Submission No 2

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

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Submission from Graeme Orr on behalf of the Democratic Audit of Australia

Background The Democratic Audit of Australia is a collaboration of academics with expertise in issues of democratic regulation, reform and legitimacy. Twice funded by the Australian Research Council, it was directed from 2002-2008 from the Australian National University by Professor Marian Sawer, and since then from Swinburne University by Professor Brian Costar. http://democraticaudit.org.au

The Bill This bill follows on from the 2010 reforms, which capped certain political donations and electoral expenditure. At the outset, we commend the incoming government for maintaining the principle of capping political finance in these ways.

The Bill, commendably short for one in this area, does two things. In the order in the Bill, it:

(a) Aggregates expenditure caps. It treats 'electoral communication expenditure' by an 'affiliated organisation' as if it were expenditure by the party itself.
(b) Limits donations to individual electors. It outlaws contributions from organisations such as corporations or unions.

These restrictions are grafted onto the 2010 reforms to the *Election Funding, Expenditure and Disclosures Act 1981*. The expenditure caps now in place do not cover all political advertising and expenditure. For an ordinary general election, the capped expenditure period is about six months: from 1 October to the fixed election date, the last Saturday in March. (If recall elections were adopted in line with the Expert Panel on Recall Elections Report, the restrictions would reappear in relation to any recall petition as well.) So the period of regulation is significant.

Whilst the regulated period is clear, what is regulated is a bit fuzzier. Since 2010, section 87 caps:

> Expenditure ... promoting or opposing, directly or indirectly, a party or the election of … candidates, *or* for the purpose of influencing, directly or indirectly, the voting at an election.

Producing and distributing material or advertisements, whether in broadcast, internet or any print form, including paying campaign staff and office accommodation, is included in the limit.

Clearly then, advertising or campaigning *up until* to six months before polling day, is unaffected by this Bill. Equally clearly, advertising or campaigning within six months, to promote or critique one side of electoral politics or its policies, is caught. The fuzzier area is so-called 'issue advertising' during the six month period. An organisation might advertise on a social issue, or a union or business run a PR campaign to pressure an industrial settlement (at least in

the private sector). Such a campaign is not caught by the law *provided* it does not have a purpose, albeit indirect, of swaying electoral choice. That 'purpose' must be objectively determined: it cannot just be up to the organisation to say 'we didn't intend to influence the election'. So much issue advertising in the six month period – including public sector union campaigns – would be caught, as long as the matter has become an issue in the campaign, eg through partisan positioning on it. (The Election Funding Authority's *Funding and Disclosure Guide: Third Party Campaigners* does not further explain what expenditure is caught, although it invites organisations to seek guidance about specific campaign activity).

Banning Organisational Contributions is Acceptable

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

Such limits effectively encourage organisations to have the public courage of their political convictions: to spend money campaigning directly, rather than by funding political parties or candidates. It is arguable that union members and shareholders will be more easily able to see (and hence make their officials accountable for) such campaigning, than is the case with one-off donations which are typically only made public after an election.

From a constitutional viewpoint, mere donations – especially large scale ones – are not in themselves acts of political communication. But smaller contributions in the form of a reasonable membership fee, set to cover the administrative costs of a membership-based organisation, *are* intimately tied to the freedom of political association. As a moral principle such membership fees ought not be banned, and as a matter of constitutional law probably cannot be. The Bill should be amended to permit organisational membership fees at a reasonable level to cover the administrative cost of servicing members.

The Aggregation Rule is Wrong - and Likely to be Unconstitutional

The Explanatory Memorandum gives no justification for this rule. Presumably its rationale is a sense that the party expenditure cap is undermined if campaigning by a body associated with a party is not included in that cap. That is, its purpose is indirect, as an anti-avoidance measure, rather than directly to restrain third party expenditure.

But the aggregation rule is not drafted merely for anti-avoidance: as it would be if it merely 'roped-in' expenditure by any front group set up by a party, or entity controlled by the party. It also goes well beyond the approach sometimes taken overseas, namely to have a rule that aggregates 'co-ordinated expenditure'. The point of that kind of rule is to encourage independence of expenditure and campaign decisions.

The proposed aggregation rule's motivation seems directed at the Labor Party and affiliated unions. The rule however is neutrally drafted, and will apply to any party with affiliated organisations: the old Country Party and the Shooters Party come to mind.

The aggregation rule is a blunt instrument. Unions sometimes advertise or campaign *against* Labor policy – notably unions in the public sector, but also some more militant private sector unions. It would be perverse to include in the Labor party's expenditure cap any expenditure that does anything other than campaign in the Labor cause.

Freedom of Political Association and Communication

As a matter both of political principle, and of constitutional law, the aggregation rule is suspect. This is especially so when, as in this Bill, it applies in tandem with a ban on organisational political donations.

It is one thing to say to organisations, as the donation ban does, 'To avoid the appearance of undue influence and corruption, you cannot give big money to a party or candidates'. Such a ban still leaves pure freedom of political expression. It also leaves parties and organisations largely free to structure their non-financial relationships – their freedom of political association.

But this Bill effectively says to organisations and parties alike: 'Campaign separately, *yet even if you do, your associational relationship means that campaigning is treated under a single cap*'. This discriminates against any form of party organisation that involves affiliated organisations. Its net effect is to say to any organisation *you must disaffiliate or sacrifice the freedom of expression of you or the affiliated party*. In the case of any significant organisational affiliations, such as trade unions, the only rational response would be disaffiliation.

There is of course a lively and ongoing debate with the Labor Party about the desirability of its union-based structures. It is not the place of law, in a democracy which respects freedom of association, to effectively dictate the outcome of that debate.

Constitutionally Implied Political Freedoms

The High Court has, in the past twenty years, developed an *implied, constitutional freedom of political communication*. Though less well developed, it has also aligned with that a *freedom of political association.* Those freedoms are necessary elements of the system of representative government rooted in the national Constitution. That system is focused on political discussion and action underpinning a national system of representative government.

This Bill of course is a State bill. *The Election Funding, Expenditure and Disclosures Act* restricts '[State] election communication expenditure' in a six month period prior to NSW elections. The Constitution of Western Australia, for instance, has been held to contain implied political freedoms, just like the national Constitution. The NSW Constitution, in entrenching a system of elections, and even the voting system for those elections, probably does as well. But the matter remains unsettled, as Dr Anne Twomey has explained elsewhere, and it is unclear how far any *State* constitutional freedoms limit the power of the NSW Parliament. (See her book *The Constitution of New South Wales* (2004) pp 205-207, and her report to the previous government on *The Reform of Political Donations, Expenditure and Funding* (2008) pp 6-7).

But it is very unlikely that the constitutionality of this Bill rests solely in the obscure hands of judicial implication from the NSW Constitution. Because the High Court held, in a unanimous decision in *Lange's case* in 1997, that:

> '[D]iscussion of maters at State or Territory level and even at local government level is amenable to protection [by the national Constitution] whether or not it bears on matters at the federal level. .... The existence of national political parties operating at federal, State, Territory and local government levels, the financial dependence of State, Territory and local governments on federal funding and policies, and the increasing integration of social, economic and political matters in Australia make this conclusion inevitable.'

As a result, even the following have been seen as falling within the implied protection under the national Constitution:

- discussion about a New Zealand Prime Minister (*Lange's case*), and
- protests against essentially State matters like duck-hunting (*Levy's case* 1998) and a named police officer (*Coleman's case* 2004).

It is very much a dissenting view that the national Constitution's implied freedoms can only cover strictly national political and governmental matters. Admittedly that narrow view does have some roots in a decision on a South Australian electoral law (*Muldowney's case* 1996). When the current High Court hands *Wooten's case,* its approach should be confirmed. That case involves parole restrictions on State prisoners, including a restriction on speaking publicly about juvenile crime and justice - primarily State matters.

In summary, a law like this Bill that curtails campaigning to influence opinions for NSW elections over a six month period, almost certainly is covered by the implied freedom of political communication in the national Constitution. This is because State and Commonwealth responsibilities and funding are overlapping and inter-related, and because political parties are not formed as State units radically distinct from their Federal organisation and reputations.

Some judges have said that *association* is only implied as a corollary of communication (eg Justices Gummow, Hayne, Heydon in *Mulholland's case* 2004; Justice Brennan in *Kruger's case* 1996). Others have said that association is a separate freedom (eg Justice Kirby in *Mulholland*; Justices McHugh, Toohey and Gaudron in *Kruger*). With this Bill, the distinction does not matter: the aggregation rule impacts association in the context of expenditure on electoral communications. Electoral communication, in turn, lies at the heart of political communication (*ACTV case* 1992)

Impact on Federally Structured Organisations

No State law can contradict a valid national law. Nor can a State law unduly burden or interfere with national level politics or elections. This is an element of the Federal principle that each level of government is owed some autonomy from laws that impose on their existence as polities or political entities. Obviously this Bill does not impose on Federal elections as such: organisations like unions are free to campaign in national elections.

However political parties are not organised into State divisions radically silo'd from a Federal structure. They evolved historically with State divisions for both State and national political activity. This is reinforced by the fact of Senate elections, and in *Commonwealth Electoral Act* funding and registration law and practice. Similarly, trade unions evolved with State branches

that register under national industrial law as well as under State industrial law (even after WorkChoices). Whilst incorporation under two industrial laws technically creates a State union *and* a Federal branch, with separate auditable accounts, in reality these State unions/Federal branches are run by the same officials with the same staff.

What flows is that in a Bill like this, regulating parties and organisations in the NSW electoral sphere, the effect on freedom of political association cannot neatly be cordoned off between 'NSW' and 'national' political associations. This is relevant here, because in the Bill's effects on political party freedom of association, there is no purely State division of a party for the Bill to regulate, free of effects on the NSW division of a party registered to engage in national elections.

Test for the Constitutionality of Restrictions on Political Freedoms

To be constitutional, the Bill's burden on constitutional freedoms must be must be:

(a) reasonably and appropriately adapted (or proportionate) to
(b) some other significant purpose, consistent with representative government.

Taken on its own, merely banning organisational donations is not a constitutional problem. Donations are not speech, nor are sizeable donations really acts of association. Further, as experience from North America shows, the courts will accept the anti-corruption (and, in Canada the equality) arguments in favour of restricting big money contributions from sources other than citizen-electors. Such a ban leaves organisations free to use their resources to campaign politically: for 3.5 years of a parliamentary cycle without restriction, and for the last six months subject to the same caps as apply to all lobby groups.

Where the Bill falls down constitutionally is in its aggregation rule, particularly as it builds on the ban on organisational donations. This imposes a significant and practical burden on the freedom of political association. (Legally, it does not matter that the burden is indirect and practical). It does so from both a party perspective and, importantly, the perspective of other organisations.

From the party perspective, a significant disincentive is imposed on one traditional form of party organisation: the mixture of individual and organisational members. From the perspective of other organisations, the Bill effectively tells any body with an affiliation to a political party that it must be silent during an election campaign – it cannot campaign independently of the party, even if their campaign is critical of a policy of that party– *or else* disaffiliate from the party. (Although curiously and presumably unintentionally, the Bill appears to leave an organisation free to disaffiliate in an election year and re-affiliate afterwards).

The aggregation rule is therefore constitutionally unsound:

(a) The burden on the freedom of political association is heavy.
(b) The burden is disproportionate to any legitimate aim - such as deterring party controlled front groups, or ensuring independence by capturing co-ordinated expenditure.

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