

**Submission**

**No 10**

# **Review of the Parliamentary Electorates and Elections Act 1912 and the Election Funding, Expenditure and Disclosures Act 1981**

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# **Joint Standing Committee on Electoral Matters**

## **Review of the *Election Funding, Expenditure and Disclosures Act 1981 (NSW)***

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### **Submission by NSW Labor**

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## Executive Summary

NSW Labor supports efforts to improve transparency and public confidence in the political process by reforming campaign finance legislation in NSW.

That is why in 1981, under Labor Premier Neville Wran, the NSW Parliament became the first Australian jurisdiction to introduce a public funding scheme for election campaigns, and require political parties and candidates to disclose donations.

And that is why in 2008, 2009 and 2010, NSW Labor Governments further reformed campaign finance legislation to require more disclosure and place limits on donations and expenditure.

However, NSW Labor believes that the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) ('the Act') as amended by the *Election Funding, Expenditure and Disclosures Amendment Act 2011* (NSW) ('the Amending Act') unreasonably restricts political participation in NSW.

**Recommendation 1:** Amend section 96D of the Act to permit political donations by non-profit organisations, but otherwise restrict political donations to individuals on the electoral roll.

**Recommendation 2:** Amend section 96D (4) of the Act to expressly permit organisations to financially affiliate with a political party.

**Recommendation 3:** Omit sections 95G (6) and (7) of the Act.

## 1. Restriction of political donations to individuals on electoral roll

The Amending Act replaced section 96D of the Act as follows:

### **96D Prohibition on political donations other than by individuals on the electoral roll**

- (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.
- (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.
- (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.
- (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 political donations to the party) are subject to this section. Accordingly, payment of any such subscription by an industrial organisation or other entity is unlawful under this section.
- (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.

In his Agreement in Principle speech in the Legislative Assembly, Premier O'Farrell argued that the prohibition of political donations by any entity other than an individual on the electoral roll was necessary to remove the "risk, reality and perception of corruption and undue influence".<sup>1</sup> In a more positive sense, the regulation of political donations can, when carefully constructed, improve transparency and public confidence in the political process.

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<sup>1</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 September 2011, 5432 (Barry O'Farrell, Premier).

NSW Labor supports electoral reform where it is appropriately adapted to achieving these goals. However, NSW Labor believes that the Act as it currently stands unreasonably restricts participation in the political process. This is best illustrated with reference to the following examples.

**Example: Unions NSW ‘Better Services for a Better State’ campaign**

In the lead up to the 2011 NSW Election, public sector workers pooled their resources to advocate for better services in NSW through the ‘Better Services for a Better State’ campaign. The campaign was co-ordinated by Unions NSW, and financed using contributions from union affiliates of Unions NSW. Under the Act as it currently stands, these contributions would be prohibited because they were not made by an individual on the electoral roll. Unions NSW would therefore be unable to finance a ‘Better Services’ style campaign using contributions from its member unions.

**Example: Clubs ‘Won’t work Will hurt’ campaign**

Clubs NSW has participated in Clubs Australia’s ‘Won’t work Will hurt’ campaign opposing the Federal Government’s proposed laws to deal with problem gambling. Clubs NSW represents almost 1,400 member clubs across NSW.<sup>2</sup> Under the Act as it currently stands, contributions to Clubs NSW from its member clubs for incurring electoral expenditure would be prohibited because they are not made by an individual on the electoral roll. Clubs NSW would therefore be unable to finance a ‘Won’t work Will hurt’ style campaign for a NSW election using contributions from its member clubs.

The unions and clubs discussed in these examples are non-profit community organisations that provide a voice in the political process for many individuals on the electoral roll. The Act unreasonably restricts their ability to participate in the political process.

Corporate donations may create a risk or perception of undue influence because they influence decision making by public officeholders in informal ways, and are made by entities whose ultimate purpose is to make a financial profit. In contrast, 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

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<sup>2</sup> Clubs NSW, *About Clubs NSW* (11 January 2012) <[http://www.clubsnsw.com.au/About\\_Us1.aspx](http://www.clubsnsw.com.au/About_Us1.aspx)>

process, because as individuals they do not have the resources to make their voice heard.

Non-profit organisations should therefore be permitted to fully participate in the political process by pooling resources from individuals on the electoral roll and either donating to political parties and candidates, or undertaking their own advocacy as a third party campaigner.

### **Recommendation 1**

Amend section 96D of the Act to permit political donations by non-profit organisations, but otherwise restrict political donations to individuals on the electoral roll.

## 2. Prohibition of union affiliation to political parties

The Act as it stood before it was amended by the Amending Act already prohibited affiliation fees from being used for campaigning by the operation of sections 96 (3), 96 (4) and 96 (6)(a) of the Act. It cannot therefore be argued that NSW Labor derives an unfair advantage in financing election campaigns from the financial affiliation of unions, because these funds cannot be used to incur electoral expenditure.

Section 96 (4) of the Act requires political parties to maintain a separate state campaign account. Section 96 (3) makes it unlawful for a political party to make payments for electoral expenditure from any account other than its separate state campaign account. Section 96 (6)(a) prohibits a political party from paying affiliation fees into its separate state campaign account. In this way, the Act prohibits affiliation fees from being used to incur electoral expenditure.

Under section 96I of the Act, using affiliation fees to incur electoral expenditure carries a maximum penalty of 200 penalty units in the case of a party. This is the same as the maximum penalty for breaching a donation or expenditure cap under the Act.

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. Under sections 110 and 110A of the Act, the NSW Election Funding Authority is empowered to inspect records and require provision of documents and information for the purpose of ascertaining whether the Act has been contravened and enforcing the Act. This is the same as the process for monitoring compliance with the donation and expenditure caps under the Act. The 'leakage' argument therefore does not justify prohibiting organisations from financially affiliating with a political party.

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. For example, it could be argued that public funding frees up other funds to pay for electoral expenditure. The 'substitution' argument does not justify removing public funding, which helps to improve public confidence in the integrity of political decision-making by reducing reliance on private donations. Similarly, the 'substitution' argument does not justify prohibiting organisations from financially affiliating with a political party, as they should have the right to participate in the political process by financially affiliating with a political party if they so choose.

The Amending Act made it clear that the restriction of political donations to individuals on the electoral roll would prohibit unions from financially affiliating to political parties by inserting a new section 96D (4) as follows:

- (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 political donations to the party) are subject to this section. Accordingly, payment of any such subscription by an industrial organisation or other entity is unlawful under this section.

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 Amending Act seeks to prohibit NSW Labor from continuing to operate in this way. The Amending Act effectively prevents individuals in NSW from participating in the political process in ways that might make them more effective in opposing the Government. 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 Amending Act also interferes with unions' internal decision making and restricts 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.

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. Both individual members and union affiliates participate in NSW Labor conferences and meetings, receive publications, emails and text messages, use the party's website, and seek support from paid staff employed by the party. Membership fees for individuals and affiliation fees for unions are required to pay for these expenses.

Campaign finance expert Joo Cheong Tham has explained in detail why unions' financial affiliation to political parties is different from corporate donations to political parties both in theory and in practice:



Membership subscriptions to political parties, whether by individuals or groups such as trade unions, need to be accompanied by an open declaration that the member supports the party's constitution, policies and principles. With corporate contributions, on the other hand, such support is not required.

Greater transparency also results from the mode of influence being formalised: party meetings governed by party rules are meant to be the primary mechanisms through which members influence policies. Corporate money, however, tends to work its influence in much more informal ways ...

The upshot is that corporate contributions and trade union affiliation fees have different degrees of legitimacy in protecting the integrity of government.

Integrity is undermined when holders of public office give an undue weight to the interests of their financiers, rather than deciding matters in the public interest. Corruption occurs when corporate financiers are able to wield covert influence over public officials simply by virtue of the money they have contributed.

The influence of trade unions that comes with their affiliation fees is exercised as members of the ALP, which by its very "publicness" is more transparent. It is in connection with a process of public deliberation and advocacy that affiliation fees are paid.

There is something terribly odd about characterising such a situation as giving rise to undue influence when it is the meaning of "public interest" that is being articulated and debated.<sup>3</sup>

Unions are also subject to far stricter regulation of their internal democracy under industrial legislation than corporations or other organisations.

The Report of the Select Committee on Electoral and Political Party Funding in 2008, despite being drafted by a six member committee with only two Labor members, unanimously recommended that union affiliation fees be permitted, and be exempt from donation caps. In particular, the Report stated that:

... the Committee believes that trade union affiliation fees should be permissible ... To ban union affiliation fees would be to place unreasonable restrictions on party structures.<sup>4</sup>

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<sup>3</sup> Joo Cheong Tham, 'Union Fees to the ALP are a special case', *The Age* (Melbourne), 15 January 2010 <<http://www.theage.com.au/opinion/politics/union-fees-to-the-alp-are-a-special-case-20100114-ma0h.html#ixzz1gecBXiDy>>.

<sup>4</sup> Legislative Council Select Committee on Electoral and Political Party Funding, NSW Parliament, *Electoral and Political Party Funding in New South Wales* (2008), 113.

The Amending Act not only prevents unions from financially affiliating with NSW Labor, but prevents *any* organisation from financially affiliating with *any* political party. This is an unreasonable restriction on political participation in NSW.

### **Recommendation 2**

Amend section 96D (4) of the Act to expressly permit organisations to financially affiliate with a political party.

### 3. Aggregation of expenditure by parties and affiliated organisations

Under the Act as it stood before it was amended by the Amending Act, electoral communication expenditure incurred by an organisation affiliated to a political party was subject to a separate cap to that of the political party.

In arguing in favour of aggregating electoral communication expenditure incurred by parties and their affiliated organisations, Premier O'Farrell has repeatedly made reference to a "\$23 million war chest" allegedly available to NSW Labor courtesy of its affiliated unions.<sup>5</sup>

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.

The Amending Act inserted additional subsections in section 95G of the Act as follows:

(6) **Aggregation of expenditure of parties and affiliated organisations**

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.

- (7) In subsection (6), 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).

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<sup>5</sup> Sean Nicholls, 'Labor to lose out in elections funds change', *Sydney Morning Herald* (Sydney), 13 September 2011 <<http://www.smh.com.au/nsw/nsw-labor-to-lose-out-in-election-funds-change-20110912-1k648.html>>.

Section 95G (6) counts electoral communication expenditure incurred by an organisation affiliated to a political party towards that party's expenditure for the purposes of the expenditure cap.

The Amending Act 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 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.

The aggregation of electoral communication expenditure incurred by parties and their affiliated organisations is particularly unreasonable where an affiliated organisation is campaigning against the party to which it is affiliated.

### **Example: ETU 'Stop the sell off' campaign**

From 2007 to 2010, the Electrical Trades Union campaigned against the NSW Labor Government on the issue of electricity privatisation. Under the Act as amended by the Amending Act, expenditure on these campaigns in the capped period would be counted towards NSW Labor's expenditure cap because the ETU is affiliated to NSW Labor, even though the ETU was opposing NSW Labor on this issue.

The aggregation of expenditure therefore unfairly disadvantages NSW Labor by reducing its expenditure cap even where expenditure is incurred independently by affiliated organisations, and unreasonably restricts the ability of affiliated organisations to campaign independently on behalf of their members.

### **Recommendation 3**

Omit sections 95G (6) and (7) of the Act.