Submission
No 5

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

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Dr John Kaye MLC
Chair
Select Committee on the Election Funding Bill 2011
Legislative Council
Parliament House
Macquarie St
Sydney NSW 2000

4 January 2012

Dear Dr Kaye,

Inquiry into the provisions of the *Election Funding, Expenditure and Disclosures Amendment Bill* 2011

Please find below my submission to the Committee's inquiry.

The *Election Funding, Expenditure and Disclosures Amendment Bill* 2011 ('the Bill') has two primary provisions – s 95G concerning the aggregation of caps and s 96D concerning the prohibition of political donations other than by individuals on the electoral roll. The constitutional aspects of each will be discussed below.

Section 95G

Proposed sub-sections (6) and (7) of s 95G aggregate the electoral communication expenditure of a political party with that of any affiliated organisations for the purpose of the application of expenditure caps. An 'affiliated organisation' is defined as one that 'is authorised under the rules of that party to appoint delegates to the governing body of that party or to participate in pre-selection of candidates for that party (or both).' The intention appears to be to prevent the exploitation of expenditure caps through parties hiving off part of their operations to separate entities, to benefit from separate third-party

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campaigner expenditure caps. I note that this aim already seems to be dealt with to some extent through s 4(8) of the Act, which provides:

> For the purposes of this Act, where anything is done by, on behalf of or for the benefit of, or any property is held by, or in trust for or for the members of, a body or organisation, incorporated or unincorporated, being a body or organisation that:
>
> (a) forms part of a party;
> (b) is established by or under the constitution of a party, or
> (c) has functions conferred by or under the constitution of a party,
>
> the thing shall be deemed to be done by, on behalf of or for the benefit of that party or the property shall be deemed to be held by that party, as the case may be.

Sub-section 95G(7) effectively extends the application of that provision to pick up bodies that are authorised 'under the rules of that party' (rather than its 'constitution', as in s 4(8)) to appoint delegates to its governing body or to participate in the pre-selection of candidates for that party. The primary difference between s 4(8) and s 95G(6)-(7) is that the former tends to apply generally while the latter appears to be directed at a particular party and a particular form of relationship which does not affect other political parties. In my view a safer approach would have been to clarify the scope of s 4(8) – perhaps by adding the words 'rules or' to 'constitution', if necessary.

While it remains unclear whether the implied freedom of political communication (whether it be derived from either the Commonwealth or State Constitution) would apply to NSW electoral laws, it will be assumed for the purposes of this submission that it does and that the test in *Lange v Australian Broadcasting Corporation* (1997) will apply. The first stage of that test is to ask whether the provision burdens freedom of political communication. The answer in relation to s 95G is probably 'Yes', to the extent that it would limit the capacity of a political party or an affiliated organisation to make public its political views by limiting its ability to expend money on advertising.

A court would then ask under the second limb of the *Lange* test whether the provision is reasonably appropriate and adapted to serve a legitimate end in a

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manner which is compatible with the system of representative and responsible government prescribed by the Constitution. The 'legitimate end' would presumably be the reduction of electoral expenditure in order to reduce the risk or perception of corruption or undue influence involved in political fund-raising to satisfy expenditure needs. Another legitimate end may be 'fairness' – i.e. treating political parties equally (although this is more contentious). The question a court would ask was whether the law was reasonably appropriate and adapted to achieve a legitimate end, or whether it was really directed at achieving another end (eg a political end).

Two arguments would be likely to be put here. On the one side it would be argued that the provision is intended to implement equality of treatment of parties, so that one party does not enjoy the benefit of extra political expenditure through affiliated unions. On the other hand it would be argued that the law is directed only at one party, with the effect of limiting the expenditure of that party or affiliated unions, but that it does not apply to expenditure of other bodies that are associated with other political parties and campaign to support those political parties. How the High Court would determine such a question is anyone's guess.

Section 96D

This provision prohibits political donations by anyone other than individuals who are on the electoral roll. This would exclude political donations from foreigners (other than those British subjects with continuing voting rights in Australia), residents who are not citizens, minors, people of unsound mind and some prisoners. It would also prohibit donations from corporations, associations, trusts, partnerships, unions, churches, statutory bodies and lobby groups.

It is arguable that the donation of money is a form of political expression (i.e. putting you money where your mouth is). This is the approach that has been taken in the United States, although there is no authority yet on this proposition in Australia. If so, then prohibiting certain persons and entities from making political donations would be regarded as breaching the first part of the *Lange* test by burdening the freedom of political communication. The second part of the test would then come into play. The question would be whether the provision is reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the system of representative and responsible government prescribed by the Constitution.

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Again, there are arguments that could be made on both sides. On the one hand, it would be argued that corporations cannot vote and that it is reasonable to confine the capacity to make political donations to those who are enrolled to vote in elections. It would also be argued that confining to electors the power to make political donations is the neatest and most easily defined and administered method of limiting donations.

On the other hand it would be argued that the implied freedom of political communication protects political communications regardless of whether or not they are made by a corporation (such as a newspaper) or an individual, and that a law that completely bans non-electors from making political donations is not reasonably appropriate and adapted to the legitimate end of reducing the risk or perception of corruption or undue influence, as such donations are already capped and can have no greater influence than donations made by individuals on the electoral roll. For example, how is a law that bans a sixteen year old from making a donation to attend a political function one that is reasonably appropriate and adapted to achieving the end of reducing the risk or perception of corruption or undue influence? Equally, how is a law that bans a corporation from making a donation of a maximum of $5000 to a political party one that is reasonably appropriate and adapted to achieving the end of reducing the risk or perception of corruption or undue influence, when there will presumably be many hundreds of other donations which also reach this cap?

The most contentious and vulnerable part of s 96D, however, is its application to donations to third-party campaigners. The effect is to prevent lobby groups from acting as third-party campaigners where they raise money for political campaigns from other groups with the same interests. Hence an association that represented the interests of shooters, pubs and clubs, environmentalists, religious bodies, or retail businesses, which would ordinarily receive its funding from rifle clubs, hotels, environment groups, churches or shops, would under s 96D be banned from receiving those donations and would be effectively neutered from running a political campaign during elections. This would leave the third-party campaigning field to big corporations, unless lobby groups were able to raise sufficient funds from individual donations from people on the electoral roll, which would be exceedingly difficult.

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The question again comes down to how this serves a legitimate end and whether it is appropriate and adapted in doing so. It is hard to see why a third-party campaigner who raises capped donations from other groups is more likely to give rise to corruption or undue influence, or the perception of it, than a third-party campaigner with its own resources or who raises donations from individuals. Given that the practical effect of this provision is likely to severely limit political communication by third-parties and given that the justification for it is quite weak, I think this aspect of s 96D is the most vulnerable to constitutional challenge.

If you need any further information, please do not hesitate to contact me.

Yours sincerely,

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