that suitable amendments can be made.²⁶⁶

- 6.40** Mr Brett Holmes, General Secretary, NSW Nurses' Association, observed that while the Nurse Association has the capacity to conduct campaigns independently, there are benefits to campaigning in a coalition:

We obviously have the capacity to stand on our own and run substantial campaigns but it is important that when you are running a campaign that you seek all the support that you can get from other legitimate groups ... It is a farcical situation where you prevent like organisations from joining together and to be able to campaign on issues that they have a similar position on.²⁶⁷

- 6.41** Some inquiry participants highlighted concerns that collaborations between small organisations with peak organisations may be prevented by the Bill. Professor Twomey remarked that such joint campaigns are highly unlikely to lead to undue influence or corruption in the electoral process:

Various small organisations here have always organised themselves with a peak organisation to represent their collective interests. Does the fact that they get those donations from those organisations so they can collectively run a single campaign lead in any way to corruption or a perception of corruption or anything like that? I think that is where the argument begins to fall down. If you want to stop front bodies being established, then there are probably more focussed and direct ways of doing it. This way is probably going too broadly in attacking structural organisations where you have a peak body representing collective bodies.²⁶⁸

- 6.42** The Greens NSW observed that while some peak organisations may be able to restructure their activities to enable continued engagement in public debate, other organisations would be constrained in their activities:

... welfare and environment groups, charitable bodies and foundations and unions will in many cases be denied the right to aggregate their funds into their peak bodies to be spent on raising issues that are of significance to them and their members ... Some peak organisations would be able to continue to operate within these restraints by clever restructuring and manipulation of their financial affairs.

²⁶⁶ Submission 12, Australian Medical Association (NSW), p 3.

²⁶⁷ Mr Brett Holmes, General Secretary, NSW Nurses' Association, Evidence, 20 January 2012, p 29.

²⁶⁸ Professor Twomey, Evidence, 20 January 2012, p 23.

Others, particularly those that receive a significant proportion of their funding from their member organisations and not individual contributions and donations, would find these restrictions onerous. Those organisations would find their ability to engage in the election debate severely constrained.²⁶⁹

Administrative burden of proposed amendments

6.43 Some inquiry participants suggested that, if enacted, the proposed amendments would create a significant administrative burden for third-party campaigners in attempting to classify donations that are able to be used for electoral expenditure. For example, Mr Avery from the Hunter District Hunting Club argued that the amendments would create a ‘blizzard of paper’ for third-party campaigners.²⁷⁰

6.44 Mr Norton highlighted that third-party campaigners may have difficulty in identifying the source of donations, especially if the third-party conducts numerous fund-raising activities:

While a third-party may have used donated money to finance electoral expenditure, working out which donor or donors gave the money may be difficult. Many third parties have multiple activities and general fundraising. If the third-party’s main activities are not primarily to do with NSW policy or politics, they are unlikely to have any basis for deeming particular donations as ‘political’. This is an implementation feasibility problem with the current law.²⁷¹

6.45 Mr Norton further elucidated that although the proposed system may be simpler than the current situation where only certain types of organisations are banned from making political donations, the proposed system would nevertheless add ‘...significant complexity and bureaucratic compliance costs to the operations of donor-reliant third parties’²⁷²:

Any banned political donor creates a need to screen who is giving money and to classify the use to which their money will be put ... Checking all personal donors against the electoral roll is a major administrative cost. For purely NSW political third parties, the proposed ban on all organisational donors may be simpler than the current system, which requires them to identify tobacco, for-profit liquor and gaming, and property developer companies. The activities of a company are not always evident from its name. However, most third parties will have at least federal and state political interests, and many have entirely non-political functions as well. Therefore, they will not be able to use a simple ‘no organisational donor’ rule, and will have to classify every sum of money received by an organisation. This may not be a routine task.²⁷³

²⁶⁹ Submission 25, The Greens NSW, p 3.

²⁷⁰ Mr David Avery, Honorary Secretary, Hunter District Hunting Club, Evidence, 18 January 2012, p 46.

²⁷¹ Submission 20, p 6.

²⁷² Submission 20, p 13.

²⁷³ Submission 20, p 13.

- 6.46** Professor Twomey also commented on the complexity of administering the proposed system, suggesting that it would be a ‘nightmare’ for organisations trying to establish if donors were on the electoral roll:

The other thing that did worry me a bit as well is if you are expecting the organisations to get their donations from individuals on the electoral roll, crikey, imagine the administration. How would you know if you are a member of the local whatever club that the donations you are getting are from people on the electoral roll? Whenever they give you a membership fee or a donation do you have to get them to sign a declaration saying, ‘I am on the electoral roll’ or something or other? ... Administratively it would be a nightmare ...²⁷⁴

- 6.47** The Public Service Association of NSW drew attention to two ways in which the proposed amendments could create administrative difficulties for third-party campaigners:

An example is the impact of the proposed restrictions on donors to voters on the electoral roll. As not all members are enrolled, and hence not all members are eligible to make donations, an administrative difficulty is created by trying to disentangle their subscriptions which could wholly or in part be expended on electoral expenditure. As Third Parties do not have ready access to the electoral roll verifying eligibility would be difficult.

Similarly the Act creates the concept of a Campaign Fund which makes sense for candidates and parties but is ill suited to established organisations who may participate intermittently in the political process. This is particularly difficult where staff costs are required to be paid from the campaign fund yet staff are permanently employed for a range of activities that are not exclusively related to electoral expenditure.²⁷⁵

- 6.48** The Asbestos Diseases Foundation of Australia Inc highlighted its concerns regarding the scope of the proposed amendment and its impact on their fundraising practices:

ADFA is concerned that the wording of section 85(1)(d) would encompass donations made by companies and unions during fundraising events which are subsequently used in whole or in part to finance a pamphlet, letter or newsletter discussing views of a political party or candidate.

It would be too great an administrative burden for ADFA to quarantine monies donated or raised at raffles, the Race Day or other fundraising events from companies, unions and other non-individuals.²⁷⁶

- 6.49** The Finance Sector Union of Australia, NSW Branch observed that the amendments would ‘... create administrative burdens and significant uncertainty about fundraising activities if there was a risk that the activities of the organisation would fall within the scope of the Bill’.²⁷⁷ The Union stated that the Bill:

... imposes significant obligations on not-for-profit groups to identify and separate possible funding sources so that only donations (as defined by S.85(1)) are accepted

²⁷⁴ Professor Twomey, Evidence, 20 January 2012, p 21.

²⁷⁵ Submission 29, Public Service Association of NSW, p 8.

²⁷⁶ Submission 16, p 3.

²⁷⁷ Submission 22, p 5.

from natural persons on the electoral roll. These obligations could be expensive and difficult to comply with.²⁷⁸

Suggested amendments

6.50 Inquiry participants suggested a number of amendments to the regulation of donations to and from third-party campaigners. These suggestions included removing third-party campaigners from proposed section 96D of the Bill, and creating a standalone section in the Act to regulate third-party campaigners.

6.51 The NSW Cancer Council urged amendments to the Bill to clarify the status of third-party campaigners and avoid inadvertent consequences:

Cancer Council is concerned that it is not sufficiently clear under the current drafting whether some of its campaigning activities or financial collaborations with groups such as NCOSS or Sydney Alliance would be adversely affected by the Bill. We urge amendments to the Bill to ensure that it does not inadvertently constrain the important lobbying work undertaken by community and not-for-profit groups such as Cancer Council.²⁷⁹

6.52 The Public Service Association of NSW expressed concern that the Act as currently drafted does not clearly regulate the behaviours of third-party campaigners, and may have subsequently created unintended consequences:

The evolution of the structure of the existing legislation has meant that the relatively new concept of Third-party campaigners has been added to the existing framework of regulation for parties and candidates. As a consequence many of the arrangements sit uncomfortably or create unintended burdens for entities classed as third-party campaigners.²⁸⁰

6.53 Unions NSW suggested that, as recognition of the fact that peak organisations often pool resources in order to most effectively undertake advocacy work on issues during election campaigns, ‘... restrictions on donations to ‘third-party campaigners’ be removed by deleting the reference to “third-party campaigners” in s 96D(1)’.²⁸¹

6.54 The Sydney Alliance also proposed that the section 96D amendments should not apply to third-party campaigners.²⁸²

6.55 The Greens NSW similarly proposed that ‘... the legislation be amended to allow the peak organisations of membership-based, not-for-profit bodies to receive money from their affiliates and spend it on issues-based campaigning’.²⁸³

²⁷⁸ Submission 22, p 8.

²⁷⁹ Submission 32, p 9.

²⁸⁰ Submission 29, p 8.

²⁸¹ Submission 24, p 13.

²⁸² Submission 1, p 2.

²⁸³ Submission 25, p 4.

- 6.56** The NSW Nurses' Association recommended that '... the Act be amended to allow for Third-party Campaigners to jointly fund campaigns of interest to the public, whether or not any political party has a particular issue on their agenda'.²⁸⁴
- 6.57** In order to provide third-party campaigners with a clearer understanding of their rights and responsibilities under the election funding, expenditure and disclosures regime, Unions NSW suggested that the sections of the Act applying to third-party campaigners should be extracted, and placed in a separate part of the Act.²⁸⁵
- 6.58** Mr Mark Lennon, Secretary, Unions NSW, further elucidated on this suggestion during his evidence to the Committee:
- ... to make it clearer and easier for third parties we believe that if there is going to be regulation of them that should be contained in a separate part of the Act. A number of our affiliates who have not dealt with the legislation before but are now captured by it because they are third-party campaigners are struggling ... This legislation is notoriously difficult, I understand, to simplify but I think that, given that a lot of third parties are not regular players in the political process, it would be to everyone's benefit, to the community's benefit, if there is a separate provision or a separate section in the Act that applies to third parties when it comes to their requirements under the legislation.²⁸⁶
- 6.59** The Public Service Association of NSW advised that it '... strongly supports the recommendation of Unions NSW to disentangle third-party regulation from the arrangements that apply ordinarily to Parties and Candidates under the existing Act'.²⁸⁷

Committee comment

- 6.60** The Committee believes that it may not have been the Government's intent in introducing the Bill to restrict the ability of third-party campaigners to advocate on behalf of their members, and notes that third-party campaigners will be able to continue to receive donations from non-individuals, so long as those donations are not used to incur electoral expenditure.
- 6.61** However, it is abundantly clear that the provisions in the Bill relating to the ban on donations from all but individuals on the electoral roll have provoked some consternation and confusion among some third-party campaigners. Inquiry participants expressed a number of concerns, relating to the ability of third-party campaigners to undertake their advocacy role both independently and jointly with other third-party campaigners, and the administrative burden of having to accurately account for the sources of donations.
- 6.62** The Committee considers that third-party campaigners play a critical role in the political process through advocating on a range of issues. The vibrancy of democracy in NSW would be diminished if third-party campaigners were deterred from engaging in public debate because of the provisions contained in the Bill.

²⁸⁴ Submission 19, NSW Nurses' Association, p 37.

²⁸⁵ Submission 24, p 9.

²⁸⁶ Mr Lennon, Evidence, 18 January 2012, pp 3-4.

²⁸⁷ Submission 29, p 8.

- 6.63** The Committee also recognises the importance of ensuring that third-party campaigners are not allowed to become surrogates for political parties in an attempt to subvert the donations and spending restrictions currently specified in the Act.
- 6.64** The Committee therefore recommends that not-for-profit, membership-based third party campaigners be allowed to pool their funds for the purposes of conducting an issues-based campaign, subject to the existing provisions of the Act that restrict third-party campaigner donations and expenditure. We believe that the ban should only apply where a third-party campaigner is either a for-profit entity, or the funds are to be spent on promoting the interests of a particular political party, candidate or group of candidates.

Recommendation 4

That Schedule 1[2] of the Election Funding, Expenditure and Disclosures Amendment Bill 2011 amending section 96D of the *Election Funding, Expenditure and Disclosures Act 1981* be amended to allow not-for-profit membership-based organisations that are third-party campaigners to pool their money in another not-for-profit organisation for the purpose of undertaking issues-based campaigning during an election period, subject to the existing caps on donations to, and expenditure by, third-party campaigners.

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- 6.65** The Committee further considers that in order to increase clarity among third-party campaigners about their rights and responsibilities under the Act, provisions relating to third-party campaigners should be consolidated into a stand-alone section of the Act.

Recommendation 5

That the NSW Government seek to amend the *Election Funding, Expenditure and Disclosures Act 1981* to consolidate provisions relating to third-party campaigners into a separate part of the Act.

Third-party campaigners and electoral expenditure

- 6.66** As noted at paragraph 6.5, the Premier asserted that the provisions contained in the Bill allow peak organisations to continue to undertake ‘genuine issues-based campaigns’.²⁸⁸ The Committee agrees that while strictly speaking this may be true, there are a number of important factors that must be taken into consideration when fully considering the potential ramifications of the Bill. For example, there was some contention among inquiry participants about the difficulty in making a distinction between a ‘genuine issues-based campaign’ and a political campaign.
- 6.67** In practice it is clear that the current definitions may be much broader than claimed by the Premier, with many campaigns currently included in the definition which would be considered by most reasonable observers as ‘issues-based’.

²⁸⁸ Mr O’Farrell, Evidence, 20 January 2012, p 3.

- 6.68** Chapter 2 briefly outlined the relevant definitions and provisions of the Act relating to third-party campaigners. The definitions of ‘third-party campaigner’, ‘electoral communications expenditure’ and ‘electoral expenditure’ are tightly interwoven: an understanding of the definition of each is critical to an appreciation of how the Act, and therefore the Bill, will impact on third-party campaigners.
- 6.69** A number of inquiry participants highlighted that the inter-relationships between these terms, and in particular the definition of ‘electoral expenditure’, generates significant confusion about what is captured by the Act. The Committee was told that these concerns would be exacerbated if the ban on all but individual donations were to be enacted, as third-party campaigners would be prevented from undertaking ‘electoral expenditure’ using monies from corporate or other organisational donors.
- 6.70** Some inquiry participants also expressed concern that the existing caps on electoral communication expenditure hinder third-party campaigners from undertaking issues-based campaigns during the election period while there are no limits on the media’s engagement in election campaigns during the same period.
- 6.71** This section begins by reiterating the definitions of ‘third-party campaigner’, ‘electoral communications expenditure’ and ‘electoral expenditure’.

Key definitions

- 6.72** The Act defines a third-party campaigner as being an entity or other person (not being a registered party, elected member, group or candidate) who incurs electoral communication expenditure during a capped expenditure period that exceeds \$2,000 in total.²⁸⁹
- 6.73** ‘Electoral communication expenditure’ is defined as being electoral expenditure of any of the following kinds:
- (a) expenditure on advertisements in radio, television, the Internet, cinemas, newspapers, billboards, posters, brochures, how-to-vote cards and other election material
 - (b) expenditure on the production and distribution of election material
 - (c) expenditure on the Internet, telecommunications, stationery and postage
 - (d) expenditure incurred in employing staff engaged in election campaigns
 - (e) expenditure incurred for office accommodation for any such staff and candidates (other than for the campaign headquarters of a party or for the electorate office of an elected member)
 - (f) such other expenditure as may be prescribed by the regulations as electoral communication expenditure.²⁹⁰

²⁸⁹ *Election Funding, Expenditure and Disclosures Act 1981*, s 4(1).

²⁹⁰ *Election Funding, Expenditure and Disclosures Act 1981* s 87.

6.74 The Act defines ‘electoral expenditure’ as:

Expenditure for or in connection with promoting or opposing, directly or indirectly, a party or the election of a candidate or candidates or for the purpose of influencing, directly or indirectly, the voting at an election.²⁹¹

6.75 Expenditure can therefore be for the purpose of:

- promoting or opposing, directly or indirectly, a party or election of a candidate(s), or
- influencing, directly or indirectly, the voting at an election.

6.76 The applicable cap for electoral communication expenditure by a third-party is \$1,166,600 if the third-party campaigner was registered with the Election Funding Authority prior to the commencement of the capped expenditure period for the election.²⁹²

6.77 The capped expenditure period for electoral communication expenditure applies from 1 October in the year before the election is to be held to the end of polling day for the election.²⁹³

Concerns with the definition of electoral expenditure

6.78 A number of inquiry participants highlighted that the relevant definitions in the Act can be unclear, and generate confusion over what is captured by the Act. The definition of ‘electoral expenditure’ generated the most concern. The perceived lack of clarity over the definition of ‘electoral expenditure’ would be particularly problematic for third-party campaigners trying to determine what donation sources are able to be used for particular campaigns.

6.79 It is to be noted that the definition of electoral expenditure predates the Bill.

6.80 The Premier argued that the Bill would not restrict peak bodies from engaging in genuine issues-based campaigning, as such campaigns did not constitute ‘electoral expenditure’:

The Bill will not prevent peak bodies from undertaking issue-based campaigns (i.e., those which do not promote or oppose a party or candidate or seek to influence the voting at an election) funded by constituent bodies, just as they do under the current legislation. Such campaigns do not constitute ‘electoral expenditure’ which is already defined in the current legislation.²⁹⁴

6.81 The Premier emphasised that ‘[t]he Bill will not prevent third-party campaigners from incurring electoral expenditure to run political campaigns. It will, however, prevent third-party campaigners from receiving political donations from corporations to incur such expenditure’.²⁹⁵

²⁹¹ *Election Funding, Expenditure and Disclosures Act 1981* s 87.

²⁹² *Election Funding, Expenditure and Disclosures Act 1981* s 95F(10) and s 95F(12). The corresponding cap for the 2011 State Election was \$1,050,000.

²⁹³ *Election Funding, Expenditure and Disclosures Act 1981*, s 95(H)(b).

²⁹⁴ Answers to supplementary questions 20 January 2012, the Hon Barry O’Farrell MP, Premier, Question 2, p 1.

²⁹⁵ Answers to supplementary questions 20 January 2012, Mr O’Farrell, Question 1, p 1.

- 6.82** The Premier advised the Committee that he believes it is possible to draw a ‘workable and clear’ distinction between issues-based campaigning and electoral expenditure:

A review of the Register of Third-Party Campaigners maintained by the NSW Electoral Commissioner for the last election indicates that the distinction between issue-based campaigning and ‘electoral expenditure’ is both workable and clear within the community. The fact that organisations such as the RSPCA are absent from the register shows that they do not consider that their campaigns constitute ‘electoral expenditure’ within the meaning of section 87 of the Act (which is not amended by the Government’s Bill).²⁹⁶

- 6.83** While the NSW Cancer Council agreed that there is a ‘clear difference’ between issues-based and political campaigns, it recommended that any changes to the Act should also clearly distinguish between the two:

There is a clear difference between campaigning activity designed to influence votes in a political election, and campaigning on issues during an election period that are designed to influence the public policy stance of Parliamentarians ... Cancer Council recommends that any changes to the Election Funding, Expenditure and Disclosures legislation clearly distinguish between campaigning that focuses on issues and campaigning focused on candidates and political parties, and does so in a way that protects the ability of non-government organisations to campaign on issues.²⁹⁷

- 6.84** Conversely, Dr Tham argued that the ‘broad definition’ of electoral expenditure, when read in conjunction with ‘electoral communication expenditure’, effectively captures all issues-based campaigns, even if the campaign does not directly advocate for a specific party:

‘Electoral expenditure’, in turn, is broadly defined by section 87(1) to mean:

Expenditure for or *in connection* with promoting or opposing, directly *or indirectly*, a party or the election of a candidate or candidates *or* for the purpose of influencing, directly *or indirectly*, the voting at an election (italics added).

This broad definition - in particular the italicised parts - has the effect that ‘electoral communication expenditure’ will capture spending on communication undertaken as part of issue-based campaigns aimed at influencing the policies of parties and candidates during the ‘capped expenditure period’, even though such campaigns may not explicitly advocate a vote for or against a particular party or candidate.²⁹⁸

- 6.85** Mr Brett Holmes, General Secretary, NSW Nurses’ Association described the legislation as being ‘fraught with danger’²⁹⁹, suggesting that ‘... the legislation is so broad as to capture almost any raising of an idea that could at some point become a potential policy issue or a position taken by a politician’.³⁰⁰

²⁹⁶ Answers to questions on notice taken during evidence 20 January 2012, Mr O’Farrell, Question 2, p 2.

²⁹⁷ Submission 32, pp 3-4.

²⁹⁸ Submission 27, p 8.

²⁹⁹ Mr Holmes, Evidence, 20 January 2012, p 27.

³⁰⁰ Mr Holmes, Evidence, 20 January 2012, p 25.

- 6.86** Mr Holmes provided an example of advocacy undertaken by the NSW Nurses' Association that 'may' be captured by the legislation:

The nurse-to-patient ratio campaign was an example of that situation where we were running an industrial campaign which, no doubt, had to influence the real decision makers. It had to influence the Government of the day in order to be able to be resolved. We were contacted by the Electoral Funding Authority suggesting that our campaigning 'may' be captured ... We were not advocating that people vote against the Government. We were advocating that people send a message to government ... This is where it becomes very difficult and confusing as to how can we run an industrial campaign in the supposed six months prior to an election?³⁰¹

- 6.87** Mr Norton similarly commented on the 'very broad' nature of electoral expenditure, noting the difficulty in proving whether or not someone had been influenced by a campaign to vote for one party or candidate over another:

Under section 87 of the *Election Funding, Expenditure and Disclosure Act 1981*, electoral expenditure is defined as 'expenditure for or in connection with promoting or opposing, directly or indirectly, a party or the election of a candidate or candidates, *or for the purpose of influencing, directly or indirectly, the voting at an election*' (emphasis added, 'an election' is a reference to a NSW election; if the spending is substantially for a non-NSW election it is not included).

For issue-based third-party activity or campaigns, the italicised part of the definition is most important. 'Directly or indirectly influencing voting' is very broad. If a communication on a NSW policy issue could be read, heard or seen by someone on the NSW electoral roll it could come within this definition. It would be hard to prove that none of these people could have been influenced in ways that would affect their NSW voting.³⁰²

- 6.88** Mr Norton further contended that it would be difficult to regulate if a party was undertaking a campaign 'for the purpose of' influencing voting:

However 'for the purpose of' will be difficult for the EFA [Election Funding Authority] to enforce, since the intention behind the funding of a policy-related statement is often ambiguous. For example, NSW newspapers spend large sums of money publishing material likely to influence voting in NSW. However, arguably this material is published because newspapers hope to make a profit by selling it, rather than 'for the purpose of' influencing voting. So a community activist group publishing material on a local issue will be caught by the law, but the *Daily Telegraph* will be exempt if its purpose is selling newspapers.³⁰³

- 6.89** Professor Twomey also noted the uncertainty surrounding the application of the second part of the definition, which states 'for the purpose of influencing, directly or indirectly, the voting'. Professor Twomey said '[a]ny issue that you discuss can be one that might influence the way people vote at an election'³⁰⁴, and continued:

³⁰¹ Mr Holmes, Evidence, 20 January 2012, p 26.

³⁰² Submission 20, pp 6-7.

³⁰³ Submission 20, p 6.

³⁰⁴ Professor Twomey, Evidence, 20 January 2012, p 17.

... if you are advocating in your issues supporting measures of road safety or harm minimisation to animals or whatever it is, potentially then you are either indirectly supporting the party that has a policy that is similar to the issues you are raising or you are doing your advertising and raising your issues for the purposes of directly or indirectly influencing the way people vote. Of course you are. Why would you be doing it otherwise?³⁰⁵

6.90 Dr Graeme Orr, on behalf of the Democratic Audit of Australia, argued that '[w]hilst the regulated period is clear, what is regulated is a bit fuzzier'.³⁰⁶ Dr Orr explained:

Clearly then, advertising or campaigning up until to six months before polling day, is unaffected by this Bill. Equally clearly, advertising or campaigning within six months, to promote or critique one side of electoral politics or its policies, is caught. The fuzzier area is so-called 'issue advertising' during the six month period. An organisation might advertise on a social issue, or a union or business run a PR campaign to pressure an industrial settlement (at least in the private sector). Such a campaign is not caught by the law provided it does not have a purpose, albeit indirect, of swaying electoral choice. That 'purpose' must be objectively determined: it cannot just be up to the organisation to say 'we didn't intend to influence the election'. So much issue advertising in the six month period – including public sector union campaigns – would be caught, as long as the matter has become an issue in the campaign ...³⁰⁷

6.91 Dr Orr further observed during his appearance before the Committee: '... the idea that you can necessarily neatly separate issue advertising from direct electioneering is very problematic because of the nature of the hubbub of election campaigns'.³⁰⁸

6.92 A number of inquiry participants commented on the difficulties of practically applying the definition of 'electoral expenditure', expressing concern that, despite the Premier's assurances about the intention of the provision, all public campaigning could in fact be captured under the Act, and hence restricted during an election period. For example, the Sydney Alliance stated:

In the Act, the definition of indirectly influencing voters is untested, and potentially extremely broad. It could include any public campaigning about an issue, such as the transportation system or health system, through a website or pamphlets. We believe this could be a significant limit on the right of community based organisations to have their needs and voices heard during elections.³⁰⁹

6.93 Mr Chris Maltby, Registered Officer, The NSW Greens, also commented on the potential for third-party campaigns to be captured under the legislation:

The whole point about talking about political issues and the political sphere is because you want to influence people's voting ... A lot of the campaigns that third parties

³⁰⁵ Professor Twomey, Evidence, 20 January 2012, p 17.

³⁰⁶ Submission 2, Professor Graeme Orr on behalf of the Democratic Audit of Australia, p 1.

³⁰⁷ Submission 2, pp 1-2.

³⁰⁸ Dr Graeme Orr, Democratic Audit of Australia, Evidence, 18 January 2012, p 57.

³⁰⁹ Submission 1, p 1.

conduct are essentially about helping people to make up their mind about how they will vote. So they will obviously be caught by the definition in the Act.³¹⁰

- 6.94** Reflecting on the lack of a clear boundary between the two types of campaign, Mr Geoff Derrick, Secretary, Finance Sector Union Australia, NSW Branch, argued that it ‘would be a very difficult line to tread’ in determining the distinction between an issues-based and a political campaign:

I think that it would be a very difficult line to tread between campaigning on an issue in an election period where one or other candidate had a professed position for or against the position the union was supporting and then arguing that that was or was not an attempt to influence voting in the election.³¹¹

- 6.95** Ms Jennifer Diamond, General Secretary, NSW Teachers Federation similarly observed: ‘At what point does issues-based campaigning – which is what we believe we do – suddenly become political?’³¹² The NSW Teachers Federation expanded on its concerns in its submission to the inquiry:

The proposed legislation will threaten the democratic right of the Federation and its members to pursue its broad political and social objectives through the uncertainty and confusion over what may be viewed as electoral expenditure and electoral communication expenditure and what has traditionally been viewed as industrial or political campaigns in support of public education objectives eg smaller class sizes, reduced teaching loads, increased funding for special needs students.³¹³

- 6.96** A number of other unions, including Unions NSW, the Australian Manufacturing Workers’ Union, NSW Branch, Community and Public Sector Union, and Electrical Trades Union of Australia, NSW Branch, also expressed consternation about the distinction between issues-based and political campaigning.³¹⁴

- 6.97** Mr Maltby recognised the complexity of distinguishing a clear boundary between issues-based and political campaigns, but argued that an attempt should nonetheless be made to clarify the boundary:

Some things are really messages about supporting particular candidates or opposing parties and those people are identified with a tick or a cross in a box. Those sorts of messages are unambiguously party related. When you are talking about broader political issues, campaigns such as Last Drinks are clearly political in nature but do not canvas votes for a particular party or place an onus on people to consider the positions of the different parties and how that accords with their own position on the issue. That would be useful and informative information as distinct from a direction. Those two places meet somewhere or another. I agree that there may be some

³¹⁰ Mr Chris Maltby, Registered Officer, The NSW Greens, Evidence, 20 January 2012, p 37.

³¹¹ Mr Geoff Derrick, Secretary, Finance Sector Union Australia (NSW), Evidence, 18 January 2012, p 26.

³¹² Ms Jennifer Diamond, General Secretary, NSW Teachers Federation, Evidence, 20 January 2012, p 51.

³¹³ Submission 31, NSW Teachers Federation, p 5.

³¹⁴ See for example Submission 24, p 5; Submission 1, p 7; Submission 17, Community and Public Sector Union, p 5; and Submission 23, pp 3-4.

difficulty in deciding where that boundary stands. However, that does not mean we should not attempt to set the boundary.³¹⁵

Concerns over existing caps on electoral communication expenditure

6.98 Although not expressly mentioned in the Bill, the issue of the existing caps on electoral communication expenditure for third-party campaigners was mentioned by some inquiry participants, most notably the NSW Nurses' Association. Concern was expressed that the existing caps on electoral communication expenditure restrict the ability of third-party campaigners to undertake campaigns during the election period.

6.99 The Public Service Association of NSW did not support the current system of capped expenditure for third-party campaigners, arguing that as third-party campaigners do not directly benefit from the outcome of an election, they should not be subject to expenditure caps:

Third-party Campaigners are not ordinary participants in the electoral process as they do not stand to directly benefit from the outcome of an election in the way that parties and candidates do. They are generally advocacy organisations seeking to place issues in the public domain and despite the outcome of an election, remain dependant on elected public officials to implement their agenda.

The effect of the system of capped expenditure on Third-Party Campaigners is to limit the capacity for an organisation to legitimately place an issue in the public domain. It should be open to an organisation to spend every cent in its treasury in pursuit of its legitimate objectives without restraint if it is in the interests of its members to do so.³¹⁶

6.100 The NSW Nurses' Association asserted that the expenditure cap '...significantly restricts the capacity of those outside the political parties or media to participate in and respond to the public debate during election periods'.³¹⁷ The Association continued:

... the NSW Nurses' Association believes the imposition of expenditure caps on Third-party Campaigners creates a massive distortion in the political process by enhancing the power of certain media outlets and political parties during the capped period, at the expense of other legitimate groups.³¹⁸

6.101 The NSW Nurses' Association, using an example of expenditure in the lead up to the March 2007 State election prior to the introduction of the caps, noted how easy it would be to exceed the electoral communication expenditure cap:

The NSW Nurses' Association ran a short television, radio and newspaper campaign prior to the 2007 State election. The total expenditure on this campaign for the period from November 2006 to March 2007 totalled \$1,247, 593 and was comprised of:

- \$1,074,604 on radio and TV advertisements and the related production costs
- \$46,288 on newspaper advertisements

³¹⁵ Mr Maltby, Evidence, 20 January 2012, p 38.

³¹⁶ Submission 29, p 7.

³¹⁷ Submission 19, p 3.

³¹⁸ Submission 19, p 17.

- \$117,676 on Billboard advertisements, and
- \$8,865 on website costs

As you can see \$1 million does not go very far and most certainly would not last long in a six-month period. It represents a serious restriction of our capacity to participate in and respond to issues of concern and interest to our members.³¹⁹

- 6.102** Mr Holmes noted that the Association potentially ran the risk of breaching the cap, and being unable to continue its advocacy work prior to an election:

We could be in a situation where we are running an industrial campaign that is determined to be political because we mention politicians or government and we may well have expended our \$1 million on that campaign and then be faced by a policy position by a government or an opposition which we would also need to campaign against but, having reach our cap, would be prevented from having a significant impact into that public campaign.³²⁰

Role of the media

- 6.103** Some inquiry participants argued that the Act, while imposing significant restrictions on third-party campaigners, failed to address the role that the media can play in influencing public opinion during the election period. Although the role of the media was not specifically mentioned within the inquiry's terms of reference, inquiry participants raised this issue as a point of comparison to the restrictions placed on third-party campaigners.

- 6.104** The Finance Sector Union of Australia, NSW Branch, argued:

While imposing a series of prohibitions and restrictions on collective organisations, the Bill does not seek to limit the engagement of media outlets and other participants who might seek to influence the political process. To this end community and not-for-profit organisations are placed at a distinct disadvantage relative to our highly concentrated mass media interests or corporate CEO's.³²¹

- 6.105** In his evidence to the Committee, Mr Derrick, emphasised the view of the Finance Sector Union Australia, NSW Branch in this regards: '...the obligations on us are much more onerous and burdensome from an administration point of view than, for example, the obligations on the Daily Telegraph or 2GB or another media outlet'.³²²

- 6.106** The NSW Teachers Federation also argued that the media, with its 'unfettered resources' was often able to exert considerable influence through campaigning on community issues:

The media has unfettered resources to campaign around community issues and has done so to great effect in the past ... The Federation contends this is at best a naive, and at worst, a dangerous mechanism to give a voice only to the rich and powerful

³¹⁹ Submission 19, p 32.

³²⁰ Mr Holmes, Evidence, 20 January 2012, p 26.

³²¹ Submission 22, pp 6-7.

³²² Mr Derrick, Evidence, 18 January 2012, p 23.

individuals within the community. It completely ignores the considerable power of the media and its owners to run campaigns backed by considerable resources.³²³

- 6.107** The NSW Nurses' Association similarly contended that both the Bill and the existing Act afford media outlets ... 'greater control of the political process than other organisations':³²⁴

To continue to give private media companies the unrestricted right of political discourse, with the only real restrictions being their own corporate resources and editorial policies, while imposing spending caps on other private entities, especially membership-based organisations, seriously compromises the rights of the people of NSW.³²⁵

Proposed amendments

- 6.108** Some inquiry participants proposed amendments to the regulations pertaining to electoral expenditure. Dr Orr of the Democratic Audit of Australia suggested that 'a much clearer position to take'³²⁶ in regard to restrictions on electoral communication expenditure would be to tightly regulate the six months prior to an election, while having less strict regulations for the other three and a half years

... whilst you might ban or limit organisational donations to parties which are essentially electioneering machines, it is a categorically different thing to intrude too far on third parties fundraising year in, year out ... what needs to be done is for the law to be clarified for interest groups particularly so that it only affects that idea of electioneering in the six-month period. I certainly would see some merit in that to ensure that you leave third parties clearly free to campaign on issue advertising for 3.5 years of the parliamentary cycle and then maybe you only regulate what they use donations for in that final six months of the true election campaign period.³²⁷

- 6.109** Dr Orr described this as 'the bright-line rule', which grants political parties and candidates preferred status over third-party campaigners in the period immediately prior to an election:

... you say that there is this period in which parties come first – the campaign period – which you define as six months. That period is shorter in Canada and longer in some other jurisdictions. You say that parties are front and centre in that period and they get some benefits from public funding as well as a monopoly in access to Parliament and privileged access to the media. However, for reasons of integrity and because of the appearance of corruption, parties will be limited in the sorts of organisational, corporate or even union donations they can receive.³²⁸

³²³ Submission 31, p 6.

³²⁴ Submission 19, p 19.

³²⁵ Submission 19, p 20.

³²⁶ Dr Orr, Evidence, 18 January 2012, p 53.

³²⁷ Dr Orr, Evidence, 18 January 2012, p 53.

³²⁸ Dr Orr, Evidence, 18 January 2012, p 60.

- 6.110** Professor Twomey argued that the ‘obvious response’ to the confusion over the definition of ‘electoral communication’ would be to clarify the definition so as to not capture issues-based campaigns by third parties.³²⁹
- 6.111** Both the Public Service Association of NSW and the Transport Workers’ Union of NSW supported measures to tighten the definitions of ‘electoral expenditure’ and ‘electoral communication expenditure’ to reduce the ambiguity for third-party campaigners.³³⁰
- 6.112** Professor Twomey, when asked if it was possible to craft an improved definition of ‘electoral expenditure’ that clearly separates issues-based campaigning and political campaigning, acknowledged the inherent difficulty in establishing a definition that could not be circumvented:

It is really hard to do it and to do so effectively. The problem is that, in the end, whatever you do someone will try to get around it. That is inevitable ... From recollection, there are places where you can run an issues campaign but you are not allowed to say, "Therefore, you should support x." You cannot include anything that supports a candidate or political party; you can only raise the issue and put your position. That is the limitation. Having said that, that simply means that people play join the dots. They note the issue and the concerns and then join the dots and conclude that they are being advised to vote for x. It might be better than what we have, but it is a little on the artificial side. If I had a brilliant answer in terms of how you do it, I would be more than happy to provide it to you and to every country in the world. However, I do not think that anyone has cracked this one yet.³³¹

- 6.113** Mr Norton observed that ‘[f]or non-partisan third parties, the problems of the current law could be limited with a narrower definition of what political activity is covered’.³³² Mr Norton explained that in Queensland, campaign expenditure caps only apply to political advertising that ‘advocates a vote for or against a candidate or for or against a registered political party’:

In Queensland, the law applying to campaign expenditure caps (though not to donations caps) is much narrower and simpler and applies only to political advertising that: ‘advocates a vote for or against a candidate or for or against a registered political party’. A definition like this leaves little doubt as to what material is covered. More importantly, it targets third parties that are partisan or front groups for a political party, while leaving third parties and third-party supporters concerned with particular issues or causes to participate in politics free of complex regulation.³³³

- 6.114** The Sydney Alliance suggested that a new category could be inserted into the Act to ‘...exempt issue-based campaigns from the restrictions currently placed on Third-party Campaigners’³³⁴, explaining that:

The scope of issue-based campaigns could be limited, for instance, to not-for-profit organisations. This would provide scope for community-based organisations like the

³²⁹ Professor Twomey, Evidence, 20 January 2012, p 17.

³³⁰ Submission 29, p 9; Submission 14, Transport Workers’ Union of NSW, p 5.

³³¹ Professor Twomey, Evidence, 20 January 2012, p 18.

³³² Submission 20, p 15.

³³³ Submission 20, p 15.

³³⁴ Submission 1, p 2.

Sydney Alliance to be able to undertake advocacy on important social issues around elections without being restricted by these new rules around donations.³³⁵

- 6.115** The Shooters and Fishers Party advocated for the removal of all expenditure caps for third-party campaigners, while retaining the current requirement for ‘registration and accountability’.³³⁶
- 6.116** Mr Norton suggested that, in order to make ‘the campaign finance system less onerous for small-scale activism’³³⁷ the current threshold of \$2,000 for registration as a third-party campaigner, as specified in section 4(1) of the Act, should be increased to \$10,000:

Regulation is currently triggered by \$2,000 in electoral communication expenditure. This is a very small amount. It captures micro-third parties, the type of third-party made up of part-time volunteers. It is difficult to see how campaigns of this size raise any issues for the integrity or fairness of the electoral system. Yet the complexity of third-party regulation creates a significant risk of unintentional breach of the law. For those who do understand the rules, compliance with them diverts significant time away from activism. Increasing the threshold to \$10,000 would remove most small-scale activism from the campaign finance system.³³⁸

Committee comment

- 6.117** The Committee acknowledges the Government’s claims that the Bill will not impact on the ability of third-party campaigners to undertake genuine issues-based campaigns. The Committee also notes the statement from the Premier that he thinks that it is possible to draw a ‘workable and clear’ distinction between issues-based campaigning and electoral expenditure.
- 6.118** However, the Committee is concerned by the level of anxiety among other inquiry participants, including both electoral and constitutional academics and third-party campaigners, about the interpretation of ‘electoral expenditure’. The Committee notes that the Premier’s view of the impact on third party campaigners is not supported by any submission authors or academic expert. This perceived lack of clarity could discourage third-party campaigners from engaging in public debate due to concerns that the campaign may be classified as a political, rather than issues-based, campaign.
- 6.119** The Committee considers that the definition of ‘electoral expenditure’ contained in the Act should be amended to more clearly distinguish what constitutes an issues-based campaign. The Committee acknowledges the difficulty in crafting an unambiguous definition of ‘electoral expenditure’, and encourages the Government to examine definitions used in other jurisdictions both in Australia and internationally, to identify if there is a more appropriate definition currently in use.

³³⁵ Submission 1, p 2.

³³⁶ Submission 28, Shooters and Fishers Party, p 2.

³³⁷ Submission 20, p 15.

³³⁸ Submission 20, p 15.

Recommendation 6

That the NSW Government seek to amend the *Election Funding, Expenditure and Disclosures Act 1981* to clarify the definition of ‘electoral expenditure’ by clearly defining what constitutes an issues-based campaign, and providing that an issues-based campaign does not constitute electoral expenditure.

Chapter 7 Constitutional issues

The terms of reference for this inquiry require the Committee to consider the risks of a successful constitutional challenge to the Election, Funding, Expenditure and Disclosures Amendment Bill 2011 (the Bill). In addressing this term of reference, the Committee must consider whether the High Court may find the provisions of the Bill to be in breach of the implied freedom of political communication and the related freedoms of political association and political participation.

The Committee considers that, if the Bill was to be enacted without amendment, there is a risk of a constitutional challenge being brought before the High Court. However, the Committee is not in a position to determine the likely outcome of such a challenge. This chapter therefore makes no recommendations, but simply presents the arguments of inquiry participants relating to the constitutional issues surrounding the Bill.

Notwithstanding that the Committee does not form any definitive conclusion regarding the Bill's constitutionality, if the changes recommended in the previous chapters of this report were implemented, the Committee believes the likelihood of a successful constitutional challenge to the Bill would be diminished.

The Committee would like to extend its appreciation to the NSW Parliamentary Library Research Service for preparing two e-briefs on constitutional issues arising from certain aspects of the Bill, namely banning political donations from third-party interest groups and changes to caps on electoral expenditure by political parties.³³⁹

Concerns about the constitutionality of the Bill

7.1 Since the introduction of the Bill, concerns have been expressed about its constitutionality by a number of parties. Concerns have also been expressed that, if the provisions of the Bill were to be challenged in the High Court, there may be potential for aspects of the existing *Election, Funding, Expenditure and Disclosures Act 1981* (the Act) to be struck down. Several inquiry participants also highlighted that it is not possible to anticipate the decisions of the High Court, and that any decision on the constitutionality of the legislation will ultimately rest with the Court.

7.2 As noted in Chapter 3, the NSW Parliament's joint Legislation Review Committee expressed concern that the Bill may 'restrict the constitutionally implied freedom of political communication'³⁴⁰, concluding:

The Committee reiterates the concerns it has previously made that laws which restrict campaign expenditure may affect the freedom of political communication.

³³⁹ NSW Parliamentary Library Research Service, *Banning political donations from third-party interest groups: a summary of constitutional issues*, E-brief 1/2012, January 2012, and *Proposed changes relating to caps on electoral expenditure by political parties: a summary of constitutional issues*, E-brief 2/2012, January 2012. Copies of these e-briefs can be found on the Parliament's website.

³⁴⁰ NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No. 5 of 2011, 11 October 2011, p 11

The Committee notes that this Bill may further impact on freedom of political communication in New South Wales.³⁴¹

7.3 The Legislation Review Committee's concern was echoed by the constitutional law academics that participated in the inquiry. Many other inquiry participants, including the Shooters and Fishers Party, Unions NSW, the Cancer Council of NSW, the Hunter District Hunting Club, suggested that the rights of their members would be at risk as a consequence of the Bill.³⁴²

7.4 During the Bill's second reading speech, the Premier noted that while he believed the Bill to be constitutionally sound, the Bill's constitutionality was likely to be a subject of debate. However, the Premier argued that uncertainty over constitutional issues should not be used as an excuse to do nothing:

It is inevitable that these laws and, I expect, this bill will trigger discussion and debate about constitutional principles. It has always been a great excuse to do nothing and a way to justify the status quo. I believe that a ban on donations other than those by individuals does not place unreasonable restrictions on the implied freedom of political communication mandated by the Commonwealth Constitution. The measures in this bill are designed to rid this State of the risk, reality and perception of corruption and undue influence. To this end, they are consistent with the principles endorsed by the High Court in the *Lange* case.³⁴³

7.5 The Premier also observed that the pending review of the Act and the *Parliamentary Electorates and Election Act 1912*, which will shortly be undertaken by the Electoral Commissioner, should not be used as an excuse to delay reform of the electoral system:

... the Parliament is now presented with a unique opportunity to use this work to make further changes to restore honesty and integrity in New South Wales politics. We should not delay these reforms but rather act now so that the changes can be implemented and processes settled before the next State election.³⁴⁴

7.6 In evidence to the committee, Professor Anne Twomey, Professor of Constitutional Law, University of Sydney, echoed the Premier's concern in regard to the excuse of constitutional uncertainty: '... constitutional issues are often used as an excuse for doing nothing. I think he is dead right on that'.³⁴⁵

³⁴¹ Legislation Review Committee, *Legislation Review Digest*, No. 5 of 2011, p 11.

³⁴² See for example: the Hon John Tingle, Vice Chairman, Shooters and Fishers Party, Evidence, 18 January 2011, p 34; Submission 2, Dr Graeme Orr on behalf of the Democratic Audit of Australia, pp 2-5; Submission 3, Last Drinks Campaign, p 5; Submission 5, Professor Anne Twomey, pp 2-5; Submission 7, Hunter District Hunting Club, p 3; Submission 8, United Voice, p 8; Submission 10, Dr Iain Stewart, pp 2-28; Submission 13, Manufacturing Workers' Union, NSW Branch, p 4; Submission 17, Community and Public Sector Union, p 8; Submission 19, NSW Nurses' Association, pp 9-17; Submission 24, Unions NSW, pp 20-21; Submission 27, Dr Joo-Cheong Tham, pp 10-11; Submission 29, Public Service Association of NSW, pp 2-5; Submission 32, NSW Cancer Council, p 8.

³⁴³ *LA Debates* (12/9/2011), 31. Discussion on the '*Lange* test' commences in paragraph 7.36.

³⁴⁴ Answers to questions on notice taken during evidence 20 January 2012, Hon Barry O'Farrell MP, Premier, p 8.

³⁴⁵ Professor Anne Twomey, Professor of Constitutional Law, University of Sydney Law School, Evidence, 20 January 2012, p 15.

- 7.7 Professor Twomey expressed regret that her 2008 report, entitled *The reform of political donations, expenditure and funding*, had seemingly been used as an excuse for ‘doing nothing’ to reform the electoral regime, but warned that any reforms should be done ‘carefully and correctly’ to limit the risk of High Court action:

The report that I wrote was never intended for the purposes of giving people an excuse to do nothing, but it was written from the point of view of wanting to make sure that what was done was done carefully and correctly and to make sure that it did not end up struck down by the High Court.³⁴⁶

- 7.8 Dr Graeme Orr of the Democratic Audit of Australia similarly cautioned against enacting legislation that might ‘goad’ the High Court to respond :

I do not think Parliament should be unduly shy of passing laws it thinks are best in principle and seeing what the court does, but I think you should be shy of doing something that effectively goads the court or requires the court to advance or develop a further limitation on parliamentary sovereignty ...³⁴⁷

- 7.9 Specifically, Dr Orr warned that the ‘double whammy’ of the combined provisions of the prohibition on donations and the aggregation of expenditure contained in the Bill, may be more constitutionally provocative than if one or other of the provisions was enacted.³⁴⁸

- 7.10 Dr Iain Stewart, Associate Professor, Macquarie University Law School, observed in his submission that the Bill is ‘likely to be challenged in the High Court’³⁴⁹, recommending that the Government carefully consider the grounds upon which a challenge might be brought:

... if the Bill does what Premier Barry O’Farrell promises it will, the ALP will have to give serious consideration to a constitutional challenge. ... on the government side, the Liberal Party needs to foresee the grounds on which a challenge may be brought and consider whether to amend or replace the Bill so as to remove or reduce the likelihood of a constitutional challenge.³⁵⁰

Concerns about the possible impact on previous reforms

- 7.11 Some inquiry participants expressed concern that if the Bill was found to be unconstitutional by the High Court, there could be repercussions for the validity of previous reforms to the election funding and disclosure scheme. For example, Professor Twomey said:

... it is important that things are done constitutionally correctly because otherwise you might have a wonderful scheme that has one or two small flaws in it and that can bring the entire thing down.³⁵¹

³⁴⁶ Professor Twomey, Evidence, 20 January 2012, p 15.

³⁴⁷ Dr Graeme Orr, Member, Democratic Audit of Australia, Evidence, 18 January 2012, p 55.

³⁴⁸ Dr Orr, Evidence, 18 January 2012, p 55.

³⁴⁹ Submission 10, p 2.

³⁵⁰ Submission 10, p 6.

³⁵¹ Professor Twomey, Evidence, 20 January 2012, p 15.

- 7.12** The Greens NSW also expressed concern that previous electoral reforms, such as the ban on donations from developers and the alcohol, tobacco and gambling-for-profit industries, would be at risk if there was a constitutional challenge:

The Greens are also concerned that the legislation, if passed unamended, would expose the resulting *Election Funding, Expenditure and Disclosures Act 1981* to a constitutional challenge that might not only bring down the changes implemented by the Bill but also the amendments made in 2009 and 2010.

- 7.13** Unions NSW were also concerned about the potential effect on other aspects of the Act if the any elements of the Bill were found to be unconstitutional:

Unions NSW believes that the progress in positive reforms made so far – those which have broad support – are put at risk by the questionable constitutionality of these modifications to the bill, and could end up casualties of a successful constitutional challenge along with the more odious aspects of the current Bill.³⁵²

Unpredictability of the High Court

- 7.14** A number of inquiry participants commented on the difficulty of attempting to predict the view of the High Court in regard to the constitutionality of the Bill. For example, Dr Orr referred to predicting the outcome of a High Court challenge as a ‘mug’s game’:

Predicting what the High Court will do is always a bit of mug’s game. I think we have had long enough with the current Chief Justice and the court to know that whilst they are not activists they are strong in principles.

- 7.15** Dr Stewart elaborated on the unpredictability of High Court:

... it [the Constitution] means what the High Court *may be likely* to say that it means. Moreover, what the High Court may be likely to say is highly unpredictable. The seven judges are unpredictable individually, collectively and as to what might turn out to be a majority among them...This unpredictability means that a constitutional case is a bit of a lottery.³⁵³

- 7.16** Professor Twomey also provided a cautionary note for attempts to predict the view of the High Court on the constitutionality of the Bill, observing: ‘To be honest, it is hard to tell. A lot of this is tealeaf reading when looking at the High Court...’³⁵⁴

Committee comment

- 7.17** The Committee acknowledges that the Bill has provoked much discussion amongst inquiry participants about its constitutionality. The Committee also acknowledges that concerns have been expressed that, if the provisions of the Bill were to be challenged in the High Court, there may be potential for other aspects of the current Act to be struck down.

³⁵² Submission 24, p 20.

³⁵³ Submission 10, p 5.

³⁵⁴ Professor Twomey, Evidence, 20 January 2012, p 18.

- 7.18** The Committee considers it likely that aspects of the Bill, if passed, will be challenged. However, as noted by several inquiry participants, it is not possible to anticipate the decision of the High Court if a constitutional challenge was mounted.
- 7.19** Accordingly, and as noted at the beginning of this chapter, the Committee will not be drawing any conclusions as to the constitutionality of the Bill, or the possible outcome if the legislation were to be challenged in the High Court. However, the Committee will explore the arguments made by inquiry participants as to the likely factors that the High Court may take into consideration during an examination of the Bill, if the Bill were to be passed in its current form.
- 7.20** The Committee's examination of the constitutional implications of the Bill begins with a discussion of the implied political freedoms. The chapter then outlines what has become known as the *Lange* test, established in the High Court's decision in *Lange v Australian Broadcasting Corporation*.³⁵⁵

Implied political freedoms

- 7.21** There are thought to be three implied political freedoms derived from the *Commonwealth of Australia Constitution Act* (hereafter referred to as the Constitution): the freedom of political communication and associated freedoms of political association and of political participation. This section provides an overview of each of these freedoms, prior to a more detailed examination of their application to the provisions of the Bill in later sections of this chapter.
- 7.22** The High Court has implied a constitutional freedom of political communication, stemming from sections 7 and 24 of the Constitution, whereby members of the Senate and House of Representatives are to be 'directly chosen by the people'. The freedom of political communication is also derived from section 128 of the Constitution, which gives electors a role in amending the Constitution.³⁵⁶
- 7.23** In *Lange v Australian Broadcasting Corporation*,³⁵⁷ the High Court found that 'freedom of communication on matters of government and politics is an "indispensable incident" of the system of representative and responsible government, as established by sections 7 and 24 of the Constitution'.³⁵⁸
- 7.24** Related to the freedom of political communication are the freedoms of political association and political participation. Constitutional experts disagree on the extent to which these freedoms have been recognised by the High Court. However, they were raised by inquiry participants as relevant to the consideration of the constitutional implications of the Bill.
- 7.25** The Democratic Audit of Australia referred to the freedoms of political communication and political association as necessary elements of representative government:

³⁵⁵ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

³⁵⁶ Submission 27, p 10.

³⁵⁷ *Lange v Australian Broadcasting Corporation*.

³⁵⁸ NSW Parliamentary Library Research Service, E-brief 1/2012, p 6, quoting Commonwealth Government Electoral Reform Green Paper *Donations, Funding and Expenditure*, 2008, para 7.26.

The High Court has, in the past twenty years, developed an *implied constitutional freedom of political communication*. Though less well developed, it has also aligned with that a *freedom of political association*. Those freedoms are necessary elements of the system of representative government rooted in the national Constitution. That system is focused on political discussion and action underpinning a national system of representative government.³⁵⁹

7.26 Dr Stewart explained his view of how the implied freedoms can operate as a limit on legislative power:

...legislation that would otherwise be within power will nonetheless be beyond power if, and to the extent to which, it infringes the Freedom ... If the Bill does infringe the implied freedoms, to the extent of the infringement it would not have been validly enacted – it would be a nullity. Any effects of finding it to be invalid would be retrospective to the moment of its commencement.³⁶⁰

Application of implied freedoms to NSW

7.27 The constitutional academics who participated in the inquiry accepted that the freedoms implied by the Constitution are also applicable to NSW, due the nature of the national political system. For example, Dr Stewart advised that the High Court has ‘deemed that freedom [of political communication] to apply to the whole of the Australian political system, including the states’.³⁶¹

7.28 Dr Joo-Cheong Tham, Associate Professor, Melbourne Law School, also observed that the freedom of political communication applies in NSW:

This freedom, while derived from the Commonwealth Constitution, also applies to state and territory legislation by virtue of the fact that the discussion of matters at the level of state and territory (or local government) is able to bear upon the choices to be made at federal elections. According to the High Court, this inter-relationship results from national political parties, the financial dependence of state, territory and local governments on federal funding and the increasing integration of social, economic and political matters in Australia.³⁶²

7.29 Some inquiry participants, such as Dr Orr and Professor Twomey, drew a distinction between freedoms derived from the NSW Constitution itself and the application of freedoms derived from the Commonwealth Constitution.³⁶³

7.30 For example, Dr Orr noted that while the NSW Constitution, ‘probably’ contains implied political freedoms, it is ‘unclear how far any *State* constitutional freedoms limit the power of the NSW Parliament’.³⁶⁴

³⁵⁹ Submission 2, p 3.

³⁶⁰ Submission 10, p 8.

³⁶¹ Submission 10, p 3.

³⁶² Submission 27, p 10.

³⁶³ See also Twomey A., *The reform of political donations, expenditure and funding*, University of Sydney, Sydney Law School, Legal Studies Research Paper No. 08/136, November 2008, pp 6-10.

³⁶⁴ Submission 2, p 3.

- 7.31** Despite this uncertainty, Dr Orr said that ‘it is very unlikely that the constitutionality of this Bill rests solely in the obscure hands of judicial implication from the NSW Constitution’.³⁶⁵ Dr Orr continued to note that following the High Court’s decision in *Lange*, the implied freedom of political communication in the Commonwealth Constitution would ‘almost certainly’ apply to the Bill.³⁶⁶
- 7.32** Professor Twomey indicated in her submission to the inquiry that it is ‘unclear whether the implied freedom of political communication would apply to NSW electoral laws’.³⁶⁷ However, her submission considered the issues pertaining to the Bill on the assumption that the freedom is in fact applicable in NSW.

Committee comment

- 7.33** The Committee acknowledges that while the implied freedom of political communication is widely accepted, there are varied views on whether the freedoms of political association and participation have been implied.
- 7.34** If the Bill were subject to a constitutional challenge in the High Court, responsibility would rest with the parties to the case to establish the existence of the implied freedoms, and the applicability of the freedoms to the constitutionality of the Bill.

Implied freedom of political communication

- 7.35** This section of the report considers whether the amendments proposed in the Bill to sections 95G and 96D of the Act may infringe the implied freedom of political communication, with specific reference to an application *Lange* test to the sections of the Bill.

The *Lange* test

- 7.36** The High Court has formulated a two part test to determine whether a law offends against the implied freedom of political communication.³⁶⁸ This test, known as the *Lange* test, was first formulated in the case of *Lange v Australian Broadcasting Corporation*³⁶⁹, and modified in *Coleman v Power*.³⁷⁰
- 7.37** *Lange v Australian Broadcasting Corporation* considered the validity of Commonwealth legislation that restricted political advertising during an election period.³⁷¹ The High Court found the legislation to be unconstitutional, as there exists an implied freedom of communication which was deemed to be an ‘indispensable incident’ of the system of government established by the Constitution.

³⁶⁵ Submission 2, p 3.

³⁶⁶ Submission 2, p 4.

³⁶⁷ Submission 5, p 2.

³⁶⁸ NSW Parliamentary Library Research Service, E-brief 1/2012, p 7.

³⁶⁹ *Lange v Australian Broadcasting Corporation*.

³⁷⁰ *Coleman v Power* (2004) 220 CLR 1.

³⁷¹ *Lange v Australian Broadcasting Corporation*.

7.38 The judgment in the case established what has become known as the ‘*Lange* test’. Professor Twomey described the *Lange* test:

Laws that ban or impose limits upon political donations or election campaign expenditure are likely to be regarded as burdening the constitutionally implied freedom of political communication. This is because they have the effect of limiting the quantity and breadth of communication about political matters. Such laws will only be held valid by the courts if they are reasonably and appropriately adapted to serving a legitimate end in a manner which is compatible with the system of representative and responsible government prescribed by the Commonwealth Constitution.³⁷²

7.39 Dr Tham outlined the two limbs of the test as follows:

- Does the law (of a state or federal parliament or a territory legislature) effectively burden freedom of communication about government or political matters either in its terms, operation or effect?
- If the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end (in a manner) which is compatible with the prescribed system of representative and responsible government?³⁷³

7.40 If the answer to the first limb of the test is ‘yes’ and the answer to the second limb ‘no’, the law will be invalid.³⁷⁴

7.41 The first limb of the *Lange* test appears to be relatively straightforward to determine. However, the second limb is less clear-cut and consequently, more open to judicial interpretation, as explained by Dr Stewart:

The burden must be proportionate (or appropriate and adapted) to some ‘legitimate end’. What will count as a legitimate end (or purpose), and what will count as proportionate (or appropriate and adapted) means toward that end, are matters for considerable and unpredictable judicial discretion.³⁷⁵

7.42 Professor Twomey considered what may constitute a ‘legitimate end’ with respect to the Bill:

The ‘legitimate end’ would presumably be the reduction of electoral expenditure in order to reduce the risk or perception of corruption or undue influence involved in political fund-raising to satisfy expenditure needs. Another legitimate end may be ‘fairness’ - i.e. treating political parties equally (although this is more contentious). The question a court would ask was whether the law was reasonably appropriate and adapted to achieve a legitimate end, or whether it was really directed at achieving another end (e.g. a political end).³⁷⁶

³⁷² Twomey A., ‘*The reform of political donations, expenditure and funding*’, University of Sydney, Sydney Law School, Legal Studies Research Paper No. 08/136, November 2008, p 1.

³⁷³ Submission 27, p 10.

³⁷⁴ NSW Parliamentary Library Research Service, E-brief 1/2012, p 7.

³⁷⁵ Submission 10, p 12.

³⁷⁶ Submission 5, pp 2-3.

7.43 Professor Twomey explained how the High Court may approach the question contained in the second limb of the *Lange* test:

In looking at that it would consider whether it did more than what was necessary to achieve that end and whether there were other ways to achieve that end that would have avoided this incidental consequence of affecting x political party. The court has been looking at it in that more objective fashion. It certainly would not look into whether this political party wanted to damage that political party. That is not the level at which it would be looking at the issue.³⁷⁷

7.44 In order to apply the *Lange* test to the provisions of the Bill, most notably the provisions amending section 96D of the Act, consideration must also be given to whether or not political donations can be deemed to be ‘political communication’. While the NSW Parliamentary Library Research Service highlighted that uncertainty exists as to what ‘political communication’ is, and what the test of whether communication is ‘political’ might be,³⁷⁸ an assumption has been made for the purposes of this chapter that political donations are a form of political communication.³⁷⁹

7.45 The next section considers the specific provisions of the Bill against the two limbs of the *Lange* test, namely:

- do the proposed new sections effectively burden the freedom of political communication (first limb of the *Lange* test)?
- if ‘yes’, are they reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the system of representative and responsible government (second limb of the *Lange* test)?

Does the Bill burden the freedom of political communication?

7.46 This section considers the question of whether the Bill burdens the freedom of political communication in relation to the two key sections of the Bill: firstly, the aggregation of election communication expenditure (in proposed section 95G) and secondly, the prohibition on political donations other than by individuals (in proposed section 96D).

Aggregation of electoral communication expenditure (s 95G)

7.47 The Parliamentary Library Research Service’s *E-Brief 2/2012* highlighted that a range of views exist as to the burden that the proposed provisions for the aggregation of electoral communication expenditure place on the freedom of political communication:

The proposed law would reduce the amount of money that a party (in particular, the Labor Party) could spend for the purposes of an election campaign by the amount of money that any affiliated organisations of the party (in the case of the Labor Party, trade unions) spend during a campaign. It could be argued that, in this way, the law

³⁷⁷ Dr Twomey, Evidence, 20 January 2012, p 19.

³⁷⁸ NSW Parliamentary Library, E-brief 1/2012, p 10.

³⁷⁹ Professor Twomey, Dr Stewart and Dr Orr considered the issues of the meaning of ‘political donation’ in their evidence to the inquiry. See for example Submission 5, p 3; Submission 10, pp 16-17, and Dr Orr, Evidence, 18 January 2012, p 57.

would limit a party's ability to communicate to voters during a campaign, and it would therefore burden freedom of communication about government or political matters.

It could also be contended that the provisions would constrain the amount that affiliated organisations could spend during a campaign. This is because such organisations will be aware that any money that they spend will limit the amount the party can spend within its expenditure cap. It could therefore be argued that the law would limit affiliated organisations' capacity to communicate with voters.

On the other hand, it could be argued that a party and its affiliates should be treated as one entity for the purposes of election campaigning (in effect, as one voice). Viewed in this way, there is no interference with the freedom to communicate about government or political matters because the entity is able, within the limits of the expenditure caps, to spend as much on election campaigning as other participants in the process.³⁸⁰

- 7.48** However, most inquiry participants appeared largely untroubled by the application of the first limb of the *Lange* test in relation to the proposed section 95G provisions. For example, Professor Twomey considered that this aspect of the Bill does effectively burden the freedom of political communication:

The first stage of that test is to ask whether the provision burdens freedom of political communication. The answer in relation to s 95G is probably 'Yes', to the extent that it would limit the capacity of a political party or an affiliated organisation to make public its political views by limiting its ability to expend money on advertising.³⁸¹

- 7.49** Dr Tham concurred that the proposed section 95G amendments burden the freedom of political communication:

Applying this [*Lange*] test to proposed sections 95G(6) and 95G(7), these provisions do burden freedom of political communication by further limiting the amount that a political party that has affiliated organisations can spend on election campaigns.³⁸²

Prohibition on political donations other than by individuals (s 96D)

- 7.50** The question of whether the prohibition on political donations other than by individuals in proposed section 96D burdens the freedom of political communication was subject to some discussion.

- 7.51** In his submission to the NSW Parliament's Joint Standing Committee on Electoral Matters inquiry into the public funding of election campaigns, Professor George Williams from the University of New South Wales Law School highlighted that any restriction on the ability to make a political donation must have a 'careful and rational justification':

... regulation could impose significant restrictions upon the making of donations to the participants in such political processes, such as by capping the level of donations or restricting the making of donations to natural persons. It would be important in each case to provide a careful and rational justification as to why any restriction serves

³⁸⁰ NSW Parliamentary Library Research Service, E-brief 2/2012, p 4.

³⁸¹ Submission 5, p 2.

³⁸² Submission 27, p 10.

to enhance the quality of democracy in the State as well as the quality of participation in democratic processes by electors and candidates.³⁸³

- 7.52** Dr Stewart highlighted the uncertainty surrounding the application of the first limb of the *Lange* test to this aspect of the Bill, suggesting that it would be ‘game on’ to determine its applicability:

If it were to be accepted that the Freedom applies to political donations, nevertheless that would not necessarily bring the Freedom to bear upon the Bill’s provisions as to donations. It would still have to be shown that political communication would be burdened if there were no donations *from organisations*. And the Bill assumes the contrary. Legally, it is then ‘game on’ regarding the facts of political funding.³⁸⁴

- 7.53** Despite this uncertainty, most inquiry participants who considered the issue concluded that the restriction does burden the freedom of political communication. For example Dr Twomey suggested that ‘... prohibiting certain persons and entities from making political donations would be regarded as breaching the first part of the *Lange* test by burdening the freedom of political communication’.³⁸⁵

- 7.54** Dr Stewart focused on the ‘practical effect’ of the law, and suggested that the proposed amendment would burden the freedom:

The applicable criterion is not the legal effect of the law, i.e. its effect in altering anyone’s rights or duties but its practical effect. The probably practical effect would be a tendency to reduce the income of political parties, which in turn would reduce their capacity to engage in political communication.³⁸⁶

- 7.55** Dr Tham argued that the section 96D amendments would burden the freedom of political communication, because the amendment

... will have an impact on the exercise of political freedoms through political parties as well as third-party campaigners. If enacted, political parties will no longer be able to receive political donations from groups and individuals not on the electoral rolls and groups.³⁸⁷

- 7.56** In contrast, Dr Orr advised the Committee that the Democratic Audit of Australia did not consider the ban proposed by new section 96D to be problematic:

We recognise that there are arguments for and against that. One argument for it is that you require trade unions, corporations and others to have the courage of their convictions – in other words, to campaign directly under their own name, in which case they are much more accountable to their shareholders and members rather than

³⁸³ NSW Parliament, Joint Standing Committee on Electoral Matters, Inquiry into public funding of election campaigns, Submission 1, Professor George Williams, University of New South Wales Faculty of Law.

³⁸⁴ Submission 10, p 18.

³⁸⁵ Submission 5, p 3.

³⁸⁶ Submission 10, p 19.

³⁸⁷ Submission 27, pp 16-17.

giving money to parties to effectively campaign. So we do not think that is constitutionally suspect ...³⁸⁸

- 7.57 Dr Orr concluded that he did not think a High Court challenge to the ban on non-individual donations was likely to be successful:

If it is just a matter of principle I do not think there is a strong chance of success [of a High Court challenge] in Australia based on the Canadian and United States experience. ...Unless you can show a situation where the flow of money is staunched completely. We have a reasonably generous system of public funding. So it has to be taken in the broader context of enabling campaigning at a reasonable level.³⁸⁹

Is the Bill reasonably appropriate and adapted to serve a legitimate end?

- 7.58 This section considers the application of the second limb of the *Lange* test to the provisions of the Bill. The second limb asks if the measures are reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the system of representative and responsible government.
- 7.59 In considering this, the Committee and inquiry participants have assumed that the answer to the first limb of the *Lange* test is 'yes': the provisions of the Bill burden the freedom of political communication.

Aggregation of electoral communication expenditure (s 95G)

- 7.60 Inquiry participants highlighted the divergent views relating to the application of the second limb of the *Lange* test to the proposed section 95G, which provides for the aggregation of electoral communication expenditure of parties and their affiliated organisations.
- 7.61 Professor Twomey outlined the two arguments that may be put in relation to the proposed amendments to section 95G:

On the one side it would be argued that the provision is intended to implement equality of treatment of parties, so that one party does not enjoy the benefit of extra political expenditure through affiliated unions. On the other hand it would be argued that the law is directed only at one party, with the effect of limiting the expenditure of that party or affiliated unions, but that it does not apply to expenditure of other bodies that are associated with other political parties and campaign to support those political parties. How the High Court would determine such a question is anyone's guess.³⁹⁰

- 7.62 In considering the second limb of the *Lange* test, the High Court would need to identify the 'legitimate interest' that the Bill is trying to achieve. Professor Twomey referred to two potential legitimate interests:

Normally the legitimate interest that underlies this sort of legislation is described as removing the risk of corruption or the perception of corruption in the political

³⁸⁸ Dr Orr, Evidence, 18 January 2012, p 53.

³⁸⁹ Dr Orr, Evidence, 18 January 2012, p 61.

³⁹⁰ Submission 5, p 3.

donations system. That tends to be legitimate interest No. 1. Under that there is a question about whether there is a second legitimate interest, which relates to the equal playing field scenario. That is a little more controversial because it is difficult when you start picking winners and losers.³⁹¹

7.63 Professor Twomey concluded that ‘... so far the High Court has seen the legitimate interest as being removing the risk or the perception of corruption in the political process’.³⁹²

7.64 Professor Twomey observed that the issue in the determination of this element of the *Lange* test is not so much what the Bill is trying to achieve, but how the Bill goes about achieving it:

I understand and accept that you do not want a situation where people can hive off bits and pieces and then establish another organisation and get the benefit of extra caps. You need to limit that somehow. I can see the point of the amendment to section 95G in doing that and I think the High Court would accept that you would not want a situation where people could exploit the rules and so on. The issue is more about how it is done. What disturbs me about the affiliation stuff, particularly in respect of section 95G (7), is that it is totally focused on one particular form of affiliation; that is, you can participate in preselection or it is authorised under the rules of the party to appoint delegates. Frankly, if I were advising the Government, I would suggest that it be drawn out further to prevent anyone else who would potentially smurf, or whatever it is called.³⁹³

7.65 Dr Tham advised that, in his view, the amendments are not reasonably and appropriately adapted for their aim:

While proposed sections 95G(6) and 95G(7) have the legitimate aim of dealing with co-ordinated election campaigns they are likely to be unconstitutional because they are not reasonably appropriate and adapted to this aim: they are based on a false assumption of co-ordinated election campaigns between the ALP and its affiliated trade unions ...³⁹⁴

7.66 Unions NSW contended that ‘... most people in NSW would not view the Bill as being “enacted to fulfill a legitimate purpose”’.³⁹⁵ The NSW Nurses Association similarly argued that the amendments are ‘out of proportion’ to the objective of the Bill to remove ‘... corruption and the so-called power of corporate money from the electoral and political process’.³⁹⁶

7.67 Dr Orr and Dr Tham both suggested ways in which this section of the Bill could be amended to reduce the risk of the Bill being found to be unconstitutional. These suggestions, together with proposals from other inquiry participants, are discussed in Chapter 4, where the Committee makes recommendations to amend this section of the Bill.

³⁹¹ Professor Twomey, Evidence, 20 January 2012, pp 19-20.

³⁹² Professor Twomey, Evidence, 20 January 2012, pp 19-20.

³⁹³ Professor Twomey, Evidence, 20 January 2012, p 18.

³⁹⁴ Submission 27, p 11.

³⁹⁵ Submission 24, p 20.

³⁹⁶ Submission 19, p 15.

Prohibition on political donations other than by individuals (s 96D)

7.68 There was much discussion among inquiry participants about how the High Court may apply the second limb of the *Lange* test to the Bill's proposed amendments to section 96D of the Act.

7.69 Professor Twomey outlined the arguments that could be made in relation to the proposed prohibition on political donations other than by individuals:

On the one hand, it would be argued that corporations cannot vote and that it is reasonable to confine the capacity to make political donations to those who are enrolled to vote in elections. It would also be argued that confining to electors the power to make political donations is the neatest and most easily defined and administered method of limiting donations.

On the other hand it would be argued that the implied freedom of political communication protects political communications regardless of whether or not they are made by a corporation (such as a newspaper) or an individual, and that a law that completely bans non-electors from making political donations is not reasonably appropriate and adapted to the legitimate end of reducing the risk or perception of corruption or undue influence, as such donations are already capped and can have no greater influence than donations made by individuals on the electoral roll.³⁹⁷

7.70 In his submission to the inquiry, the Premier asserted that the amendments are 'reasonable, measured and equitable':

The reforms in the Bill are a reasonable, measured and equitable way to put in place a system of political participation in New South Wales that is more transparent and more accessible. Restricting donations to individuals on the electoral roll balances any concerns there may be about freedom of communication with the NSW public's legitimate interest in the integrity of the political process. A ban on donations other than by individuals will rid the State of the risk, reality and perception of corruption and undue influence.³⁹⁸

7.71 Other inquiry participants disagreed with the Premier's statements. For example, the Australian Manufacturing Workers' Union, NSW Branch argued that the Premier '... underestimates the restrictions that the Bill in fact places on the freedom of political communication of unions and union members.'³⁹⁹ The Union continued to argue:

The Bill does nothing to end influence or interference with the political process. It certainly does not create a level playing field - quite the contrary: what it does do is widen and entrench the ability of individuals of means to influence the political process, while narrowing and diminishing the ability of those who do not have sufficient excess individual capital to communicate in their interest.⁴⁰⁰

³⁹⁷ Submission 5, p 4.

³⁹⁸ Submission 11, Office of Premier, p 2. See also the discussion of the Premier's second reading speech on the Bill in Chapter 3 of this report.

³⁹⁹ Submission 13, p 15.

⁴⁰⁰ Submission 13, p 15.

7.72 Dr Tham argued that restricting donations to citizens on the electoral roll was a ‘questionable aim’ because it ‘wrongly excludes citizens not on electoral rolls, citizens residing overseas and permanent residents’.⁴⁰¹ Dr Tham further argued that preventing donations from organisations was also questionable because it ‘...advances a problematic individualised understanding of political freedoms and the political process ...’.⁴⁰²

7.73 Dr Tham concluded that, due to these questionable aims, it was likely that the proposed section 96D provisions would be found unconstitutional if challenged:

Applying the *Lange* test to this provision, it is likely to be concluded that this restriction burdens political communication in that it restricts the money that is used for election campaigns. Significantly, there is a good chance that this burden will be found unconstitutional for breaching the implied freedom of political communication because it is informed by a questionable aim and because it is not reasonably appropriate and adapted to this aim.⁴⁰³

7.74 Some inquiry participants differentiated between donations to political parties, donations to third-parties, and affiliation fees in their consideration of the application of the *Lange* test to this part of the Bill. For example, Professor Twomey highlighted donations to third parties as being the most vulnerable to constitutional challenge:

The most contentious and vulnerable part of s 96D, however, is its application to donations to third-party campaigners. The effect is to prevent lobby groups from acting as third-party campaigners where they raise money for political campaigns from other groups with the same interests. Hence an association that represented the interests of shooters, pubs and clubs, environmentalists, religious bodies, or retail businesses, which would ordinarily receive its funding from rifle clubs, hotels, environment groups, churches or shops, would under s 96D be banned from receiving those donations and would be effectively neutered from running a political campaign during elections. This would leave the third-party campaigning field to big corporations, unless lobby groups were able to raise sufficient funds from individual donations from people on the electoral roll, which would be exceedingly difficult.⁴⁰⁴

7.75 Professor Twomey queried how the provision as it relates to donations to third-party campaigners serves a legitimate end, or is appropriate and adapted in serving that end:

It is hard to see why a third-party campaigner who raises capped donations from other groups is more likely to give rise to corruption or undue influence, or the perception of it, than a third-party campaigner with its own resources or who raises donations from individuals. Given that the practical effect of this provision is likely to severely limit political communication by third-parties and given that the justification for it is quite weak, I think this aspect of s 96D is the most vulnerable to constitutional challenge.⁴⁰⁵

⁴⁰¹ Submission 27, p 15.

⁴⁰² Submission 27, p 15.

⁴⁰³ Submission 27, p 21.

⁴⁰⁴ Submission 5, p 4.

⁴⁰⁵ Submission 5, p 5.

- 7.76** Dr Tham considered that the ban on the payment of affiliation fees was likely to be problematic due to the ‘significant burden’ the provision would place on the ALP:

Applying the *Lange* test, the ban on organisational affiliation fees will place a significant burden on the ability of the ALP to engage in political communication as such fees constitute an important revenue stream. There is a reasonable likelihood that this burden will be found to be in breach of the implied freedom of political communication: its aim is, firstly, dubious given the lack of proper justification, and the severity of the burden is likely to mean it is not reasonably appropriate and adapted.⁴⁰⁶

- 7.77** Dr Stewart similarly expressed concern about the relative impact of the ban on affiliation fees on the ALP, suggesting that there would be a ‘fatal weakness’ if the impact on the ALP was disproportionate:

The cost to the ALP would be disproportionate if the result were to cripple the ALP as an effective political force. The disproportion would be greater if the impact upon the ALP were to be substantially more serious than the impact upon the other parties and especially its main opponent, the Liberal Party. And in the case greater still, given that for the foreseeable future the relative advantage would be to the party in government and, through it, to the government of the day.⁴⁰⁷

- 7.78** Dr Orr expressed concern about the ‘double whammy’ contained in the Bill: the ban on non-individual donations coupled with the aggregation provision. If one or other of these measures were to be implemented, Dr Orr did not perceive there to be a problem with either provision. However, if implemented together, Dr Orr argued that the provisions may be problematic:

The primary problem with this bill is what I call the ‘double whammy’ of marrying the aggregation point or rule with the limit on contributions or banning of contributions and how that affects trade unions or Labor parties. If you put those two things together you have something that clearly breaches freedom of political association. If you take them apart and do one or the other it becomes constitutionally less suspect.⁴⁰⁸

Committee comment

- 7.79** As mentioned at the start of the chapter, the Committee is unable to draw any definitive conclusions as to the constitutionality of the Bill. However, we acknowledge the complex and varied arguments presented by inquiry participants in relation to the constitutional implications of the Bill.

- 7.80** The Committee believes that, if the Bill were to be enacted, there is a significant risk that a constitutional challenge to the Bill would occur, on the grounds that it infringes on the implied freedom of political communication. In the event that such a challenge was to occur, it is clearly evident that there will be a number of complex factors for the High Court to take into consideration in examining the constitutionality of the Bill.

⁴⁰⁶ Submission 27, p 31.

⁴⁰⁷ Submission 10, pp 23-24.

⁴⁰⁸ Dr Orr, Evidence, 18 January 2012, p 55.

7.81 The Committee does note that evidence does indicate that such a challenge has at least some possibility of success and that on that basis there is a risk of constitutional challenge as specified in the terms of reference. The Committee notes that while this risk would not be eliminated by amendments it would be reduced.

Ancillary freedoms

7.82 As discussed at paragraph 7.21, there may be two ancillary freedoms to the freedom of political communication derived from the Constitution: the implied freedom of political association and the implied freedom of political participation. This section briefly discusses these two ancillary freedoms. It should be noted, however, that there is conjecture as to the existence and application of these freedoms.

Implied freedom of political association

7.83 The first ancillary freedom is the implied freedom of political association. Dr Tham of the Melbourne Law School outlined two key aspects of the freedom of political association:

Freedom of political association possesses several key aspects, notably:

- the individual's right to form political associations, act through such associations and to participate in the activities of these associations; and
- the association's ability to determine its membership, the rules and manner of its governance and the methods it will use to promote its common objectives.⁴⁰⁹

7.84 Dr Tham argued that this freedom is 'crucial in order to ensure the proper workings of Australian democracy', specifically 'pluralism that is required both to protect the integrity of representative government as well as fairness in politics.'⁴¹⁰

7.85 Dr Tham concluded, that the proposed amendments relating to the prohibition on the payment of affiliation fees would be a 'severe incursion'⁴¹¹ into the freedom of political association, particularly in relation to the right to form and structure party associations:

... the impact of a ban on organizational membership fees on the freedom of party association is quite severe: it will mandate a particular party structure, direct parties and, while not directly banning parties that allow for organisational membership, generally make them unviable unless such parties are able to secure sufficient public funding ... Absent an adequate rationale for limiting freedom of party association, it is hard to escape the conclusion that such a ban represents an unjustified limitation on freedom of party association.⁴¹²

⁴⁰⁹ Submission 27, pp 28-29.

⁴¹⁰ Submission 27, p 28.

⁴¹¹ Submission 27, p 30.

⁴¹² Submission 27, pp 28-29.

7.86 Dr Orr, on behalf of the Democratic Audit of Australia, acknowledged the implied freedom of political association, and argued that the proposed amendments relating to the aggregation of electoral communication expenditure are constitutionally unsound on the basis of that freedom:

Where the Bill falls down constitutionally is in its aggregation rule, particularly as it builds on the ban on organisational donations. This imposes a significant and practical burden on the freedom of political association ... From the party perspective, a significant disincentive is imposed on one traditional form of party organisation: the mixture of individual and organisational members. From the perspective of other organisations, the Bill effectively tells anybody with an affiliation to a political party that it must be silent during an election campaign – it cannot campaign independently of the party, even if their campaign is critical of a policy of that party – or else disaffiliate from the party.⁴¹³

7.87 Dr Orr concluded that the aggregation rule ‘...is therefore constitutionally unsound’ because:

- the burden on the freedom of political association is heavy
- the burden is disproportionate to any legitimate aim, such as deterring party controlled front groups, or ensuring independence by capturing coordinated expenditure.⁴¹⁴

7.88 Dr Stewart was of the view that the High Court has not yet recognised a freedom of political association.⁴¹⁵ However, Dr Stewart suggested that if such a freedom were to be recognised by the High Court, the Bill would infringe that freedom.⁴¹⁶

Implied freedom of political participation

7.89 The second ancillary freedom is the implied freedom of political participation. Dr Stewart indicated that the High Court may have recognised a freedom of political participation in two cases, namely *Roach V Electoral Commisisoner* and *Rowe v Electoral Commissioner*.⁴¹⁷

It seems arguable that through some recent cases, separately from the Freedom [of political communication] although on the same bases, the High Court has developed what might be called a ‘freedom of political participation’... such appears to be the direction of the law, so far as it has a direction.⁴¹⁸

7.90 The implied freedom of political participation proceeds mainly from the words ‘directly chosen by the people’ in sections 7 and 24 of the Constitution. In both *Roach* and *Rowe*, the High Court found that these words indicate the provision of universal adult suffrage, with exceptions to universal suffrage only able to be made with ‘substantial reason’.⁴¹⁹

⁴¹³ Submission 2, p 5.

⁴¹⁴ Submission 2, p 5.

⁴¹⁵ Submission 10, p 28.

⁴¹⁶ Submission 10, p 2.

⁴¹⁷ *Vicki Lee Roach v Electoral Commissioner and Commonwealth* (2007)233CLR162; *Rowe v Electoral Commissioner* (2010)243CLR1.

⁴¹⁸ Submission 10, p 24.

⁴¹⁹ Submission 10, pp 24-45, p 26.

7.91 Dr Stewart noted that both *Roach* and *Rowe* concerned political participation by individuals as voters.⁴²⁰ However, Dr Stewart suggested that the Bill, if enacted, ‘... would infringe, if such has been recognised, an implied freedom of political participation’.⁴²¹

7.92 Dr Stewart argued that the provisions in the Bill relating to the restrictions on political donations would be the most likely to be found invalid if the implied freedom of political participation was recognised by the High Court:

... it may be argued that the Bill if enacted:

- would burden a freedom of political participation with regard to political parties, by tending to reduce the incomes of all political parties
- would do so disproportionately through its exception impact upon the income of the ALP in NSW (and possibly other parties); and therefore
- would be invalid at least as to its provisions regarding political donations.⁴²²

Committee comment

7.93 The Committee acknowledges the significant level of debate that has been generated by the Bill, both in regards to its impact for participants in the political process, and its potential constitutional implications. The Committee wishes once again to express our appreciation to all inquiry participants for their contributions to this inquiry, particularly given the short time frame in which this inquiry was undertaken. The Committee values the thoughtful and, at times, challenging arguments presented by participants in relation to the Bill.

7.94 The Committee is not in a position to definitively determine the likelihood of a successful constitutional challenge to the Bill, either with or without the amendments proposed by the Committee in this report. Ultimately, any decision about the constitutionality of the legislation will rest with the High Court.

7.95 The Committee is, however, of the view that if the Bill was to be enacted without amendment, there is a significant risk of a challenge being brought before the High Court. The Committee believes that, if the changes recommended by the Committee in the previous chapters of this report are implemented, the likelihood of a successful constitutional challenge to the Bill would be diminished.

⁴²⁰ Submission 10, p 28.

⁴²¹ Submission 10, p 2.

⁴²² Submission 10, p 28.

Chapter 8 Conclusion

- 8.1** The Committee strongly supports reform to the existing electoral funding, expenditure and disclosure scheme that enhance the fairness, equity and transparency of the scheme. We also support reforms that seek to further minimise the risk and perception of undue influence or corruption distorting democracy in NSW. However, the Committee cannot support reforms that may result in an imbalanced system that benefits some participants in the process at the expense of others.
- 8.2** The Committee believes that if the recommendations contained in this report are implemented, the electoral funding, expenditure and disclosure scheme in NSW will be strengthened, to the benefit of democracy and all participants in the electoral process in this State.

Appendix 1 Submissions

No	Author
1	Sydney Alliance
2	Dr Graeme Orr, on behalf of the Democratic Audit of Australia
3	Last Drinks Coalition
4	Save Our State Party
5	Professor Anne Twomey
6	Mr David Penn
7	Hunter District Hunting Club Inc.
8	United Voice NSW Branch
9	Australian Deer Association Inc.
10	Dr Iain Stewart
11	Office of the Premier
12	Australian Medical Association NSW
13	Australian Manufacturing Workers' Union, NSW Branch
14	Transport Workers' Union of NSW
15	Australian Deer Association Sapphire Coast/Monaro
16	Asbestos Diseases Foundation of Australia Inc.
17	Community and Public Sector Union
18	Sporting Shooters Association NSW
19	NSW Nurses' Association
20	Mr Andrew Norton
21	Christian Democratic Party
22	Finance Sector Union of Australia, NSW Branch
23	Electrical Trades Union of Australia, NSW Branch
24	Unions NSW
25	The Greens NSW
26	Australian Labor Party, NSW Branch
26a	Australian Labor Party, NSW Branch
27	Dr Joo-Cheong Tham
28	Shooters and Fishers Party
29	Public Service Association of New South Wales
30	Action on Smoking and Health Australia
31	NSW Teachers Federation

No	Author
32	Cancer Council NSW

Appendix 2 Witnesses

Date	Name	Position and Organisation
Wednesday 18 January 2012 Jubilee Room Parliament House	Mr Mark Lennon	Secretary, Unions NSW
	Mr Paul Doughty	Campaigns & Industrial Officer, Unions NSW
	Mr Paul McNabb	President, Sporting Shooters Association (NSW) Inc
	Mrs Diana Melham	Executive Director, Sporting Shooters Association of Australia (NSW) Inc
	Mr Geoff Derrick	NSW/ACT Secretary, Finance Sector Union
	The Hon John Tingle	Vice-Chairman, Shooters and Fishers Party
	Mr David Avery	Honorary Secretary, Hunter District Hunting Club Inc
Friday 20 January 2012 Jubilee Room Parliament House	Dr Graeme Orr	Associate Professor, Faculty of Law, University of Queensland
	Hon Barry O'Farrell MP	Premier
	Professor Anne Twomey	Professor of Constitutional Law, University of Sydney
	Mr Brett Holmes	General Secretary, NSW Nurses' Association
	Mr Tony O'Grady	Manager, Projects & Compliance, NSW Nurses' Association
	Mr John Moran	External Media Issues Consultant, NSW Nurses' Association
	Mr Chris Maltby	Registered Officer, The NSW Greens

Date	Name	Position and Organisation
	Mr Ian Smith	Treasurer and Party Agent, Christian Democratic Party
	Mr Leighton Thew	Acting State Manager, Christian Democratic Party
	Ms Jenny Diamond	General Secretary, NSW Teachers Federation
	Ms Lenore Hankinson	Industrial Officer, NSW Teachers Federation

Appendix 3 Tabled documents

Friday 20 January 2012

Public Hearing, Jubilee Room, Parliament House

- 1 Document entitled 'The Greens NSW, political donations and the \$1.6 million', tabled by the Hon Barry O'Farrell MP, Premier of NSW.
- 2 Correspondence from the NSW Teachers Federation to the Hon Adrian Piccoli MP, Minister for Education, dated 14 June 2011, regarding 'Invest in TAFE for a better state – teachers, skills and prosperity', tabled by Ms Lenore Hankinson, Industrial Officer, NSW Teachers Federation.

Appendix 4 Answers to questions on notice

The Committee received answers to questions on notice from:

- 1 The Hon Barry O'Farrell MP, Premier of NSW
- 2 Dr Graeme Orr
- 3 Finance Sector Union of Australia, NSW Branch
- 4 NSW Teachers Federation.

Appendix 5 Election Funding, Expenditure and Disclosures Amendment Bill 2011

First print



New South Wales

Election Funding, Expenditure and Disclosures Amendment Bill 2011

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Election Funding, Expenditure and Disclosures Act 1981*:

- (a) to provide that electoral communication expenditure incurred by a party for a State election campaign is to be treated as expenditure that exceeds the applicable cap if that expenditure and any other electoral communication expenditure incurred by an affiliated organisation exceed the applicable cap for the party, and
- (b) to prohibit political donations from corporations or other entities.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

b2011-013-33.d11

Election Funding, Expenditure and Disclosures Amendment Bill 2011

Explanatory note

Schedule 1 Principal amendments to Election Funding, Expenditure and Disclosures Act 1981 No 78

Schedule 1 [1] provides that electoral communication expenditure incurred by a party is to be treated as expenditure that exceeds the applicable cap if that expenditure and any other electoral communication expenditure incurred by an affiliated organisation exceed the applicable cap for the party. The applicable cap for the party is both the overall cap (generally \$100,000 multiplied by the number of Assembly electorates contested) and the separate cap for expenditure in each electorate (\$50,000). An *affiliated organisation* of a party means a body or other organisation, whether incorporated or unincorporated, that is authorised under the rules of that party to appoint delegates to the governing body of that party or to participate in pre-selection of candidates for that party (or both).

Schedule 1 [2] prohibits political donations from corporations or other entities so that political donations may only be made by individuals on the electoral roll. An offence is committed under section 96I of the Act if a donation from a corporation or other entity is accepted, if an individual makes a political donation on behalf of a corporation or an entity or if a corporation or other entity makes a gift to an individual for the purpose of the individual making a political donation. As a result of the amendments, it will be unlawful for a corporation or other entity (including an industrial organisation) to pay annual or other subscriptions to a party for affiliation with the party. The prohibition will not extend to transfers between branches of parties or between associated parties.

Schedule 2 Consequential amendments to Election Funding, Expenditure and Disclosures Act 1981 No 78

Schedule 2 [1]–[9] are minor amendments consequent on the prohibition on political donations from corporations and other entities made by Schedule 1 [2]. **Schedule 2 [10]** makes it clear that a person cannot be punished twice for an offence under the Act that constitutes a breach of the proposed prohibition on political donations by corporations and a breach of the existing prohibition on political donations by property developers and tobacco and liquor or gambling industry business entities, their directors and other associates.

Schedule 2 [11] enables savings and transitional regulations to be made as a consequence of the proposed Act. **Schedule 2 [12]** contains transitional provisions. The prohibition on political donations from corporations will apply to political donations made after the commencement of the proposed Act. The amendment relating to the aggregation of expenditure of parties and affiliated organisations will apply to elections held after the commencement of the proposed Act.

Explanatory note page 2

First print



New South Wales

Election Funding, Expenditure and Disclosures Amendment Bill 2011

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1 Name of Act	2
2 Commencement	2
Schedule 1 Principal amendments to Election Funding, Expenditure and Disclosures Act 1981 No 78	3
Schedule 2 Consequential amendments to Election Funding, Expenditure and Disclosures Act 1981 No 78	5



New South Wales

Election Funding, Expenditure and Disclosures Amendment Bill 2011

No. , 2011

A Bill for

An Act to amend the *Election Funding, Expenditure and Disclosures Act 1981* in relation to caps on electoral communication expenditure and prohibitions on political donations.

Clause 1 Election Funding, Expenditure and Disclosures Amendment Bill 2011

The Legislature of New South Wales enacts:	1
1 Name of Act	2
This Act is the <i>Election Funding, Expenditure and Disclosures Amendment Act 2011</i> .	3 4
2 Commencement	5
This Act commences on a day or days to be appointed by proclamation.	6

Election Funding, Expenditure and Disclosures Amendment Bill 2011

Principal amendments to Election Funding, Expenditure and Disclosures Act 1981 No 78 Schedule 1

Schedule 1	Principal amendments to Election Funding, Expenditure and Disclosures Act 1981 No 78	1
		2
		3
[1]	Section 95G Aggregation of applicable caps	4
	Insert at the end of the section:	5
	(6) Aggregation of expenditure of parties and affiliated organisations	6
		7
	Electoral communication expenditure incurred by a party that is of or less than the amount specified in section 95F for the party (as modified by subsection (2) in the case of associated parties) is to be treated as expenditure that exceeds the applicable cap if that expenditure and any other electoral communication expenditure by an affiliated organisation of that party exceed the applicable cap so specified for the party.	8
		9
		10
		11
		12
		13
		14
	(7) In subsection (6), an <i>affiliated organisation</i> of a party means a body or other organisation, whether incorporated or unincorporated, that is authorised under the rules of that party to appoint delegates to the governing body of that party or to participate in pre-selection of candidates for that party (or both).	15
		16
		17
		18
		19
[2]	Section 96D	20
	Omit the section. Insert instead:	21
	96D Prohibition on political donations other than by individuals on the electoral roll	22
		23
	(1) It is unlawful for a political donation to a party, elected member, group, candidate or third-party campaigner to be accepted unless the donor is an individual who is enrolled on the roll of electors for State elections, the roll of electors for federal elections or the roll of electors for local government elections.	24
		25
		26
		27
		28
	(2) It is unlawful for an individual to make a political donation to a party, elected member, group, candidate or third-party campaigner on behalf of a corporation or other entity.	29
		30
		31
	(3) It is unlawful for a corporation or other entity to make a gift to an individual for the purpose of the individual making a political donation to a party, elected member, group, candidate or third-party campaigner.	32
		33
		34
		35
	(4) Annual or other subscriptions paid to a party by a person or entity (including an industrial organisation) for affiliation with the party that are, by the operation of section 85 (3), taken to be gifts (and	36
		37
		38

Election Funding, Expenditure and Disclosures Amendment Bill 2011

Schedule 1 Principal amendments to Election Funding, Expenditure and Disclosures Act 1981 No 78

- | | |
|---|---|
| political donations to the party) are subject to this section. | 1 |
| Accordingly, payment of any such subscription by an industrial organisation or other entity is unlawful under this section. | 2 |
| | 3 |
| (5) Dispositions of property between branches of parties or between associated parties that are, by the operation of section 85 (3A), taken to be gifts (and political donations to the parties) are not subject to this section. | 4 |
| | 5 |
| | 6 |
| | 7 |

Election Funding, Expenditure and Disclosures Amendment Bill 2011

Consequential amendments to Election Funding, Expenditure and
Disclosures Act 1981 No 78

Schedule 2

Schedule 2	Consequential amendments to Election Funding, Expenditure and Disclosures Act 1981 No 78	1
		2
		3
[1]	Section 84 Definitions—general	4
	Omit “entity or other person (not being a party, elected member, group or candidate)” from the definition of <i>major political donor</i> in section 84 (1).	5
	Insert instead “individual (not being an elected member or candidate)”.	6
		7
[2]	Section 84 (5)	8
	Omit the subsection.	9
[3]	Section 86 Meaning of “reportable political donation”	10
	Omit “entity or other person” and “entity or person” wherever occurring in section 86 (2) and (3).	11
	Insert instead “individual”.	12
		13
[4]	Section 92 Political donations required to be disclosed	14
	Omit “(in the case of an individual) or the address of the registered or other official office of the donor (in the case of an entity)” from section 92 (2) (d).	15
		16
[5]	Section 92 (2) (f)	17
	Omit the paragraph.	18
[6]	Section 95A Applicable cap on political donations	19
	Omit “entity or other person” and “entity or person” wherever occurring in section 95A (2) and (3).	20
	Insert instead “individual”.	21
		22
[7]	Section 95B Prohibition on political donations that exceed applicable cap	23
	Omit section 95B (6).	24
		25
[8]	Section 96E Prohibition on certain indirect campaign contributions	26
	Insert after section 96E (3):	27
	Note. An indirect campaign contribution that is a political donation as a gift (although excluded from the operation of this section if its value as a gift does not exceed \$1,000) cannot be made by a corporation because of section 96D.	28
		29
		30
		31

Election Funding, Expenditure and Disclosures Amendment Bill 2011		
Schedule 2	Consequential amendments to Election Funding, Expenditure and Disclosures Act 1981 No 78	
<hr/>		
[9]	Section 96G Prohibition on receiving loans unless details recorded	1
	Omit "entity or other" wherever occurring in section 96G (1) (b) and (3) (a).	2
[10]	Section 96GAB	3
	Insert after section 96GAA:	4
	96GAB Superseded provision of Division relating to corporate donations	5
	After the commencement of Schedule 1 [2] to the <i>Election Funding, Expenditure and Disclosures Amendment Act 2011</i> ,	6
	section 96D makes it unlawful for a political donation to be made	7
	other than by an individual. Accordingly, a person cannot be	8
	punished twice for an offence arising under section 96I for a	9
	single act that is unlawful under both this Division and	10
	section 96D.	11
		12
[11]	Schedule 2 Transitional provisions	13
	Insert at the end of clause 1A (1):	14
	<i>Election Funding, Expenditure and Disclosures Amendment Act 2011</i>	15
		16
[12]	Schedule 2	17
	Insert after Part 5:	18
	Part 6 Provisions consequent on enactment of Election Funding, Expenditure and Disclosures Amendment Act 2011	19
		20
		21
20	Definition	22
	In this Part, <i>amending Act</i> means the <i>Election Funding, Expenditure and Disclosures Amendment Act 2011</i> .	23
		24
21	Application of amendments	25
(1)	The amendment made by Schedule 1 [1] to the amending Act applies to elections held after the commencement of that amendment.	26
		27
		28

Election Funding, Expenditure and Disclosures Amendment Bill 2011

Consequential amendments to Election Funding, Expenditure and
Disclosures Act 1981 No 78

Schedule 2

-
- | | |
|--|-------------|
| (2) The amendment made by Schedule 1 [2] to the amending Act applies to political donations made after the commencement of that amendment. | 1
2
3 |
|--|-------------|

Appendix 6 Minutes

Minutes No. 1

Thursday 24 November 2011

Members Lounge, Parliament House, Sydney, at 7.45 pm

1. **Members present**

Dr Kaye (*Chair*)

Mr Borsak

Miss Gardiner

Mr Khan

Mrs Maclaren-Jones

Dr Phelps

Mr Primrose

Mr Whan

2. **Apologies**

Ms Fazio

3. **Tabling of resolution establishing the Committee**

The Chair tabled the resolution of the House of 23 November 2011, establishing the Committee.

4. **Committee membership**

The Chair tabled the minutes of the House of 24 November 2011, reporting membership of the Committee.

5. **Initial procedural resolutions**

Resolved on the motion of Mr Whan:

5.1 **Filming, broadcasting and still photography of public proceedings**

That the Committee authorises the filming, broadcasting and still photography of the public proceedings of the Committee, in accordance with the resolution of the Legislative Council of 18 October 2007.

5.2 **Publishing transcripts of evidence**

That, unless the Committee decides otherwise, the Committee authorises the publication of transcripts of evidence taken at public hearings.

5.3 **Publishing answers to questions on notice**

That, unless the Committee decides otherwise, the Committee authorises the publication of answers to questions on notice.

5.4 **Media statements**

That, unless the Committee decides otherwise, media statements on behalf of the Committee may be made only by the Chair.

5.5 **Inviting witnesses**

That, unless the Committee decides otherwise, arrangements for inviting witness are to be left in the hands of the Chair and the Committee Clerk, after consultation with the Committee.

6. Conduct of inquiry

6.1 Call for submissions

Resolved, on the motion of Mr Primrose: That the closing date for submissions be 11 January 2012.

6.2 Advertising

Resolved, on the motion of Mr Primrose: That the Inquiry and call for submissions be advertised in *The Daily Telegraph* and *The Sydney Morning Herald* as soon as practicable.

6.3 Invitations to make submissions

Resolved, on the motion of Mr Primrose: That the Committee write to the following stakeholders informing them of the Inquiry and inviting them to make a submission:

- Dr Anne Twomey, Associate Professor, University of Sydney
- Professor George Williams, University of NSW
- Joo Cheong-Tham, Associate Lecturer in Law, University of Melbourne
- Andrew Geddis, Associate Professor, University of Otago
- Graeme Orr, Associate Professor, University of Queensland
- Dr Sally Young, Senior Lecturer, University of Melbourne
- Professor Brian Costar, Swinburne University of Technology
- Institute of Public Affairs
- Australian Democrats (NSW)
- Australian Labor Party (NSW Branch)
- Christian Democratic Party
- Country Labor Party
- Family First
- Liberal Party of Australia (NSW Division)
- The Fishing Party
- The Greens
- The National Party of Australia (NSW Branch)
- The Shooters and Fishers Party
- Australian Business Party
- Mr Greg Piper MP
- Ms Clover Moore MP
- The Hon Richard Torbay MP
- Australian Liquor, Hospitality and Miscellaneous Workers' Union (LHMU) (NSW branch)
- Australian Manufacturing Workers' Union (AMWU) (NSW branch)
- Australian Nursing Federation (NSW Branch)
- Australian Services Union (NSW branch)
- Communications, Electrical and Plumbing Union (NSW branch)
- Community and Public Sector Union (CPSU) (NSW branch)
- Construction, Forestry, Mining and Energy Union (CFMEU) (NSW branch)
- Electrical Trades Union of Australia (NSW branch)
- Finance Sector Union (NSW branch)
- Fire Brigade Employees Union (NSW branch)
- Independent Education Union NSW/ACT
- Maritime Union of Australia (Sydney Branch)
- Media, Entertainment and Arts Alliance
- National Tertiary Education Union (NSW Division)
- NSW Nurses Association

- NSW Teachers Federation
- Public Service Association of NSW
- Transport Workers' Union
- Unions NSW.
- Action on Smoking and Health Australian
- Centre for Democracy and Justice
- Australian Fishing Tackle Association
- Boating Industry Association
- Community Before Development – Stop Overdevelopment
- Democracy Watch
- Democratic Audit of Australia
- GetUp!
- Nature Conservation Council of NSW
- NSW Council of Churches
- NSW Farmers Association
- Our Community, Our Council
- Property Council of NSW
- Public Interest Advocacy Centre
- Residents First Woollahra
- Save Our Suburbs
- Sporting Shooters Association (NSW)
- Sydney Alliance
- The Sydney Institute
- Urban Taskforce Australia
- Women's Electoral Lobby
- Association of Professional Engineers, Scientists and Managers
- Australia Australian Business Limited
- Australian Hotels Association
- Australian Shareholders Association
- Clubs NSW
- Employers First
- NSW Business Chamber
- Audit Office of NSW
- Australian Electoral Commission
- Australian Securities and Investment Commission
- Centre for Independent Studies
- Citizens Electoral Council (NSW Branch)
- Democracy 4 Sale Research Project
- Election Funding Authority of NSW
- Electoral Council of Australia
- Family Voice Australia
- Emily's List
- Independent Commission Against Corruption
- Council of Social Service NSW (NCOSS)
- NSW Electoral Commission
- Local Government and Shires Association
- St James Ethics Centre.

6.4 Publication of submissions

Resolved, on the motion of Mr Primrose: That the Committee authorises the publication of all submissions to the Inquiry into the provisions of the Election Funding, Expenditure and Disclosures Bill 2011, subject to the Committee Clerk checking for confidentiality, adverse mention and other issues. Submissions identified as containing confidentiality, adverse mention or other issues will then be considered by the Committee.

6.5 Hearings

Resolved, on the motion of Mr Khan: That the Committee hold a public hearing in Sydney on 17 and 18 January 2012, and a reserve day on 20 January 2012, and that the following witnesses be invited to appear to give evidence:

- Dr Anne Twomey, Associate Professor, University of Sydney
- Professor George Williams, University of NSW
- Clubs NSW
- Democracy 4 Sale Research Project
- GetUp!
- Nature Conservation Council of NSW
- NSW Council of Churches
- Sporting Shooters Association (NSW)
- St James Ethics Centre Sydney Alliance
- The Sydney Institute
- Unions NSW
- Finance Services Union
- NSW Teachers Federation or Fire Brigade Employees Union
- Australian Labor Party (NSW Branch)
- Christian Democratic Party
- Country Labor Party
- Liberal Party of Australia (NSW Division)
- The Greens
- The National Party of Australia (NSW Branch)
- The Shooters and Fishers Party.

6.6 Media release

Resolved, on the motion of Mr Primrose: That the Chair issue a media release announcing the establishment of the Inquiry and advising of the decisions made at this meeting.

6.7 Report deliberative

Resolved, on the motion of Mr Whan: That the committee meet to consider the draft report of the inquiry at 1.00 pm on Monday 13 February 2012.

7. Personal statement

Dr Kaye noted that the organisation Democracy for Sale is closely associated with the Greens.

8. Adjournment

The Committee adjourned at 8.00 pm *sine die*.

Rachel Simpson
Committee Clerk

Minutes No. 2

Friday 16 December 2011

Room 1153, Parliament House, Sydney, at 2.35 pm

1. Members presentDr Kaye (*Chair*)

Mr Borsak

Miss Gardiner

Mr Khan

Dr Phelps

Mr Primrose

Mr Whan

2. Apologies

Ms Fazio

Mrs Maclaren-Jones

3. Previous minutes

Resolved, on the motion of Mr Khan: That Draft Minutes No 1 be confirmed.

4. Correspondence

The Committee noted the following items of correspondence received:

- 25 November 2011 – from Dr Joo-Cheong Tham, University of Melbourne, requesting an extension for making a submission until 13 January 2012
- 30 November 2011 – from Mr Pascal Marcelis, Manager, Government Relations, Australian Securities and Investment Commission (ASIC), advising that ASIC will not be making a submission to the inquiry
- 30 November 2011 – from Professor George Williams, University of NSW, advising that he will not be making a submission to the inquiry and that he is unavailable to appear at the hearings in January 2012
- 1 December 2011 – from Mr Josh Landis, Executive Manager – Policy & Government, ClubsNSW, advising that ClubsNSW will not be making a submission to the inquiry and declining the invitation to appear at the hearings in January 2012
- 8 December 2011 – from Mr Peter Achterstraat, Auditor-General, advising that the NSW Audit Office will not be making a submission to the inquiry
- 13 December 2011 – from Ms Iona Silver, Executive Assistant to State Director, Liberal Party of Australia (NSW Division), advising that the Liberal Party of Australia (NSW Division) will not be making a submission to the inquiry and declining the invitation to appear at the hearings in January 2012
- 14 December 2011 – from Mr Gerard Henderson, Executive Director, The Sydney Institute, advising that The Sydney Institute will not be making a submission to the inquiry
- 14 December 2011 – from Ms Alison Peters, Director, NCOSS, requesting an extension for making a submission until 20 January 2012
- 15 December 2011 – from Ms Amanda Tattersall, Director, Sydney Alliance, declining the invitation to appear at the hearings in January 2012.

5. Hearings

The Committee noted that, as of 16 December 2011, the following witnesses have accepted the Committee's invitation to appear at the public hearings in January:

5.1. Wednesday 18 January 2012:

- Mr Mark Lennon, Secretary, Unions NSW

- Mr Geoff Derrick, Secretary, Finance Services Union.

5.2. Friday 20 January 2012:

- Mr Ben Franklin, State Director, The National Party of Australia (NSW Branch)
- Dr Anne Twomey, University of Sydney
- Dr Norman Thompson, Democracy 4 Sale Research Project
- Mr Chris Maltby, Registered Officer, NSW Greens.

The Committee noted that, as of 16 December 2011, the following witnesses have declined the Committee's invitation to appear at the public hearings in January 2012:

- Clubs NSW
- Professor George Williams
- Liberal Party of Australia (NSW Division)
- The Sydney Institute
- Sydney Alliance.

Mr Whan moved: That the Premier be invited to give evidence at one of the public hearings in January 2012.

Question put.

The Committee divided.

Ayes: Mr Borsak, Dr Kaye, Mr Primrose, Mr Whan.

Noes: Miss Gardiner, Mr Khan, Dr Phelps.

Question resolved in the affirmative.

Resolved, on the motion of Mr Primrose: That representatives from NCOSS be invited to give evidence at one of the public hearings in January 2012.

6. Adjournment

The Committee adjourned at 2.40 pm until 8.45 am Wednesday 18 January 2012 (public hearing).

Rachel Simpson
Committee Clerk

Minutes No. 3

Wednesday 18 January 2012

Jubilee Room, Parliament House, Sydney, at 9.30 am

1. Members present

Dr Kaye (*Chair*)
Mr Borsak
Ms Fazio
Miss Gardiner
Mr Khan
Mrs Maclaren-Jones
Dr Phelps
Mr Primrose
Mr Whan

2. Minutes

Resolved, on the motion of Mr Phelps: That draft Minutes No 2 be confirmed.

3. Correspondence

The Committee noted the following items of correspondence:

Received:

- 16 December 2011 – from Mr Colin Barry, Electoral Commissioner, advising that the NSW Election Funding Authority will not be making a submission to the inquiry
- 20 December 2011 – from Mr Brendan Cavanaugh, State Organiser, Australian Labor Party (NSW Branch), advising that ALP (NSW Branch) will be making a submission to the inquiry but declining the invitation to appear at the hearings in January 2012
- 2 January 2012 – from Mr Ben Franklin, State Director, The National Party (NSW Division), advising that The National Party (NSW Division) will not be making a submission to the inquiry and declining the invitation to appear at the hearings in January 2012
- 10 January 2012 – from the Hon David Ipp QC, Commissioner, Independent Commission Against Corruption, advising that in the Commission's opinion the proposed Bill does not raise new corruption concerns
- 11 January 2012 – from Mr Brett Holmes, General Secretary, NSW Nurses' Association, expressing interest in giving evidence to the Committee at the hearing on 20 January
- 11 January 2012 – from Mr Pepe Clarke, Chief Executive Officer, Nature Conservation Council (NCC), advising that the NCC has sought legal advice on the implications of the Bill and is unable to participate in the inquiry until that advice is received
- 13 January 2012 – from Dr Norman Thompson, Director, Democracy for Sale, advising that he is no longer available to appear at the hearings in January 2012.

Sent:

- 16 December 2011- from the Chair to the Premier, the Hon Barry O'Farrell MP, inviting him to appear at one of the public hearings for the inquiry.

4. Parliamentary Library Research Service E-briefs

The Committee noted that the Parliamentary Library Research Service has prepared two E-briefs on aspects of the Election Funding, Expenditure and Disclosures Amendment Bill 2011.

Resolved, on the motion of Mr Whan: That the secretariat convey the thanks of the Committee to the Parliamentary Library Research Service for preparing the E-briefs on aspects of the Election Funding, Expenditure and Disclosures Amendment Bill 2011.

Mr Primrose joined the meeting.

Ms Fazio joined the meeting.

5. Submissions

The Committee noted that it has received 30 submissions and one supplementary submission to the inquiry, which have been published by the Committee Clerk under the authorisation of the Committee's previous resolution of 24 November 2011.

6. Public hearings**Allocation of question time**

Resolved, on the motion of Mr Phelps: That, for the hearings for the Inquiry into the provisions of the Election Funding, Expenditure and Disclosures Amendment Bill 2011, the sequence of questions to be

asked alternate between Opposition, Cross Bench and Government members, in that order, with 15 minutes allocated to each.

Return of answers to questions on notice

Resolved, on the motion of Mrs Maclaren-Jones: That, for the Inquiry into the provisions of the Election Funding, Expenditure and Disclosures Amendment Bill 2011, answers to questions taken on notice during the hearing be provided by Monday 30 January 2012.

Public hearing

The witnesses, the public and media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses from Unions NSW were sworn and examined:

- Mr Mark Lennon, Secretary
- Mr Paul Doughty, Campaigns and Industrial Officer.

The evidence concluded and the witnesses withdrew.

The following witnesses from the Sporting Shooters Association of Australia (NSW) Inc were sworn and examined:

- Mr Paul McNabb, President
- Mrs Diana Melham, Executive Director.

The evidence concluded and the witnesses withdrew.

The following witness from the Finance Sector Union was sworn and examined:

- Mr Geoff Derrick, NSW/ACT Secretary.

The evidence concluded and the witness withdrew.

The following witness from the Shooters and Fishers Party was sworn and examined:

- The Hon John Tingle.

The evidence concluded and the witness withdrew.

Ms Fazio left the meeting.

The following witness from the Hunter District Hunting Club Inc was sworn and examined:

- Mr David Avery, Honorary Secretary.

The evidence concluded and the witness withdrew.

The Chair advised that in anticipation of the delayed arrival of the next witness due to a flight delay, the public hearing would be suspended from 2.40 pm to 2.50 pm.

The Chair requested the public and the media to withdraw for a deliberative meeting.

The public and the media withdrew.

7. Deliberative meeting

Mr Khan circulated copies of the following documents:

- Submission No 1, Professor George Williams, to the Joint Select Committee on Electoral Matters inquiry into public funding of election campaigns
- Transcript of evidence, Dr Orr, Dr Tham, Dr Twomey, Professor Williams, 1 February 2010, to the Joint Select Committee on Electoral Matters inquiry into public funding of election campaigns.

The Committee deliberated.

Resolved, on the motion of Miss Gardiner: That the Clerk provide written advice regarding:

- the use that can be made of evidence or material that is on the public record but has not been received by the Committee, for example submissions or evidence to an inquiry by another committee, or unreported judgements, and
- whether such material can be used by a member in a dissenting report.

8. Resumption of public hearing

The public hearing resumed at 2.55 pm.

The witnesses, the public and media were admitted.

Ms Fazio rejoined the meeting.

The following witness was sworn and examined:

- Dr Graeme Orr, Associate Professor, Faculty of Law, University of Queensland.

The evidence concluded and the witness withdrew.

The public hearing concluded at 3.50 pm. The public and the media withdrew.

9. Adjournment

The Committee adjourned at 3.50 pm until 9.45 am on Friday 20 January 2012.

Cathryn Cummins

Clerk to the Committee

Minutes No. 4

Friday 20 January 2012

Jubilee Room, Parliament House, Sydney, at 9.45 am

1. Members present

Dr Kaye (*Chair*)
 Mr Borsak
 Ms Fazio
 Miss Gardiner
 Mr Khan
 Mrs Maclaren-Jones
 Dr Phelps
 Mr Primrose
 Mr Whan

2. Public hearing

The witnesses, the public and media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters. The Chair reminded Premier O'Farrell that he did not need to be sworn, as he had sworn an oath to his office as a member of Parliament.

The Premier was examined.

The Premier tendered the following document:

- *'The Greens NSW, political donations and the \$1.6 million'*, dated 10 January 2012, Dr John Kaye.

The evidence concluded and the Premier withdrew.

The following witness was sworn and examined:

- Professor Anne Twomey.

The evidence concluded and the witness withdrew.

The following witnesses from the NSW Nurses' Association were sworn and examined:

- Mr Brett Holmes, General Secretary
- Mr Tony O'Grady, Manager, Projects & Compliance
- Mr John Moran, Media Consultant.

The evidence concluded and the witnesses withdrew.

The following witness from the NSW Greens was sworn and examined:

- Mr Chris Maltby, Registered Officer.

The evidence concluded and the witness withdrew.

The following witnesses from the Christian Democratic Party were sworn and examined:

- Mr Ian Smith, Treasurer and Party Agent
- Mr Leighton Thew, State Manager.

The evidence concluded and the witnesses withdrew.

The following witnesses from the NSW Teachers Federation were sworn and examined:

- Ms Jenny Diamond, General Secretary
- Ms Lenore Hankinson, Industrial Officer.

Ms Hankinson tendered the following document:

- Correspondence from the NSW Teachers Federation to the Hon Adrian Piccoli MP, Minister for Education, dated 14 June 2011, regarding 'Invest in TAFE for a better state – teachers, skills and prosperity'.

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 3.35 pm. The public and the media withdrew.

3. Deliberative meeting

Acceptance and publication of documents tendered during the public hearing

Resolved, on the motion of Ms Fazio: That the Committee accept, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and Standing Order 223(1) the following document tendered during the public hearing:

- *The Greens NSW, political donations and the \$1.6 million*, dated 10 January 2012, Dr John Kaye, tendered by the Premier.

Resolved, on the motion of Ms Fazio: That the Committee accept and publish, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and Standing Order 223(1) the following document tendered during the public hearing:

- Correspondence from the NSW Teachers Federation to the Hon Adrian Piccoli MP, Minister for Education, dated 14 June 2011, regarding *Invest in TAFE for a better state – teachers, skills and prosperity*, tendered by Ms Hankinson, NSW.

Supplementary question

The Committee noted that members should submit any supplementary questions for the witnesses at today's hearings to the secretariat by 4.00 pm on Monday 23 January 2012.

Submissions

The Committee noted that Submission Nos 31 and 32 were published by the Committee Clerk under the authorisation of the Committee's previous resolution of 24 November 2011.

Consideration of the Chair's draft report

The Committee noted that the Chair's draft report will be distributed to members' offices by 4.30 pm on Wednesday 8 February 2012.

Resolved, on the motion of Mr Whan: That, subject to the availability of all members of the committee, the deliberative meeting to consider the Chair's draft report be held at 10.00 am on Monday 13 February 2012, in Room 1153.

Clerk's advice

The secretariat circulated copies of the Clerk's advice regarding:

- the use that can be made of evidence or material that is on the public record but has not been received by the Committee, for example submission or evidence to an inquiry by another committee, or unreported judgements, and
- whether such material can be used by a member in a dissenting report.

The Committee noted the Clerk's advice.

4. Adjournment

The Committee adjourned at 3.45 pm until 10.00 am on Monday 13 February 2012 in Room 1153 (*report deliberative*).

Cathryn Cummins

Clerk to the Committee

Draft Minutes No. 5

Monday 13 February 2012

Room 1153, Parliament House, Sydney, at 10.00 am

1. Members present

Dr Kaye (*Chair*)

Mr Borsak

Ms Fazio
Miss Gardiner
Mr Khan
Mrs Maclaren-Jones
Dr Phelps
Mr Primrose
Mr Whan

2. Previous minutes

Resolved, on the motion of Dr Phelps: That draft Minutes Nos 3 and 4 be confirmed.

3. Correspondence

The Committee noted the following items of correspondence:

Received:

- 23 January 2012 – from Dr Graeme Orr, providing answers to questions taken on notice
- 30 January 2012 – from Mr Geoff Derrick, Secretary-Finance Sector Union of Australia NSW Branch, providing answers to questions taken on notice
- 30 January 2012 – from Ms Jenny Diamond, General Secretary-NSW Teachers Federation, providing answers to questions taken on notice
- 31 January 2012 – from Premier O’Farrell, providing answers to questions taken on notice and supplementary questions.
- 6 February 2012 – email from Mr Chris Maltby, Registered Officer, NSW Greens, attaching an amended copy of the Greens NSW submission no. 25 to the inquiry.

Resolved, on the motion of Dr Phelps: That the Committee authorise the Secretariat to replace the existing version of Submission No. 25 with the amended version as submitted by Mr Maltby on 6 February 2012.

4. Answers to questions taken on notice and supplementary questions

The Committee noted the following answers to questions taken on notice and supplementary questions received and published by the Committee Clerk under the authorisation of the Committee’s previous resolution of 24 November 2011:

- The Premier
- Dr Graeme Orr
- NSW Teachers Federation
- Finance Sector Union of Australia NSW.

5. Consideration of the Chair’s draft report

The Chair tabled his draft report entitled *Inquiry into the provisions of the Election Funding, Expenditure and Disclosures Amendment Bill 2011*, which having been previously circulated, was taken as being read.

Chapter 1 read.

Resolved, on the motion of Ms Fazio: That Chapter 1 be adopted.

Chapter 2 read.

Mr Khan moved: That paragraph 2.5 be amended by inserting a new sentence after the first sentence to read: ‘That Committee called for submissions from a wide range of stakeholders and published a discussion paper identifying areas for possible reform. 189 submissions were received from individuals, political parties, local governments, academics and community organisations.’

Question put.

The Committee divided.

Ayes: Mr Borsak, Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Noes: Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the affirmative.

Mr Khan moved: That following paragraph 2.5, paragraphs be inserted to read:

‘Submissions acknowledged the need to reform the way in which political parties are funded in New South Wales. The Liberal Party NSW Branch’s submission argued for political donations to be limited to those from individuals, stating:

“There is a strong philosophical argument that, in a democracy, only those who have a right to participate as voting citizens should be able to influence elections with their political donations” (p. 6).

The Liberal Party’s submission questioned the public interest of escalating expenditure by political parties, identifying a 467 per cent increase in campaign expenditure by the Labor Party between their last election in Opposition in March 1995 and the March 2007 election. In the same period, the Consumer Price Index rose by 36.7 per cent (p. 2).

The submission prepared by Ms Lee Rhiannon MLC, on behalf of The Greens, also sought a ban on donations other than those from individuals. Recommendation 1.1 of The Greens submission called for a:

“Ban (on) all forms of donations to political parties except those donations received from individuals or bequests” (p.3).

Ms Lee Rhiannon’s submission on behalf of The Greens also called for the introduction of electoral funding laws based on the Canadian model of political party funding, highlighting the benefits the 2004 Canadian reforms:

“Canada’s new laws have reduced public cynicism towards politicians... Canada’s new laws encourage parties to seek more donors, thereby increasing grassroots political involvement” (p. 8).

For a description of the approach adopted by Canada to political donations and the regulation of campaign expenditure see para. 2.36 below.’

Question put.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Noes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the negative.

Mr Whan moved: That following paragraph 2.6, a new paragraph be inserted to read:

‘Since the tabling of the report of the NSW Legislative Council’s Select Committee on Electoral and Political Party Funding no public debate or compelling evidence regarding the banning of affiliation fees for political parties has emerged.’

Question put.

The Committee divided.

Ayes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Noes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Question resolved in the affirmative.

Mr Khan moved: That following paragraph 2.10, a new paragraph be inserted to read:

‘That Committee called for a wide range of stakeholders. Amongst those was a submission from the Liberal Party NSW Branch, which stated in part:

“We are committed to imposing an annual cap at a low level on how much a person is able to donate to the candidates or political party of their choice. We believe that only enrolled individuals should be able to donate, with donations from corporations, trade unions and other organisations being banned. Our support is contingent on the bans being comprehensive. For example, we would not support banning donations from corporations unless donations from trade unions were also banned” (p. 15).’

Question put.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Noes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the negative.

Mr Khan moved: That following paragraph 2.10, the following paragraphs be inserted to read:

‘A submission was also received from Mr David Shoebridge (then described as) the Convenor, The Greens NSW. He stated:

“There are existing and workable international models for public funding and donations reform that can be readily adopted by New South Wales. The most pertinent examples are from Canada and New Zealand. Canada’s system has not only overcome a vigorous challenge in its Supreme Court but did so having accommodated its federalist structure” (p. 1)

Mr Shoebridge observed, when considering the issues of election spending noted that:

“...Labor spent \$19,888,182, nearly four times as much as the Liberal Party in the lead-up to the 2007 NSW State Election.”

Mr Shoebridge went on to observe:

“If electoral expenditure restrictions are to be effective they must also apply to associated entities of political parties as well as third parties. Expenditure by associated entities of political parties must for these purposes be treated as expenditure by the political party itself.

“Expenditure by genuine third parties is recognised as being in a separate category and must not only be tolerated, but should be encouraged in any pluralist democracy. Nevertheless, if electoral expenditure caps are to be placed on political parties then some form of reasonable expenditure caps must also be placed on third parties to ensure no one voice dominates a campaign.

“Again international models, including the Canadian and New Zealand schemes provide positive and workable international models for New South Wales...” (p. 12)’

Question put.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.
 Noes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the negative.

Mr Khan moved: That following paragraph 2.10, a new paragraph be inserted to read:

‘Mr Robert Borsak, on behalf of the Shooters Party, also made a submission to the inquiry. The Shooters Party submission was, however, limited to the issues of campaign expenditure and the political education fund, and did not address issues of donation caps.’

Question put.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.
 Noes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the negative.

Mr Khan moved: That following paragraph 2.12, a new paragraph be inserted to read:

‘It is worth noting that during the Agreement in Principle debate on the Election Funding and Disclosures Amendment Bill 2010, some contributors to the debate raised issues similar to those now being considered by this Committee. For instance, Ms Clover Moore MP (Independent) stated in part:

“Notwithstanding my support for the caps I support also the Opposition's proposed amendment for the Auditor-General to determine what caps and limits are appropriate. I welcome also the retention of the ban on developer donations and new amendments to ban donations from the tobacco industry, although I maintain that donations from all corporations, business entities and organisations, including trade unions, should be banned. I am particularly concerned about donations from the liquor industry. Donations should be restricted to individuals who are enrolled to vote in New South Wales parliamentary elections. I support the amendments proposed by the Opposition.”

Question put.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.
 Noes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the negative.

Dr Phelps moved: That following paragraph 2.12, new paragraphs be inserted to read:

‘During debate on the Election Funding and Disclosures Amendment Bill 2010 in the Legislative Council, the NSW Liberals and Nationals moved a series of amendments, which sought amongst other things:

- The determination of donation and expenditure caps by the Auditor General;
- The aggregation of expenditure by parties and affiliated organisations;
- The prohibition on political donations other than by individuals on the electoral roll;

During the debate on the Bill, the Hon. Don Harwin MLC (Liberal) described the then Government’s Bill as:

“...a half-hearted bill that neglects critical areas of overdue reform” (Legislative Council Hansard, 10/11/10, p. 27462).

The Hon. Don Harwin MLC, during the debate on the Liberals and Nationals Amendments, stated that the amendments were designed to:

“...try to incorporate some integrity into this legislation” (Legislative Council Hansard, 10/11/10, p. 27465).’

Question put.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Noes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the negative.

Miss Gardiner moved: That following paragraph 2.12, new paragraphs be inserted to read:

‘Dr John Kaye (The Greens) said of the Liberal Nationals amendments during the Bill's second reading speech in the Legislative Council:

“Mr O’Farrell has said that he would prefer it if only voters were allowed to make donations to political parties—there should be no donations from unions or corporations. That is terrific, bring it on. We will work with the Coalition to get that through” (Legislative Council Hansard, 10/11/10, p. 27484).

The Greens combined with the Australian Labor Party to defeat each of the Liberals and National amendments.’

Question put.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Noes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the negative.

Resolved, on the motion of Mr Khan: That following paragraph 2.12, a new paragraph be inserted to read:

‘Another important element of the Election Funding and Disclosures Amendment Bill 2010 was a significant increase in the level of public funding available to political parties.’

Resolved, on the motion of Mr Khan: That following paragraph 2.28, a new paragraph be inserted to read:

‘In addition to expenditure caps on electoral donations, the *Electoral Funding, Expenditure and Disclosures Act 1981*, also imposes a cap on political donations of \$2,000 to third-party campaigners.’

Resolved, on the motion of Miss Gardiner: That paragraph 2.30 be amended to insert the words ‘discussion and possible’ immediately after the words ‘context of’.

Miss Gardiner moved: That following paragraph 2.33, a new paragraph be inserted to read:

‘In the dissenting report to the Joint Standing Committee report, The Greens Senator Lee Rhiannon recommended that there be a ban on all donations from all entities other than those received from individuals on the electoral roll.’

Question put.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.
 Noes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the negative.

Mr Whan moved: That paragraph 2.34 be amended by inserting at the end of the sentence the words 'or banning affiliation fees'.

Dr Phelps moved: That the motion of Mr Whan be amended by inserting the after the words 'or banning affiliation fees' the words 'however the Greens recommended such fees be capped at \$200 per affiliated body and the Coalition's dissenting report noted that affiliation fees could be used as a 'back door' method for circumventing donation limits.'

Amendment put.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.
 Noes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the negative.

Original question put.

The Committee divided.

Ayes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.
 Noes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Question resolved in the affirmative.

Ms Fazio moved: That paragraph 2.36 be amended by inserting after the first sentence, a new sentence, to read: 'It should be noted that these jurisdictions differ from Australia in that they do not have compulsory voting and have not introduced legislative change with regard to affiliation fees or affiliated organisations as proposed in this Bill.'

Resolved, on the motion of Dr Phelps: That the amendment be considered in seriatim: first, that clause which reads: 'It should be noted that these jurisdictions differ from Australia in that they do not have compulsory voting' and second, that clause which reads: 'and have not introduced legislative change with regard to affiliation fees or affiliated organisations as proposed in this Bill.'

First question put and resolved in the affirmative.

Second question put.

The Committee divided.

Ayes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.
 Noes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Question resolved in the affirmative.

Dr Phelps moved, by leave: That the Committee rescind its resolution of 13 February 2012 that, following paragraph 2.6, a new paragraph be inserted to read:

‘Since the tabling of the report of the NSW Legislative Council’s Select Committee on Electoral and Political Party Funding no public debate or compelling evidence regarding the banning of affiliation fees for political parties has emerged.’

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Noes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the negative.

Ms Fazio moved: That Chapter 2, as amended, be adopted.

The Committee divided.

Ayes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Noes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Question resolved in the affirmative.

Chapter 3 read.

Mr Whan moved: That following the heading ‘Overview of the Bill’ a new paragraph be inserted to read:

‘The Committee noted that since introducing this Bill the Government parties have continued fund raising in a matter which would not be permitted under the provisions of this Bill.’

Question resolved in the negative.

Resolved, on the motion of Mr Khan: That paragraph 3.5 be amended by omitting the final sentence that reads ‘This view was echoed by Ms Clover Moore MP, who said that the reforms would ‘...prevent undue influence being exercised over the political process of the perception of it’ from the final sentence and inserting a new paragraph, to read:

‘This view was echoed by Ms Clover Moore MP, Independent, who said, in part:

“This reform will prevent undue influence being exercised over the political process or the perception of it, and that is welcome. Limiting donations to individuals who are enrolled to vote in New South Wales parliamentary elections will help to achieve that.

Currently party campaigns can be topped up with campaigns run by affiliated third party organisations to give that party an unfair advantage over other candidates. What the former Government did with that legislation was really quite cynical and I opposed that move at the time. The inclusion of campaign expenditure of affiliated organisations, such as unions, in the legislated expenditure cap of a political party also will assist to level the playing field. That is particularly important for Independents, who do not have the advantage of state-wide campaigns. I welcome these latest changes and recent moves in New South Wales to improve what not very long ago was a lax donations regime. I commend the bill to the House.”

Dr Phelps moved: That following paragraph 3.6 a new paragraph be inserted to read:

‘It is noted Mr John Robertson MP, was, before entering the NSW Legislative Council, the immediate past Secretary of Unions NSW. He in turn followed other recent previous secretaries who entered politics in NSW, including The Hon. John Ducker MLC; The Hon. Barrie Unsworth; and The Hon. Michael Costa MLC.’

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.
 Noes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the negative.

Ms Fazio moved: That following paragraph 3.7 a new paragraph be inserted to read:

‘Further during the debate, Mr Robertson stated:

“There is no doubt that this bill is designed to fundamentally undermine the Labor Party's structures, decision-making processes and day-to-day operations. It seeks to insert provisions in the electoral funding laws which will not impact on the Liberal Party, The Nationals or even The Greens but which will affect the Labor Party. This bill seeks to stop the union movement from affiliating with the Labor Party—the very union movement that banded together to form the Labor Party 120 years ago.”

Question put.

The Committee divided.

Ayes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.
 Noes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Question resolved in the affirmative.

Dr Phelps moved: That paragraphs 3.23 to 3.29 be omitted.

Question put.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.
 Noes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the negative.

Dr Phelps moved: That following paragraph 3.27 a new paragraph be inserted to read:

‘The Legislation Review Committee noted similar concerns about restricting freedom of speech in relation to the Election Funding and Disclosures Amendment Bill 2010.’

Question put.

The Committee divided.

Ayes: Mr Borsak, Miss Gardiner, Ms Fazio, Mr Khan, Mrs Maclaren-Jones, Dr Phelps, Mr Primrose, Mr Whan.
 Noes: Dr Kaye.

Question resolved in the affirmative.

Resolved, on the motion of Mr Khan: That following paragraph 3.34 a new paragraph be inserted to read:

‘In the Greens NSW submission to the inquiry, Mr Maltby highlighted the need for electoral funding reform to be comprehensive, stating:

“...we believe that backdoor donation paths must be closed but without inflicting damage on the fabric of democracy. Allowing corporate or union money to be funnelled into separate bodies that then campaign for candidates or parties would undermine any ban on corporate donations.” (Submission 25, p 2)

Mr Maltby said of donations to peak bodies by affiliated organisations:

“We accept that allowing peak bodies to receive money and then spend it on advocating a vote for a party or candidate would create a backdoor campaign financing mechanism that would undermine the intent of the legislation.” (Submission 25, p 4)

Mr Khan moved: That paragraph 3.39 be amended by omitting the words ‘and noted the concerns of the Legislation Review Committee with regard to the Bill’.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Noes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the negative.

Resolved, on the motion of Mr Khan: That paragraph 3.42 be amended by omitting the word ‘However’ at the beginning of the paragraph.

Resolved, on the motion of Ms Fazio: That paragraph 3.42 be amended by inserting the words ‘the appearance or risk of’ after the word ‘minimising’.

Ms Fazio moved: That Chapter 3, as amended, be adopted.

Ayes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Noes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Question resolved in the affirmative.

Chapter 4 read.

Resolved, on the motion of Mr Khan: That paragraph 4.7 be amended by commencing a new paragraph at the end of the first sentence; and by omitting the words ‘on one hand’ and inserting instead the words ‘It was argued’.

Mr Khan moved: That paragraph 4.8 be amended by omitting the words in the first sentence after the words ‘affiliated organisations’.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Noes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the negative.

Miss Gardiner moved: That paragraph 4.23 be amended by inserting the following words at the end of the paragraph:

“The Committee noted that there was a widespread expectation that the Labor Party would be routed at the NSW 2011 general elections and so the unions affiliated with the ALP may have considered the mounting of third party campaigns in that extraordinary electoral cycle to be a poor investment.”

Question put.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.
Noes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the negative.

Mr Khan moved: That following paragraph 4.23 a new paragraph be inserted to read:

‘It is also notable that whilst Unions NSW sought to adduce evidence relating to the 2011 State election, they did not seek to produce evidence relating to previous election experiences. It is to be noted in that respect that the 2010 Annual Report for Unions NSW under the heading “Political” disclosed a coordinated third party campaign undertaken by Unions NSW in 20 key marginal seats at the previous federal election.’

Question put.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, and Dr Phelps.
Noes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the negative.

Mr Khan moved: That following paragraph 4.31 new paragraphs be inserted to read:

‘Committee Comment

The Committee was not provided with any detailed examples by any trade union of campaigns said the be run [sic] against a party to which a union was affiliated during the actual election campaign period.

Indeed, the Committee considers that it beggars belief that a union would remain unaffiliated with a political party and actually campaign against that party in the lead up to an election.

The far more likely scenario is that a union, or any other affiliated organisation in such a circumstance, would either refuse to contribute to a co-ordinated campaign with the political party or alternatively disaffiliate from the political party.’

Question put.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.
Noes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the negative.

Miss Gardiner moved: That paragraph 4.47 be amended by omitting the second sentence.

Question put.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, and Dr Phelps.
Noes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the negative.

Miss Gardiner moved: That paragraphs 4.48, 4.49 and Recommendation 1 be omitted:

Question put.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, and Dr Phelps.

Noes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the negative.

Ms Fazio moved: That paragraph 4.48 be amended by inserting a sentence at the end of the paragraph to read:

‘The Committee also notes that the definition of directly advocating for a party is crucial if this legislation is to operate in an equitable fashion.’

The Committee divided

Ayes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Noes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Question resolved in the affirmative.

Ms Fazio moved: That Recommendation 1 be amended by inserting a dot point before the words ‘has the effect of directly advocating a vote for’; inserting the word ‘,or’ after the words ‘vote for’; inserting a dot point and the words ‘is incurred at the request of, or in co-operation with’ before the words ‘the party to which it is affiliated’.

The Committee divided

Ayes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Noes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Question resolved in the affirmative.

Mr Primrose moved: That Chapter 4, as amended, be adopted.

The Committee divided

Ayes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan

Noes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Question resolved in the affirmative.

Chapter 5 read.

Resolved, on the motion of Miss Gardiner: That before the heading ‘The proposed amendment’ a new heading ‘Background’ and new paragraphs be inserted to read:

‘Background

As a result of the amendments enacted in the Election Funding and Disclosures Amendment Bill 2010, there are in place significant restrictions on the making of political donations to political parties and candidates.

Section 95A of the *Election, Funding, Expenditure and Disclosures Act 1981*, presently limits donations to:

- \$5,000 to a registered party or group;
- \$2,000 to non-registered parties, elected members, candidates or third-party campaigners;

The 2011 Bill does not amend these expenditure caps.’

Mr Khan moved: That following paragraph 5.8 a new paragraph be inserted to read:

Consistent with the views expressed by the Premier, that there is a perception (at least) of undue influence of decision-making in this State, is the statement Mr David Avery, Honorary Secretary, Hunter District Hunting Club, who opined:

“Do not forget money is the lifeblood of politics or we would not be here. Our representatives need funding to run a campaign” (Inquiry Transcript, 18/01/12, p. 47).

Question put.

The Committee divided.

Ayes: Miss Gardiner, Dr Kaye, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Noes: Mr Borsak, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the affirmative.

Dr Phelps moved: That paragraph 5.9 be amended by omitting the second sentence.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Noes: Mr Borsak, Dr Kaye Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the negative.

Dr Phelps moved: That following paragraph 5.9 a new paragraph be inserted to read:

In the submission made by the Greens NSW to the Joint Standing Committee into the Public Funding of Election Campaigns, the then convenor of The Green NSW, Mr David Shoebridge, stated:

“...international models, including the Canadian and New Zealand schemes provide positive and workable international models for New South Wales...” (p. 12)

In that respect, as noted in Chapter 2 of this report, the Canadian model restricts contributions to political parties by corporations and trade unions.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Noes: Mr Borsak, Ms Fazio, Dr Kaye, Mr Primrose, Mr Whan.

Question resolved in the negative.

Mr Khan moved: That before paragraph 5.16 three new paragraphs be inserted to read:

“As the committee has previously observed, when considering the impact of clause 96D of the Bill, it should first be noted that the 2010 amendments to the *Election Funding, Expenditure and Disclosures Act 1981*, there are already significant restrictions on donations that can now be made to political parties.

These restrictions include:

- \$5,000 to a registered party or group;
- \$2,000 to non-registered parties, elected members, candidates or third-party campaigners.

It can be further noted that restriction have already been imposed on the making of donations to political parties by property developers, the tobacco industry business entities, and liquor or gambling industry business entities.

The 2010 amendments to the Act were made in the context of very significant increases in the level of public funding available to political candidates and registered parties.

Question put.

The Committee divided.

Ayes: Miss Gardiner, Dr Kaye, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.
Noes: Mr Borsak, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the affirmative.

Dr Phelps moved: That following paragraph 5.25 two paragraphs be inserted after to read:

‘The Committee notes that clause 96D of the Bill does not absolutely restrict collective action. As was noted in questioning of Mr David Avery, Honorary secretary, Hunter District Hunting Club Incorporated, by the Chair, Dr John Kaye:

“CHAIR: You could have other engagements. If this legislation were to pass in it’s current form, is it correct to say that you could have other engagements with the political process, you are just losing one avenue that you have traditionally used. But is it not correct to say there are other ways that a club such as yours could engage with the political process?”

Committee comment

The Committee concludes that, whilst strongly held, the views of some participants, suggesting that limiting donation to individuals would unduly restrict collective action were overstated.’

Question put.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.
Noes: Mr Borsak, Ms Fazio, Dr Kaye, Mr Primrose, Mr Whan.

Question resolved in the negative.

Mrs Maclaren-Jones moved: That following paragraph 5.34 three paragraphs be inserted to read:

‘It should be noted that prior to the 2011 NSW State Election, the Sporting Shooters Association made a campaign donation of \$300,000 to the Shooters and Fishers Party, with approximate “in-kind” support of \$25 000. In addition to these contributions, an additional \$100,000 was made by another association.

A contribution was made by the Hunter District Hunting Club Incorporated of \$100,000.

As a result of the 2010 amendments to the *Election Funding Act 1981*, the three organisations would now limited to contributions of \$5,000 each.

Question put.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.
Noes: Mr Borsak, Ms Fazio, Dr Kaye, Mr Primrose, Mr Whan.

Question resolved in the negative.

Mr Whan moved: That paragraph 5.49 be amended by omitting the word ‘others’ and inserting instead ‘the majority of witnesses’

Question put.

The Committee divided.

Ayes: Mr Borsak, Ms Fazio, Mr Primrose, Mr Whan.

Noes: Miss Gardiner, Dr Kaye, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Question resolved in the negative.

Mr Whan moved: That paragraph 5.50 be amended by omitting the second sentence.

The Committee divided.

Ayes: Mr Borsak, Ms Fazio, Mr Primrose, Mr Whan.

Noes: Miss Gardiner, Dr Kaye, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Question resolved in the negative.

Mrs Maclaren-Jones moved: That paragraph 5.51 be omitted

Question put.

The Committee divided.

Ayes: Mr Borsak, Ms Fazio, Mr Primrose, Mr Whan.

Noes: Miss Gardiner, Dr Kaye, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Question resolved in the negative.

Ms Fazio moved: That paragraph 5.52 be omitted.

The Committee divided.

Ayes: Mr Borsak, Ms Fazio, Mr Primrose, Mr Whan.

Noes: Miss Gardiner, Dr Kaye, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Question resolved in the negative.

Mr Khan moved: That paragraph 5.52 be amended by omitting all words after 'after 96D'.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Noes: Mr Borsak, Ms Fazio, Dr Kaye, Mr Primrose, Mr Whan.

Question resolved in the negative.

Mr Whan moved: That Recommendation no. 2 be omitted, and a new recommendation 2 be inserted to read:

The committee is concerned about banning Australian residents who are not on the electoral roll and not for profit organisations from making donations. The Committee believes the legislation should be amended to ensure these groups are able to continue to participate in the democratic process. In addition the changes advocated in recommendations 3 and 4 should be implemented.

Question put.

The Committee divided.

Ayes: Mr Borsak, Ms Fazio, Mr Primrose, Mr Whan.

Noes: Miss Gardiner, Dr Kaye, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Question resolved in the negative.

Mr Khan moved: That Recommendation 2 be amended by omitting the words ‘in addition to the changes advocated by the Committee in Recommendations 3 and 4’.

Question put.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Noes: Mr Borsak, Ms Fazio, Dr Kaye, Mr Primrose, Mr Whan.

Question resolved in the negative.

Mr Khan moved: That before paragraph 5.53 a new paragraph and heading be inserted to read:

‘Introduction

The Election Funding and Expenditure and Amendment Bill 2010 introduced into the Act Section 95D.

It is noted that by the introduction of Section 95D, the then Government sought to differentiate the level of donations that could be made by individuals, corporations, trade unions and other organisations from entities affiliated with a political party.

Question put.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Noes: Mr Borsak, Ms Fazio, Dr Kaye, Mr Primrose, Mr Whan.

Question resolved in the negative.

Mr Khan moved: That before paragraph 5.58 a new paragraph be inserted to read:

‘Clause 96D of the Bill will seek to amend the exemption created by Section 95D of the Act.’

Question put.

The Committee divided.

Ayes: Miss Gardiner, Dr Kaye, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Noes: Mr Borsak, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in affirmative.

Mr Whan moved: That paragraph 5.60 be omitted

Question put.

The Committee divided.

Ayes: Mr Borsak, Ms Fazio, Mr Primrose, Mr Whan.

Noes: Miss Gardiner, Dr Kaye, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Question resolved in negative.

Mr Khan moved that paragraph 5.60 be amended by putting the quote as a new paragraph.

Question put.

The Committee divided.

Ayes: Mr Borsak, Miss Gardiner, Dr Kaye, Mr Khan, Mrs Maclaren-Jones, Dr Phelps, Mr Primrose, Mr Whan.

Noes: Ms Fazio.

Question resolved in the affirmative

Mr Khan moved: That following paragraph 5.61 a new paragraph be inserted to read:

‘Dr Graeme Orr, Democratic Audit of Australia, when questioned on the issue of affiliation fees stated:
 “Once the previous Labor Government went down the track of regulating political donations in more ways than disclosure it opened up the question that if you leave it purely to the parties to decide how much they set their membership fees at—and the membership fees or affiliation fees can be unlimited—then effectively it is a backdoor to circumventing any donation limits you might have for the purpose of political equality and integrity” (Transcript, 18/01/12, p. 55).’

Question put.

The Committee divided.

Ayes: Miss Gardiner, Dr Kaye, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Noes: Mr Borsak, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the affirmative.

Mr Khan moved: That paragraph 5.63 be omitted.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Noes: Mr Borsak, Ms Fazio, Dr Kaye, Mr Primrose, Mr Whan.

Question resolved in the negative.

Dr Phelps moved: That following paragraph 5.75 a new paragraph be inserted to read:

‘Committee Comment:

It is noted by the Committee that nothing in Clause 96D of the Bill limits the capacity of any entity, including an industrial organisation to affiliate with any political party. The provisions of Section 96D only have an impact on the capacity of an entity to make contributions to a political party and do not interfere with any right of free association.’

Question put.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Noes: Mr Borsak, Ms Fazio, Dr Kaye, Mr Primrose, Mr Whan.

Question resolved in the negative.

Mr Khan moved: That following paragraph 5.75 a new paragraph be inserted to read:

‘The Committee further notes that there is compelling logic in the argument that the impact of Section 96D may indeed encourage entities, including industrial organisations, to affiliate with a political party (if the party is constitution and rules allow) because of the reduced financial burden upon the entity or industrial organisation.’

Question put.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Noes: Mr Borsak, Ms Fazio, Dr Kaye, Mr Primrose, Mr Whan.

Question resolved in the negative.

Mr Whan moved: That following paragraph 5.78, a paragraph be inserted to read:

‘Dr Tham also suggested that the ban on affiliation fees may be an unjustified limitation on freedom of party association saying:

“Is there a compelling justification for such a severe incursion into the freedom of the ALP to organise itself as it sees fit? It is exceedingly difficult to see one. There is firstly, the prima facie legitimacy of membership fees – they are payments made as a condition for participating within political parties Absent an adequate rationale for limiting freedom of party association, it is hard to escape the conclusion that such a ban represents an unjustified limitation on freedom of party association.”

Question put.

The Committee divided.

Ayes: Mr Borsak, Ms Fazio, Dr Kaye, Mr Primrose, Mr Whan.

Noes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Question resolved in the affirmative.

Mrs Maclaren-Jones moved: That following paragraph 5.85, a paragraph be inserted to read:

‘The Committee notes that nothing in Clause 96D of the Bill directly impacts upon the rules or constitution of any political party, and nor does a restriction on membership fees in any way impact upon an affiliated entity’s capacity to participate in pre-selections, or policy formulation with any political party. It will remain for political parties and their affiliated entities to resolve their relationships consistent with the party’s constitution and rules.’

Question put.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Noes: Mr Borsak, Ms Fazio, Dr Kaye, Mr Primrose, Mr Whan.

Question resolved in the negative.

Ms Fazio and Mr Khan left the meeting.

Mr Whan moved: That following paragraph 5.85, a paragraph be inserted to read:

‘During public hearings Premier O’Farrell was asked what had changed from the Liberal Party submission to the previous election funding inquiry which said: “our approach is to respect the different traditions of our parties and allow affiliation fees to be retained for non-campaign purposes.” He responded “nothing has changed”.’

Question put.

The Committee divided.

Ayes: Mr Borsak, Dr Kaye, Mr Primrose, Mr Whan.
Noes: Miss Gardiner, Mrs Maclaren-Jones, Dr Phelps.

Question resolved in the affirmative.

Ms Fazio and Mr Khan rejoined the meeting.

Mr Khan moved: That paragraphs 5.86 to 5.89 be omitted.

Question put.

The Committee divided.

Ayes: Mr Borsak, Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.
Noes: Ms Fazio, Dr Kaye, Mr Primrose, Mr Whan.

Question resolved in the affirmative.

Mr Whan moved: that the following paragraphs 5.90 to 5.92 be omitted:

‘5.90 Mr Maltby of The Greens NSW supported the continued quarantining of affiliation fees for administrative purposes only, but suggested that it would be appropriate to reduce the amount of fees permissible to provide a more accurate reflection of the organisational costs of administering members:

“I think they are overly generous in the current environment but the fact that they are quarantined for administrative purposes is a good feature of the current arrangement ... We do not want that to be a back channel for the funding of political activity by the party. It should reflect the true costs or some sort of cost in managing that affiliation ... We are open to discussion I think about the amounts or the way that formula would be calculated so that it was balanced against the organisational costs of administering those members ...”⁴²³

5.91 The Greens NSW recommended that the Bill be amended to permit the payment of affiliation fees provided that:

- the organisation is membership based
- members are balloted at least once every four years, with the majority agreeing to the payment of the fees
- fees are capped at the \$0.50 times the number of members of the organisation at 1 October of the year in which the fees are paid, up to a maximum of \$5,000 (indexed annually)
- the fees are not used for any election campaigning activity and are used only to pay for the cost of administering the party.⁴²⁴

5.92 The Greens NSW further suggested that individual party membership fees should be capped at \$250 per annum, with that amount deducted from the individual’s donation limit.⁴²⁵

⁴²³ Mr Maltby, Evidence, 20 January 2012, pp 33-34.

⁴²⁴ Submission 25, p 6; Correspondence from Mr Chris Maltby, Registered Officer, The Greens NSW, to the Director, 6 February 2012.

⁴²⁵ Submission 25, p 6.

Question put.

Ayes: Mr Borsak, Ms Fazio, Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps, Mr Primrose, Mr Whan.

Noes: Dr Kaye.

Question resolved in the affirmative.

Mr Whan, moved by leave: That the Committee rescind its decision of 13 February 2012, that paragraphs 5.86 to 5.89 be omitted.

Question put.

The Committee divided.

Ayes: Mr Borsak, Ms Fazio, Dr Kaye, Mr Primrose, Mr Whan.

Noes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Question resolved in the affirmative.

Mr Whan moved: That following paragraph 5.89, a paragraph be inserted to read:

‘For the reasons he outlined in his submission to this inquiry Dr Tham recommended the rejection of section 96D.’

Question put.

The Committee divided.

Ayes: Mr Borsak, Ms Fazio, Dr Kaye, Mr Primrose, Mr Whan.

Noes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Question resolved in the affirmative.

Dr Phelps moved: That paragraphs 5.93 to 5.95 and Recommendation 3 be omitted.

Question put.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Noes: Mr Borsak, Ms Fazio, Dr Kaye, Mr Primrose, Mr Whan.

Question resolved in the negative.

Mr Whan moved: That before paragraph 5.93, a paragraph be inserted to read:

‘The Committee notes that the definition of ‘affiliated organisation’ contained in the Bill may constitute a direct attack on the internal structure and organisation of the Australian Labor Party which has many members that fit this definition.’

Dr Phelps moved: That Mr Whan’s motion be amended to insert the words ‘or may not’ after the word ‘may’.

Amendment put.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Noes: Mr Borsak, Ms Fazio, Dr Kaye, Mr Primrose, Mr Whan.

Question resolved in the negative.

Original question put.

The Committee divided.

Ayes: Mr Borsak, Ms Fazio, Dr Kaye, Mr Primrose, Mr Whan.

Noes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Question resolved in the affirmative.

Mr Whan moved: That before paragraph 5.93, a paragraph be inserted to read:

‘The Committee accepts the position put by the majority of submission authors and witnesses to this inquiry and with the position taken in previous inquiries that to ban affiliation fees capped at a reasonable level is an undue infringement on the right of organisations to determine their own structures.’

Question put.

The Committee divided.

Ayes: Mr Borsak, Ms Fazio, Dr Kaye, Mr Primrose, Mr Whan.

Noes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Question resolved in the affirmative.

Mr Whan moved: That paragraph 5.95 be amended by omitting the word ‘tightly’ from the first sentence and by omitting the final sentence of the paragraph.

Question put.

The Committee divided.

Ayes: Mr Borsak, Ms Fazio, Mr Primrose, Mr Whan.

Noes: Miss Gardiner, Dr Kaye, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Question resolved in the negative.

Mr Whan moved: That Recommendation 3 be amended by omitting all words after ‘provided the fees are capped to’ and inserting instead ‘an amount which is at least the administration costs imposed on the party by the affiliation’.

Ms Fazio moved that the amendment of Mr Whan be amended by omitting the words ‘at least’ and inserting instead ‘not greater than or equal to’.

Amendment put.

The Committee divided.

Ayes: Mr Borsak, Ms Fazio, Dr Kaye, Mr Primrose, Mr Whan.
Noes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Question resolved in the affirmative.

Original question, as amended, put.

The Committee divided.

Ayes: Mr Borsak, Ms Fazio, Mr Primrose, Mr Whan.
Noes: Miss Gardiner, Dr Kaye, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Question resolved in the negative.

Mr Primrose moved: That Recommendation 3 be amended by omitting the words 'less than' and inserting instead 'equal to or not greater than'.

Question put.

The Committee divided.

Ayes: Mr Borsak, Ms Fazio, Dr Kaye, Mr Primrose, Mr Whan.
Noes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Question resolved in the affirmative.

Mr Primrose moved: That Chapter 5, as amended, be adopted.

The Committee divided.

Ayes: Mr Borsak, Ms Fazio, Dr Kaye, Mr Primrose, Mr Whan.
Noes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Question resolved in the affirmative.

Chapter 6 read.

Mr Khan moved: That the second sentence of the second introductory paragraph on page 59 be omitted.

Question put.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.
Noes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the negative.

Miss Gardiner moved: That following paragraph 6.9 a new paragraph be inserted to read:

'It should be noted that Section 95A of the existing Act places a cap on political donations of \$2,000 upon various groups, including third-party campaigners. This political donations cap is unaffected by Section 96D.'

Question put.

The Committee divided.

Ayes: Miss Gardiner, Dr Kaye Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Noes: Mr Borsak, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the affirmative.

Miss Gardiner moved: That following paragraph 6.9 a new paragraph be inserted to read:

‘It should further be noted that the current structure of the Bill, including the regulation of third-party campaigners, arose by amendments introduced in the Electoral Funding and Disclosures Amendment Bill 2010.’

Question put.

The Committee divided.

Ayes: Dr Kaye, Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Noes: Mr Borsak, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the affirmative.

Miss Gardiner moved: That following paragraph 6.9 a new paragraph be inserted to read:

‘When the previous State Labor Government introduced the Bill, its passage was supported by the Greens NSW.’

Question put.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Noes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the negative.

Dr Phelps moved: That paragraphs 6.48 to 6.57 be omitted.

Question put.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Noes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the negative.

Mr Whan moved: That paragraph 6.58 be amended to omit the words ‘was not’ and insert instead ‘may not have been’.

Question put.

The Committee divided.

Ayes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Noes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Question resolved in the affirmative.

Mr Khan moved: That paragraph 6.59 be omitted.

Question put.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Noes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the negative.

Dr Phelps moved: That the first sentence of paragraph 6.60 be amended by omitting 'considerable' before 'consternation' and inserting instead 'some'.

Question put.

The Committee divided.

Ayes: Miss Gardiner, Dr Kaye, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Noes: Mr Borsak, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the affirmative.

Dr Phelps moved: That the first sentence of paragraph 6.60 be amended by inserting the word 'some' before 'third-party campaigners'.

Question put.

The Committee divided.

Ayes: Mr Borsak, Miss Gardiner, Dr Kaye, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Noes: Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the affirmative.

Mr Khan moved: That paragraph 6.60 be amended to omit all words after 'public debate'.

Question put.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Noes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the negative.

Dr Phelps moved: That paragraph 6.60 be amended to insert the words 'and the Election Funding and Disclosures Amendment Bill 2010' at the end of the paragraph.

Question put.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.
Noes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the negative.

Resolved, on the motion of Mr Khan: That paragraph 6.61 be amended by omitting the word 'however'.
Mr Khan moved: That paragraph 6.62 and Recommendation 4 be omitted.

Question put.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.
Noes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the negative.

Mr Khan left the room.

Mr Whan moved: That paragraph 6.62 be amended by omitting the last sentence.

Question put.

The Committee divided.

Ayes: Mr Borsak, Ms Fazio, Mr Primrose, Mr Whan.
Noes: Dr Kaye, Miss Gardiner, Mrs Maclaren-Jones, Dr Phelps.

Question resolved in the negative on the casting vote of the Chair.

Mr Khan rejoined the meeting.

Dr Phelps moved: That paragraph 6.63 and recommendation 5 be omitted.

Question put.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.
Noes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the negative.

Dr Phelps moved: That paragraph 6.64 be amended by omitting the second and third sentences.

Question put.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.
Noes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the negative.

Dr Phelps moved: That paragraph 6.64 be amended in the second sentence by omitting the words 'strictly speaking this may be' and inserting instead 'this is'.

Question put.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Noes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the negative.

Mr Whan moved: That following paragraph 6.64, a new paragraph be inserted to read:

'In practice it is clear that the current definitions may be much broader than claimed by the Premier, with many campaigns currently included in the definition which would be considered by most reasonable observers as 'issues-based'.'

Question put.

The Committee divided.

Ayes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Noes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Question resolved in the affirmative.

Resolved, on the motion of Mr Khan: That following paragraph 6.75, a new paragraph be inserted to read:

'It is to be noted that the definition of electoral expenditure predates the Election Funding, Expenditure and Disclosures Bill 2011.'

Ms Fazio moved: That paragraph 6.113 be amended by omitting the word 'belief' and inserting instead 'claims', and by inserting the words 'he thinks that' after 'the Premier that'.

Question put.

The Committee divided.

Ayes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Noes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Question resolved in the affirmative.

Dr Phelps moved: That paragraphs 6.114 and 6.115 and Recommendation 6 be omitted.

Question put.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Noes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the negative.

Mr Whan moved: That paragraph 6.114 be amended by inserting a new sentence after the first sentence of the paragraph to read:

‘The Committee notes that the Premier’s view of the impact on third-party campaigners is not supported by any of the submission authors or academic experts who gave evidence to the inquiry.’

Question put.

The Committee divided.

Ayes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.
Noes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Question resolved in the affirmative.

Mr Whan moved: That Recommendation 6 be amended by inserting after ‘an issues-based campaign’ the words ‘and providing that an issues-based campaign does not constitute electoral expenditure.’

Ayes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.
Noes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Question resolved in the affirmative.

Mr Primrose moved: That Chapter 6, as amended, be adopted.

Question put.

The Committee divided.

Ayes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.
Noes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Question resolved in the affirmative.

Chapter 7 read.

Mr Whan moved: That introductory paragraphs 2 and 3 be omitted and the following paragraph be inserted instead:

‘The Committee considers that, if the Bill was to be enacted without amendment there is a risk of a constitutional challenge being brought before the High Court. Amending the Bill as recommended by the Committee will not completely remove this risk however it may reduce the possibility of a successful challenge.’

Question put.

The Committee divided.

Ayes: Mr Borsak, Ms Fazio, Mr Primrose, Mr Whan.
Noes: Dr Kaye, Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Question resolved in the negative.

Mr Khan moved: That paragraph 7.2 be omitted.

Question put.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.
Noes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the negative.

Mr Khan moved: That paragraph 7.3 be omitted.

Question put.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.
Noes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the negative.

Mr Whan moved: That paragraph 7.19 be amended by omitting the first sentence.

Question put.

The Committee divided.

Ayes: Mr Borsak, Ms Fazio, Mr Primrose, Mr Whan.
Noes: Miss Gardiner, Dr Kaye, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Question resolved in the negative.

Mr Whan moved: That paragraph 7.34 be amended by inserting a new sentence at the end of the paragraph to read:

‘The Committee did however hear evidence from a number of constitutional experts which, while not entirely consistent, did make it clear that there was a strong chance of the Bill infringing on these freedoms.’

Question put.

The Committee divided.

Ayes: Mr Borsak, Ms Fazio, Mr Primrose, Mr Whan.
Noes: Miss Gardiner, Dr Kaye, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Question resolved in the negative.

Dr Phelps moved: That the paragraph 7.66 be omitted.

Question put.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.
Noes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the negative.

Miss Gardiner moved: That the paragraph 7.71 be omitted.

Question put.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Noes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the negative.

Mr Whan moved: That paragraph 7.79 be amended by omitting the first sentence, and by omitting the word 'However' from the second sentence.

Question put.

The Committee divided.

Ayes: Mr Borsak, Ms Fazio, Mr Primrose, Mr Whan.

Noes: Dr Kaye, Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Question resolved in the negative.

Mr Whan moved: That paragraph 7.80 be amended by inserting a sentence at the end of the paragraph to read:

'The Committee does note that evidence does indicate that such a challenge has at least some possibility of success and that on that basis there is a risk of constitutional challenge as specified in the terms of reference. The Committee notes that while this risk would not be eliminated by amendments it would be reduced.'

Question put.

The Committee divided.

Ayes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Noes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Question resolved in the affirmative.

Mr Khan moved: That paragraph 7.94 be omitted.

Question put.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Noes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the negative.

Dr Phelps: That paragraph 7.95 be amended by omitting the third sentence.

Question put.

The Committee divided.

Ayes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.
Noes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.

Question resolved in the negative.

Resolved, on the motion of Dr Phelps: That paragraphs 7.95 and 7.96 be omitted and inserted into a new concluding chapter entitled 'Chapter 8: Conclusion'.

Mr Whan moved: That Chapter 7, as amended, be adopted.

Question put.

The Committee divided.

Ayes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.
Noes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Question resolved in the affirmative.

Chapter 8 read.

Mr Primrose moved: That Chapter 8 be adopted.

Question put.

The Committee divided.

Ayes: Mr Borsak, Dr Kaye, Ms Fazio, Mr Primrose, Mr Whan.
Noes: Miss Gardiner, Mr Khan, Mrs Maclaren-Jones, Dr Phelps.

Question resolved in the affirmative.

Resolved, on the motion of Ms Fazio: That the draft report, as amended, be the report of the Committee and that the Committee present the report to the House, together with transcripts of evidence, submissions, tabled documents, answers to questions on notice and supplementary questions, minutes of proceedings and correspondence relating to the inquiry.

Resolved, on the motion of Ms Fazio: That dissenting statements be submitted to the Secretariat by 4 pm Tuesday 14 February 2012.

Resolved, on the motion of Mrs Maclaren-Jones: That the Committee thank the minute-takers for their assistance during the deliberative meeting.

Resolved, on the motion of Mr Khan: That the Committee commend the Secretariat for their assistance in the conduct of the inquiry.

6. Adjournment

The Committee adjourned at 3.40 pm, *sine die*.

Rachel Simpson
Clerk to the Committee

Appendix 7 Dissenting Statements

BY HON STEVE WHAN MLC

Labor members of the Committee agree that openness and transparency is a key aim of electoral funding legislation. It is also a key objective that electoral funding laws do not have the impact of treating any one participant in the electoral process, be that a Party, organisation or individual, unfairly.

Clearly on this basis the Government's legislation fails.

Evidence to the Committee shows clearly that this legislation in the form introduced by the Government would have an unfair impact on the ability of peak bodies to participate in the democratic process, it would restrict freedom of political association by unions and other democratic representative bodies and its aggregation provisions would result in bizarre penalties for Labor candidates and campaigns.

The situation for peak groups – described by a Liberal Committee member as “the peak group problem” – has been shown to be completely unfair. The presumably unintentional impact of this legislation would be that a peak body would be unable to collect contributions from its constituent bodies to run a campaign, but a company or a wealthy individual could run a campaign.

It was clear from the evidence to the Committee that the Premier did not understand the impact his own legislation had in this case. At one stage in his evidence he claimed the legislation banned third party campaigns altogether, which it clearly does not. In another he claimed peak bodies would not be disadvantaged because issues based campaigns are not affected, evidence contradicted by all the experts who gave an opinion.

The evidence shows that this legislation would target deliberately and directly the structure of the Australian Labor Party and would negatively impact on new entrants and smaller parties. The Labor Members of the Committee believe existing parties represented in the Parliament the Shooters and Fishers and Christian Democrats would be very negatively affected by this legislation. It is interesting to note that if the legislation was mirrored at a Federal level it would also remove a large part of the Australian Greens' fundraising.

In targeting the Labor Party's traditional structure it is the opinion of the Labor Members of the Committee that the Premier is quite simply engaging in a vindictive attempt to damage the capacity of other parties to oppose his Government. The Premier's position on this is not even consistent with his pre-election position as put forward in a previous Liberal Party submission which endorsed the retention of affiliation fees for non-campaign purposes.

The Committee Report has highlighted a number of key issues of equity and this dissenting report agrees with most of the recommendations. It highlights some differences with the discussion of the issues and differences in emphasis on some issues.

Committee Report Chapter 4 – Aggregation of Political Expenditure

It was clear from evidence provided and quoted in the Committee Report that the model proposed for aggregation of political expenditure by the Government was deeply flawed in several respects. The

Labor Members believe that Chapter 4 of the Committee Report highlights those issues and Recommendation 1 is supported.

Committee Report Chapter 5 - Prohibition on political donations other than by individuals

When considering the evidence provided to this enquiry it would be fair to say that there was really only one witness who felt that the Government had its proposed legislation in this area right. That was the Premier. All other witnesses whether they represented groups or legal experts pointed to issues with the proposal.

There was general agreement about the banning of corporate donations however the same could not be said for the impact on not for profit groups.

Labor Members do not agree with Recommendation 2 of the Committee Report. We are concerned about banning not for profit organisations from making electoral donations. We recommend the legislation be amended to ensure these groups are able to continue to participate in the democratic process.

New Recommendation 2

The Committee is concerned about banning not for profit organisations from making electoral donations. The Committee believes the legislation should be amended to ensure these groups are able to continue to participate in the democratic process. In addition the changes advocated in Recommendations 3 and 4 should be implemented.

BY HON AMANDA FAZIO MLC**Committee Report Chapter 5 - Affiliation Fees**

The Government has proposed a measure that would ban affiliation fees to political parties. In practice this only affects the Australian Labor Party, whose structure for most of its 120 years of existence has included unions affiliating and paying an affiliation fee.

The ban on affiliation fees raises problems from several perspectives.

The proposed ban is justified by the Government as levelling the playing field when it comes to political campaigning. In fact under laws introduced by the previous Labor Government, affiliation fees can only be used for administrative purposes. They are not able to be used for campaigning and this expenditure is fully accounted for in annual returns.

Election funding returns should already detail the staffing costs of a campaign. Of the major parties Labor and the Nationals both declared full costs of staffing in their last campaign – the Liberal Party however failed to do so and while a response from the EFA has still not been sighted it does appear they should be obliged to do so.

Given affiliation fees are not part of the election campaign funding equation the key philosophical question is should the Parliament force one party to fundamentally change its structure?

While many people within the Labor Party are talking about internal change, from a point of view of democratic process it would seem quite outrageous if fundamental change to the structure of the Labor Party was forced by Labor's political opponents in a Coalition Government.

Prior to the election of the O'Farrell Government the Liberal Party essentially agreed with this position stating in its submission to a previous election funding enquiry *“our approach is to respect the different traditions of our parties and allow affiliation fees to be retained for non-campaign purposes”*

At the time this submission was lodged the now Premier endorsed the content of his Party's submission.

Mr Christopher Maltby, Registered Officer for the Greens NSW, said in his evidence to the Committee

“It does not seem to me that a bill which on the face of it—as has been identified by other submissions—is primarily targeted at the structure of the Labor Party is an appropriate thing for the Parliament to be undertaking at this point. Whether the Labor Party wants to amend its structure is a matter for the Labor Party. I think it should not be forced on it by a particular Parliament or a funding regime.

We do have a view about the size of affiliation fees. I think they are overly generous in the current environment but the fact that they are quarantined for administrative purposes is a good feature of the current arrangement. They are not an under the cover way to expand the war chest of the Australian Labor Party in campaigning in elections. So that is a good thing for the perceived fairness of the political process in this State. “

Constitutional experts also question both the justification for and constitutionality of a ban on affiliation fees.

In his submission to this enquiry Associate Professor Joo-Cheong Tham from the Melbourne Law School recommends the rejection of Section 96D.

What he says also supports the view that it is not up to others including regulators to dictate the structure of the Labor Party and goes on to deal in detail with the measure being an “unjustified limitation on Freedom of Political Association”.

Associate Professor Tham stated:

“Is there a compelling justification for such a severe incursion into the freedom of the ALP to organise itself as it sees fit? It is exceedingly difficult to see one. There is firstly, the prima facie legitimacy of membership fees – they are payments made as a condition for participating within political parties Absent an adequate rationale for limiting freedom of party association, it is hard to escape the conclusion that such a ban represents an unjustified limitation on freedom of party association.” (p 30)

In supporting this conclusion the submission provides thorough analysis of the Premier’s justification for the ban and also the structural differences that make it clear that this is a measure directed at the ALP.

It would be fair to say that all submissions from Trade Unions agreed with the view above, unions whether affiliated or not felt that as democratic organisations it was their right to decide if they wished to affiliate with a political party and not up to the Parliament to dictate to them. In several cases union witnesses pointed to the proposed ban as a direct attack on their ability to represent their members by taking part in ALP policy making.

Recommendation 9 of the NSW Select Committee on Electoral and Political Funding from 2008 also agreed with this position stating “*Similarly, the committee believes that trade union affiliation fees should be permissible, despite the proposed ban on union donations. To ban union affiliation fees would be to place unreasonable restrictions on party structures.*”

BY HON PETER PRIMROSE MLC**Committee Report Chapter 5 - Affiliation Fees**

Association Professor Graeme Orr from the University of Queensland also believes that a complete ban on affiliation fees would be problematic. He says on page 2 of his submission on behalf of the Democratic Audit of Australia:

“From a constitutional viewpoint, mere donations – especially large scale ones – are not in themselves acts of political communication. But smaller contributions in the form of a reasonable membership fee, set to cover the administrative costs of a membership-based organisation, are intimately tied to the freedom of political association. As a moral principle such membership fees ought not be banned, and as a matter of constitutional law probably cannot be.

The Bill should be amended to permit organisational membership fees at a reasonable level to cover the administrative cost of servicing members. “

In essence Professor Orr holds that a full ban would be likely to infringe on freedom of political association along with Professor Tham. Professor Orr however introduces the prospect of a restriction on the size of affiliation fees being reasonable and suggests basing those on the administrative costs association with the memberships.

While Labor Members believe affiliation fees should remain as they are given all the evidence provided above and also the fact that they can only be used for administrative purposes, we agreed with the majority report recommendation that the fees be capped at a level "equal or not greater than" the administrative costs of the affiliation.

Labor Members of the Committee have concerns about the final part of Recommendation 3 which requires that 'the consent of their members to do so has been obtained.'

Evidence to the Committee from affiliated and non affiliated unions was consistent in pointing out that they have democratic structures and they should be able to make affiliation decisions and be accountable to their members in the normal way. The Labor Members oppose any move away from the ability of an affiliated body to democratically control its own decisions.

Committee Report Chapter 6 – Third Party Campaigners

It is clear from all the evidence to this Committee that an unintended consequence of this legislation would be to prevent peak bodies from collecting contributions from their constituent or member groups to conduct any campaign that fell within the broad definition of a political campaign in the existing act. Labor Members support the Committee's recommendations in this chapter.

Committee Report Chapter 7 – Constitutional Issues

The Committee term of reference 1(h) asked for an assessment of the “risks of a successful constitutional challenge”.

While the Labor members accept that the Committee cannot prejudge what might happen if the High Court was to consider this legislation we do believe that the very strong weight of evidence indicates that if this legislation was passed unamended there would be a very strong ‘risk of a successful constitutional challenge’.

In reaching this conclusion we disagree with those parts of the Committee Comment in this Chapter that fail to adequately highlight this risk.

The evidence supporting our conclusion is largely included in the Committee Report.

In this and previous inquiries legal evidence has largely involved discussion of the “Lange” test. As outlined in the Committee Report at paragraph 7.45 this has two limbs: first does the section effectively burden the freedom of political communication; and secondly, if yes, is it reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the system of representative and responsible government?

Witnesses before this Committee who dealt with this aspect of the legislation generally agreed that the answer to the first limb of the test was yes. The debate then rests around what the High Court, if it were to deal with this legislation, might define to meet the second test.

Labor Members find the views expressed by Dr Tham, Dr Stewart and Dr Orr extremely persuasive. These views are quoted in the Committee Report at paragraphs 7.49, 7.54, 7.55, 7.65, 7.67, 7.73, 7.76, 7.77 & 7.78. These opinions make it clear that there would be a significant danger of a successful challenge should this legislation proceed unamended.

This Dissenting Report concludes that this risk could be significantly reduced by adopting the recommendations put forward in this report which would result in a more reasonable definition of aggregated expenditure, ‘reasonable’ caps on affiliation fees (being a level which reflects the administrative cost of the affiliation) and the removal of the inequity the Government wishes to create for peak bodies.

BY HON JENNY GARDINER MLC, HON TREVOR KHAN MLC AND HON NATASHA MACLAREN-JONES MLC AND HON DR PETER PHELPS MLC

The Liberal and National members of the Select Committee partially agree to Recommendation 2 and dissent to Recommendations 1, 3, 4, 5 and 6.

All the Recommendations, as written, introduce unnecessary levels of complexity and provide loopholes for the deliberate circumvention of the intent of this Bill, namely to create a fair electoral system that requires donations of a political nature to be limited to individuals on the electoral roll. As previous Liberal Party submissions on this matter have argued:

There is a strong philosophical argument that, in a democracy, only those who have the right to participate as voting citizens should be able to influence elections with their political donations.

It is worth noting that the moves toward a reform of the system of political donations in NSW, and indeed at the Commonwealth level, arose from a prolonged period of perceived and actual corruption under the previous NSW Labor Government. The 2010 'reforms' introduced by Labor were selective and deliberately quarantined their own Party from a culture of accountability over 'big money' influence.

It should never be forgotten that the current Bill is about stopping, once and for all, the perceived influence of 'big money' on the political process in NSW – irrespective of whether that 'big money' and the influence which it delivers comes from businesses, non-government organisations (NGO's) or trade unions.

Recommendation 1

This Recommendation rests on the improbable basis that an organisation which was affiliated to a particular political party would deliberately work against the interests of that party during the set election period. This is a nonsense. If an affiliated body felt so aggrieved it would be much more likely to disaffiliate from that Party.

It is worth noting comments by Mr David Shoebridge – who is now a Greens MLC, but at the time of his submission was the Convenor of the NSW Greens – when he stated:

If electoral expenditure restrictions are to be effective they must also apply to associated entities of political parties as well as third parties. Expenditure by associated entities of political parties must for these purposes **be treated as expenditure by the political party itself**. (emphasis added)

The Liberal and National members of the Committee concur with this view and note that this view is entirely consistent with the Bill as presented.

Recommendation 2

The Liberal and National members of the Committee concur with that part of Recommendation 2 which reads: "That Schedule 1[2] of the Election Funding, Expenditure and Disclosures Bill 2011 amending section 96D of the *Election Funding, Expenditure and Disclosures Act 1981* to prohibit political donations other than by individuals on the electoral roll be agreed to", but dissent from the remainder of the Recommendation for the reasons given below.

Recommendation 3

This Recommendation unnecessarily complicates the Bill, which is predicated on the idea that donor income received by a political party should only be from individuals on the roll, not from businesses or other organisations.

The Recommendation also creates an obvious loop-hole whereby a donor organisation could circumvent the donation restrictions by paying inflated 'affiliation fees', which are little more than donations in another guise. The argument that such fees may only be used for administration belies the obvious and inherent fungibility of money – an 'affiliation fee' frees up donations for campaigning purposes, which would otherwise be used for Party administration.

Moreover, the concepts of the 'reasonableness' of the affiliation fees and the attribution of the quantum of 'administration costs' necessary to service the affiliation are so opaque as to warrant ridicule.

Recommendation 4

The Recommendation also unnecessarily complicates the Bill and allows for yet more loop-holes and the development of US-style Political Action Committees (PACs).

If this Recommendation were to be enacted, it would reduce the level of transparency by allowing individuals or organisations to covertly donate to one organisation in the knowledge that such monies could then be on-forwarded to another organisation and the original donor would remain hidden.

Moreover, it would lead to the advent of what one academic has described as 'smurfing' – the proliferation of like-minded front organisations which run overtly or covertly coordinated campaigns, and which are deliberately designed to allow donors to circumvent individual political donations caps.

Recommendation 5

This Recommendation is unnecessary, given that there is a comprehensive plain-English guide to the obligations placed upon third-party campaigners available online at:

http://efa.nsw.gov.au/__data/assets/pdf_file/0004/84748/Funding_and_Disclosure_Guide_Third-party_Campaigners_Nov_11.pdf

Moreover, the Liberal and National members remain gravely concerned that attempts to do 'special deals' to accommodate third-party campaigners will merely relocate the problem of 'big money' activism and influence from political parties to a proliferation of US-style PACs.

Recommendation 6

This Recommendation is unnecessary given the definition of 'electoral expenditure' has been in both the State and Federal Electoral Acts for many years, as is well understood by the participants in the political process.

The complaints about the definition appear to be based on the view of some NGOs and unions that they should have the right to engage in partisan political activity during an election period, yet not be subject to the same limitations that are imposed upon registered political parties. This is not a position acceptable to us.

Conclusion

The Liberal and National members on the Committee remain unconvinced of the need to make any amendments to the Bill. The Bill represents the most significant reform to the electoral funding system in more than 30 years, but it is not radical within the broader Westminster systems of government. In fact, Australia finds itself well behind New Zealand, Britain, Canada and even the USA in the implementation of such reforms. In each of these countries, the changes have been welcomed as significant anti-corruption measures and have withstood challenges to their constitutionality. It is a credit to the current NSW Government that they have taken the lead in introducing measures which will go a long way towards bringing back honesty and accountability to the political process in NSW.