

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

Organisation: Unions NSW

Name: Mr Mark Lennon

Position: Secretary

Date Received: 13/06/2012



13 June 2012

Joint Standing Committee on Electoral Matters
Parliament House
Macquarie St
Sydney NSW 2000
Fax: (02) 9230 3309

Dear Committee,

Review of the Parliamentary Electorates and Elections Act 1912 and the Election Funding, Expenditure and Disclosures Act 1981 (Inquiry)

Unions NSW wishes to make a brief submission to the above Inquiry.

Introduction

Unions NSW is the peak body for unions in NSW. It has 64 affiliated unions, 10 affiliated regional trades and labour councils and represents approximately 600 000 union members. It is governed by an elected executive who are assisted in the day-to-day operations of the organisation by a small team of officers and support staff.

Our union affiliates cover the spectrum of the workforce, stretching from workers in finance to footwear and construction to communications, and we are the largest member based organisation for workers in NSW.

As the voice of working people in NSW, Unions NSW regularly seeks to put forward views on issues important to union members in NSW to influence the public debate in the interests of working people and their families. In this sense, Unions NSW is an active “third party” campaigner, alongside many other community groups and advocacy organisations that promote social change, as well as business and corporate lobby groups. It is in this capacity that we make this submission.

February 2012 amendments to the EFE&D Act

In making a submission to this Inquiry we confine our contribution in detail to term of reference 4 (c):

*4) In its review of the EFE&D Act, the Committee is to consider the following matters:
(...)*

c) the operations and effectiveness of recent campaign finance reforms including the (...) Election Funding and Disclosures Amendment Act 2010.

In doing so we refer the Committee to our earlier submission (attached) of 11 January in which the basis of our objection to this most recent amendment is put forward in some detail. We reiterate the previous recommendations contained in this submission.

Recommendation 1:

That the February 2012 amendments to the EFE&D Act are undemocratic and partisan, and as such should be immediately repealed.

EFE&D Act – general comments

As a third party campaigner, Unions NSW also wishes to put a view in terms of compliance with the EFE&D Act, and some of the difficulties created by some of the subjective nature of the definitions in the Act are addresses in our earlier submission. Aside from this, it has been widely observed that the EFE&D Act 1981 has been the subject of numerous and arguably rushed amendments by this and previous governments, and as a result, has become an unwieldy and unnecessarily complex Act. It would hopefully be uncontroversial to recommend that, subject to our other recommendations, a set of principles in the current Act be identified and a comprehensive redraft and simplification be conducted. We would think this would get broad support from stakeholders from across the spectrum, including from the Authorities whose role it is to enforce and administer the provisions of the Act.

Recommendation 2:

That a comprehensive redraft of the EFE&D Act be conducted in in a fully transparent manner, with ample time for development, drafting and consultation, to ease compliance and to provide greater clarity for parties of their obligations.

Furthermore, for the purposes of the current Inquiry, and again with reference to our previous submission, Unions NSW contends that such a redraft would provide the opportunity (if regulation of third party campaigners is deemed necessary) to draft provisions relating to third party campaigners more appropriately in a separate section and remove such provisions designed for regulation of political parties and candidates which are neither relevant nor appropriate for third party campaigners.

Recommendation 3

That in conducting such a redraft, sections of the legislation applying to third party campaigners be untangled from that applying to parties and candidates and placed in a separate, stand-alone part of the Act.

Provisions of the Parliamentary Electorates and Elections Act 1912

In general terms, Unions NSW believes that an electoral system which facilitates the enfranchisement of a greater number of people results in better democracy. Conversely, overly punitive provisions in electoral law geared more towards the exclusion of individuals can be anti-democratic. The experience has been that fraudulent practices resulting in, for example, multiple voting, are extremely rare, and even in the rare instances they are alleged they are very insignificant in scale; certainly not nearly approaching the scale of the number

of people of voting age at each general election who do not cast a valid vote, for whatever reason. Any reform in this area should have the primary objective of increasing the numbers of people who exercise their democratic rights as citizens each election.

Recommendation 4:

While reserving comment on any specific proposals, in general Unions NSW supports measures aimed at simplifying the process of enrolment and voting aimed at maximising the meaningful participation in elections by the greatest possible number of citizens in NSW, subject to suitable safeguards to ensure the integrity of the conduct of elections. We recommend consideration of reforms aimed at achieving this.

I thank the committee for your consideration of these recommendations.

Yours sincerely,

Mark Lennon
Secretary

Summary of Recommendations

Recommendation 1:

That the February 2012 amendments to the EFE&D Act are undemocratic and partisan, and as such should be immediately repealed.

Recommendation 2:

That a comprehensive redraft of the EFE&D Act be conducted in a fully transparent manner, with ample time for development, drafting and consultation, to ease compliance and to provide greater clarity for parties of their obligations.

Recommendation 3

That in conducting such a redraft, sections of the legislation applying to third party campaigners be untangled from that applying to parties and candidates and placed in a separate, stand-alone part of the Act.

Recommendation 4:

While reserving comment on any specific proposals, in general Unions NSW supports measures aimed at simplifying the process of enrolment and voting aimed at maximising the meaningful participation in elections by the greatest possible number of citizens in NSW, subject to suitable safeguards to ensure the integrity of the conduct of elections. We recommend consideration of reforms aimed at achieving this.

Attachment:

Unions NSW Submission to Inquiry into the provisions of the Election Funding, Expenditure and Disclosures Bill, 11 January 2012.



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

**Submission by Unions NSW
11 January 2012**

Unions NSW
Trades Hall Building
Level 3, 4-10 Goulburn Street
Sydney NSW 2000
T: 02 9881 5999
F: 02 9261 3505

Contents

1. Introduction	3
Reforms to our system of funding elections	3
2. Regulation of “Third Party” campaigns – general	5
Current provisions in the Act applying to Third Party Campaigners	7
3. Effect of restrictions of donations to third party campaigners.....	11
Example: the Better Services for a Better State campaign	12
4. Aggregation of spending between parties and affiliated organisations.....	14
5. Implications of a scheme of individual donations – General Comments	16
6. Ban on ability of unions to financially affiliate to political parties	17
7. Constitutionality of the bill – general comments	20
8. Summary of recommendations.....	22

1. Introduction

Unions NSW welcomes the opportunity to make a submission to the *Inquiry into the Provisions of the Election Funding, Expenditure and Disclosures Bill 2011* ("The Inquiry").

Unions NSW is the peak body for unions in NSW. It has 64 affiliated unions, 10 affiliated regional trades and labour councils and represents approximately 600 000 union members. It is governed by an elected executive who are assisted in the day-to-day operations of the organisation by a small team of officers and support staff.

Our union affiliates cover the spectrum of the workforce, stretching from workers in finance to footwear and construction to communications, and we are the largest member based organisation for workers in NSW.

As the voice of working people in NSW, Unions NSW regularly seeks to put forward views on issues important to union members in NSW to influence the public debate in the interests of working people and their families. In this sense, Unions NSW is an active "third party" campaigner, alongside many other community groups and advocacy organisations that promote social change, as well as business and corporate lobby groups.

22 affiliates to Unions NSW are also affiliated to the Australian Labor Party, however the remaining 42 are not, nor is Unions NSW itself.

Reforms to our system of funding elections

Unions NSW support reform 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.

To this end Unions NSW has welcomed the inquiries that have occurred at both State and Federal level in recent years regarding the reform of our electoral law in order to maintain the confidence of the community in the system.

However, for union members it is important that any reforms continue to allow working people the right to exercise their collective political voice, either through their union acting as a "third party campaigner" around election time, or by affiliating with a political party.

The reforms proposed in addition to the amendments to electoral funding laws last year, in our view, puts that right at risk.

For instance as a consequence of the 2010 amendments to the Election Funding, Expenditure and Disclosures Act 1981 (*“the Act”*), there remains uncertainty and confusion amongst unions as to what may be regarded as electoral expenditure and electoral communication expenditure, as opposed to spending on industrial campaigns.

2. Regulation of “Third Party” campaigns – general

Unions NSW believes in the concept of maximising transparency and disclosure as a cornerstone of an approach to modern campaign financing regulation in which the public can have maximum confidence. As such, we have made every effort to comply with the spirit and letter of the existing disclosure requirements which commenced in 2011 and we are well aware the same can be said for our affiliates.

We wish to put to the committee, however, that provisions which leave doubt, confusion or disagreement over what should or should not be declared (or in the case of proposed amendments, what is counted towards an expenditure cap) create difficulties and cost which act as a disincentive for any organisation to engage in the public debate around issues at election time. Political parties are formed for the explicit purpose of running candidates for election to public office. For unions, campaigning on issues important to members around elections, while significant, is a very minor proportion of a unions operating budget the vast bulk of which is on industrial representation and workplace organising. It is also difficult to clearly distinguish between “everyday” campaigning on public issues and “election campaigning” that one would think would be intended to be captured for the purposes of political party campaign finance regulation.

The concept of “Third Party campaigner” is a very new one in NSW electoral law, introduced in the Keneally Government’s amendments to the Act which commenced on 1 January 2011.

Advocates for the regulation of third party campaigns argue that if limits on both the “supply” and “demand” side of campaign finance (donations and expenditure) are introduced, then the absence of equivalent regulations applying to third parties will result in donors donating to and expenditure being made by and through third parties rather than candidates and parties themselves.

Unions NSW has previously put the view that a regulation on third parties is not necessary and that there was little evidence that any spending by candidates and parties had been substituted by that of third parties as a result of previously introduced regulation. In the most recent Inquiry into election campaign finance matters, the Inquiry into Public Funding of Election Campaigns (Joint Standing Committee on Electoral Matters, 2010) we submitted:

Unions NSW does not believe that third party campaigns, whether coinciding with an election period or not, and whether they are run by community groups, business groups, unions or other advocacy groups, are a “problem” that requires a regime of monitoring, policing, enforcement and sanction by the state. To the contrary, different views being expressed publicly and with the comparable prominence as those run by candidates or parties seeking office are a positive contribution to pluralist political discourse.

Advocates of a new regulatory regime for third party campaigns may cite the example of the the United States, where quite separately from the issue of the huge funds (and corresponding large donations) required by the major parties to run their campaigns, is the influence wielded by the corporate sector through their funding of campaigns where it is not clear who is

providing the funding¹, often under the banner of a bogus, made-up advocacy group. For this reason, advertisements must make the source of funding clear. This is not a reason to restrict the ability of organisations to put their view forward in the public arena.

In the context of advocating reform, Joo Cheung Tham has argued that “we should resist what legal expert Graeme Orr has perceptively described as the “regulatory instinct” that automatically deems such absence [of regulation] a lack that needs to be remedied by more legislation – not least because more regulation does not necessarily produce better outcomes”².

Even if regulation of third party expenditure is deemed necessary, there remains extreme difficulty in defining what should be covered and therefore in compliance and enforcement.

This practical difficulty is well illustrated by the difficulties with declaration requirements which were introduced federally in 2006 for third parties.

As Unions NSW noted in its previous submission³:

Under the current federal arrangements for example “political expenditure” (for which is required a range of reporting requirements) is defined as, amongst other items in a lengthy list:

the public expression of views on an issue in an election by any means⁴.

The Australian Council of Trade Unions contended in their submission⁵ to the Federal Government’s Electoral Reform Green Paper for organisations such as trade unions or community groups, whose central purpose as membership organisations is to advocate in their members’ interests, “It is virtually impossible ... to determine the line between expenditure incurred as a legitimate part of an organisation’s everyday functions and political expenditure”.

Their submission noted numerous difficulties just with this one provision, listing some examples:

- *When precisely does a subject become ‘an issue in an election’? During the last election period, one of our affiliates produced material promoting increased public funding of public schools. Was the level of public funding for schools an issue in the last election? At the time, media commentators were widely observing that education was not an election issue. So does this mean that this expenditure need not be reported?*
- *What if the purpose of expenditure is not to express views ‘on an issue in an election’ but a non-partisan attempt to generate public interest and attention around a particular issue of concern:*

¹ There is a very large number of examples such as “Hands off our Health Care” campaign” being run by “Patients First” (<http://www.joinpatientsfirst.com/>) which in turn is a project of “Americans for Prosperity”, a foundation funded by other family “foundations” set up by extremely wealthy company executives and directors. The campaign has included media advertising against Democratic Party candidates, with no transparency around the source of funding, and as an example sits alongside many others into which HMOs and large pharmaceutical companies have poured huge amounts of funds.

² Orr, G. (2000), “The Law Comes to the Party”: The Continuing Juridifications of Australian Political Parties”, Constitutional Law and Policy Review, 3: 41., in Tham, Joo Cheung (2010), Money and Politics: The Democracy we can’t Afford:, Sydney: UNSW Press.

³ Unions NSW (2010), Submission to Inquiry into Public Funding of election campaigns, Joint Standing Committee on Electoral Matters, 25 January

⁴ *Commonwealth Electoral Act (1914)*, s314AEB(1): Annual returns relating to political expenditure.

⁵ ACTU (2009), *ACTU Submission on the Electoral Reform Green Paper: Donations, Funding and Expenditure*, ACTU, Melbourne.

that is, expenditure seeking to make a particular issue an issue in an election? Does this type of expenditure need to be reported?

- *What precisely does the phrase 'in an election' mean? Is this just expenditure incurred after an election has been called?*⁶

The subsequent report recently released on 25 November 2011 acknowledged concerns such as these, in particular that “the use of the term ‘issue in an election’ in section 314AEB(1)(a)(ii) of the Electoral Act has given rise to considerable administrative difficulties.”⁷ “

Accordingly it made a recommendation to rectify the issue by deleting the requirement:

The committee notes the AEC’s comments that the term ‘issue in an election’ is particularly confusing given that it is not used elsewhere in the Electoral Act, and that section 314AEB(1)(a)(ii) does not, when read in the context of the other paragraphs, cover any form of expenditure that is not covered elsewhere. Accordingly, the most feasible method by which the clarity of the term can be improved is by deleting the requirement from the definition of ‘political expenditure’ in section 314 AEB(1)(a).

Current provisions in the Act applying to Third Party Campaigners

In amendments passing parliament in late 2010 and commencing in 2011, the NSW Government amended the *Election Funding, Expenditure and Disclosures Act 1981*, amongst other reforms which introduced the concept of a third party campaigner, defined as (s4):

*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 (as defined in Part 6) that exceeds \$2,000 in total.*

In order to meet the definition, this definition of “third party campaigner” inserted into the Act refers back to the existing definition in the Act of “electoral communications expenditure”. This definition, until the introduction of the “third party campaigner” concept, was used to describe a sub-category of expenditure of political parties and candidates. This sub-category of expenditure was intended to be used to describe the sorts of expenditure to which a cap applied for these political parties and candidates.

From the definitions (s87) of the Act, electoral communications expenditure:

*(2): is **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,*

⁶ Ibid.

⁷ Joint Standing Committee on Electoral Matters (2011) Report on the funding of political parties and election campaigns, Commonwealth of Australia

(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,

but is not electoral expenditure of the following kinds:

(g) expenditure on travel and travel accommodation,

(h) expenditure on research associated with election campaigns,

(i) expenditure incurred in raising funds for an election or in auditing campaign accounts,

(j) such other expenditure as may be prescribed by the regulations as not being electoral communication expenditure.

This attempt to retro-fit the existing legislation to take account of third parties is unnecessarily unclear when applied to the circumstances of a third party as opposed to a political party or candidate, the latter being for which the definition was drafted.

For example, it would be unusual for a union, or perhaps any other third party, to employ staff exclusively for a third party election campaign. It would be expected however that the background of an election would lead to a spike in campaigning activity given the opportunity for additional exposure for an issue which the climate of an election may provide. Yet staff members of a union would still have existing responsibilities not related to election campaign activity. It is therefore impossible to quantify and place a dollar value on the proportion of time spent exclusively on election issues versus normal work. The same can be said for the on-costs of employing staff such as office accommodation and phone calls. Accordingly, and after seeking legal advice as a precaution, Unions NSW has taken this definition as applying to staff specifically engaged for an election period to work on a third party election campaign. Still, the wording of this definition, drafted as it was for the circumstances of a political party or candidate's campaign, is highly subjective and lacking in clarity for third party campaigns.

Similarly, union publications around election time would typically contain commentary on election issues, however they would generally not exclusively focus on the election. It is not practical (or at least very difficult) to report a proportional cost of the production and distribution of such a publication, even without taking into account the subjective interpretation as to what subject matter needs to be declared.

In any case both of these types of expenditure would be insignificant compared to expenditure undertaken on paid media advertising on any worthwhile scale which would have any chance of being effective in the context of saturation level political advertising which has become the norm in an election period.

Applying regulation to these forms of third party expenditure (such as staff time or publications) does not achieve the intention of legislation pertaining to third parties – ie to prevent political parties or their supporters from avoiding caps or disclosure requirements by channelling significant expenditure through third party campaigners instead.

Further to our comments on current Act provisions, the definition of electoral communications expenditure referred to above classifies the **type** of expenditure currently required to be declared. The broader definition of electoral expenditure goes to the **subject matter** of the material to which these sections apply, defining it as, in s87 (1):

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.

The nature of this section as applied to third parties represents similar difficulties to that observed by the Committee in the recent Federal Inquiry with respect to the use of the term “an issue in an election”. It would seem that expressing a view on any policy position could be interpreted, when viewed in light of the respective positions of a political party, as being captured by this definition. Any other requirements which flow from this definition then become problematic and potentially, highly unreasonable.

We recognise that there is difficulty for legislators in arriving at a definition which appropriately classifies actual electioneering on the part of third parties in seeking to achieve a level playing field for parties and candidates. However, neither the broad definition in the act concerning the **subject matter** of the material (*electoral expenditure*), nor the definition concerning the **type** of expenditure (s87 (2): electoral communications expenditure), does this adequately, or in a way that makes sense when applied to third party campaigners.

Unions NSW believes this can be improved in a way that benefits everyone, including the regulators and those subject to the regulation, and better meets the objectives of the Act. A first step in ameliorating the potential problems in the first terms of reference of the Inquiry, which can be done without altering the intent or effect of the bill, is to extract sections of the act applying to third parties and from where they are inappropriately lumped in together with parties and candidates, and place them in a separate part of the act.

A second step is to create a separate definition for third party election campaign expenses to which the disclosure and other provisions of the Act apply. Proportionally easily the largest cost, with all other costs insignificant in comparison, is paid media advertising. Along with material distributed on election day it is also the only form of expenditure for third parties which could be said to be made especially for the purposes of an election campaign. For the most effective and clearly understood regulations, electoral expenses for third parties should apply to paid placements of media advertisements, including production cost, as well as printed material which is intended to be distributed on election day. This would also ensure that the normal, everyday advocacy, and communications with an organisations own membership, and other types of expenditure which cannot be decoupled from normal expenditure, are not subject to the regulations.

Recommendation 1

That legislation applying to third party campaigners be untangled from that applying to parties and candidates and placed in a separate, stand-alone part of the Act.

Recommendation 2

That the types of expenditure to which this section applies and is subject to regulation be defined to include paid media advertisements, including electronic, print media and paid billboards, as well as material intended to be distributed on the day of an election.

3. Effect of restrictions of donations to third party campaigners

Unions NSW wishes to address an aspect of the Bill which we fear will have unintended consequences which are harmful to the standard and diversity of voices in public debate and the ability of a large number of organisations to put their views in the public arena.

The proposed section 96D (1) of the Bill states that:

*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 (...)* (author's emphasis).

It is our concern with the inclusion of "third party campaigner" in this section which we will address here.

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.

Here, it is necessary to refer to the Act's definition of "political donation", defined in s85(d) as:

*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 (...) incur **electoral expenditure**.*

Serious concerns arise when coupled with the sweeping definition of *electoral expenditure*. It is easy to see how the everyday advocacy work undertaken by unions, as well as many other not for profit and community groups, could readily be captured by these definitions when they are read together. Putting forward a policy position publicly could easily be taken to be indirectly "promoting or opposing (...) a party" (s87 (1)).

In relation to the proposed ban on donations, this could be taken to apply to the putting forward of a policy position using *any* means.

The proposed ban on donations is not restricted to those organisations who engage in *electoral communications expenditure* by running advertisements and the like. It applies to organisations which engage in the much more broadly defined *electoral expenditure*.

The implications for peak councils such as Unions NSW are obvious, given that no funds are raised from individuals. Separately from affiliation fees which may not classify as "gifts" under the Act, where organisations make extra contributions for the purposes of a campaign, it would classify as political donations.

Therefore this Bill, had it had been in place from 2005 would certainly have rendered the “Your Rights at Work” campaign illegal (if it had applied federally), as it would have more recently the *Better Services for a Better State* campaign.

It is typical for unions and many other organisations when running a campaign to pool their resources and put views forward under the banner of a common message. Below is a non-exhaustive list of examples of NSW campaigns conducted by peak councils or a number of membership-based organisations working together. It is not to say that all of the following constituted “electoral expenditure” as defined by the act, but as most focussed on the March 2011 election, many would have:

- *Better Services for a Better State* (NSW public services unions and Unions NSW)
- *Last Drinks* (Australian Medical Association and Police and Health unions)
- *Coalition for Children in Care* (Private Foster care organisations, pre 2011 election)
- *Protecting our Children, Protecting our Future*, (Association of Childrens Welfare Agencies - Private Foster care organisations, post 2011 election)
- *NSW Deserves Better / 10 big ideas to fix NSW* (NSW Business Chamber)
- *Build Them Here* (Manufacturing unions)
- *Don't be careless* (Carers NSW – peak council of carers)
- *Vote 1 Fairness in NSW* (NSW Council of Social Services, a peak council of community services organisations)
- *Natural Advantage - A 2011 State Election Agenda* – Nature Conservation Council of NSW – peak council of community environment groups)
- *Youth homelessness matters* (YFoundations – peak council of youth homelessness groups and refuges)
- *NSW Irrigators Council 2011 NSW Election Policy Suite* (peak council of irrigators and farmers)
- *NSW Farmers Association* – pre election candidate forums
- *Access choice liveability* (Shelter NSW)
- *NSW Election 2011: Getting the Fundamentals Right* (Infrastructure Partnerships Australia)

Example: the Better Services for a Better State campaign

In late 2008, unions representing public sector workers in New South Wales saw a need to promote value of the work their members do and improve awareness in the community of the importance of maintaining and improving services. Unions pooled resources and in 2009 launched the “Better Services for a Better State” campaign, with common branding and an interactive website.

As the March 2011 election approached the Better State campaign used the opportunity this provided to raise the profile of the issues raised by the campaign by inviting all candidates for election to commit to its principles by signing a declaration of support for a 5 point plan. Many organisations use a similar model of a checklist, candidate survey or charter addressed to politicians in this way. *The Better State 5 point plan* called on candidates, if elected to office, to:

1. *Invest in services*
2. *Look after public assets*

3. *Plan long term*
4. *Back our workers*
5. *Govern for the common good*

Amongst the 226 candidates for election who signed this declaration were candidates from the Liberal Party, the Nationals, the Greens, the Christian Democratic Party, the ALP and many independent candidates. In reply to an invitation to the then Leader of the Opposition to sign, the Liberal Party of NSW responded that the Liberals and Nationals were “largely supportive of the Better State 5 point plan”⁸.

Mainly via the Better State website, details of the candidates who signed and did not sign the declaration were publicised for all 93 lower house seats. Accompanying this were television commercials with the tagline “Before I vote, I want some answers”, which encouraged the public to go to the website and see where their candidates stood.

Material produced by Unions NSW which related to candidates and voting (and thus electoral communications expenditure) were duly declared as third party expenditure by Unions NSW.

For this electoral component of the Better State campaign, and as declared to the Electoral Funding Authority, Unions NSW spent \$197,490.82.

This came from contributions from organisations – being the union affiliates of Unions NSW. Therefore, under the provisions of the Bill, this campaign would be illegal.

Wherever one stands on the substance of the issues touched on by this campaign, to ban such a campaign would be a most serious, unwarranted and undesirable attack on the free speech of the working people who contributed to this campaign through the unions of which they are members.

Recommendation 3:

Owing to special circumstances of peak councils and organisations which pool their resources to engage in campaigns around issues, that restrictions on donations to “third party campaigners” be removed by deleting the reference to “third party campaigners” in s96D (1).

⁸ Letter from Mark Neeham, Director, Liberal Party of NSW to Mark Lennon, Secretary, Unions NSW, 1 February 2011. While they may have declined to sign, a similar letter of general support was sent by several other Liberal and National Party candidates in response to them being invited to sign the Declaration of Support.

4. Aggregation of spending between parties and affiliated organisations

The concerns of Unions NSW in relation to how proposed regulations may affect third party campaigners went to what may be unintended consequences of the Bill. The remaining sections of the Bill we wish to address as proposed by the Government are rather more pointed.

The Bill proposes an additional section **95G**:

(6) 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).*

The proposed section 95G(6) means that electoral communications expenditure from a union that is affiliated to a political party is automatically counted towards that party's expenditure for the purposes of the spending cap.

In his public comments to justify this aggregation, the Premier has repeatedly made reference to an alleged "\$23 million war chest" available to the ALP⁹.

Returns from the March 2011 NSW election¹⁰ showed that total expenditure from unions on third party campaigns in the March 2011 was \$594,067.71. This included:

- \$197,490.82 from Unions NSW on the afore-mentioned *Better State* campaign, the aims of which the NSW Liberal Party indicated they "broadly support";
- \$137,799.30 from the NSW Teachers Federation, largely comprised of costs associated with the *Invest in TAFE for a Better State* campaign, for which around 40 Coalition candidates signed a declaration of support.

Of this \$594,067.71, \$194,864.95 represented third party expenditure from union affiliates of the ALP. This is *less than 1 per cent* of the \$23 million figure being used publicly by the Government to justify this attack on the ability of working people to pool their resources to have their issues and concerns voiced publicly.

These figures compare with spending totalling \$879,238.17 from third party groups other than unions, including \$354,211.62 from the NSW Business Chamber on their *NSW Deserves Better* campaign in the lead up to the election.

⁹ Nicholls, S (2011), "Labor to lose out in elections funds change", *Sydney Morning Herald*, 13 September, viewed at <http://www.smh.com.au/nsw/nsw-labor-to-lose-out-in-election-funds-change-20110912-1k648.html> on 15 December 2011.

¹⁰ Election Funding Authority of NSW, viewed at http://www.efa.nsw.gov.au/disclosures_and_reports

In any case, the majority of union campaign expenditure in the lead up to the 2011 NSW election could not be described as *party* political.

The rhetoric of the Government behind this proposal does not even remotely resemble reality.

The assumption inherent in this proposed section is incorrect. As has previously been argued, both inside and outside of election periods, and regardless of their party affiliation, unions campaign around issues in a manner which could fall in the very broad definition of “electoral communications expenditure” because they put a view in favour or against a particular policy position.

Yet this applies in cases where in doing so unions could not be said to be advocating a vote for a particular party. One need not look far for examples of unions in effect campaigning against the party to which they are affiliated, yet as materials produced could classify as “electoral communications material” it would be counted as if it was the party’s own expenditure.

The affiliates of Unions NSW who are also affiliates of the ALP have expressed their objection in the strongest terms to us of the potential of this section to equate their voice to that of the ALP, and seeing it as an unconscionable restraint on their ability to speak publicly on their members’ behalf.

Recommendation 4:

Sections of the bill aggregating campaign expenditure between parties and other organisations that are affiliated to them (proposed sections 95G (6) and (7)) are unreasonable and unjust, are based on a false premise, and should be deleted.

5. Implications of a scheme of individual donations – General Comments

The inherent assumption in the Bill, that a scheme limited to individual donations is automatically preferable to a regime allowing both donations from individuals and organisations, is worthy of discussion.

Advocates for restricting donations to only those from individuals hold up the Canadian model as an example of where these have improved transparency and confidence in campaign finance.

The Canadian experience is indeed instructive. In 2004 Canada restricted political donations to those from individuals (which attracted a generous tax rebate for donors), and instituted a public funding model including a per-vote subsidy to political parties.

The majority Harper Government is now pushing to implement the abolition of direct public funding of political parties through the per-vote subsidy¹¹.

In Canada a very small number of individuals make donations – for example, between 0.8% and 1.2% of registered voters in 2009¹². These donations, once made, attract a large subsidy via a tax rebate. Under the Harper Government's proposal to abolish the per-vote subsidy, this small group of individual donors to political parties would control and direct 100% of all of the funding to their preferred political parties and candidates.

A ban on corporate donations would *not* have the desired effect of reducing perceived or real influence of donors if it were simply replaced by a donation regime consisting entirely of individual donations, given the latter would be dominated by the same individuals as those who formerly would have made donations directly via a corporation. There is a risk that the only difference would be that under a regime of donations restricted to individuals, there would be far less transparency.

¹¹ Kennedy, M. (2011), "Opposition slams Tories over plans to eliminate political subsidies", *The Vancouver Sun*, 4 October 2011, viewed at <http://www.vancouversun.com/news/Opposition+slams+Tories+over+plan+eliminate+political+subsidies/5502288/story.html> on 15 December 2011.

¹² Elections Canada - Political Financing Reports and database: <http://elections.ca/content.aspx?section=fin&lang=e>, cited in Wikipedia (2011), "Federal Political Financing in Canada", viewed at http://en.wikipedia.org/wiki/Federal_political_financing_in_Canada on 15 December 2011.

6. Ban on ability of unions to financially affiliate to political parties

Perhaps the most dramatic aspect of the Bill is the way the Government has used the opportunity of electoral reform to make an attack on its main opposition. 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.

Section 96D (4) of the Bill prohibits party affiliation thus:

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.

Prohibiting workers pooling funds through their unions, in favour of a scheme of individual donations, assists one side of politics at the expense of the other in a particularly one-sided way, with the wealthy having far greater capacity to contribute. This is not conducive to a healthy democracy.

Unions NSW has 64 affiliates, 22 of which are affiliated to the ALP. Union decisions to affiliate are made by their elected governing bodies. Unions are subject to far more stringent regulation of their internal democracy through state and federal industrial laws than corporations or other organisations. Unions strongly believe it should remain their right to participate in the political process by affiliation to parties, subject to a decision of their democratically elected leadership.

Campaign Finance expert and advocate for reform Joo Cheong Tham has written on why union affiliation to political parties is very different from corporate donations:

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 debated¹³

Like Australia, the United Kingdom has embarked on a process of election campaign finance reform. The most recent legislation aimed at constraining the "arms race" of campaign finance came as a result of several reviews and reports. As in Australia, the British Labour Party was founded on a model which included formal affiliation by trade unions.

The first review of prospects for campaign finance reform was conducted by former civil servant Sir Hayden Phillips in 2007 at the behest of the then Prime Minister, who explicitly addressed the question of how measures aimed at reducing perceived influence of corporations may also adversely impact traditional structure of the existing parties in an unintended way. In rejecting a common cap on all donations, he noted that including affiliation in this "would place the Labour Party at a peculiar disadvantage" which would be "neither fair nor sustainable". On union affiliation, he contended that "a limit on donations need not, in my view, challenge the Party's constitutional relationship with trade unions (...). I would not favour an approach to funding reform which prescribes how parties should or should not organise themselves beyond any necessary changes in donations policy"¹⁴.

Noting the UK's Constitutional Affairs Committee's requirement that:

Any move to change the nature of party funding must not stray into prescriptive devices to require political parties to organise internally in ways that violate their democratic relationships with other institutions¹⁵

the United Kingdom Government's response to the Phillips Review and the subsequent reforms introduced continued to allow organisational affiliation to political parties, to which newly introduced restrictions on donations did not apply¹⁶.

In the case of the ALP, one of the oldest political parties in the world, the Party has comprised individual members and affiliated unions since its creation. In contrast with the view put by the Government, it was for this reason that the 2008 Report into Electoral and Political Party Funding in New South Wales the Select Committee despite having only 2 ALP members, unanimously recommended that union affiliation fees be exempt

Similarly, the Committee believes that trade union affiliation fees should be permissible, (...). To ban union affiliation fees would be to place unreasonable restrictions on party structures¹⁷.

¹³ Tham, Joo Cheong (2010), "Union Fees to the ALP are a special case", *The Age*, 15 January 2010, viewed at <http://www.theage.com.au/opinion/politics/union-fees-to-the-alp-are-a-special-case-20100114-ma0h.html#ixzz1gecBXiDy> on 15 December 2011.

¹⁴ Phillips, H (2007), *Strengthening Democracy: Fair and Sustainable Funding of Political Parties*, The Review of the Funding of Political Parties, March: 10

¹⁵ Constitutional Affairs Committee (2006), *Party Funding: First Report of Session 2006-7*, London: The Stationary Office, 41: paragraph 110, in Ministry of Justice, loc. cit.

¹⁶ Eg Ministry of Justice (2008), *Party Finance and Expenditure in the United Kingdom – The Government's proposals*, London: The Stationary Office

¹⁷ Select Committee into Electoral and Political Party Funding (2008), *Report of the Inquiry*, Parliament of NSW

The Committee went on to recommend that party affiliation fees from organisations be exempt from any ban on donations from organisations.

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):

*Dispositions of property between branches of parties or between **associated parties** that are, by the operation of s85 (3A), taken to be gifts (and political donations to the parties) are not subject to this section (author's emphasis).*

The inclusion of this section serves to further the perception that the Government is using the guise of election funding reform to advance its partisan political interests in a particularly one sided way.

Recommendation 5:

Not for profit, membership based organisations should retain the right to affiliate to political parties, and existing political parties should retain their right to adopt or maintain a structure which provides for organisational membership. Section 96D (4) of the Bill, prohibiting these rights, should be deleted.

7. Constitutionality of the bill – general comments

The terms of reference for the Inquiry call on it to inquire into the “the risks of a successful constitutional challenge”.

Unions NSW is under the assumption that the Inquiry will call upon those with relevant expertise in constitutional law to make submissions as to the constitutionality of the Bill.

Briefly, however, based on discussions and enquiries made by Unions NSW, we do note the possibility that aspects of both the current Act and the Bill potentially offend implied political rights in the Australian Constitution.

The implied freedom of political communication in the Australian constitution has been the subject of much discussion elsewhere¹⁸. Commentators have observed that the High Court in the early 1990s struck out legislation prohibiting political advertising on the basis that it infringed the right to freedom of communication on matters relevant to political discussion¹⁹, implied in the way the system of representative government established by the Commonwealth Constitution.

In a subsequent High Court case which further examined if there were any circumstances in which Commonwealth statute could place limits on this right, Brennan J commented that:

No Law of the Commonwealth can restrict the freedom of the Australian people to discuss governments and political matters unless the law is enacted to fulfill a legitimate purpose and the restriction is appropriate and adapted to the fulfillment of that purpose.²⁰

Aspects of the Government’s Bill seek to specifically diminish the voice of working people through their organisations in a focused and targeted way. Accordingly we contend that most people in NSW would not view the Bill as being “enacted to fulfill a legitimate purpose”.

Our further comments in relation to the constitutionality of the Bill are in relation to the *risks* of a challenge, rather than the likelihood of one’s success. 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.

In the United States, while set before a fundamentally different constitutional framework and legal system, successful Supreme Court action has severely limited any prospect for real reform of donations regulation and stymied attempts to stem the endless escalation of the funds spent on campaigns. Recent successful constitutional challenges such as that in the Citizens United²¹ case in 2010 have overturned several election finance statutes, most notably the *Bipartisan Campaign*

¹⁸ For example, Twomey, A. (2008), *The reform of political donations, expenditure and funding*, Paper prepared for the Department of Premier and Cabinet of New South Wales, viewed at http://www.dpc.nsw.gov.au/_data/assets/pdf_file/0015/33027/Twomey_Report.pdf on 15 December 2011.

¹⁹ Australian Capital Television Pty Limited and Ors v The Commonwealth (1992) 177 CLR 106

²⁰ Nationwide News Pty Ltd v Wills (1991-1992) 177 CLR 1

²¹ *Citizens United v. Federal Election Commission*, 558 U.S. 08-205 (2010), 558 U.S. —, 130

Reform Act of 2002 (the McCain–Feingold Act) and put the cause of campaign finance reform in the US back as far as forty years.

A recent example that illustrates the current out-of-control campaign spending in the US is that of Republican candidate for the Governor of California, Meg Whitman. In an *unsuccessful* bid to replace Arnold Schwarzenegger as Governor of California in the 2010 gubernatorial election Whitman personally funded a *\$US119 million* campaign against the Democratic Party candidate. Such a situation of mega-expenditure means that ordinary people cannot realistically aspire to ever run for elected office. While not to say the NSW situation is anywhere near as dire, the US example is illustrative of how reasonable and well supported reforms, even of marginal effect, could be placed at risk by the current overreach by the NSW Government if it were to be found unconstitutional.

8. Summary of recommendations

In this submission to *the Inquiry into the provisions of the Election Funding, Expenditure and Disclosures Bill 2011*, Unions NSW recommends:

1. That legislation applying to third party campaigners be untangled from that applying to parties and candidates and placed in a separate, stand-alone part of the Act.
2. That the types of expenditure to which regulation of third party campaigns applies be defined to include paid media advertisements, including electronic, print media and paid billboards, as well as material intended to be distributed on the day of an election.
3. Owing to special circumstances of peak councils and organisations which pool their resources to engage in campaigns around issues, that restrictions on donations to “third party campaigners” be removed by deleting the reference to “third party campaigners” in s96D (1).
4. Sections of the bill aggregating campaign expenditure between parties and other organisations that are affiliated to them (proposed sections 95G (6) and (7)) are unreasonable and unjust, are based on a false premise, and should be deleted.
5. Not for profit, membership based organisations should retain the right to affiliate to political parties, and existing political parties should retain their right to adopt or maintain a structure which provides for organisational membership. Section 96D (4) of the Bill, prohibiting these rights, should be deleted.