

**Submission
No 20**

**INQUIRY INTO PROVISIONS OF THE ELECTION
FUNDING, EXPENDITURE AND DISCLOSURES BILL
2011**

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The political rights of third parties and their supporters in NSW
Submission to the NSW Legislative Council Select Committee on the Provisions
of the Election Funding, Expenditure and Disclosures Amendment Bill 2011

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This report was written by Andrew Norton, Higher Education Program Director at the Grattan Institute. In his former employment at the Centre for Independent Studies he worked on campaign finance law issues, particularly as they relate to third parties.

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1. Overview

This submission covers the impact of NSW campaign finance law on third parties and their supporters. A third party is a person or organisation involved in politics but not running for office. The *Election Funding, Expenditure and Disclosures Amendment Bill 2011* would end organisational political donations to third parties, prohibit political donations from one third party to another, and prohibit organisational affiliation fees paid by third parties to political parties. These changes would come on top of the 2010 campaign finance reforms which banned some donors, capped donations in the official campaign period, and imposed expenditure caps during the campaign period.

The legal definition of 'political donation' is critical to understanding the implications of current campaign finance law, and the effects of prohibiting a larger group of donors. It involves a transfer of property, so it does not affect self-funded campaigns. A donation must be a gift of property, including a service, provided for no or inadequate consideration. Where there is adequate consideration, such as contracting with a third party to pay for a specified campaign, there is no gift.

To be a political donation, the gift must be used for 'electoral expenditure', which is spending for the purpose of directly or indirectly influencing voting in NSW. This raises two issues for third parties. The first is whether their activity that may influence voting in NSW is 'for the purpose of' influencing voting. This is an important issue for research institutions. The second is whether a particular donation was used for electoral expenditure. For multi-

purpose third parties, there may be no link between their electoral expenditure and any specific donation.

The submission gives examples of different scenarios that third parties and their supporters may face under the current and proposed NSW campaign finance rules. These examples show that seemingly minor changes in scenario facts can have major legal implications. They show that similar political activities are regulated in very different ways, depending on how they are financed and who finances them. In its operations, NSW campaign finance law appears arbitrary and inconsistent.

In practice, NSW campaign finance law disadvantages donor-reliant third parties relative to self-funded third parties. Self-funded third parties tend to be the 'vested interests' that campaign finance law originally set out to regulate.

These problems with NSW campaign finance law are primarily due to conceptual problems arising from an inappropriate analogy with the issues surrounding donations to political parties, and with the idea that any donor should be banned from giving money.

The NSW campaign finance system needs wide-ranging revision. Within the more limited scope of the terms of reference of the Select Committee on the Provisions of the *Election Funding, Expenditure and Disclosures Amendment Bill 2011* this submission recommends its rejection, along with changes to the definition of 'electoral expenditure' and a higher threshold of campaign spending before third parties are regulated.

2. Third party political funding in NSW

This section focuses on the regulation of third party funding, from the perspective of both the third parties and those who would like to support them. The existing law is complex, with guides issued by the Election Funding Authority (EFA) covering only some of the many possible issues third parties and their funders may face.

2.1 Which third parties are regulated in NSW?

NSW campaign finance law does not cover all third parties. Third parties operating in NSW but not active in NSW issues are exempt. Where third parties are active in both NSW and non-NSW politics, the non-NSW activities are primarily subject to federal laws (or the laws of another state, where relevant).

The trigger for regulation in NSW is spending \$2,000 or more on 'electoral communication expenditure' in the official campaign period.¹ In future, this campaign period will run from 1 October the year before the election to election day, which is the fourth Saturday in March. 'Electoral communication expenditure' includes spending on advertisements and other campaign material, and expenditure on staff and accommodation related to the campaign.² If third parties have or are going to spend \$2,000 or more in the campaign period, they must register as third parties. Otherwise they are prohibited from receiving political

donations or making electoral communication expenditure during the campaign period.³

2.2 How are political funds regulated in NSW?

NSW campaign finance law does not regulate all third party fundraising. For third parties in the system (having spent or planning to spend \$2,000 or more on electoral communication expenditure), it only controls political donations. How a political donation is defined is therefore crucial to understanding the implications of current campaign finance law and the amendments proposed in the *Election Funding, Expenditure and Disclosures Amendment Bill 2011*.

2.2.1 Transfer of property

The first element of political donation is that it must be a transfer of property made by one person or entity to another; the provision of a service is included in the definition of property (section 84 of the *Election Funding, Expenditure and Disclosure Act 1981*).⁴ Money a third party already possesses from non-donor sources is not covered. Outside the campaign period, funds for self-financed campaigns are only limited by the third party's financial resources. In the context of the *Election Funding, Expenditure and Disclosures Amendment Bill 2011*, it means that organisations with ABNs can still finance their own campaigns. Similarly, when a candidate funds their own campaign it is not classified as a political donation: section 95A(4). So the law only regulates

¹ Definition of third party: *Election Funding, Expenditure and Disclosures Act 1981*, section 4.

² *Election Funding, Expenditure and Disclosures Act 1981*, section 87.

³ *Election Funding, Expenditure and Disclosures Act 1981*, section 96AA(1).

⁴ However, bequests are not covered.

providing resources for campaigns run by other persons or entities.

One complex area of the law is the status of free goods or services. For example, would taking a video placed on a website such as YouTube and using it for political activities in NSW be made from one person to another, given that YouTube is a passive partner in the transaction?

2.2.2 The absence or presence of consideration

The second element of a political donation is that it must be a gift. This is defined in section 84 of the *Election Funding, Expenditure and Disclosure Act 1981* as a transfer of property without adequate or with inadequate 'consideration'. Consideration is a concept from contract law. There is consideration if a third party is paid by some other person or entity to provide a promised service. For example, there is consideration when newspapers, television stations, and other media receive money to run campaign advertisements. There would be a contract law remedy for failure run the advertisements or failure to pay for running the advertisements.

The reference to 'inadequate consideration' is to avoid overpricing designed to transfer property from one person or entity to another. Overpriced functions were a common example of this in political party fundraising, though now specifically dealt with by section 85(2) of the *Election Funding, Expenditure and Disclosure Act 1981*.

The exclusion of payments for consideration from the law means that, in answer to item (b) in the terms of reference, that 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. In the YouTube example above, the video could be defined as a service provided without consideration.

2.2.3 Use of the gift for 'electoral expenditure

The third element of a political donation is the use to which it is or is to be put. It must be a gift that 'was used or is intended to be used by the entity' for electoral expenditure: *Election Funding, Expenditure and Disclosure Act 1981* section 85(1)(d). Whose intention is not entirely clear, but in the context it seems to be the recipient's intention. It is covering the two possibilities of the third party having already spent the money or intending to spend the money. Donor's intentions are only relevant to the law if they make a gift with the intention of it being accepted in contravention of a prohibition or limit on donations: *Election Funding, Expenditure and Disclosure Act 1981* section 96HA.

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. The work of academics and think-tanks such as the Grattan Institute could be included. These organisations would rely on the ‘for the purpose of’ provision to exempt themselves (and their donors) from NSW campaign finance law.

However ‘for the purpose of’ will be difficult for the EFA 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.

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.

For third parties with multiple sources of income, presumably they can use the fungible nature of money to determine that any donation from a banned donor was not used and is not intended to be used for electoral expenditure. This should be within the law provided there are sufficient gifts from permitted donors to cover the electoral expenditure, and no donor signalled their intention to facilitate electoral expenditure by the third party (so exposing themselves to legal risk, and the third party if the donor indicates communication with them on the topic). However, the third party would need to take care in their fundraising messages to avoid any accusation that they were raising money specifically for electoral expenditure. Mentioning an issue could trigger suspicion that money from banned donors was to be spent on electoral expenditure.

2.3 Permitted and prohibited donors

If all the elements of the definition of a political donation are present, the issue becomes whether the person or entity giving the gift is a prohibited donor.

For individuals, the *Election Funding, Expenditure and Disclosure Act 1981* currently prohibits donations from people who are not on the NSW, federal or NSW local government electoral rolls: section 96D(1). Only Australian citizens or British citizens on the electoral roll before January 1984 are entitled to be on the electoral roll. Therefore, they are the only people entitled to make political donations (special prohibitions apply to some citizens; see below).

All other permanent and temporary residents of Australia are not entitled to make a political donation.

For entities, most organisations with a relevant business number—defined as an ABN (Australian Business Number) or another number recognised by ASIC (Australian Securities and Investment Commission)—are currently allowed to make political donations. The exceptions are organisations from industries listed in division 4A of the *Election Funding, Expenditure and Disclosure Act 1981*: property developers, tobacco industry business entities, and for profit liquor and gaming business entities. Division 4A prohibitions include close associates of corporations in these industries, including their directors or officers or their spouses, legal or de facto: section 96GB(3). These people lack any right to make a political donation to a third party. They are also prohibited from soliciting another person to make a political donation: section 96GA(4).

In addition to the list prohibited industries, organisations without a relevant business number are not allowed to make a political donation. This includes informally organised third parties and foreign third parties without a relevant business number. However, in most cases these third parties could acquire a relevant business number and therefore the right to make a political donation. In some circumstances, non-citizen residents of Australia could also incorporate themselves.

The *Election Funding, Expenditure and Disclosures Amendment Bill 2011* would remove the right of all organisations, with a relevant business number or not, to make a political donation. As a result, only people on the electoral roll would retain donation rights.

2.4 Examples of effects on third parties and their supporters

Table 1 below provides examples of how current NSW campaign finance laws and the proposed amendments (if they pass) affect or would affect the political rights and capacities of third parties and their supporters. The intention is to highlight the complexity of the laws, how changing a seemingly minor part of the scenario alters rights, and how similar political activities end up with very different legal implications.

The same general political scenario applies to each: An ALP-Green government forms in NSW, and introduces a special additional NSW carbon tax. It is strongly opposed by the Liberal Party. Unless otherwise indicated, all the examples of political activity occur outside the period before elections when different and more complex rules apply. As noted, this period starts 1 October the year before the election and concludes with the election. If gifts are to support electoral expenditure during this period they are capped at \$2,000. Each third party can spend a maximum of \$1.05 million on electoral communication expenditure. The donations need to go into and come out of a specific campaign account if they are to be used on electoral communication expenditure. I have assumed, except where indicated to the contrary, that the third party is already registered, having spent \$2,000 on electoral communication expenditure in the past.

Prior to the 2010 reforms to the *Election Funding, Expenditure and Disclosure Act 1981*, all the third party and donor political activities mentioned in table 1 would have been legal.

Table 1: Third party resource-raising scenarios

Political activity	Actual or proposed legal situation in NSW
ABC Coal Ltd funds its own \$1 million TV campaign against the NSW carbon tax.	OK. ABC Coal Ltd gets its money from Chinese power stations in exchange for coal, and purchases advertising for consideration. There are no gifts and therefore no donations.
ABC Coal Ltd, DEF Coal Ltd, and GHI Coal Ltd sign a contract with a specially created entity, Energy Producers Campaigns NSW Pty Ltd, to campaign against the carbon tax. Each commits to paying \$1 million for developing and delivering an advertising campaign against the NSW carbon tax, and Energy Producers Campaigns NSW Pty Ltd signs a contract to provide it.	OK. Consideration exists and so there is no gift and therefore no donation.
ABC Coal Ltd, DEF Coal Limited, and GHI Coal Limited are, along with other companies, members of the NSW Business Association, which provides general services to its corporate members and represents their interests to government. NSW Business Association runs a \$500,000 campaign against the carbon tax from its general	OK. The membership fees were consideration for services provided by the NSW Business Association. There is no gift and therefore no donation.

membership fee funds.	
NSW Business Association decides its \$500,000 campaign is too small, and issues a general appeal for funds from its members.	Permitted now, but would be prohibited if the <i>Election Funding, Expenditure and Disclosures Amendment Bill 2011</i> passes. The payments are unlikely to be classed as consideration as no rights or obligations are created on either side.
NSW Business Association prepares an anti-carbon tax advertisement financed out of its pre-existing membership revenues, and gives it to its members to promote as they choose. ABC Coal Ltd, DEF Coal Limited, and GHI Coal Limited agree to split the three main commercial networks between them, and place the advertisements themselves. The TV stations invoice the coal companies directly.	Complex issues as to whether the advertisement is a gift. As a service, it is likely to be property under the law. If provided as part of normal membership services, for which there is consideration, it is probably not a gift. Also, a gift may possibly be avoided if the advertisement is simply placed on the NSW Business Association website, and taken by the coal companies, rather than given to them. Aggregation rules do not apply to third parties, so there is no legal issue with a co-ordinated campaign.
NSW Citizens Against the Carbon Tax was formed by conservative political activists, concerned that the carbon tax will severely damage the NSW economy. They plan a campaign against the tax, and send a brochure seeking funds to ABC	Permitted now. If the <i>Election Funding, Expenditure and Disclosures Amendment Bill 2011</i> passes it will still be permitted if NSW Citizens Against the Carbon Tax has not been registered as a third party. Once it has been registered,

Coal Ltd, DEF Coal Ltd, and GHI Coal Ltd.	any campaign is unlikely to be consideration for transfers of money by the coal companies. The transaction will therefore be prohibited.
NSW Citizens Against the Carbon Tax was formed by conservative political activists, concerned that the carbon tax will severely damage the NSW economy. They plan a campaign against the tax, and send a brochure seeking funds to a mailing list of Australian citizens known to dislike the ALP and the Greens.	OK. To fund campaigns before the campaign period, individuals on the electoral roll can give as much as they like. To finance campaigns during the campaign period, living donors can give up to \$2,000 a year. Fortunately for NSW Citizens Against the Carbon Tax, many of its supporters are elderly. Shortly before one of them dies during the campaign period, he changes his will to give \$100,000 to NSW Citizens Against the Carbon Tax. Bequests are not donations under NSW electoral law, and so this gift can be accepted.
Green Planet, an international climate change organisation based in London, is funded from investment earnings on a \$200 million bequest from a businessman. Due to the global nature of the climate change issue, it funds campaigns around the world. It spends \$500,000 running advertisements on NSW TV supporting the carbon tax.	OK. While organisations without Australian business numbers cannot donate to support electoral expenditure, they can directly fund electoral expenditure.
NSW Citizens Against Climate	Prohibited. Green Planet does

Change was formed by environmental activists in NSW. Green Planet, an international climate change organisation based in London and with no offices in Australia, offers to give NSW Citizens Against Climate Change \$500,000 to finance a campaign for the carbon tax.	not have an Australian business number. Under the proposed amendments, Green Planet's donation would be prohibited even if it registered in Australia.
ABC Solar Energy Ltd gives money to a think-tank, the Climate Research Institute. The Climate Research Institute is based in Sydney and employs experts in weather patterns and the economics of energy. They publish their work in academic journals. The Climate Research Institute's views are sought by governments, companies, NGOs and media outlets all around Australia. It finds that climate change is a major threat, and that an increased carbon tax is an appropriate policy response.	OK. The purpose of the Climate Research Institute's work is not to influence voting in an NSW election, even though its research is used by others for that purpose. It has never registered as a third party.
XYZ Charity raises significant donated funds each year to assist NSW residents in need, which is its sole activity. As part of an effort to improve its image, ABC Coal Ltd is a significant and regular donor to XYZ Charity.	OK. XYZ Charity has no electoral expenditure. It has never registered as a third party, and it can receive donations from anyone.
XYZ Charity raises significant donated funds each year to assist NSW residents in need. As	Permitted now. Probably OK with the proposed amendment. XYZ Charity registers as a third

<p>part of an effort to improve its image, ABC Coal Ltd is a significant and regular donor. XYZ Charity becomes concerned that the new carbon tax will increase costs for people who are already struggling financially. It runs a campaign to draw attention to this problem with the new carbon tax.</p>	<p>party due to its new campaign activity, but can say that its electoral expenditure was financed by its donors who are on the electoral roll (though it is has never checked on their citizenship status).</p>
<p>XYZ Charity raises significant donated funds each year to assist NSW residents in need. XYZ Charity becomes concerned that the new carbon tax will increase costs for people who are already struggling financially. Its CEO is reported in the media stating the organisation's concerns. ABC Coal Ltd, which had previously shown no interest in XYZ Charity, gives them a substantial donation. Subsequently XYZ Charity runs a campaign to draw attention to problems with the new carbon tax.</p>	<p>Permitted now, but if the proposed amendments pass there are risks for XYZ Charity that the ABC Coal Ltd gift will be seen as financing electoral expenditure, and would therefore be prohibited.</p>
<p>Michael Tang came to Australia from Malaysia as an international student. His PhD was on climate change. He has decided to stay in Sydney, but so far has only achieved permanent residence and is therefore not yet on the electoral roll. He decides he would like to give money to NSW</p>	<p>Prohibited. People who are not on the electoral roll cannot make political donations.</p>

<p>Citizens Against Climate Change.</p>	
<p>Michael Tang came to Australia from Malaysia as an international student. His PhD was on climate change. He has decided to stay in Sydney, but so far has only achieved permanent residence and is therefore not yet on the electoral roll. However, he has set up a climate change economic consultancy, a company with an ABN. He decides he would like to use the consultancy to give money to NSW Citizens Against Climate Change.</p>	<p>Permitted now, but would be prohibited if the <i>Election Funding, Expenditure and Disclosures Amendment Bill 2011</i> passes. The payments are unlikely to be classed as consideration as no rights or obligations are created on either side.</p>
<p>Michael Tang came to Australia from Malaysia as an international student. His PhD was on climate change. He has decided to stay in Sydney, but so far has only achieved permanent residence and is therefore not yet on the electoral roll. However, he has set up a climate change economic consultancy, a company with an ABN. NSW Citizens Against Climate Change decide to pay him his normal rates to advise them on the best design of a carbon tax.</p>	<p>OK. Tang is being paid to perform his work, with consideration.</p>
<p>Michael Tang came to Australia from Malaysia as an international student. His PhD was on climate</p>	<p>Prohibited. A gift is defined to include a service. There is inadequate consideration and</p>

<p>change. He has decided to stay in Sydney, but so far has only achieved permanent residence and is therefore not yet on the electoral roll. However, he has set up a climate change economic consultancy, a company with an ABN. NSW Citizens Against Climate Change want him to advise them on the best design of a carbon tax to improve their credibility in public debate, but say they cannot afford his normal fees. Because Tang supports their cause, he offers to do the work for half price.</p>	<p>so this is a gift that will be used on electoral expenditure. As Tang is not on the electoral roll, he cannot make a gift.</p>	<p>electoral roll. However, he has set up a climate change economic consultancy, a company with an ABN. He offers to pay NSW Citizens Against Climate Change \$10,000 for information relevant to his business. The usual market value of the information would be \$5,000.</p>	<p>pay market value for the information that he will use in his business.</p>
<p>Michael Tang came to Australia from Malaysia as an international student. His PhD was on climate change. He has decided to stay in Sydney, but so far has only achieved permanent residence and is therefore not yet on the electoral roll. He decides he would like to support NSW Citizens Against Climate Change by delivering campaign leaflets to households.</p>	<p>OK. Voluntary labour that is not a provision of service that the supporter normally provides is not classified as a gift.</p>	<p>Michael Tang came to Australia from Malaysia as an international student. His PhD was on climate change. He has decided to stay in Sydney, but so far has only achieved permanent residence and is therefore not yet on the electoral roll. However, he has set up a climate change economic consultancy, a company with an ABN. He has no particular preference for either side of the debate. He plans to attend fundraising functions of both NSW Citizens Against Climate Change and NSW Citizens Against the Carbon Tax, in the hope that he will meet potential clients for his business. Each function charges \$500 per person and only offers cheap wine, beer and soft drinks.</p>	<p>Prohibited. Tickets to fundraising events are specifically classed as political donations under the legislation. Otherwise, this might have been an example of what would normally be classed as inadequate consideration being regarded as adequate, given the commercial rationale and potential. However, each organisation could allow Mr Tang to attend for free.</p>
<p>Michael Tang came to Australia from Malaysia as an international student. His PhD was on climate change. He has decided to stay in Sydney, but so far has only achieved permanent residence and is therefore not yet on the</p>	<p>There is inadequate consideration and so this is likely to be classified as a gift that will be used on electoral expenditure. As Tang is not on the electoral roll, he cannot make a gift. However, he can</p>	<p>Reginald Jones is an Australian citizen on the NSW electoral roll. He is an enthusiastic political activist, supporting NSW Citizens</p>	<p>Provided it is not to finance expenditure during campaign period, Reginald can make his donations. However, during the</p>

<p>Against the Carbon Tax, the NSW Shooters Rights Association, NSW Drivers for a Higher Speed Limit, and NSW Elderly People for Better Hospitals. All these groups are actively campaigning on their issues in NSW. Reginald wants to give each of them \$3,000 to help ensure their voices are heard in NSW politics.</p>	<p>campaign period only \$2,000 each of his money can go to the campaigns of a maximum of three third parties. He will have to drop one of his four third parties (unless he agrees to the money being diverted to a non-NSW cause). If the remaining three third parties have other uses for his money they can put \$2,000 in their campaign account, and keep \$1,000 for the other purpose.</p>
<p>Fred Smith is a popular paid columnist with the <i>Daily Bugle</i>, a newspaper selling 500,000 copies a day in NSW. He is obsessively opposed to the carbon tax, and devotes numerous columns to attacking it. The Daily Bugle Ltd is through Smith spending \$200,000 a year against the carbon tax.</p>	<p>OK now and under the proposed amendment. Smith's wages are not a gift, and the purpose of employing him is primarily to attract readers to the <i>Daily Bugle</i>.</p>
<p>Fred Smith is a popular columnist with the <i>Daily Bugle</i>. Despite having lived in Sydney for 20 years, he is from New Zealand and has never taken out Australian citizenship. He is obsessively opposed to the carbon tax, and devotes numerous columns to attacking it. A third party, NSW Citizens Against the Carbon Tax, ask him to write for free an article they will use in a mail-out to NSW</p>	<p>Probably prohibited. As Smith is a professional writer, this is a service for which he would normally charge. In this case there is inadequate consideration and so it is a gift that will be used on electoral expenditure. As Smith is not on the electoral roll, he cannot make a gift.</p>

<p>voters urging opposition to the carbon tax.</p>	
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2.5 Problems in NSW third party campaign finance regulation

As table 1 shows, if passed the *Election Funding, Expenditure and Disclosures Amendment Bill* would add to the seemingly arbitrary distinctions in NSW third party campaign finance law. In the Michael Tang example above, giving money is now legal if he uses his company, but illegal if he pays it personally; giving professional advice is legal if he is paid for it at normal rates, but illegal if he is does it for half price. Fred Smith is allowed to have a big influence on the carbon tax debate through his column in the *Daily Bugle*, because he is paid for it and the newspaper's purpose is not to influence voting, but he is not allowed to have a small influence through writing a free article for NSW Citizens Against the Carbon Tax. Green Planet can pay the *Daily Bugle* to run advertisements for a carbon tax, but it cannot give NSW Citizens Against Climate Change money that it would use to run an advertisement in the *Daily Bugle*.

Under the provisions of the *Election Funding, Expenditure and Disclosures Amendment Bill*, ABC Coal Ltd could still fund a campaign against a NSW carbon tax, but only if it directly runs the campaign itself or has legal arrangements that ensure that the funding of a third party is not defined as a gift. The exact same campaign could be legally funded by the NSW Business Association out of existing general revenues, but would be illegally funded if it made a general request to its corporate members to give money for the campaign. ABC Solar Energy Ltd could influence the carbon tax debate through financially assisting the Climate Research Institute, but not by giving money to NSW Citizens Against Climate Change.

NSW campaign finance law adds significant complexity and bureaucratic compliance costs to the operations of donor-reliant third parties. 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. NSW has a large population of permanent residents and long-term temporary residents such as international students and section 457 visa holders. 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. As the XYZ Charity example in table 1 indicates, banning corporate donations could create an unfortunate legal grey area for multi-purpose third parties.

These problems are not due to defects in drafting. They are due to conceptual problems in NSW campaign finance law.

For issue-based third parties, it is not clear why donations are less acceptable than payments for consideration. 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 (though unions are

targeted by the proposed affiliation fee ban; see section 3). Forcing business and unions to use campaigns over which they have direct control may dilute a moderating public interest influence that might occur when their money is donated to a third party they do not control.

Further, 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 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. For electoral communication expenditure during the campaign period, the remaining donors can give only \$2,000 each, further widening the resource gap. Former NSW Premier Kristina Keneally (NSW Hansard, 28 October 2010) argued that her 2010 campaign reforms would create a more level playing field for third parties, but in practice there is a less level fundraising playing field than before.

Part of the conceptual problem is an inappropriate analogy with political parties. Even without campaign finance rules, the range of political services a political party can sell is limited ethically, politically, and in law. Donations have been targeted by campaign finance law because of the suspicion that, without there being any formal agreement, gifts to political parties are buying policies or other favours. The *Election Funding, Expenditure and Disclosures Act* redefines payments for consideration in entry fees for fundraising functions as gifts to ensure that parties do not use these fees to evade restrictions on donations: section 85(2).

By contrast, 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.

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.⁵ These are people living here, paying taxes here, affected in many ways by the decisions of politicians. Permanent residents are entitled to use NSW public schools and hospitals for free. Premier Barry O'Farrell's claim that these people 'do not have a stake in the system' (NSW Hansard, 12 September 2011) is clearly mistaken. Non-citizens need to be given a full opportunity for their views to be heard. Yet under some circumstances, non-citizen residents may be prohibited by NSW campaign finance law from giving money to their own representative groups.

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*

⁵ For a discussion of this, see Charles Richardson, 'Is Citizenship Necessary?', *Policy*, Spring 2011, pages 3-9.

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.

Organisations are also a form of collective action by individual citizens. Banning organisational donations makes citizens less effective in raising their political concerns. 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.

2.6 Ameliorative steps

It is beyond the scope of this Legislative Council review to re-assess the entire 2010 reform package. Apart from rejecting the further prohibitions in the *Election Funding, Expenditure and Disclosures Amendment Bill*, two further reforms are worth considering that would make the system simpler and fairer for third parties and their supporters.

For non-partisan third parties, the problems of the current law could be limited with a narrower definition of what political activity is covered. As noted above, in NSW a political donation is one that finances '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'.⁶ 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'.⁷ 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.

A second step is aimed at making the campaign finance system less onerous for small-scale activism. 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.

⁶ *Election Funding, Expenditure and Disclosures Act 1981*, section 87(1).

⁷ *Electoral Act 1992 (QLD)*, section 199.

3. Aggregating campaign expenditure

The *Election Funding, Expenditure and Disclosures Amendment Bill 2011* would, if passed, mean that third party electoral communication expenditure would count towards the electoral communication expenditure cap of an affiliated political party (\$100,000 per contested Legislative Assembly seat for the statewide campaign, with a separate cap of \$50,000 for any one seat).

The ALP is strongly opposed to this attempt to have affiliated union electoral communication expenditure count towards the ALP campaign electoral communication expenditure cap. The proposed provision would apply even if the union electoral communication expenditure was a campaign against the ALP, such as over public sector wages and conditions or the various disputes over electricity privatisation. As 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.

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.

The amendment should be rejected.