

Submission
No 25

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

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Submission to NSW Upper House Select Committee on the provisions of the Election Funding, Expenditure and Disclosures Amendment Bill 2011

The Greens NSW

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1. Introduction

The Greens NSW have long campaigned for a prohibition on donations from corporations and other organisations to political parties, candidates, associated entities and elected representatives¹.

The *Election Funding, Expenditure and Disclosures Amendment Bill 2011*² (the Bill), introduced into the Spring 2011 session of parliament by the Premier Barry O'Farrell, however seeks to do much more than just limit political donations to those made by individuals.

It would dramatically restrict the valid operations of a number of organisations, including those not-for-profit entities that seek to campaign through their peak bodies, the union movement, and the Labor Party.

The Greens are concerned that if the Bill were made law it would impose unacceptable constraints on the exercise of free speech by both the union movement and organisations like the Nature Conservation Council (NCC) and the Council of Social Services of NSW (NCOSS).

Given the potential impacts on the quality of the democracy, the Greens welcome the careful consideration of this bill by an upper house committee and the consequent exposure to detailed public debate.

This submission makes three recommendations for amendments to the legislation to remove these restrictions.

2. Key concerns

The Greens' key concerns with the bill are:

- ◆ **The proposed restriction on peak organisations is an unnecessary restraint on the rights of free speech.** Peak organisations that spend more than \$2,000 during any capped state election period (October until the election) on 'electoral communication', would become a 'third party campaigner' under the Act. This includes any communications activity which seeks to influence voters, such as highlighting an environmental, work place or social issue. It does not need to include directly advocating a vote for a party or candidate.

As a third party campaigner, it would then become illegal (under proposed section 96D of the Bill) for these organisations to receive any donation for the purpose of electoral expenditure at any time (not just during the election period) from anyone other than a natural person. The Act has a very broad definition of electoral expenditure which goes beyond just advocating for a party or candidate but includes any attempt to influence voting. This could include many examples of issues-based campaigning.

Peak organisations such as NSW Council of Social Services, the Sydney Alliance³, Nature Conservation Council and Unions NSW could be prohibited from receiving any money from their affiliates for raising issues of concern to their member groups;

¹ http://nsw.greens.org.au/sites/greens.org.au/files/policydownloads/Electoral%20and%20Funding%20Reform_0.pdf

² <http://i.mp/pwHXMV>

³ <http://www.sydneyalliance.org.au/>

- ◆ **The aggregation of the spending of organisations that are affiliated to a political party into the spending of that party for the purposes of the caps on electoral communication expenditure would undermine the right of those organisations to conduct campaigns on issues of concern to their members.** Affiliated organisations are defined as those that are 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). This legislation would directly affect the rights of affiliated unions to run issues-based campaigns during election campaign, such as opposing electricity privatisation and Better Services for a Better State; and
- ◆ **The ban on affiliation fees would undermine the right of parties to have collective membership of the party.** While there has been much criticism of the relationship between the Labor party and its affiliated unions, it is highly inappropriate for parliament to use campaign financing and donation legislation to attempt to undermine a party or to make illegal a legitimate internal party arrangement.

These issues are considered in greater detail in the sections below.

The Greens are also concerned that the legislation, if passed unamended, would expose the resulting Election Funding, Expenditure and Disclosures Act 1981 (the Act) to a constitutional challenge that might not only bring down the changes implemented by the Bill but also the amendments made in 2009 and 2010.

The current bill could put at risk the advances that include:

- ◆ The ban on donations from developers and the alcohol, tobacco and gambling-for-profit industries;
- ◆ Limits on the size of donations to parties and candidates; and
- ◆ Limits on spending by political parties and candidates.

It is important that the Committee receives advice from constitutional experts as to the possible implications for existing campaign financing reform.

The Greens urge the Committee to develop and recommend amendments to the Bill that would remove these unnecessary and damaging restrictions on the exercise of free speech.

Passage of a ban on the use of corporate funds by political parties is an essential step towards a healthier democracy. However, the legislation as it stands creates a conflict between this important objective and the rights of free speech of members of unions and environment and social justice organisations.

3. Closing loopholes without damaging democracy

The Greens recognise the difficulties associated with loopholes in election funding restrictions when they apply only to political parties and not to third parties.

However we believe that backdoor donation paths must be closed but without inflicting damage on the fabric of democracy.

Allowing corporate or union money to be funnelled into separate bodies that then campaign for candidates or parties would undermine any ban on corporate donations.

On the other hand, a robust democracy relies on protecting the right of individuals and membership-based organisation to pool their money and spend it collectively on advocating for causes or issues that are of concern to them.

The current Bill goes too far in attempting to close those loopholes and a better balance needs to be sought.

This debate happens in the context of a political culture in which large corporations exert massive economic and political power. The imbalance between the ability of the corporate sector to influence policy outcomes and the power of citizens to protect the public welfare is dramatically illustrated by the mining sector's capacity to undermine and destroy the Resource Super Profits Tax.

The only way individual citizens can effectively resist the corporate economic power is to band together collectively. The capacity to do so should not be undermined by election funding legislation.

4. Unacceptable impacts on peak organisations

The Bill would stop many peak organisations running issues-based campaigns using money they have received from their member organisations.

As demonstrated in Appendix A below, under proposed section 96D of the Bill and the provisions of the Election Funding, Expenditure and Disclosures Act 1981 (the Act), welfare and environment groups, charitable bodies and foundations and unions will in many cases be denied the right to aggregate their funds into their peak bodies to be spent on raising issues that are of significance to them and their members.

Once an organisation has spent more than \$2,000 during the capped election funding period 'for the purpose of influencing, directly or indirectly, the voting at an election' it becomes a third party campaigner.

Such an organisation would then be caught by proposed section 96D of the Bill which would prohibit it from receiving 'political donations' which includes any money that it might spend 'for the purpose of influencing, directly or indirectly, the voting at an election'.

Issuing a report card, a set of policies or other activities designed to suggest to voters that they should consider certain issues would almost certainly qualify.

The NCC's publication⁴ 'Icons Under Threat' would most likely be in breach of proposed s. 96D as it was funded by the Wilderness Society and the Dara Foundation.

NCOSS would be unable to accept funding from any of its member organisations for its election materials (for example see the 'Vote 1 Fairness' March 2011 booklet and materials⁵), even though these do not advocate a vote for a party or candidate.

Unions NSW's Better Services for a Better State campaign⁶ or any other political activities such as rallies and events designed to highlight the needs of employees in NSW could not be funded out of money given to it by its constituent unions. This would effectively mute the voice of working people.

Some peak organisations would be able to continue to operate within these restraints by clever restructuring and manipulation of their financial affairs.

Others, particularly those that receive a significant proportion of their funding from their member-organisations and not individual contributions and donations, would find these restrictions onerous. Those organisations would find their ability to engage in the election debate severely constrained.

⁴ <http://nccnsw.org.au/content/icons-under-threat>

⁵ <http://www.ncoss.org.au/content/view/3206/194/>

⁶ <http://betterstate.org.au/>

The Greens believe that this restriction on free speech is unfair and unreasonable.

We believe that working people have the right to organise themselves into a union and be heard collectively. We support the important work of the environment movement and its right to organise itself into local groups and peak bodies. We believe that NCOSS plays an important role in advocating for the organisations that service the most disadvantaged communities in NSW.

There are other peak organisations whose policy objectives do not align so closely with the Greens. These bodies equally should have the right to represent their membership, without being banned from doing so by donations law.

The robustness of a democracy is only supported by allowing individuals to aggregate their effort in alerting the electorate to the issues about which they feel strongly.

We accept however the need to ensure that third parties are not used as a front to allow corporate funding to be used for partisan election campaigning, thereby undermining the intent of the Bill.

The Act (s. 87(1)) divides electoral expenditure into two classes:

- ◆ that which advocates for or opposes, directly or indirectly, a party or candidate; and
- ◆ that which is for the purpose of influencing, directly or indirectly, the voting at an election.

The latter class of expenditure includes issues-based campaigning, that is, making voters aware of the issues on which they might vote and their importance in determining how they vote. This does not include advocating directly or even indirectly for one party or another.

The NCOSS election material is a good example.

The Greens recommend that the legislation be amended to allow the peak organisations of membership-based, not-for-profit bodies to receive money from their affiliates and spend it on issues-based campaigning.

It is noted that section 95A(f) of the Act⁷ already places a limit of \$2,000 on a donation to a third party. The Committee is encouraged to clarify the existing law in this regard and to determine if affiliation fees paid to a peak body would amount to a political donation.

We accept that allowing peak bodies to receive money and then spend it on advocating a vote for a party or candidate would create a backdoor campaign financing mechanism that would undermine the intent of the legislation.

Recommendation 1: *The legislation should be amended so that peak bodies would be able to spend monies on electoral communications received from their member-organisations, provided:*

- (a) *the member organisations are not-for-profit and membership-based (i.e. they have members and a constitution that elects their officers), and*
- (b) *the money spent is issues-based and not designed to promote a particular party or group of parties. The issuing of report cards on parties' policies would be permitted but not advocating a vote for a particular party.*

⁷ <http://www.legislation.nsw.gov.au/maintop/view/inforce/act+78+1981+cd+0+N>

5. Affiliated union spending

The Bill (at proposed section 95G (6) and (7)) proposes to aggregate the electoral communications spending of a body affiliated to a political party (e.g. a union affiliated to the ALP) into the electoral communications spending of the party for the purposes of the caps on election spending.

The Greens recognise the right of any union, regardless of its affiliation to a political party, to be able to run issues-based campaigns, including during elections. This is a fundamental matter of respecting the collective free speech rights of the members of that union.

For example under the government's proposed legislation, if a union that is affiliated to the Labor party spent money on a campaign promoting a policy issue such as more funding for public transport, that money would reduce the Labor party's ability to spend on promoting itself.

Union members would be denied the right to collectively use their money to enter into the debate over important social, economic or environmental issues.

The restriction on affiliated spending is unfair and may well be challenged in the High Court.

The Greens however recognise the risk that campaign spending by affiliated bodies could in effect undermine the caps on expenditure introduced in the 2010 amendments to the act. Affiliated bodies of a party could spend up to the third party limit advocating a vote for that party or that party's candidates without affecting the limits on spending of that party.

The Greens therefore recommend that the Bill be amended to allow affiliated bodies to spend on issues-based campaigns but to ensure there is no loophole that effectively increases the cap on electoral communications expenditure by allowing for de-facto election spending by an affiliated body.

Recommendation 2: *The Bill be amended so that for the purposes of the section that aggregates the expenditure of parties and affiliated organisations (proposed 95G(6)), electoral expenditure would be limited to expenditure for or in connection with promoting or opposing, directly or indirectly, a party or the election of a candidate or candidates. Affiliated organisations should be allowed to run issues-based campaigns, without affecting the expenditure of the party to which they are affiliated, provided they do not advocate a vote for a party or candidate.*

Note: As the bill stands, under s. 87 of the Act, "electoral expenditure" also includes expenditure for the purpose of influencing, directly or indirectly, the voting at an election.

The distinction between an issues based campaign and advocating a vote for a party is made in the federal jurisdiction in establishing tax exemption status.

This recommendation would allow, for example, a Better Services for a Better State campaign or a Fair Go for Public Transport campaign to be funded by affiliated unions without affecting Labor's spending ability, provided the campaign did not advocate a vote for a party or candidate.

6. Affiliation fees

The Bill (at proposed section 96D(4)) seeks to ban the payment of affiliation fees, such as those paid by affiliated unions to the Labor party.

Affiliation fees are seen by many as a backdoor way to allow donations and a mechanism for the continuation of much that is wrong with politics in NSW.

On the other hand,

- ◆ Affiliation fees are a valid way for organisations to maintain a foothold in parliamentary politics. This is seen by many as a valid mechanism for advancing the rights of the members of those organisations and equalising the political consequences of the economic imbalance between large corporations and individual citizens. Wealthy corporations are able to exercise political power flowing from their wealth while individuals are relatively disenfranchised.
- ◆ If organisations, as directed by their members, seek to be engaged in electoral politics on behalf of their members, and a party wishes to accept collective membership, then there is no valid public policy reason for impeding that membership.
- ◆ Using campaign donation legislation to change the shape and function of a political party is inappropriate and establishes a dangerous precedent.
- ◆ The legislation, instead of being welcomed as a restraint on money politics, will be seen by many union members as a Liberal and National party attack on their union and their capacity to project their views into politics.
- ◆ Banning affiliation fees imposes an unreasonable cost on the party as they still have to service those members, including, for example, running conferences, and distributing materials.

The 2010 amendments to the Act (s. 96(6)(a)) prohibit the use of affiliation fees for election campaign expenditure and limited it to administrative purposes.

The Greens aim to achieve a balance between protecting the collective rights of members of membership-based organisations and the integrity of the ban on donations from entities other than individuals.

Recommendation 3: *The Bill be amended to allow fees to be paid by an affiliated organisation to a political party, provided that:*

Before an organisation can pay any fees to a political party a secret ballot of all members of the organisation is to be held at least once every four years and the majority of members voting agree to paying those fees. Provisions should be included to allow such a ballot to be held in a cost effective online manner

Fees can be collected from an organisation provided that:

- a. *The organisation is membership-based (i.e. members are only individuals, pay subscriptions and elect a governing body);*
- b. *Fees are capped at the greater of (these amounts are to be indexed by inflation – Sydney CPI):*
 - *\$5,000; or*
 - *\$0.50 times the number of members in the organisation at 1 October of the year in which the fees are paid, up to a maximum of \$7,500; and*
- c. *The fees are not used for any election campaigning activity and are used only to pay for the cost of administering the party.*

Individual party membership fees can be collected from individuals but they are capped at \$250 p.a. and are counted as part of that individual's donations to the party.

Note: Section 95D3(a) of the Act currently caps party membership fees at \$2,000 for each individual member. The Greens believe this is too large and recommend that it be reduced to \$250 per annum.

By excluding affiliation fees from the campaign fund, the money could only be spent on organisational activities. Money spent on campaigning in NSW state elections has to be paid from a tightly audited bank account, into which affiliation fees would not be allowed to be paid under this amendment.

There is an argument that administration fees would free up other money to be spent on campaigns. While there is some truth in this, restrictions on the total amount collected as fees limit any damage that might be done.

The Greens believe in a healthy democracy as a core principle. These amendments are a matter of principle but clearly in the current context their immediate application would be to the Labor party and its culture of affiliating unions.

The Greens NSW do not believe that donations law reform should be used to restrict the ability of unions or other membership based organisations to become members of political parties on behalf of their members.

However this does not alter the position adopted by the Greens NSW that we do not accept such collective membership or donations from any organisation.

There is scope for legitimate political debate as to how collective political participation can best happen. For The Greens NSW this is achieved through internal party structures. Other parties, such as the Labor Party, may legitimately determine to allow external structures such as unions to provide some of that democratic control and oversight.

7. Conclusions

While the Greens strongly support the core principle of the Bill, we are concerned that as drafted it seeks to impose unreasonable restrictions on the rights of many organisations to engage in the political process.

We have made three recommendations for changes to the Bill to allow for a ban on donations other than from individuals while still allowing for peak bodies and affiliated unions to campaign on issues and to not interfere in the internal organisational arrangements of political parties.

Appendix 1: Implications for issues-based organisations

This appendix demonstrates that under proposed section 96D of the Bill and the provisions of the Election Funding, Expenditure and Disclosures Act 1981 (the Act), peak bodies such as the NCC, NCOSS or Unions NSW would be unable to accept any money from any of their constituent organisations for any political campaigning.

According to section 4 of the Act, organisations qualify as third party campaigners if they:

- ◆ spend more than \$2,000 in the period from 1 October in the year before the election until voting day ('the capped expenditure period') and
- ◆ do so as electoral communication expenditure.

Section 87 of the Act defines *electoral expenditure* as any expenditure which is either:

- ◆ "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."

Electoral communications expenditure is election expenditure on communications, including

- ◆ advertisements in radio, television, the Internet, cinemas, newspapers and billboards,
- ◆ posters and brochures,
- ◆ internet, telecommunications, stationery and postage,
- ◆ employing staff engaged in election campaigns, and
- ◆ office accommodation for any such staff and candidates.

Thus an organisation would qualify as a third party campaigner under s. 4 and 87 of the Act if it spent more than \$2,000 on producing and promoting materials that attempted to influence voters, *even if those materials were not designed to promote a particular party.*

Having passed that bar at one election, the body would then be prohibited under proposed section 96D(1) of the Bill from accepting a political donation at any time from anyone other than an individual who is enrolled on the electoral roll for local, state or federal elections.

Section 85(1)(d) of the Act defines a political donation to an entity other than a party, elected member or group of candidates to be *inter alia* "a gift made ... to enable the entity ... to incur electoral expenditure" which includes any expenditure "for the purpose of influencing, directly or indirectly, the voting at an election."