

Submission
No 27

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

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Date received: 13/01/2012

The Director
Select Committee on Election Funding Bill
New South Wales Legislative Council
By email: fundinginquiry@parliament.nsw.gov.au

13 January 2012

Dear Director,

Inquiry into the provisions of the Election Funding, Expenditure and Disclosures Amendment Bill 2011 (NSW)

This inquiry is to be welcomed: despite the Election Funding, Expenditure and Disclosures Amendment Bill 2011 (NSW) running only to seven pages, it raises complex questions of principle and practical application. If enacted, its provisions will effect significant changes to the *Election Funding, Expenditure and Disclosures Act 1981* (NSW). This inquiry provides a vital opportunity to comprehensively examine the Bill.

The key parts of this submission are as follows:

- Part I: Proposed sections 95G(6) and 95G(7) of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW): Aggregation of electoral communication expenditure when incurred by affiliated organisations;
- Part II: Proposed section 96D of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW): Restriction of political donations to individuals on the electoral rolls;
- Part III: Proposed section 96D(4) of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW): Prohibition of affiliation fees from corporations and other entities.

I hope this submission will be of assistance to the Committee.

Thank you.

Yours sincerely,

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LIST OF RECOMMENDATIONS

Recommendation One:

- Proposed sections 95G(6) and 95G(7) to the *Election Funding, Expenditures and Disclosures Act 1981* (NSW) should be rejected.
- A provision should be inserted into the *Election Funding, Expenditures and Disclosures Act 1981* (NSW) that aggregates the 'electoral communication expenditure' of political parties, candidates and third-party campaigners (whether they be individuals or groups) when there is a co-ordinated campaign for the purpose of New South Wales State elections.
- Factors to be considered in determining whether there is a co-ordinated campaigns between a political party and a third-party campaigner should include:
 - whether the third-party campaigner is an office bearer of the party;
 - whether the third-party campaigner is a member of the party (whether as an individual or as an organisation).

Recommendation Two:

- Proposed section 96D of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) should be rejected.

Recommendation Three:

- The ban on organisational affiliation fees to be enacted through proposed section 96D of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) should be rejected.

I PROPOSED SECTIONS 95G(6) AND 95G(7) OF *ELECTION FUNDING, EXPENDITURE AND DISCLOSURES ACT 1981* (NSW): AGGREGATION OF ELECTORAL COMMUNICATION EXPENDITURE WHEN INCURRED BY AFFILIATED ORGANISATIONS

A *Brief Explanation of Proposed Amendment*

The *Election Funding, Expenditure and Disclosures Act 1981* (NSW) ('the Act') limits 'electoral communication expenditure' incurred by political parties, candidates and third-party campaigners. The general rule is that these limits apply separately to each candidate and political party.¹ Crucial exceptions to this rule are found in section 95G of the Act that provides for the aggregation of 'electoral communication expenditure' in several situations. None of these situations, however, provide for aggregation of the 'electoral communication expenditure' of a third-party campaigner to that of a political party. It is this that the Election Funding, Expenditure and Disclosures Amendment Bill 2011 (NSW) ('the Bill') seeks to change through proposed sections 95G(6) and 95G(7) of the Act.

If enacted, proposed section 95G(6) will aggregate the 'electoral communication expenditure' of an 'affiliated organisation' of a party to the expenditure incurred by the party – if the combined 'electoral communication expenditure' of the affiliated organisation/s and the party exceed the limit/s applying to the party then the party is treated to have breached these limit/s. Proposed section 95G(7) defines 'affiliated organisation of a party' as 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)'.

B *Legitimate Aim of Aggregating Expenditure of Co-ordinated Electoral Campaigns*

The general rule that the limits on 'electoral communication expenditure' under the Act apply separately to each candidate and political party is informed by the

¹ *Election Funding, Expenditure and Disclosures Act 1981* (NSW) s 95F ('Act').

understanding that these limits seek to promote fairness in *electoral contests* and amongst *electoral contestants* and that for such purpose, contestants, whether as candidates or political parties, should be treated as separate entities as they should be presumed to be competing with each other.

This rule does not apply when there is clearly a co-ordinated electoral campaign between the candidate/s and the party or between parties. Hence, sections 95G(1) and 95G(2) of the Act aggregate the 'electoral communication expenditure' of 'associated parties' (parties that endorse the same candidates or form a 'recognised coalition'²); sections 95G(4) and 95G(5) do the same in relation to a party and the candidate/s it has endorsed for the election to the Legislative Council. When there is a co-ordinated electoral campaign, the candidate/s and the party or the parties can legitimately be treated as one for the purposes of the 'electoral communication expenditure' limits.

These provisions of the Act can be said to give rise to the following principle:

'Electoral communication expenditure' limits should apply separately to each political party (with no aggregation of spending from other parties, candidates or third-party campaigners) unless there is a co-ordinated electoral campaign for the purpose of New South Wales elections.

It is this principle, in particular its proviso, that gives rise to the justification for proposed sections 95G(6) and 95G(7). According to the Premier, Barry O'Farrell, these amendments deal with the 'unfair loophole' where 'organisations intimately involved in the governance of a political party, even with office bearers in common, campaigning on behalf of a party with no corresponding offset to the party's own ability to spend'.³ More specifically, Deputy Premier, Andrew Stoner, identified the target of the provisions being trade unions running 'proxy campaigns' for the Australian Labor Party.⁴

² This phrase is not defined by the Act.

³ New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 September 2011, 5432 (Barry O'Farrell).

⁴ New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 October 2011, 6045 (Andrew Stoner).

C *Flawed Assumption of Co-ordinated Electoral Campaigns Between ALP and its Affiliated Trade Unions*

While the amendments are informed by a legitimate aim, they remain seriously flawed. It is true, of course, that the Australian Labor Party ('ALP') and its affiliated trade unions can – and do – engage in co-ordinated electoral campaigns. But by *always* aggregating the expenditure of 'affiliated organisations' to the ALP, proposed sections 95G(6) and 95G(7) assume that the ALP and its affiliated trade unions are *necessarily* engaged in co-ordinated electoral campaigns. This is a deeply problematic assumption – it does not hold simply because the policy views and agenda of the ALP and its affiliated trade unions do not always coincide. There are many reasons for this including divisions between the affiliated trade unions and the parliamentary wing of the ALP (due in part to their different constituencies: for the trade unions, their members; for the ALP, the voters); and the diversity of trade union movement.

Indeed, striking examples can be given of the political conflict between the ALP and its affiliated trade unions. Take, for instance, the campaign by New South Wales unions (including those affiliated to the New South Wales ALP) against then ALP Premier Morris Iemma's plan to privatise the electricity industry.⁵ Consider further the campaign in the most recent State elections by the New South Wales branch of the Electrical Trades Union - a union affiliated to the New South Wales ALP - to support non-ALP candidates who opposed the privatisation of the State's electricity industry.⁶

D *Unfair Impact: Over and Under-Inclusive Scope*

Proposed sections 95G(6) and 95G(7) are also unfair in their operation. They are *over-inclusive*: 'electoral communication expenditure' spent on campaigns by trade unions affiliated to the ALP *against* the ALP would perversely count towards the ALP's spending limits. Expenditure on the recent election campaign by the Electrical Trades Union in support of non-ALP candidates would, for example, count towards the 'electoral communication expenditure' limits of the ALP.

⁵ See Michael Easson, 'How the machine ate the Labor Party', *The Australian Financial Review* (Sydney), 11 June 2010, 66.

⁶ See Editorial, 'Labor leader electrocutes the Premier', *The Sunday Telegraph* (Sydney), 28 November 2010, 49; Steven Scott, 'Power play reveals high ALP tension', *The Australian Financial Review* (Sydney), 30 November 2010, 16; Sean Nicholls, 'Forcing out Riordan will upset unions, retiring MP warns', *The Sydney Morning Herald* (Sydney), 30 November 2010, 4.

These provisions will cut deep into the political campaigns of affiliated trade unions undertaken during the 'capped expenditure period', the period during which the limits on 'electoral communication expenditure' apply.⁷ 'Electoral communication expenditure' is, in essence, 'electoral expenditure' directed at electoral communication.⁸ 'Electoral expenditure', in turn, is broadly defined by section 87(1) to mean:

Expenditure 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 (italics added).

This broad definition - in particular the italicised parts - has the effect that 'electoral communication expenditure' will capture spending on communication undertaken as part of issue-based campaigns aimed at influencing the policies of parties and candidates during the 'capped expenditure period',⁹ even though such campaigns may not explicitly advocate a vote for or against a particular party or candidate.¹⁰

Proposed sections 95G(6) and 95G(7) are also *under-inclusive*. They clearly fail to capture all co-ordinated electoral campaigns: they do *not* cover electoral campaigns co-ordinated between:

- a political party and its candidates, and other individuals (including those who are office-bearers in the party);
- a political party and its candidates, and groups other than affiliated organisations; and
- third-party campaigners.

The false assumption upon which these amendments are based together with its discriminatory scope give credence to the criticism that they unfairly target the ALP and its-affiliated trade unions.

⁷ This period will typically run from 1 October of the year before State elections up to the polling day: see *Act* s 95H.

⁸ *Act* s 87(2).

⁹ See *Act* s 95H.

¹⁰ Cf New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 October 2011, 6053 (Barry O'Farrell).

E *Undermining Freedom of Party Association and Vitality of Party System*

Australian political parties organise themselves in various ways. Some parties, such as the Liberal Party¹¹ and the National Party¹², may restrict themselves to individual memberships and are, in this way, *direct parties*. Others like the ALP¹³ and the New South Wales Greens¹⁴ allow both individual membership and membership by groups and are therefore *mixed parties*. The Constitution of the federal National Party also allows it to be a mixed party as organisations can become associations of the Party where there is no state branch.¹⁵ Some parties like the Shooters Party fall somewhere in the middle: membership is formally restricted to individuals,¹⁶ while close links are maintained with various groups.¹⁷ In these situations such groups, while not members of the party, act as *ancillary organisations*.¹⁸ Such diversity of party structures should be respected because it is one of the main ways in which the pluralism of Australian politics is sustained. The freedom of political parties to organise their party structures is also a crucial aspect of freedom of party association.

These general principles reveal another vice of proposed sections 95G(6) and 95G(7): by targeting ‘affiliated organisations’, their impact is restricted to parties with indirect structures – that is, parties which allow membership by groups – and do not extend to direct parties. This not only undermines freedom of party association by

¹¹ See, for example, Liberal Party of Australia (New South Wales), *Constitution and Regulations of the Liberal Party of Australia (NSW)* cl 2.1.

¹² See, for example, NSW Nationals, *Constitution and Rules of the National Party of Australia (NSW)* cl 2.

¹³ See, for example, Australian Labor Party (NSW Branch), *Rules of the Australian Labor Party (NSW) 2005–2006* cl A.2–A.3.

¹⁴ The Greens NSW, *Constitution of the Greens (NSW)* cl 2.1.

¹⁵ National Party of Australia, *Constitution of the National Party of Australia (Cth)* cl 71. Before 1945, various farmers’ organisations had formal relationships with the Country Party, the predecessor of the National Party: Keith O Campbell, ‘Australian Farm Organizations and Agricultural Policy’ in Colin Hughes (ed), *Readings in Australian Government* (University of Queensland Press, 1968) XXX, 438.

¹⁶ NSW Shooters and Fishers Party, *Constitution of The Shooters Party (NSW)* by-law 2.

¹⁷ In the case of the Shooters Party, this is made clear by its Constitution, which states that one of its aims is ‘[t]o exert a discipline through shooting organizations and clubs and within the non-affiliated shooting community, to curb the lawless and dangerous element; and to help shooters understand that they hold the future of their sport in their own hands by their standards of conduct’: NSW Shooters and Fishers Party, *Constitution of The Shooters Party (NSW)* cl 2(g) (emphasis added). In relation to the 2003 State Election, The Shooters Party received thousands of dollars in contributions from various hunting and pistol clubs including the Federation of Hunting Clubs Inc, Singleton Hunting Club, St Ives Pistol Club, Illawarra Pistol Club and the NSW Amateur Pistol Association: Election Funding Authority (NSW), *Details of Political Contributions of More than \$1,500 Received by Parties that Endorsed a Group and by Independent Group at the Legislative Council 2003* (2003) <http://www.efa.nsw.gov.au/_data/assets/pdf_file/0007/63718/2003PartyContributions.pdf>.

¹⁸ For fuller explanations of direct and indirect party structures, see Maurice Duverger, *Political Parties: Their Organization and Activity in the Modern State* (Routledge, 2nd ed, 1964) 6–17.

discriminating against a particular type of party structure but may also have the effect of undermining the vitality of Australia's party system by reducing its diversity.

F *The Implied Freedom of Political Communication*

The High Court has implied a freedom of political communication from sections of the *Commonwealth Constitution* relating to representative and responsible government, specifically sections 7, 24, 64 and 128.¹⁹ This freedom, while derived from the *Commonwealth Constitution*, also applies to state and territory legislation by virtue of the fact that the discussion of matters at the level of state and territory (or local government) is able to bear upon the choices to be made at federal elections. According to the High Court, this inter-relationship (find a better term, maybe symbiotic relationship?) results from national political parties, the financial dependence of state, territory and local governments on federal funding and 'the increasing integration of social, economic and political matters in Australia'.²⁰

The current test for determining whether this freedom has been breached (often referred to as the *Lange* test) has two limbs:

- Does the law (of a state or federal parliament or a territory legislature) effectively burden freedom of communication about government or political matters either in its terms, operation or effect?
- If the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end (in a manner) which is compatible with the prescribed system of representative and responsible government?²¹

Applying this test to proposed sections 95G(6) and 95G(7), these provisions do burden freedom of political communication by further limiting the amount that a political party that has affiliated organisations can spend on election campaigns.

¹⁹ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 566–67 ('*Lange*').

²⁰ *Lange* (1997) 189 CLR 520, 571–72. See also *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 142 (Mason CJ), 168–69 (Deane and Toohey JJ), 215–17 (Gaudron J) ('*ACTV*'); *Coleman v Power* (2004) 220 CLR 1, 45 (McHugh J).

²¹ The test was stated in *Lange* (1997) 189 CLR 520, 571–72 as modified by a majority in *Coleman v Power* (2004) 220 CLR 1, 50 (McHugh J), 78 (Gummow and Hayne JJ), 82 (Kirby J).

While proposed sections 95G(6) and 95G(7) have the legitimate aim of dealing with co-ordinated election campaigns,²² they are likely to be unconstitutional because they are not reasonably appropriate and adapted to this aim: they are based on a false assumption of co-ordinated election campaigns between the ALP and its affiliated trade unions;²³ they are both over and under inclusive.²⁴

G *Proposed Change*

The regulatory framework governing election funding in Canada and the United Kingdom have provisions dealing with co-ordinated campaigns by *third parties*. Section 351 of the *Canada Elections Act 2000* (Canada) states that:

A third party shall not circumvent, or attempt to circumvent, a limit set out in section 350 in any manner, including by splitting itself into two or more third parties for the purpose of circumventing the limit or acting in collusion with another third party so that their combined election advertising expenses exceed the limit.

Section 94(6) of *Political Parties, Elections and Referendum Act 2000* (UK) stipulates that:

(6) Where—

(a) during a regulated period any controlled expenditure is incurred in a particular part of the United Kingdom by or on behalf of a third party, and
(b) the expenditure is so incurred in pursuance of a plan or other arrangement whereby controlled expenditure is to be incurred by or on behalf of—

(i) that third party, and

(ii) one or more other third parties, respectively in connection with the production or publication of election material which can reasonably be regarded as intended to achieve a common purpose falling within section 85(3),

the expenditure mentioned in paragraph (a) shall be treated for the purposes of this section and Schedule 10 as having also been incurred, during the period and in the part of the United Kingdom concerned, by or on behalf of the other third party (or, as the case may be, each of the other third parties) mentioned in paragraph (b)(ii).

²² See text above accompanying nn 2-4.

²³ See text above accompanying nn 5-6.

²⁴ See text above accompanying nn 7-10.

The above provisions provide useful guidance but have significant limitations. Both deal only with campaigns co-ordinated amongst third parties and do not apply to campaigns co-ordinated between political parties and candidates, and third parties (whether they be individuals or groups). The Canadian provision has other shortcomings: it provides for a prohibition rather than aggregation of spending, and it is too narrow in scope as it is triggered only when there is either collusion or a purpose to circumvent the spending limits, rather than when there is a co-ordinated electoral campaign.

Recommendation One:

- Proposed sections 95G(6) and 95G(7) to the *Election Funding, Expenditures and Disclosures Act 1981* (NSW) should be rejected.
- A provision should be inserted into the *Election Funding, Expenditures and Disclosures Act 1981* (NSW) that aggregates the 'electoral communication expenditure' of political parties, candidates and third-party campaigners (whether they be individuals or groups) when there is a co-ordinated campaign for the purpose of New South Wales State elections.
- Factors to be considered in determining whether there is a co-ordinated campaigns between a political party and a third-party campaigner should include:
 - whether the third-party campaigner is an office bearer of the party;
 - whether the third-party campaigner is a member of the party (whether as an individual or as an organisation).

II PROPOSED SECTION 96D OF *ELECTION FUNDING, EXPENDITURE AND DISCLOSURES ACT 1981* (NSW): RESTRICTION OF POLITICAL DONATIONS TO INDIVIDUALS ON THE ELECTORAL ROLLS

A *Brief Explanation of Proposed Amendments*

The caps on political donations in section 95A of the Act and prohibition on breaching such caps in section 95B(1) currently do not differentiate between:

- individuals on the roll of electors for the federal, State or local govt elections and those not so registered;
- individuals, on the one hand, and corporations and other entities, on the other.

Proposed section 96D of the Act does so differentiate by banning political donations from all except individuals on the roll of electors for the federal elections, State elections and local government elections ('electoral rolls'). Proposed section 96D(4) is specifically directed towards party membership subscriptions and will be discussed separately in Part III.

B *Questionable Aim*

New South Wales Premier, Barry O'Farrell, has explained proposed section 96D as implementing the Coalition's commitment 'to restrict political donations to individuals – citizens on the electoral roll, the people who decide elections'.²⁵ In the words of the Premier, '(i)t will invest the [i checked this against original] power to donate solely in those who have the power to vote, those with the greatest stake in the system'.²⁶

The Premier further stated in the 2nd Reading Speech to the Bill:

...the only way that you can ensure that the public is going to have confidence about our electoral system is to limit [donations] to the individuals who are on the electoral roll. It must be limited to those Australian citizens who are enrolled, not overseas citizens and non-residents, because of course those people do not get the vote. They

²⁵ New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 September 2011, 5432 (Barry O'Farrell).

²⁶ *Ibid.*

do not have a stake in the system and they should not be able to influence the system – nor should unions, third party interest groups and corporations . . .²⁷

These statements suggest that two arguments underlie the ban on political donations from those not on the electoral rolls:

- Argument 1): Only those on the electoral rolls should be able to influence the political process;
- Argument 2): Because of Argument 1), non-citizens and organisations should not be able to influence the political process.

Therefore, non-citizens and organisations should not be able to make political donations.

Each argument - and consequently the ban - is flawed. Argument 1) wrongly excludes citizens not on electoral rolls. Outside its scope are some citizens who are residing overseas.²⁸ Also falling outside its scope are resident citizens not registered under the electoral rolls – the Australian Electoral Commission, for one, has estimated that 1.4 million Australian citizens who are entitled (and obliged) to vote in federal elections are ‘missing’ from the federal electoral roll.²⁹

Argument 1) seems intuitively appealing because it invokes the notion of citizenship. It implies a *citizenship-centred* understanding of the right to vote and political freedoms more generally – citizenship being treated as a necessary condition for these rights. Such a narrow understanding, however, fails to appreciate that citizenship should not be the only basis for the right to vote or for political freedoms. There is a persuasive argument that long-term residence and attachment to the country should also result in an entitlement to vote: such a right should extend, for example, to permanent residents (as they do in New Zealand).³⁰

²⁷ New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 September 2011, 5433 (Barry O’Farrell).

²⁸ Peter Mares and Brian Costar, ‘The Voting Rights of Non-Resident Citizens and Non-Citizen Residents’ in Joo-Cheong Tham, Brian Costar and Graeme Orr (eds), *Electoral Democracy: Australian Prospects* (Melbourne University Press, 2011) 3.

²⁹ Peter Brent and Rob Hoffman, ‘Electoral Enrolment in Australia: Freedom, Equality and Integrity’ in Joo-Cheong Tham, Brian Costar and Graeme Orr (eds), *Electoral Democracy: Australian Prospects* (Melbourne University Press, 2011) 20.

³⁰ See Mares and Costar, above n 28.

More significantly, citizenship should not be the sole basis upon which the ability to influence the political process in Australia is based (or put differently, the ability to exercise political freedoms in this country). Key political freedoms, in particular, those of political expression and association, are human rights – individuals possess these rights by virtue of their status as human beings, not because they are citizens of a country. This is made abundantly clear by the key international conventions on human rights.³¹ Those regularly subject to the laws of a country, while not necessarily entitled to a right to vote,³² should also be able to participate in the political process:³³ permanent residents and temporary residents who are on a long-term basis (e.g. migrant workers on the 457 (Business (Long Stay) visas) should be able to express and organise themselves politically especially in relation to the laws to which they are subject.

The difficulties with Argument 1) weaken the force of Argument 2). Argument 2) is also wrong for another set of reasons: even if Argument 1) is accepted, this does not mean that organisations should not be able to influence the political process. Citizens in Australia typically influence the political process through organisations and groups (political parties, companies, trade unions or non-government organisations). Institutions like the media and independent statutory agencies also play an indispensable role in Australian politics. There is little doubt: Australian politics is heavily collectivised and institutionalised. Yet, Argument 2) neglects this reality and advances a problematic *individualised* understanding of political freedoms and the political process.

It should also be noted that overseas comparisons are equivocal in providing support for a ban on political donations from entities and individuals not on the electoral rolls. Closest to proposed section 96D of the Act is the position in Canada where political donations are restricted to citizens *and* permanent residents.³⁴ In the United Kingdom,

³¹ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 19-20; *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19, 22.

³² See *Universal Declaration of Human Rights*, art 21(1).

³³ See Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books, 1983) 31-64.

³⁴ Section 404(1) of the *Canada Elections Act* (SC 2000 c 9) provides that:

No person or entity other than an individual who is a citizen or permanent resident as defined in subsection 2(1) of the *Immigration and Refugee Protection Act* shall make a contribution to

political donations are restricted to individuals registered on the electoral registers *as well as* companies registered in the UK and other EU countries and UK trade unions.³⁵ New Zealand, on the other hand, generally does not ban political donations from organisations or those not on electoral rolls³⁶ (A NZ\$1 500 donation limit, however, applies to ‘overseas persons’, those residing outside New Zealand who are not New Zealand citizens or registered on the electoral rolls, companies registered or which have their principal place of business outside of New Zealand).³⁷

C *Unjustified Limitation of Political Freedoms*

1 *Impact on Political Freedoms*

The ban to be imposed by section 96D of the Act will have an impact on the exercise of political freedoms through political parties as well as third-party campaigners. If enacted, political parties will no longer be able to receive political donations from groups and individuals not on the electoral rolls and groups. This will mean at the

a registered party, a registered association, a candidate, a leadership contestant or a nomination contestant.

³⁵ Section 54 of the *Political Parties, Elections and Referendum Act 2000* (UK) provides that:

- (1) A donation received by a registered party must not be accepted by the party if—
 - (a) the person by whom the donation would be made is not, at the time of its receipt by the party, a permissible donor; or
 - (b) the party is (whether because the donation is given anonymously or by reason of any deception or concealment or otherwise) unable to ascertain the identity of that person.
- (2) For the purposes of this Part the following are permissible donors—
 - (a) an individual registered in an electoral register;
 - (b) a company—
 - (i) registered under the Companies Act 2006, and
 - (ii) incorporated within the United Kingdom or another member State, which carries on business in the United Kingdom;
 - (c) a registered party, other than a Gibraltar party whose entry in the register includes a statement that it intends to contest one or more elections to the European Parliament in the combined region;
 - (d) a trade union entered in the list kept under the Trade Union and Labour Relations (Consolidation) Act 1992 or the Industrial Relations (Northern Ireland) Order 1992;
 - (e) a building society (within the meaning of the Building Societies Act 1986);
 - (f) a limited liability partnership registered under the Limited Liability Partnerships Act 2000... which carries on business in the United Kingdom;
 - (g) a friendly society registered under the Friendly Societies Act 1974 or a society registered (or deemed to be registered) under the Industrial and Provident Societies Act 1965 or the Industrial and Provident Societies Act (Northern Ireland) 1969; and
 - (h) any unincorporated association of two or more persons which does not fall within any of the preceding paragraphs but which carries on business or other activities wholly or mainly in the United Kingdom and whose main office is there.

³⁶ See *Electoral Act 1993* (NZ) sub-pt 3, pt 6A.

³⁷ *Electoral Act 1993* (NZ) s 207K.

very least that political parties will have to institute mechanisms to ensure that their donors are on the roll of electors.

A more complex situation attends third-party campaigners, that is, individuals or groups that incur 'electoral communication expenditure during a capped expenditure period . . . that exceeds \$2 000 in total'.³⁸ Essential to understanding this situation is appreciating the definitions of 'political donations' and 'gifts' under the Act. 'Political donations' are a type of 'gift'.³⁹ As it applies to third-party campaigners, a 'political donation' is:

a gift made to or for the benefit of an entity or other person (not being a party, elected member, group or candidate), the whole or part of which was used or is intended to be used by the entity or person:

- (i) to enable the entity or person to make, directly or indirectly, a political donation or to incur electoral expenditure, or
- (ii) to reimburse the entity or person for making, directly or indirectly, a political donation or incurring electoral expenditure.⁴⁰

If there is no 'gift' - a disposition of property with no or inadequate consideration⁴¹ - then there is no 'political donation' and restrictions on 'political donations' (including those proposed by the Bill) have no application.

This analysis indicates that the impact of the ban proposed by section 96D in relation to 'political donations' on third-party campaigners will depend on the income or funds they use incurring 'electoral expenditure' or making 'political donations'. If they use 'gifts', they will be caught by the ban; on the other hand, if commercial revenue is used, the ban will not apply as no 'gifts' are being used. The implications of this will be drawn out more fully below in relation to various third-party campaigners.

Two other points should be made before canvassing the specific position of different third-party campaigners. The first point concerns the period the ban sought by proposed section 96D will apply. An individual or group needs to have incurred more than \$2 000 of 'electoral communication expenditure' during a 'capped expenditure period' in order to have the status of a third-party campaigner (Of note is that the

³⁸ Act, s 4.

³⁹ See Act, s 85.

⁴⁰ Act, s 85(1)(d).

⁴¹ Act, s 84(1) (definition of 'gift').

‘electoral communication expenditure’ can be spent in *any* ‘capped expenditure period’: for instance, it could have been spent in the previous State elections.). But once an individual or group is a third-party campaigner, the ban proposed by section 96D will apply to ‘political donations’ received *at any time* and not just during a ‘capped expenditure period’. This is clear from the terms of the proposed section. Also, the definition of ‘political donations’ upon which this section turns captures all ‘electoral expenditure’ and is not restricted to ‘electoral expenditure’ incurred during the ‘capped expenditure period’ (see above).

Second, non-government organisations that do not engage in *any* ‘electoral expenditure’ or make *any* ‘political donations’ will not be caught by these restrictions. They are not ‘third-party campaigners’ as they would not have incurred any ‘electoral communication expenditure’. Further, the ‘gifts’ they receive will not be ‘political donations’ under the Act.

The impact of proposed section 96D on third-party campaigners can now be illustrated in more detail:

- *Non-Government Organisations that are Predominantly Political Organisations* (e.g. GetUp!⁴²)

We can assume that the income of these organisations mostly comes from donations – ‘gifts’ under the Act – and because such donations are given to enable the organisations to engage in political spending, they are most likely to be ‘political donations’ under the Act.⁴³ If so, these organisations will have to institute mechanisms to ensure all of its donors are on the electoral rolls.

- *Non-Government Organisations with Charitable and Political Purposes* (e.g. Brotherhood of St Laurence⁴⁴ and RSPCA⁴⁵)

We can assume that the income of these organisations mostly comes from donations which are ‘gifts’ under the Act. If so, these organisations will have to do one of the following:

- restrict donations to those on the electoral rolls;

⁴² See GetUp!, *GetUp! Action for Australia* (2012) <<http://www.getup.org.au/>>.

⁴³ See in particular *Act*, s 85(1)(d).

⁴⁴ See Brotherhood of Saint Lawrence, *Home* (9 January 2012) <<http://www.bsl.org.au/>>.

⁴⁵ See RSPCA Australia, *Home* <<http://www.rspca.org.au/>>.

- have an 'open' donation system while setting up a separate fund for political campaigning with incoming funds restricted to those on the electoral rolls.

- *Trade Unions*

There is a strong argument that the restrictions on 'political donations' do not apply to trade union membership fees – the principal source of trade union income - as such payments are not 'gifts' under the Act. According to the Act, a 'gift' means:

any disposition of property made by a person to another, otherwise than by will, being a disposition made *without consideration in money or money's worth or with inadequate consideration*, and includes the provision of a service (other than volunteer labour) for no or inadequate consideration (italics added).

Trade union membership fees are typically paid for services provided by the union, particularly its bargaining and campaigning activities. It is difficult then to characterise such fees as being made with no or inadequate consideration (It should be noted that these fees are not caught by section 85(3) which only deems membership subscriptions paid to political parties to be 'gifts'; indeed, this deeming provision itself suggests that membership subscriptions are not otherwise 'gifts').

If trade union membership fees are, however, 'gifts', compliance with restrictions on 'political donations' proposed by section 96D is likely to require trade unions to do one of the following:

- restrict membership to those on the electoral rolls: this would mean closing membership to workers who are permanent and temporary residents;
- have an 'open' membership system while setting up a separate fund for political campaigning with incoming funds restricted to those on electoral rolls.

- *Businesses*

If the restriction of political donations to those on the electoral rolls is enacted, the flow of money used by businesses for political campaigns is not likely to be significantly affected. This is because such money is often drawn from

share-holder funds, funds which are not 'gifts' under the Act as the purchase of shares is clearly for good consideration.

What about campaigns run by peak organisations like Unions NSW, Minerals Council of Australia, ACOSS or Clubs NSW?⁴⁶ The restriction proposed by section 96D will have no impact on campaigns funded by commercial revenue as such income does not come within the definition of 'gift' under the Act (and therefore, is not a 'political donation'). Whether funds provided by constituent organisations will be lawful if this restriction is enacted depend on the manner in which such funds are provided. If they are provided largely free of conditions, they are likely to be 'gifts', being funds provided for inadequate consideration. If, however, they are provided conditionally, (for instance, as payment under a contract for the peak organisation to conduct a campaign), they are not likely to be 'gifts' and therefore, will be lawful even if proposed section 96D is enacted.

2 *Why Unjustified*

There is nothing inherently wrong with limitations on political freedoms, including the freedom to make political donations – the crucial question is whether such limitations are justified.⁴⁷ This question can be usefully considered by asking whether there is a legitimate aim and, if so, whether the limitations are reasonably adapted to this aim (these are conveniently also the issues to be analysed when determining whether these limitations breach the implied freedom of political communication).⁴⁸

The answer to both issues point to a lack of proper justification for proposed section 96D. As outlined above, its aim is questionable not least because of its citizenship-centred and individualised understanding of political freedoms.⁴⁹ The individualised

⁴⁶ See Suzanne Smith, 'Clubs plot campaign against pokies reform', *ABC News* (online), 3 December 2010 < <http://www.abc.net.au/news/2010-12-03/clubs-plot-campaign-against-pokies-reform/2361180>>; Sean Nicholls, 'Xenophon accuses clubs of pokie fear tactics', *The Sydney Morning Herald* (Sydney), 28 December 2010, 2; Ben Langford, 'Clubs' pokie cry a 'scare campaign', *Illawarra Mercury* (Wollongong), 15 February 2011, 3.

⁴⁷ There is a compelling argument for limiting the freedom to make political donations through caps on such donations in the interest of preventing corruption and undue influence and promoting fairness in politics, see Joo-Cheong Tham, *Money and Politics: The Democracy We Can't Afford* (University of New South Wales Press, 2010) 108-110.

⁴⁸ See text above accompanying n 21.

⁴⁹ See text above accompanying nn 29-34.

understanding also results in proposed section 96D (if enacted) having an (unjustified) impact on freedom of political association whether it be through political parties, companies, trade unions, other non-government organisations and peak organisations. This section also has a discriminatory impact: it particularly affects organisations that rely primarily upon 'gifts' (e.g. organisations that are predominantly political entities; organisations with charitable and political purposes).⁵⁰

D *The Implied Freedom of Political Communication*

The reasons why the impact imposed by proposed section 96D (if enacted) is unjustified similarly suggest that this amendment is likely to be in breach of the implied freedom of political communication. Applying the *Lange* test⁵¹ to this provision, it is likely to be concluded that this restriction burdens political communication in that it restricts the money that is used for election campaigns. Significantly, there is a good chance that this burden will be found unconstitutional for breaching the implied freedom of political communication because it is informed by a questionable aim and because it is not reasonably appropriate and adapted to this aim, given its impact on freedom of political association, particularly for organisations that rely upon donations for their income.

Recommendation Two:

- Proposed section 96D of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) should be rejected.

⁵⁰ See text above accompanying nn 42-46.

⁵¹ See text above accompanying n 21.

III PROPOSED SECTION 96D(4) OF ELECTION FUNDING, EXPENDITURE AND
DISCLOSURES ACT 1981 (NSW): PROHIBITION OF AFFILIATION FEES FROM
CORPORATIONS AND OTHER ENTITIES

A *Brief Explanation of Proposed Amendment*

The Act currently deems subscriptions paid to a party by an individual or an entity to be 'gifts' to a party.⁵² This results in such payments being 'political donations'⁵³ and, therefore, being subject to the caps on political donations under the Act.⁵⁴ Importantly, the Act provides an exemption from these caps for party subscriptions and party levies. Section 95D states the following:

- (1) A party subscription paid to a party is to be disregarded for the purposes of this Division, except so much of the amount of the subscription as exceeds the relevant maximum subscription under subsection (3).
- (2) A "party subscription" is:
 - (a) an annual or other subscription paid to the party by a member of the party, or
 - (b) an annual or other subscription paid to the party by an entity or other person (including an industrial organisation) for affiliation with the party.
- (3) For the purposes of this section:
 - (a) the maximum subscription in respect of membership of a party is \$2,000, and
 - (b) the maximum subscription in respect of affiliation with a party is:
 - (i) if the amount of the subscription is not calculated by reference to the number of members of the affiliate--\$2,000, or
 - (ii) if the amount of the subscription is calculated by reference to the number of members of the affiliate--\$2,000 multiplied by the number of those members of the affiliate.
- (4) A party levy paid to a party by an elected member endorsed by the party is to be disregarded for the purposes of this Division.

Under these provisions, an individual who is a member of a political party could pay annual membership subscriptions up to \$2 000 *as well as* make donations to the same

⁵² Act, s 85(3).

⁵³ This results from Act, s 85(1)(a).

⁵⁴ Act, s 95A(1).

political party up to its cap. Entities, for instance trade unions, could also be affiliated to a political party and pay affiliation fees up to the maximum provided by section 95D(3).

As explained earlier, proposed section 96D restricts political donations to individuals on the electoral rolls. Of particular note for the present discussion is proposed section 96D(4). It provides that:

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 operation of section 85(3), taken to be gifts (and political donations) are subject to this section. *Accordingly, payment of any such subscription by an industrial organisation or other entity is unlawful under this section (italics added).*

Very oddly, the Bill does not seek to repeal or amend section 95D of the Act which currently provides for an exemption for party subscriptions and party levies. This will need to be rectified for the purpose of clarity.

That said, the intent of proposed section 96D(4) is clear enough from the words italicised above: it seeks to ban affiliation fees, in particular, fees paid by trade unions affiliated to the ALP. Is such a ban justified? The submission argues 'no'.⁵⁵

B *A Ban on Organisational Membership Fees: Misdirected at 'Trade Union Bosses'*

A ban on organisational membership fees (including trade union affiliation fees) will have a severe impact upon the trade union-ALP link by either prohibiting or severely limiting the amount of money that trade unions can contribute to the ALP. By banning or at least reducing significantly the flow of trade union affiliation fees to the ALP, such measures will most likely weaken the relationship that the trade union movement has with the ALP.

Indeed, this is one of key aims of some advocates of limits on political donations. For example, former NSW Premier Bob Carr has endorsed his successor, Morris Iemma's call for banning organisational contributions on the basis that unions will not be able

⁵⁵ The following sections heavily draw from Tham, above n 47, 96-126.

to affiliate to the ALP on a collective basis.⁵⁶ Discontented with the power wielded by 'trade union bosses' within the ALP, some would prefer that the ALP-union link be made illegal.

There are, in fact, three main complaints bundled up in the epithet, 'trade union bosses' and it is crucial to consider them separately. The first is the claim that the presence within the party of 'trade union bosses', or more kindly, the influence of trade union officials within the ALP, is making the ALP unelectable or at least preventing it from becoming 'the natural party of Federal government'.⁵⁷ The concern here is that the influence of trade unions has the effect of making the ALP not representative of the Australian community, thereby impairing – perhaps even severely damaging – its electoral prospects.

Such views may or may not be correct. The issue here, however, does not turn on the veracity of these views; the question here is whether a ban on organisational membership fees is a legitimate way of dealing with concerns regarding the electability of the ALP (or for that matter, the electability of any party). The answer is "surely not": these are matters for the ALP and its members to decide, not one for regulation, let alone contribution limits involving a ban on organisational membership fees. Should these concerns not be dealt with properly then the discipline of the ballot box will operate with voters choosing not to support the ALP.

There are two other complaints implied by criticisms of 'trade union bosses': one relating to internal party democracy and the other to trade union democracy. Mark Aarons, a former union official and an adviser to Bob Carr when he was New South Wales Premier, has argued that the ALP is organised in 'a most undemocratic way'⁵⁸ because affiliated trade unions exercise 'a grossly out-of-proportion, even extraordinary, influence over policy formulation'.⁵⁹ This lack of proportion is said to arise because the level of power trade union delegates exercise within the ALP is not justified by the level of union density: how can it be right that trade unions have 50

⁵⁶ Editorial, 'Limit political donations: Carr', *The Australian* (online), 4 May 2008 <<http://www.theaustralian.news.com.au/story/0,25197,23643124-2702,00.html>>.

⁵⁷ Mark Aarons, 'The Unions and Labor' in Robert Manne (ed), *Dear Mr Rudd: Ideas for A Better Australia* (Black Inc., 2008) 86, 91.

⁵⁸ *Ibid* 88.

⁵⁹ *Ibid*.

per cent of delegates in ALP conferences when less than one-fifth of the workforce is unionised?⁶⁰

This argument, however, turns on a fallacious use of the term, 'undemocratic'. It is true that parties have a representative function in that *parties or the party system as a whole* should represent the diversity of opinion within a society. This is, however, not the same as saying that *a single party* should seek to represent the entire spectrum of this opinion. Not only is this practically impossible but paradoxically, parties discharge their representative function by representing different sections of society. It is the cumulative effect of such sectional representation that stamps a party system as representative in overall terms. In this context, characterising the manner in which the ALP is organised as being undemocratic simply because its membership base is not wholly representative of the Australian public is somewhat perverse.

To say this is to emphasise that there is nothing self-evidently 'undemocratic' about such influence. It is not to imply that the extent of union influence over the ALP is justifiable or desirable. Some, for example, might argue that such influence results in a rather partial notion of the 'public interest'. Just as the relationships between the Liberal Party and its business supporters, the National Party and agricultural producers, and the Greens and the environmental groups, are relevant considerations for the voters in deciding whether a political party adequately represents the 'public' or 'national' interest, such matters are clearly legitimate considerations for citizens deciding whether or not to vote for the ALP.

There is another difficulty with characterising the manner in which the ALP is organised as being undemocratic: reducing trade union influence will not necessarily revitalise the internal democracy of the ALP.⁶¹ So much can be seen through a rough depiction of the power relations within the ALP as given in Table 1. The party elite comprises the parliamentary leadership, the members of parliament and their staff,⁶²

⁶⁰ In 2007, union density stood at 19 per cent of the Australian workforce: Australian Bureau of Statistics, *Employee Earnings, Benefits and Trade Union Membership, Australia, August 2007* (2007) cat no. 6310.0.

⁶¹ This point is made well by Bolton: John R. Bolton, 'Constitutional Limitations on Restricting Corporate and Union Political Speech' (1980) 22 *Arizona Law Review* 373, 417.

⁶² This would include political advisers, some of which have been criticised as exercising 'power without responsibility': Anne Tieman, *Power Without Responsibility: Ministerial Staffers in Australian*

the union leadership (including union delegates), and the party officials and bureaucrats. The rank and file, on the other hand, consists of the party members.

Table 1: Power relations within the ALP

Party elite	Union leadership	Parliamentary leadership	Party officials and bureaucracy
Rank and file	Party members		

These relations can be analysed according to horizontal and vertical dimensions. Reducing the influence of the union leadership does not mean that power will flow vertically to the rank and file. In the context of shrinking party membership within the ALP,⁶³ it is far more likely that power will be redistributed horizontally to others remaining within the party elite. Where the 'party in public office', the parliamentary leadership, is already ascendant over the 'party on the ground' as well as the 'party central office',⁶⁴ it is a fair bet that the parliamentary leadership will be a key beneficiary of this redistribution of power. A similar conclusion results when one casts an eye to power relations beyond the party. Looking at the 'material constitution'⁶⁵ of the ALP, that is, its relationship with class forces, diminishing the influence of trade unions within the ALP is likely to mean a corresponding empowerment of business interests but not of the rank and file. Moreover, the power of the government bureaucracy also needs to be factored in, especially when the ALP is in government: its influence is likely to increase as sources of countervailing power like trade unions weaken in strength.

Governments from Whitlam to Howard (University of New South Wales Press, 2007). Tieman's study was focused on ministerial advisers.

⁶³ For figures, see Gary Johns, 'Party Organisation and Resources: Membership, Funding and Staffing' in Ian Marsh (ed), *Political Parties in Transition?* (Federation Press, 2006) 46, 47; Ian Ward, 'Cartel Parties and Election Campaigns' in Ian Marsh (ed), *Political Parties in Transition?* (Federation Press, 2006) 70, 73-75.

⁶⁴ Ward, above n 63, 70, 72, 85-88. On the power of trade unions within the ALP, see Kathryn Cole, 'Unions and the Labor Party' in Kathryn Cole (ed), *Power, Conflict and Control in Australian Trade Unions* (Pelican Books, 1982), where it was concluded that:

'the power of unions within the ALP is far more circumscribed than is commonly believed and the process which each of the party's two sections (i.e. industrial and political wings) accommodates to the demands and needs of the other is complex and tortuous'

Kathryn Cole, 'Unions and the Labor Party' in Kathryn Cole (ed), *Power, Conflict and Control in Australian Trade Unions* (Pelican Books, 1982) 100.

⁶⁵ Tom Bramble and Rick Kuhn, 'The Transformation of the Australian Labor Party' (Speech delivered at the Joint Social Sciences Public Lecture, Australian National University, 8 June 2007) <<http://dspace.anu.edu.au/handle/1885/45410>>.

Underlying all this is a risk of throwing the baby out with the bath water. While it is true that the internal democracy of the ALP is undermined in some cases by trade unions because of their oligarchical tendencies, the answer is not to excise trade unions from the party. Collective organisations like trade unions play a necessary, though at times problematic, role in empowering citizens. The ambivalent character of such organisations is well captured by sociologist Robert Michels. As noted earlier, Michels is famous for his iron law of oligarchy: '[w]ho says organization, says oligarchy'.⁶⁶ He is perhaps less well known for his observation that '[o]rganization ... is the weapon of the weak in their struggle with the strong'.⁶⁷ Within the ALP, collective organisations like trade unions allow individual members to band together to secure a voice that they would not have otherwise. While they do give rise to the risk of oligarchy within the organisations themselves, functioning well they provide 'effective internal polyarchal controls'⁶⁸ that counter the oligarchical tendencies of the party. By severely diminishing the role of trade unions within the ALP, undifferentiated contribution limits will likely increase the oligarchical tendencies within the party.

The other complaint in relation to 'trade union bosses' concerns trade union democracy. Aarons has argued that because 'individual unionists have no practical say in whether they are affiliated to the ALP and whether a proportion of their membership fees pay for this [and] ... in how their union's votes will be cast', there is 'not a democratic expression of the union membership's wishes'.⁶⁹ This criticism, however, is doubly misconceived. First, under any system of representative governance, most decisions are made by representatives without the direct say of their constituencies. It is this feature that contrasts representative systems from those based on direct democracy and, indeed, this is how the Australian system of parliamentary

⁶⁶ Robert Michels, *Political Parties: A Sociological Study of the Oligarchical Tendencies of Modern Democracy* (Collier Books, 1962) 365. Michels' iron law is better understood as pointing to the 'oligarchical tendencies' of organisations. The title of the last part of Michels' book is, in fact, 'Synthesis: The Oligarchical Tendencies of Organizations': Robert Michels, *Political Parties: A Sociological Study of the Oligarchical Tendencies of Modern Democracy* (Collier Books, 1962).

⁶⁷ Michels, above n 66, 61. Schattscheider has similarly observed that '[p]eople do not usually become formidable to governments until they are organised': E E Schattscheider, *Party Government* (Holt, Rinehart and Winston, 1942) 28.

⁶⁸ Charles E. Lindblom, *Politics and Markets: The World's Political Economic Systems* (Basic Books, 1977) 141.

⁶⁹ Aarons, above n 57, 86, 89.

representation is supposed to work. The key question in such contexts is not whether members have a direct say but whether the representatives are effectively accountable to their constituencies, in this case, trade union delegates to their members. The real problem here is one of 'union oligarchies'⁷⁰ that are insulated from effective membership control. Yet, and this brings us to the second misconception, a ban on organisational membership (including trade union affiliation fees) will do little to meaningfully address this problem.⁷¹ At best, what they would do is carve out certain decisions from the remit of trade union oligarchies while still leaving the oligarchies intact.

C *Unjustified Limitation of Freedom of Political Association*

It is essential that political finance regulation respect freedom of political association because such freedom is crucial to the proper workings of Australian democracy. Specifically, it is necessary in order to ensure pluralism in Australian politics, pluralism that is required both to protect the integrity of representative government as well as fairness in politics. This does not, however, mean that state regulation of political associations is impermissible. There can be public interest grounds for limiting freedom of political association. Whether particular measures are justified will depend upon the weight of such rationales, the extent to which the limitation is adapted to advancing such rationale/s and the severity of the limitation.

In evaluating a ban on organisational membership fees, it is convenient to begin with the last factor, the severity of the ban. Freedom of political association possesses several key aspects, notably:

- the individual's right to form political associations, act through such associations and to participate in the activities of these associations; and

⁷⁰ Andrew Parkin, 'Party Organisation and Machine Politics: the ALP in Perspective' in Andrew Parkin and John Warhurst (eds), *Machine Politics in the Australian Labor Party* (Allen & Unwin, 1983) 15, 22.

⁷¹ Aarons has argued that problems with 'trade union bosses' requires review of the funding provided by trade unions to the ALP: Mark Aarons, 'Rein in union strongmen's ALP power', *The Australian* (online), 18 March 2008 <<http://www.theaustralian.news.com.au/story/0,25197,23391595-7583,00.html>>.

- the association's ability to determine its membership, the rules and manner of its governance and the methods it will use to promote its common objectives.⁷²

Here we focus on freedom of party association and, in particular, the ability of political parties to determine their membership. As noted earlier, there is a diversity of party structures in Australian politics with direct and mixed parties. Such diversity, it was pointed out, should be respected as it contributes to the pluralism of Australia's democracy.⁷³

When viewed from this perspective, the impact of a ban on organisational membership fees on the freedom of party association is quite severe: it will mandate a particular party structure, direct parties and, while not directly banning parties that allow for organisational membership, generally make them unviable unless such parties are able to secure sufficient public funding.⁷⁴

The specific impact on the trade union-ALP relationship can be illustrated through the typology developed by industrial relations experts Matthew Bodah, Steve Coates and David Ludlam. According to these authors, there are two dimensions to union-party linkages, formal organisational integration and a level of policy-making influence, which give rise to four types of linkages:

- external lobbying type – that is, no formal organisational integration between unions and parties, with unions having no or little influence in party policy-making;
- internal lobbying type – that is, no formal organisation integration between unions and parties, but unions are regularly consulted in policy-making;
- union/party bonding type – that is, unions occupy important party positions but do not enjoy domination of party policy-making; and

⁷² Affidavit of Keith Ewing to IDSA litigation. See also Howard Davis, *Political Freedom: Associations, Political Purpose and the Law* (Continuum, 2000) 46.

⁷³ See text above accompanying nn 11-18.

⁷⁴ This seems to be the position in relation to the Canadian New Democratic Party that still allows trade unions to affiliate on a collective basis: see Harold Jansen and Lisa Young, 'Solidarity Forever? The NDP, Organised Labour, and the Changing Face of Party Finance in Canada' (Paper presented at the Annual Meeting of the Canadian Political Science Association, London, Ontario, 2-4 June 2005) <<http://www.partyfinance.ca/publications/OrganizedLabour.pdf>>. See also the discussion in Keith D. Ewing, *The Cost of Democracy* (Hart Publishing, 2007) 220-21.

- union dominance model – that is, unions occupy important party positions and dominate party policy-making.⁷⁵

According to this typology, the trade union-ALP link fits either the union/party bonding type or the union dominance model because of the organisational integration of trade union affiliates into the ALP. As members of state and territory branches of the ALP, affiliated trade unions are guaranteed 50 per cent representation at state and territory conferences.⁷⁶ These conferences determine state and territory branch policies and elect state party officials and delegates to National Conference.⁷⁷ The latter functions as ‘the supreme governing authority of the Party’⁷⁸ and elects members of the National Executive, ‘the chief administrative authority’ of the party.⁷⁹ A ban on organisational membership fees will, however, make organisational integration between the ALP and unions much less viable; the menu of options is effectively restricted to the external/internal lobbying types.

Is there a compelling justification for such a severe incursion into the freedom of the ALP to organise itself as it sees fit? It is exceedingly difficult to see one. There is, firstly, the prima facie legitimacy of membership fees – they are payments made as a condition for participating within political parties. Further, as the previous discussion has argued, the ‘trade union bosses’ objections are misdirected: amongst others, a ban on organisational membership fees will neither enhance internal party democracy nor invigorate trade union democracy. Absent an adequate rationale for limiting freedom of party association, it is hard to escape the conclusion that such a ban represents an unjustified limitation on freedom of party association.

⁷⁵ Matthew Bodah, Steve Ludlam and David Coates, ‘The Development of an Anglo-American Model of Trade Union and Political Party Relations’ (2003) 28(2) *Labor Studies Journal* 45, 46; see also Steve Ludlam, Matthew Bodah and David Coates, ‘Trajectories of Solidarity: Changing Union-Party Linkages in the UK and the USA’ (2002) 4(2) *British Journal of Politics and International Relations* 222, 233–41. For an application of the typology to the Australian context, see Gerard Griffin, Chris Nyland and Anne O’Rourke, ‘Trade Unions, the Australian Labor Party and the Trade-Labour Rights Debate’ (2004) 39(1) *Australian Journal of Political Science* 89.

⁷⁶ See, for example, Australian Labor Party (NSW Branch), *Rules of Australian Labor Party (NSW Branch)* cl B.25(a), B.26; Australian Labor Party, Victorian Branch, *Rules of Australian Labor Party Victorian Branch* cl 6.3.2.

⁷⁷ See, for example, Australian Labor Party (NSW Branch), *Rules of Australian Labor Party (NSW Branch)* cl B.2; Australian Labor Party, Victorian Branch, *Rules of Australian Labor Party Victorian Branch* cl 6.2.

⁷⁸ Australian Labor Party, *National Constitution of the ALP* cl 5(b).

⁷⁹ *Ibid* cl 7(a).

It was such a concern with freedom of party association that led the New South Wales Select Committee to include trade union affiliation fees in their exemption for membership fees.⁸⁰ The key reasons given by the six-member committee, which had only two ALP members, are worth reproducing:

The Committee considers that membership fees should not be encompassed by the Committee's proposed ban on all but small individual donations ... *Similarly, the Committee believes that trade union affiliation fees should be permissible, despite the proposed ban on union donations. To ban union affiliation fees would be to place unreasonable restrictions on party structures.*⁸¹

D *The Implied Freedom of Political Communication*

Applying the *Lange* test, the ban on organisational affiliation fees will place a significant burden on the ability of the ALP to engage in political communication as such fees constitute an important revenue stream.⁸² There is a reasonable likelihood that this burden will be found to be in breach of the implied freedom of political communication: its aim is, firstly, dubious given the lack of proper justification, and the severity of the burden is likely to mean it is not reasonably appropriate and adapted.

E *Re-Emphasising the Scope of the Argument*

There are many critics of the trade union-ALP relationship: a considerable number of voters believe that this relationship casts doubt on the ability of the ALP to govern for all; within the union movement there are union members – even union leaders⁸³ – who strongly take the view that this relationship fails to serve their best interests; and, even within the ALP this relationship does not enjoy unqualified support, with some rank-and-file members feeling disenfranchised by the influence enjoyed by union affiliates

⁸⁰ NSW Select Committee on Electoral and Political Party Funding, Parliament of New South Wales, *Electoral and Political Party Funding in New South Wales* (2008) 107–8, 113 (Recommendation 9).

⁸¹ *Ibid* 113 (emphasis added).

⁸² See Tham, above n 47, 67–71.

⁸³ See, for example, Dean Mighell, 'Unions must leave Labor', *The Age* (online), 11 February 2010 <<http://www.theage.com.au/opinion/politics/unions-must-leave-labor-20100210-nsat.html>>.

and more than a few key party officials expressing concern that the relationship undermines the party's ability to win public office.

For the most part, this submission says very little, often nothing, on these questions. It has focussed on whether there should be a ban on organisational membership fees (including trade union affiliation fees) under a regime of contribution limits. In concluding that there should be an exemption for such fees, the submission does not amount to a general defence of the trade union-ALP relationship. The central point is that this relationship should not be prohibited as a matter of law. The broader question as to whether this relationship is desirable or justified raises a complex range of issues, most of which fall outside the scope of this submission.

Recommendation Three:

- The ban on organisational affiliation fees to be enacted through proposed section 96D of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) should be rejected.