

Submission No: 46

## Panel of Experts – Political Donations

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Submitted by Unions NSW

Date: 17 September 2014





# **Submission to the Panel of Experts on Political Donations**

17 September 2014

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## Introduction

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1. Unions NSW welcomes the opportunity to make a submission to the Political Donations, Panel of Experts. This submission is consistent with positions previously expressed by Unions NSW in several recent state and federal Parliamentary Inquiries.
2. The submission is structured around the Panel's terms of reference, followed by the Unions NSW recommendation for each.
3. NSW has one of the most effective and stringent regulatory frameworks in regards to political donations. Since its inception in 1981 the Election Funding, Expenditure and Disclosures Act has been regularly amended making the Act unwieldy and difficult to navigate for those it seeks to regulate. As stated in previous inquiries, Unions NSW supports the redrafting and simplification of the Act including the clarification of definitions relating to:
  - Electoral expenditure and electoral communications expenditure;
  - The untangling of provisions relating to third party campaigners from those provisions applying to political parties and candidates; and
  - Regulation of third party campaigners to be included in a separate part of the Act.

4. Unions NSW understands this Panel is charged with exploring the viability of a full public funding model of elections in NSW. We understand the primary reason articulated for justifying the shift to full public funding is a purported desire to remove conflicts of interest and / or corruption from political donations.
  
5. Unions NSW does not believe full-public funding is the most effective way of preventing corruption due to the possibility that it would impermissibly burden the implied freedom of political communication contemplated by the Australian Constitution. Unions NSW believes the best way to regulate donations and prevent corruption is by having:
  - Realistic caps on donations (which can be made by both individuals and organisations)
  - Real time reporting of donations; and
  - Harsher punishments for contravening the electoral funding laws or undertaking corrupt actions which breach the legislation.
  
6. Recent ICAC hearings have strongly indicated that the potential for corruption lies at the politician and party level, not at a campaigning level. Recent hearings have also highlighted the effectiveness of the current legislation to identify and punish corrupt behaviour within elected officials.
  
7. Unions NSW believes that any changes to electoral funding must facilitate openness, transparency and ensure no one group has undue influence over the political process.

## Full Public Funding

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### Feasibility

8. A system of full public funding is neither in the public interest nor feasible and it is arguably unconstitutional. Political parties should retain independence from the state and not become reliant solely on public funding, the arrangements for which can be changed by successive governments.
9. Unions NSW supports the introduction of increased transparency measures such as real time public disclosure and reasonable caps on both donations and expenditure as the best means to improve the system and the public's confidence in it.

### Third Party Campaigners

10. If a full public funding model for election campaigns was adopted, it should provide public funds to registered third party campaigners. This would also ensure the plurality of voices in public discourse during an election campaign. However, it is unlikely such a proposal would be acceptable to the public, and is another reason why a full public funding model is unfeasible.
11. Another option would be to allow third party campaigners to receive donations, as is currently the case, with the existing caps placed on third party campaigners increased.

12. A model of full public campaigning must take into account the freedom of political communication and associated implications for third party campaigners, and ensure they are still able to fund and run political campaigns during election periods.

## Minor Parties

13. It could be argued that the existing means of distribution of public funding amongst political parties (ie it is commensurate with the vote received at the previous election) is unfair to newly established political parties. If public funding was the sole source of funding available, Unions NSW contends it would be unfair and undesirable to have a scheme which silences new and minor parties.

14. Conversely it is hard to see how any attempt to accommodate new political parties would not create a risk that public funding would be sought by “non-genuine” candidates, political parties or causes, in a way that would be unacceptable to the public. The lack of any suitable way of treating new political parties is another reason why a full public funding model would be unfair and administratively unworkable.

## Level of Funding

15. Unions NSW is opposed to the introduction of full public funding and believes the level of public funding currently available to political parties is appropriate. Public funding should not be extended beyond the per-vote funding currently

available to political parties and indexed accordingly.

## Funding Caps

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### Electoral Expenditure Caps

16. Placing caps on election expenditure provides for an even playing field between parties and third party campaigners.

17. To achieve this, Unions NSW believes the cap placed on third party campaigners needs to be increased to align more fairly with the expenditure caps of political parties and candidates. An increased cap is also important for organisations whose campaigning activities form part of their core business.

18. Caps should be adjusted based the cost of paid media, including printing that would be reviewed annually.

### Donation Caps

19. Caps that currently exist in the 2010 amendments to the *Electoral Funding, Expenditure and Disclosures Act 1981* (\$5,700 per donor for political parties and \$2,400 for third-party campaigners) are an appropriate level and should be retained. This is a level which keeps donations below that which would afford undue influence to any single donor, be they individuals or organisations.

20. Consideration should be made for peak councils which are made up of organisations, who pool their funds in order to campaign. The nature of peak councils means that they may pool funds from constituent organisations to campaign collectively. As such, caps placed on peak councils should be higher than those set for other third party campaigners.
21. Where a peak council pools funds from its constituent organisations, it should not be regarded that those constituent organisations have made a political donation.
22. There is a need to clearly define the meaning of 'peak council' to prevent third party campaigners from creating 'non-genuine' bodies in order to bypass funding caps. By definition, large representative bodies with clear governance structures, a participatory membership structure and a registered ABN would be the characteristics underpinning any definition of a peak council.

## Third Party Campaigners

23. For third party campaigners, the current EFED Act specifies:
- The same caps on expenditure as political parties as is appropriate;
  - A smaller cap on donations, and;
  - Limits the maximum number of third party campaigners to which an organisation or individual can donate to three.
24. This is consistent with the objective of placing limits on the ability of donors to circumvent the caps on donations to political parties and candidates by

instead funnelling donations to a range of third party campaigners.

As outlined above, the current caps need to be adjusted to take into account the collective nature of peak body campaigns.

## Prohibited Donors

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25. As was found in the Unions NSW High Court Case, there are difficulties in excluding particular entities from donations. The current exclusion of donors is not necessarily consistent with the rights to freedom of political association.
26. The prohibited donors section in Div 4A of the Act was not addressed in any detail in argument because the validity of the provisions were not in issue. The defendant, except in relation to submissions concerning corporations, *“did not seek to explain s 96D by analogy to the provisions of Div 4A. In particular, it did not seek to liken the interests of industrial organisations, such as the plaintiffs, to those of the prohibited donors”* (Unions NSW v New South Wales [2013] HCA 58 (18 December 2013)).
27. While the current exclusion of certain donors may not be consistent with the rights to freedom of political expression, Unions NSW accepts there are arguably legitimate reasons for the limited prohibition of donors where the nature of the business is contrary to, for example, broadly accepted public health issues. However, this is a complex area of public policy where many issues sort to be included will be done so on emotive rather than evidence based arguments.

28. Unions NSW believes, real time disclosure of donations would mitigate some of the issues that may arise as a result of currently prohibited donors making political donations. The voting public is central in setting the standards of appropriate political donations. Providing up-to-date information on what donations political parties, elected representatives and candidates are accepting and from whom, will assist in reducing the potentially corrupting nature of prohibited donations.

29. Consideration should also be given to the influence that large donations by private firms may have on the awarding of Government contracts. Unions NSW believes the NSW Government procurement process should require companies tendering for Government contracts must declare any political donations, at state and/federal federal level, they have made in the preceding 5 years. This disclosure should then be taken into consideration by decision makers who will be required to assess and mitigate any bias that may exist as a result of these donations.

## Approval of donations

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30. The terms of reference questioned whether prior approval of a majority of members of a corporate entity or organisation was required before making a donation. Unions NSW believes this is unnecessary as such a decision is on par with other business or organisation decisions which are made by the delegated authority of a CEO or equivalent. Governance requirements

already exist in corporations and industrial law and should not also be an additional area falling under the purview of electoral funding law. This is particularly so if, as is recommended, proper transparency through a requirement for more frequent “real time” disclosure is introduced.

## Disclosure of donations

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31. Unions NSW strongly supports the introduction of requirements for more frequent disclosures of political donations to candidates, parties and third party campaigners. While Unions NSW does not have a prescribed time frame for the reporting, voters have a right to have information available on the donations received by parties, candidates and third party campaigners well before they vote. As such, Unions NSW supports a ‘black out’ period of donations both before and after a general election or by-election that would ensure donation disclosure at the time of the election was up-to-date and accurately identifies who financed the parties or third party campaigners.
32. Current disclosures are seriously undermined in achieving their objective of transparency by the fact that disclosures are not known until after the electorate has voted.
33. Unions NSW also supports the full disclosure of all party funds. Under this approach, all political parties would be audited, with all their funds (not just donations) traced back to their source.

34. Unions NSW believes additional administrative funding should be supplied to political parties and third party campaigners to assist with this process.

## Penalties for contravening the Act

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35. Penalties for both accepting and making donations that contravene the Act should also take into account additional benefits that have been received by either side. The judicial process should consider ways in which these benefits can be monetised and repaid to the State. For example, if it is found that a company has won a Government contract based on donation bribery, the financial gain made by individual parties should be taken into account, monetised and required to be paid back in whole or in part.