

**Submission  
No 26**

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

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# **Select Committee on the provisions of the Election Funding, Expenditure and Disclosures Amendment Bill 2011**

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**Submission by NSW Labor**

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## Executive Summary

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

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

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

However, NSW Labor believes that the Election Funding, Expenditure and Disclosures Amendment Bill 2011 (NSW) ('the Bill') would place unreasonable restrictions on political participation.

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

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

**Recommendation 3:** Omit proposed subsections 95G (6) and (7).

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

### Select Committee Terms of Reference (a) and (b)

The Bill proposes replacing section 96D of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) ('the Act') as follows:

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

- (1) It is unlawful for a political donation to a party, elected member, group, candidate or third-party campaigner to be accepted unless the donor is an individual who is enrolled on the roll of electors for State elections, the roll of electors for federal elections or the roll of electors for local government elections.
- (2) It is unlawful for an individual to make a political donation to a party, elected member, group, candidate or third-party campaigner on behalf of a corporation or other entity.
- (3) It is unlawful for a corporation or other entity to make a gift to an individual for the purpose of the individual making a political donation to a party, elected member, group, candidate or third-party campaigner.
- (4) Annual or other subscriptions paid to a party by a person or entity (including an industrial organisation) for affiliation with the party that are, by the operation of section 85 (3), taken to be gifts (and political donations to the party) are subject to this section. Accordingly, payment of any such subscription by an industrial organisation or other entity is unlawful under this section.

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

NSW Labor supports electoral reform where it is appropriately adapted to achieving these goals. However, NSW Labor believes that the Bill as it currently stands will

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

unreasonably restrict participation in the political process. This is best illustrated with reference to the following examples.

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

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

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

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

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

Corporate donations may create a risk or perception of undue influence because they influence decision making by public officeholders in informal ways, and are made by entities whose ultimate purpose is to make a financial profit. In contrast, non-profit organisations represent defined groups of individuals within the community and openly advocate for their interests without aiming to make a financial profit. Without the ability to organise through non-profit community organisations, these individuals would be left without the capacity to exercise an effective voice in the political process, because as individuals they do not have the resources to make their voice heard.

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

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

**Recommendation 1**

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

## 2. Prohibition of union affiliation to political parties

### Select Committee Term of Reference (d)

The existing campaign finance legislation in NSW prohibits affiliation fees from being used for campaigning by the operation of sections 96 (3) and 96 (6)(a) of the Act. It cannot therefore be argued that NSW Labor derives an unfair advantage in financing election campaigns from the financial affiliation of unions, because these funds cannot be used to incur electoral expenditure.

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

- (4) Annual or other subscriptions paid to a party by a person or entity (including an industrial organisation) for affiliation with the party that are, by the operation of section 85 (3), taken to be gifts (and political donations to the party) are subject to this section. Accordingly, payment of any such subscription by an industrial organisation or other entity is unlawful under this section.

The Australian Labor Party was founded in 1891, making it one of the oldest political parties in the world. For 120 years, Labor has consisted of individual members and affiliated unions. The Bill seeks to prohibit NSW Labor from continuing to operate in this way. The Bill would effectively prevent individuals in NSW from participating in the political process in ways that might make them more effective in opposing the Government. This interference with a political party's internal structure represents an unreasonable restriction on its members' right to organise themselves in order to participate in the political process.

The Bill also proposes to interfere with unions' internal decision making and restrict their voice in the political process. This similarly represents an unreasonable restriction on their members' right to determine how to participate in the political process. Each union's decision as to whether or not to affiliate with a political party is made by its democratically elected governing body. Unions should have the right to participate in the political process by affiliating with a political party if they so choose.

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

Membership subscriptions to political parties, whether by individuals or groups such as trade unions, need to be accompanied by an open declaration that the member

supports the party's constitution, policies and principles. With corporate contributions, on the other hand, such support is not required.

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

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

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

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

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

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

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

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

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

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

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



**Recommendation 2**

Amend the proposed subsection 96D (4) of the Bill to expressly permit organisations to financially affiliate with a political party.

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

#### Select Committee Term of Reference (f)

At present, electoral communication expenditure incurred by an organisation affiliated to a political party is subject to a separate cap to that of the political party. In arguing in favour of aggregating electoral communication expenditure incurred by parties and their affiliated organisations, Premier O'Farrell has repeatedly made reference to a "\$23 million war chest" allegedly available to NSW Labor courtesy of its affiliated unions.<sup>5</sup>

According to disclosures made to the NSW Election Funding Authority, total electoral communication expenditure on third party campaigns by unions affiliated to NSW Labor in the 2011 NSW Election campaign amounted to \$194,824.95. This is less than 1 per cent of the amount being quoted publicly by the Premier to justify the aggregation of expenditure by political parties and affiliated organisations.

Expenditure by unions affiliated to NSW Labor was substantially less than the \$879,238.17 incurred by third party groups other than unions. The \$354,211.62 incurred by the NSW Business Chamber on its 'NSW Deserves Better' campaign alone exceeded expenditure on third party campaigns by unions affiliated to NSW Labor.

The Bill proposes inserting additional subsections in section 95G as follows:

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

Electoral communication expenditure incurred by a party that is of or less than the amount specified in section 95F for the party (as modified by subsection (2) in the case of associated parties) is to be treated as expenditure that exceeds the applicable cap if that expenditure and any other electoral communication expenditure by an affiliated organisation of that party exceed the applicable cap so specified for the party.

- (7) In subsection (6), an **affiliated organisation** of a party means a body or other organisation, whether incorporated or unincorporated, that is authorised under the rules of that party to appoint delegates to the governing body of that party or to participate in pre-selection of candidates for that party (or both).

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

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

The Bill treats electoral expenditure incurred by affiliated organisations as if it were incurred by the political party itself. In other words, it equates the voice of the affiliated organisation with that of the political party, and denies the affiliated organisation the right to speak with its own voice. This unreasonably restricts both the political party, which has no direct control over expenditure by its affiliated organisations, and the affiliated organisation, which has an independent right to participate in the political process in NSW.

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

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

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

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

#### **Recommendation 3**

Omit proposed subsections 95G (6) and (7).