

Submission
No 22

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

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

**Submission by Finance Sector Union of Australia NSW Branch
as at 11 January 2012**

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1. Introduction

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

Our union covers the workforce in the banking, insurance and financial services industries across NSW. A majority of our members are women who are paid below average weekly earnings¹. Almost all FSU members work in the private sector and a majority work for very large, powerful corporations.

The Australian government estimates that financial services are Australia's largest industry, contributing 10.8% to growth and employing 400,000 Australians.²

Corporations in the financial services industries account for an estimated 33% of the total value of the ASX with market capitalisation of \$455.7 billion as at June 2011³ with many of these corporations headquartered in NSW. It follows that financial services are an integral

¹ <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6302.0>

² <http://www.treasurer.gov.au/DisplayDocs.aspx?doc=speeches/2010/010.htm&pageID=005&min=ceba&Year=&DocType=>

³ http://www.asx.com.au/documents/research/financial_sector_factsheet.pdf

part of the NSW economy and issues of market operation and industry regulation are matters of public importance.

Our union has a duty to, "advance and protect the rights and interests of members in all matters relating to their employment."⁴

The FSU has dual registration in the NSW and Federal jurisdictions. FSU is governed by an elected executive that has prescribed powers under the registered rules of the Union. The NSW Union Executive comprises eight members employed directly in the industries of the union (honorary officials) and one full time Secretary.⁵ Each of the eight honorary officials reports to an elected section council of up to twenty members⁶. The honorary officials have a two year term of office and the Secretary has a four year term.⁷ Decisions of the Executive can be reviewed or rescinded by the Annual General Meeting of the union⁸.

The challenges faced by FSU members include those that emanate from the workplace such as; job security, pay and gender based pay equity, working hours and work intensification, health & safety including workplace bullying, skills and conflicted remuneration systems that can place employee interests at odds with consumer interests.

Outside work, but connected to the quality of work / life balance are important issues such as transport, education, health, environment and crime.

Given that challenges related to FSU members' employment transcend the workplace, with many issues determined by state law and state government policy and expenditure, FSU seeks to participate actively and constructively in the public debate and political processes of NSW. We do so with the express hope and intent that we can influence NSW Government policy and NSW law in ways that advance the interests of FSU members.

As FSU members are also members of their communities and share the typical hopes and aspirations of others in the state, FSU members' interests are usually synonymous with the interests of the broader population of NSW.

It is in the Union's interests that the political process is both effective and transparent, retaining the confidence of the people of NSW. We understand that with the advent of new technologies and the emergence of new issues, it is necessary from time to time to review and reform the framework of our democracy to ensure that it continues to serve the people of NSW well. It is with this in mind that FSU welcomes the Inquiry.

In the execution of its duties the FSU Executive has formed the view that the political process is a critical element to determining the quality of life for our members, their families and their communities. It follows that the Executive has made decisions in relation to political activity and affiliations where this is within the scope of the union rules and in that light the

⁴ Registered rules of Finance Sector Union of Australia, New South Wales Branch (EE41): rule 4(vi)

⁵ Registered rules of Finance Sector Union of Australia, New South Wales Branch (EE41): rule 8

⁶ Registered rules of Finance Sector Union of Australia, New South Wales Branch (EE41): rule 7A

⁷ Registered rules of Finance Sector Union of Australia, New South Wales Branch (EE41): rule 8B

⁸ Registered rules of Finance Sector Union of Australia, New South Wales Branch (EE41): rule 15

FSU is affiliated to the ALP. Our affiliation to the ALP brings FSU within the scope of the proposed amendments to the Act that seeks to regulate the activities of affiliates and the ALP⁹.

Examples of FSU activity and engagement in public debate in NSW on behalf of our members include our efforts to maintain strong occupational health and safety laws as well as laws that protect the rights of FSU members in relation to Bank Holidays and weekend trading. We have also sought to ensure that when Government enters into contracts to procure financial services, preference is afforded to local suppliers who employ local staff to undertake the work given the benefits that are likely to flow to the state and the economy at large. Many of our activities undertaken to pursue the legitimate interest and rights of FSU members will fall within the definition of a "third party campaigner" as provided by the ELECTION FUNDING, EXPENDITURE AND DISCLOSURES ACT 1981 – s. 4.

Our ongoing efforts to have collaborative working relationships with other community based groups such as the Consumers Association, the Sydney Alliance and the Asbestos Diseases Foundation of Australia and faith groups is also potentially impacted by the Bill. Each of the community groups that we engage with around matters that are subject to public debate and capable of interpretation as being caught by the Act to the extent that they are "for the purpose of influencing, directly or indirectly, the voting at an election".¹⁰

For reasons detailed in this submission FSU opposes significant parts of the Bill on the basis that they would have the effect of providing one side of politics a very significant structural and organisational advantage to the exclusion of all others and at the same time the Bill would severely curtail or completely prevent FSU from pursuing its legitimate engagement in public debate in the interest of FSU members.

2. The constraints imposed by the bill on community and not-for-profit organisations, including unions, community groups, clubs and environment and social justice organisations and their ability to engage in the political process

NSW and Australia has an advanced, modern and sophisticated democracy that has evolved through common law traditions. Our Parliamentary elections are at the heart of democratic government in NSW and throughout our Parliamentary history, the vast majority of successful candidates have opted for collective activity through party structures in order to win seats and either form government or influence the government of the day and its legislative program.

As is typical in liberal democracies around the world, alongside our system of party based collective electoral activity, and supporting the vibrancy of our democracy is a series organised collective institutions such as special interest groups, trade unions and business

⁹ Election Funding, Expenditure and Disclosures Amendment Bill 2011, Principal amendments to Election Funding, Expenditure and Disclosures, Act 1981 No 78, Schedule 1

¹⁰ ELECTION FUNDING, EXPENDITURE AND DISCLOSURES ACT 1981 - SECT 87 (1)

associations that are "integrated" into the system and seen as "part and parcel of the formal structure of those democracies".¹¹

We are concerned that the timing of this Inquiry brings with it serious risks that many not-for-profit organisations that are part of our democracy will miss the opportunity to understand the consequences of the Bill and will therefore not make their own submissions in relation to its impact. Many not-for-profit organisations run with minimal administrative support and rely heavily on volunteer labour. The late-December through to January period is traditionally a period of shut-down or reduced activity for many organisations as paid staff take annual holidays at this time of year.

The Bill, if made law, would impose severe restrictions on many of these collective institutions through the proposed abolition of affiliation payments, the aggregation of expenditure between certain parties and some of their affiliates, the restriction on accepting donations to persons on the electoral role and the considerable administrative burden placed on not-for-profit organisations that would add to an existing heavy burden brought about by the amendments to the Act made in 2010.

While this submission will deal with specific elements of the Bill, there is a real risk that the totality of the Bill will have the distinct impact of severely reducing if not completely curtailing collective engagement in public discourse during the election period for everyone except the political parties directly contesting the election. This approach seems to be underpinned by the view that democracy is best served when contributions to political debate are restricted to natural persons acting in isolation and not collectively. The same view assumes that all natural persons can participate equally in public discourse regardless of economic, geographic or social factors. It is the FSU submission that both of these assumptions are wrong.

FSU rejects this view as one flawed through an incomplete appreciation of the value brought to our democracy by the not-for-profit sector and a failure to appreciate the disadvantage to citizens in low socio-economic groups and isolated communities if they were to be denied the capacity to pool their political resources in order to compete in the market place of ideas that is public debate.

While imposing a series of prohibitions and restrictions on collective organisations, the Bill does not seek to limit the engagement of media outlets and other participants who might seek to influence the political process. To this end community and not-for-profit organisations are placed at a distinct disadvantage relative to our highly concentrated mass media interests or corporate CEOs.

The proposed Section 96D(1) imposes significant obligations on not-for-profit groups to identify and separate possible funding sources so that only donations (as defined by S.85(1)) are accepted from natural persons on the electoral role. These obligations could be expensive and difficult to comply with. As an example, if a community group that might at some time in the future be deemed a third party campaigner such as the Country Women's Association, a Sporting Club or victim's support groups like the Asbestos Diseases

¹¹ Edmondson (Ed) *The Political Context of Collective Action*, Routledge 2007 p.2

Foundation held an event where donations were sought or an entry fee was charged that could subsequently be deemed a "gift" under S.85(1) of the Act, these organisations would need to ensure that the payments received were not drawn from accounts in the names of organisations or family companies. Even where the donation was offered by a natural person and the funds were drawn from that person's account, the organisation would need to ascertain whether the donor was on the electoral role and record all of the prescribed details so that it can be reported if required by S.92 of the Act.

Because S.96D as proposed by the Bill does not appear to be limited to the "relevant disclosure period" as exists in S.88(1A) (b) of the Act, it seems that these new impositions could relate to all fund raising activity that falls with the definitions of "donations" in the Act. FSU experienced significant administrative difficulty and costs in complying with the disclosure provisions of the Act as adopted by the Parliament in 2010 and we are concerned that the proposed amendments would further complicate an already complicated and burdensome administrative process if adopted.

In our own case, FSU concedes that we will probably fall within the definition of a "third party campaigner" as defined by the Act during most state elections. Separate from our political activities, and through the normal course of our work we will from time to time seek sponsorship of certain activities. As an example, in November, 2011 our union held a Delegates Conference in Sydney for 150 FSU delegates from around the state. In order to defray the significant costs associated with the Conference, the Union obtained sponsorships from a law firm and from an industry superannuation fund. While we are confident that these sponsorships are not connected to our political work and would not be caught by the existing provisions of the Act, we are concerned that these commercial arrangements would offend the proposed S.96D in its current form, leaving FSU in the unintended position where we would be in possible breach of the law if we engaged in third party campaign activity in the 2015 state election simply because we had accepted funds in 2011 from organisations that were proscribed by S.96D.

Amnesty International Australia actively seeks corporate donations to support their work in Australia and overseas. A quick search of the Amnesty International Australia website¹² will reveal that Amnesty is currently running campaigns in Australia and overseas that directly relate to public policy issues. It is entirely plausible that Amnesty would take action in Australia during an election period that could be deemed to be caught by the current provisions of S.87 of the Act (subject to the purpose test inferred by that section of the Act) and would in the process be found to be a "third party campaigner" required to make disclosures and required to vet donations in accordance with the proposed S.96D. We do not believe that it is the intention of the Government or the Parliament to censor the work of Amnesty International, but we are concerned that adoption of the Bill in its current form could have that unintended consequence.

It is a feature of liberal democratic public discourse in Australia and elsewhere that organisations will form alliances from time to time to jointly pursue their shared goals. These alliances can be either permanent or short term and will have different structures that reflect the intent of the participating groups. To the extent that alliances are formed by not-for-profit

¹² <http://www.amnesty.org.au>

groups and they establish umbrella organisations for administrative or campaigning purposes, it is apparent that these umbrella organisations would be barred from engaging in any activities that led to either "electoral expenditure" or "electoral communication expenditure" as defined in S.87 of the Act because the monies used for this purpose would not ordinarily come directly from a person on the electoral roll. FSU contends that the recent example of the umbrella group "Alliance of Australian Retailers" which was actually funded by the three large tobacco companies operating in Australia¹³ to be the public face of their campaign against the Federal Government's proposals for plain packaging of tobacco products demonstrates that adequate disclosure of funding arrangements can be sufficient to facilitate genuine public scrutiny of third party campaigns.

While FSU supports thorough disclosure laws and limits on campaign spending, it is our view that prohibition should be the last resort.

3. the impact of the bill on peak organisations, whose constituent entities are themselves membership-based

FSU is affiliated with Unions NSW and the ACTU. These peak organisations play an essential role in co-ordinating campaigns on behalf of our union and other affiliates. Neither Unions NSW nor the ACTU have individual persons as members, rather these individuals join the relevant union that is the constituent part of the peak body.

The proposals embodied in the Bill will effectively outlaw all "political expenditure" and "political communication expenditure" for Unions NSW and the ACTU where that expenditure falls within the purview of the Act.

The obvious example of the 2005-07 "Your Rights @ Work" campaign run by Unions NSW and the ACTU would not be possible if the Bill were to become law. Other campaigns that would be outlawed would include the Unions NSW, "Better Services for a Better State" campaign.

FSU believes that this is among the clearest indications that the Bill is fundamentally aimed at providing a lasting advantage to the Liberal and National parties in NSW by crippling the ALP administratively and organisationally. While the biggest casualty of such a move would clearly be the ALP, other parties would also suffer reduced influence and capacity. The Greens Party, the Shooters and Fishers and the Christian Democrats would all risk seeing the Liberal / National Coalition entrenched with a solid majority in both Houses of the Parliament from 2015 onwards if the ALP was rendered incapable of providing effective opposition.

Paradoxically a number of the peak organisations that more readily fall within the natural constituencies of the Liberal and National Parties might also be constrained from engaging in public discourse.

¹³ <https://www.australianretailers.com.au/>

It is a potentially dangerous move to make fundamental changes to the electoral system even when there is an apparent gain to be achieved for the government of the day. It was the Qld ALP that introduced the gerrymandered electorate zones in that state in 1949¹⁴ that subsequently played a role in keeping the ALP out of office from 1957 to 1989. It was the Wran ALP government that abolished compulsory preferential voting in 1981 when it was considered that an advantage was to be gained over the Liberal/ National Coalition but now with fewer direct contest between Liberals and Nationals, the demise of One Nation and the advent of the Greens Party it is the ALP the needs preferences to flow in a disciplined way if it is to win marginal seats.¹⁵

The existence of third party campaigners and the engagement of peak councils in public debate have strengthened our democracy and any legislative provisions aimed at reducing their capacity to actively campaign for their ideas and seek commitments from candidates and political parties will risk reducing the quality of our political debate and the integrity of our electoral system.

4. the impact on community organisations, whose members are voters registered to vote

The Bill is premised on the assumption that collective engagement in politics is to be discouraged and only individualistic engagement is to be encouraged. This is either naïve in that it reflects a complete abrogation of Australian and liberal democratic history where citizens and their organisations have developed a robust polemic or worse still, it is an attempt to marginalise and exclude large groups of people who do not have the means by which to engage in politics in a fashion that matches the wealthy and the well connected.

By stopping working people from combining their resources via their unions and stopping community members from forming local collective organisations, to the exclusive benefit of those capable of providing significant individual donations, the Bill disaggregates the efforts of many in order to preserve a privileged position for a few. The result will be that our democracy will be weaker.

We are not aware of any community organisation made up of only members who are voters registered to vote. Rather, it is our experience that all membership based organizations, FSU included, have constitutional eligibility that extends to individuals beyond those who are registered to vote in local government, state or federal polls. It follows that the provisions of the Bill would create administrative burdens and significant uncertainty about fundraising activities if there was a risk that the activities of the organisation would fall within the scope of the Bill, especially S.96D. We suspect that the result will be that most organizations would withdraw from public debate in order to avoid the risk and burden of being caught by the amended Act.

We refer to comments in part 2 (*The constraints imposed by the bill on community and not-for-profit organisations, including unions, community groups, clubs and environment and*

¹⁴ http://en.wikipedia.org/wiki/Queensland_Legislative_Assembly#Queensland.27s_gerrymander

¹⁵ <http://www.abc.net.au/unleashed/41416.html>

social justice organisations and their ability to engage in the political process) of this submission to outline in more detail the some of the problems to be faced by membership based organizations.

5. The impact of the prohibition on the payment of affiliation fees for organisations affiliated to political parties

FSU is concerned that this provision is a thinly disguised attack on the viability of the ALP in the guise of electoral funding reform. The result will be to effectively outlaw the ALP in its current form to the significant advantage of the Liberal and National Parties.

The ALP was formed by unions more than 120 years ago and is the oldest Labor party in the world. The relationship between affiliated unions and the ALP reflects what Valenzuela¹⁶ referred to as the "social democratic" model of union engagement with political parties. In this model unions link up to form one relatively strong political party. Other examples of this social democratic model exist in the United Kingdom, Ireland, New Zealand and Norway. Valenzuela goes on to explain that this is just one of a number of structural relationships that exist between unions and political parties in liberal democracies. Never the less, it is the option that has dominated the union involvement with politics in Australia for more than 100 years.

Affiliation brings with it the right to send delegates to ALP conferences which in turn determine ALP policy. This process is the most transparent and widely scrutinized internal political process in Australia with the State Conference open to the media and the subject of very significant coverage whether the ALP is in Government or Opposition. This openness adds to the vibrancy of NSW democracy.

The proposals to sever formal ties between the FSU and the ALP would severely constrain the union's capacity to fulfill its obligations to "advance and protect the rights and interests of members". We would lose all capacity to directly influence the formation of ALP policy on matters of critical importance to FSU members.

Such a change would also fundamentally alter the structure, philosophy and direction of the ALP given that the party would be weakened organisationally and intellectually by the removal of affiliated unions.

FSU openly affiliates with the ALP in order to directly influence ALP policy and direction and through this we seek to influence the policy and direction of the government of the day. We do not accept the view that this engagement with politics is somehow wrong. Rather, we see it as our duty to engage in public debate and our engagement is no less legitimate than that of talk back radio commentators or newspaper editors or corporate CEOs.

We do not expect that all people or even all FSU members will necessarily agree with our ALP affiliation but it is one that has been made for the union as a whole just as we adopt budgets and commit union resources to particular industrial campaigns. We accept and support the reality that FSU members are not bound to support any candidate or party at the

¹⁶ Wood (ed), Trade Unions and Democracy, Transaction Publishers 2006, p, 305

ballot box. FSU members' votes need to be won by politicians on the merits of these politicians' policies and performance.

Having regard to the plurality of views held by FSU members but remaining focussed on the obligation to engage in public debate and the formation of public policy we have made decisions to affiliate to Unions NSW and the Trade Union Committee for Aboriginal Rights and we are actively considering the option of affiliation with the Sydney Alliance. This is because we know that by acting in isolation we cannot achieve the changes in society that our members seek.

While each of these decisions is open to change from time to time, they are not made with a view about whether one or other affiliation is popular at any given time. Rather, they are made with a longer term perspective about the need for the union to influence the development and implementation of public policy as it impacts our members.

Any decision of the union is reviewable by members and can be overturned at the Annual General Meeting of the Union.

6. The impact of donation caps on donations of registered voters and their organisations

Given our history and in the current circumstances the FSU is not likely to be directly impacted by the donation caps in their current form.

7. The impact of the aggregation of the electoral spending of affiliated organisations under the expenditure cap of the party to which they are affiliated

This, together with the ban on affiliations and prohibition on collective action by community based alliances acting in unison, is the third leg of the significant efforts by the Government to build in a structural electoral advantage by effectively outlawing the ALP in its current form and constraining its affiliates in order to gain electoral advantage.

If the Bill was to be made law it would leave the curious circumstance where one union affiliated to the ALP could not pay affiliation fees but would have any "political expenditure" in the prescribed period subject to the aggregation provisions of S.95G whereas another union, campaigning on the same issues, using the same material but not affiliated to the ALP would be free to spend an unlimited amount on the same campaign as a registered third party campaigner without it impacting the ALP expenditure cap at all.

It would be similarly curious that an affiliated union's expenditure in an electorate would be aggregated with that of the ALP for the purposes of the cap even if the material produced did not support the ALP candidate. It is a matter of public record that from time to time one or more ALP-affiliated unions disagree with the policies and actions of ALP politicians.

The ALP cannot bind an affiliate, censor its published material or control its electoral communications expenditure. The apparent assumption underlying the S.95G that the ALP and all affiliates will always "sing from the same song sheet" is therefore fundamentally flawed.

FSU proudly defends its independent capacity to promote or criticise any party or person that acts against the interests of its members. Our ALP affiliation should not be considered to be a surrendering of our rights and responsibilities in this regard.

8. Amendments necessary to address any adverse impact identified

The FSU sees the Bill as flawed in a number of areas as well as exacerbating a series of problems emanating from the 2010 amendments to the Act. In order to resolve these problems FSU supports the recommendations to the Inquiry that we understand are being proposed in the submission from Unions NSW. These steps are:

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.