

**Submission
No 6**

**THE FINAL REPORT OF THE EXPERT PANEL –
POLITICAL DONATIONS AND THE GOVERNMENT’S
RESPONSE**

Organisation: Unions NSW
Name: Ms Kate Minter
Position: Research Officer
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Unions NSW Submission

Electoral Matter Committee

Inquiry into Political Donations – Final Report

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Unions NSW
Trades Hall
Level 3, 4 Goulburn Street
Sydney
T: 02 9881 5999
F: 02 9261 3505

Introduction

1. Unions NSW is the peak body for trade unions and union members in NSW and has been fighting for the rights of working people in Australia since 1871. It has over 65 affiliated unions and Trades and Labour Councils representing approximately 600,000 workers across the State. Affiliated unions cover the spectrum of the workforce in both the public and private sectors. Unions NSW is a not-for-profit organisation funded by its affiliates.
2. One of the objectives of Unions NSW is to represent and advance the interests of working people in NSW. The majority of this work takes place at the workplace level and through the industrial relations systems. However, the interests of workers are also inextricably linked to the Government of the day and their legislative and policy agenda.
3. Unions NSW and our affiliates take an active role in political debates and election campaigning for the purpose of representing and progressing the interests of working people. Our affiliates and their members are cognisant that few individuals have the financial, social or political capital to affect change on their own. This is why unions and their members have historically pooled their resources to run campaigns collectively.
4. Ostensibly unions engage directly in the political process by campaigning during election periods. Elections provide a pivotal point in the electoral cycle when candidates are most directly accountable to electors. It is also at this time when union members as constituents are able to actively engage in the political process and to collectively prosecute issues which directly affect their social and economic wellbeing. Unions NSW and our affiliated unions have a long history of electoral campaigning at both a state and federal level.
5. At the 2015 State Election, Unions NSW was a registered third party campaigner and ran a campaign which was jointly funded by Unions NSW and a number of its affiliated unions. Unions NSW is not affiliated to the NSW Labor Party, or any other political party.
6. New South Wales has one of the most effective and stringent regulatory frameworks in regards to political donations. Since its inception in 1981 the *Election Funding, Expenditure and Disclosures Act* has been regularly amended making the Act unwieldy and difficult to navigate for those it seeks to regulate. As stated in previous inquiries, Unions NSW supports

the redrafting and simplification of the Act. However, Unions NSW is concerned the review of the Act may lead to limitations being placed on the rights of unions and their members as third party campaigners to actively participate in electoral campaigns and the democratic process.

Attack on third party campaigners

7. Third party campaigners, including unions, are member based organisation which work to educate and mobilise large number of activists and members to take part in political activities during election periods. Unions NSW believes the success of these campaigns was the prime driver behind the Federal Government’s most recent Inquiry conducted by the Joint Select Committee on Electoral Matter into Campaigning at Polling Places which reviewed the Federal electoral act. Unions NSW would be concerned if one of the basis of this inquiry by the NSW Coalition Government was to seek to restrict the role of third party campaigners in election campaigns.
8. The 2012 amendments to the *Election Funding, Expenditure and Disclosures Act 1981 (NSW) (EFED Act)* restricted the implied freedom of political communication of third party campaigners. The Act prohibited persons or entities which are not enrolled on the NSW electoral roll from making political donations to political groups, parties, candidates, members and third party campaigners. Section 96D of the EFED Act also made it clear that affiliation fees paid by a union to the political parties with which it is affiliated is a donation and therefore unlawful. The amendments also sought to aggregate in section 95G(6) the ‘electoral communication expenditure’ incurred by a political party with that incurred by an affiliated organisation of that political party.
9. The 2012 amendments to the EFED Act were effectively an attack on the rights of collectivised workers to participate in political campaigns. Unions NSW successfully challenged the legislation in the High Court on the grounds it breached the implied freedom of political communication contained in the *Australian Constitution*¹. In light of the High Court Case the NSW Government was required to amend the EFED Act to remove section 96D and 95G(6).

¹ Unions NSW v NSW [2013] HCA 58

10. In October 2014 the Coalition Government attempted to make amendments to the Act which would have restricted the spending of third party campaigners in election periods to \$250,000. These amendments did not gain support from the NSW Legislative Council, and are perhaps indicative of the fact the Coalition Government were not able to mount a credible argument in favour of implementing such spending caps. Unions NSW saw this proposed amendment as part of a series of attempts from the Coalition Government to constrain the implied freedoms of political expression of third party campaigners.

Panel of Experts - Recommendation 4. a)

That the government not pursue a total ban on political donations on the grounds that it is not in the public interest, not feasible in practice, and not likely to survive constitutional challenge.

11. Unions NSW supports this recommendation and urges the Government to not pursue a total ban on political donations. This recommendation is important in ensuring freedom of political expression for electors and third party campaigners is maintained.

Panel of Experts - Recommendation 30

That a) specific provision be introduced regulating ‘associated entities’ (being entities that are controlled by a political party or that operate solely for the benefit of a political party; and b) that disclosure obligations of associated entities be the same as those of political parties.

12. Unions NSW does not oppose recommendation 30. However, the term ‘associated entities’ must be clearly defined in a way that does not limit the political participation of third party campaigners. This is crucial in upholding third party campaigners’ freedom to political communication. Unions NSW believes the parameters defined in recommendation 30 go some way to ensuring third party campaigners, such as unions, are not considered to be the ‘associated entities’ of political parties. Unions NSW requests the NSW Government seriously consider the precise definition they place on the term ‘associated entities’ to ensure the High Court Decision in *Unions NSW & Ors V State of New South Wales* is upheld.

Panel of Experts - Recommendation 31

That the cap on electoral expenditure by third-party campaigners be decreased to \$500,000 and adjusted annually for inflation, rounded up to the nearest whole number multiple of \$100.

13. Unions NSW opposes the recommendation to decrease the cap on electoral expenditure by third party campaigners to \$500,000. Unions NSW believes third party campaigners play a crucial role in the political and electoral process. This significant reduction in the spending of

third party campaigners is a direct attack on their ability to campaign and/or participate in any meaningful way during a State election and reduces their implied freedom of political communication. Unions NSW does not believe there is a sufficient argument to warrant a change to the current cap.

Election Expenditure Reporting

14. Amendments to the *Election Funding, Expenditure and Disclosures Act* in 2014 introduced rigorous reporting of all electoral communication expenditure and the setting up of a specific 'campaign account' with the third party campaigners' bank. These requirements placed a significant administrative and cost burden on Unions NSW and other third party campaigners during the 2015 State Election.

15. In order to comply with the new reporting requirements for electoral expenditure, Unions NSW implemented new internal systems for the classification and reporting of election expenditure, including enlisting the services of accounts consultants to aid in the setting up of new internal procedures. Unions NSW also sought legal advice to ensure compliance with the legislation. It is estimated the increased regulatory reporting requirements of electoral expenditure cost Unions NSW \$70,000 in external advice. Further, the requirement of expenditure to be individually classified, reported and reformatted for the NSW Electoral Commission has significantly increased the administrative burden on existing Unions NSW staff.

Panel of Experts - Recommendation 18

That the model for calculating entitlements from the Administration Fund which operated immediately prior to the 2014 amendments to the Act be reinstated.
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16. Unions NSW believes the current reporting requirements place a significant and excessive administrative burden on third party campaigners. Unions NSW believes additional administrative funding should be supplied to political parties and third party campaigners to assist with the stringent reporting requirements or alternatively to streamline the administrative requirements outside normal auditing requirements.

Panel of Experts - Recommendation 37

That a) the current requirements for double auditing of disclosures of political donations and electoral expenditure and claims for payment of public funding be removed; and b) the NSW Auditor-General be responsible for the auditing of the disclosures and claims for all political parties that receive public funding for administrative expenditure.

17. Unions NSW supports the removal of the requirement for double auditing of disclosure of electoral expenditure and notes this will go some way towards reducing the administrative and cost burden placed on third party campaigners and political parties.

Disclosure of donations

18. The objective of transparency in the current disclosure requirements is undermined by the fact disclosures are not known until after the electorate has voted. Voters have a right to have information available on the donations received by parties, candidates and third party campaigners well before they vote. There is a need for a transparent real time reporting process in NSW which would be far more powerful mechanism for identifying conflicts of interest than many of the other measures outline in the recommendations.

Panel of Experts - Recommendation 23 24 and 25

That the NSW Electoral Commission replace paper based disclosures with an online disclosure system as soon as possible.

That the NSW Electoral Commission supplements disclosures with explanatory material and analysis to inform the public about the sources and amounts of political donations.

That online, real-time disclosure of political donations of \$1,000 or more be introduced for the six-month period before the election.

19. Unions NSW supports the recommendation calling for an online centralised disclosure system for donations to political parties, candidates and third party campaigners and for real-time disclosure in the six month period before an election.
20. In order to ensure voters have all information about political donations available to them at the time of the election, a 'black out' period on donations should be introduced both directly before and after a general election or by-election. This would ensure donation disclosure at the time of the election was up-to-date and accurately identified who financed the parties or third party campaigners.

Full Public Funding

21. As argued in our submission to the Panel of Experts, Unions NSW does not believe a system of full public funding is either in the public interest nor feasible, and is arguably unconstitutional. Political parties should retain independence from the state and not become reliant solely on public funding, the arrangements for which can be changed by successive government.
22. Unions NSW believes the level of public funding currently available to political parties is appropriate. Public funding should not be extended beyond the per-vote funding currently available to political parties.
23. However, if a model of full public funding for election campaigns was adopted, it should provide public funds to registered third party campaigners. This would also ensure plurality of voices in public discourse during an election campaign. However, it is unlikely such a proposal would be acceptable to the public, and is therefore another reason why full public funding model is unfeasible.