



Proposed changes relating to caps on electoral expenditure by political parties: a summary of constitutional issues

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1. Introduction

This e-brief discusses the constitutional issues associated with the proposed amendments in the Election Funding, Expenditure and Disclosures Amendment Bill 2011 relating to caps on electoral expenditure. It is to be read in conjunction with e-brief 1/2012, which discusses the constitutional issues relating to the Bill's proposed ban on the making of political donations by third-party interest groups.

2. Current caps on expenditure

Legislation passed in 2010 established caps on electoral communication expenditure for State elections.¹ The new provisions are contained in the *Election Funding, Expenditure and Disclosures Act 1981*, Part 6, Div 2B.

The provisions define "electoral communication expenditure" as electoral expenditure of a number of specified kinds: e.g. electoral expenditure on advertisements, or on the production and distribution of election material (s 87). In turn, "electoral expenditure" means:

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.

The expenditure caps apply during the period from 1 October in the year before which the election is to be held to the end of polling day for the election (s 95H). There are separate caps for political parties, candidates, and third-party campaigners.

2.1 Caps on political parties: For a party that endorses candidates for election to the Assembly, the applicable cap for the party is \$100,000 multiplied by the number of electoral districts in which a candidate is so endorsed (s 95F(2)). Thus, for a party that endorses candidates in all 93 electorates, the cap is \$9.3 million.

There is an additional cap of \$50,000 per electorate for expenditure incurred by a party substantially for the purposes of the election of a candidate in a particular electorate (s 95F(12)). Thus, for a party that incurs this type of expenditure in all 93 electorates, the additional cap is \$4.65 million.

The Act refers to the aggregation of expenditure caps in certain situations (s 96). For example, if two or more registered parties are associated, the amount of \$100,000 of expenditure in respect of any electorate in which there are candidates endorsed by the associated parties is, for the purpose of calculating the cap on expenditure, to be shared by those parties (s 96(2)).

2.2 Caps on individual candidates:

Different caps apply to candidates endorsed by a party and independent candidates. The cap for a candidate endorsed by a party for election to the Assembly is \$100,000 (s 95F(6)).

2.3 Caps on third-party campaigners: The Act (s 4) defines third-party campaigners as:

an entity or other person (not being a registered party, elected member, group or candidate) who incurs electoral communication expenditure during a capped expenditure period (as defined in Part 6) that exceeds \$2,000 in total.

The cap for a third-party campaigner is \$1.05 million if they were registered before the commencement of the capped expenditure period for the election, or \$525,000 in any other case (s 95F). There is an additional cap of \$20,000 for expenditure incurred by a third-party campaigner substantially for the purposes of the election of a candidate in a particular electorate.

The Register of Third-Party Campaigners for the 2011 NSW Election can be viewed on the Election Funding Authority's [website](#). That register lists various unions, Unions NSW, the NSW Business Chamber, the Property Council of Australia, the Australian Christian Lobby, GetUp Limited, and other organisations.

3. Proposed amendments

The Election Funding, Expenditure and Disclosures Amendment Bill 2011 would insert into the Act provisions for the aggregation of expenditure of parties and *affiliated organisations*. The new provisions (to be inserted into s 95G) are set out below:

(6) Aggregation of expenditure of parties and affiliated organisations

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

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

In the second reading [speech](#) on the Bill, Premier O'Farrell explained the rationale for these amendments:

Unfortunately, [the existing] party expenditure caps are not currently affected by the expenditure of organisations that are affiliated with a political party. This leads to organisations intimately involved in the governance of a political party, sometimes even with office bearers in common, campaigning on behalf of a party with no corresponding

offset to the party's own ability to spend.

The Government believes that this is an unfair loophole that undermines the integrity of the whole scheme. The bill closes this loophole by combining the electoral communication expenditure of affiliates with the expenditure of political parties for the purpose of determining whether a party has exceeded the applicable expenditure cap. It does this by aggregating the expenditure of a political party with that of its affiliated organisations.²

Mr O'Farrell had sought to introduce these amendments when the 2010 legislative reforms were before the Parliament. In those debates, Mr O'Farrell [stated](#) that the new regime would allow the Labor Party to spend \$18.6 million under the party and individual candidate expenditure caps (\$100,000 for each of the 93 electorates plus \$100,000 for each of the 93 Legislative Assembly candidates) and, in addition, "its 22 affiliated unions can spend \$23 million" (as third-party campaigners).³ Mr O'Farrell said that he would move an amendment to the 2010 Bill to:

ensure that affiliated Labor Party unions or other organisations—any third party affiliated with a political party—will fall within the spending cap of that political party. In other words, under our...amendment the maximum the Labor Party could spend, including through its affiliated 23 unions, to contest all 93 seats would be \$18.6 million.⁴

4. Comments by experts

It appears that only one constitutional law expert has commented on the provisions that would aggregate the expenditure of a party and its affiliates. An article in *The Australian* on 13

September 2011, reported the views of Anne Twomey as follows:

...Anne Twomey said the ban on corporate donations appeared constitutional, but questioned the restrictions on Labor affiliated unions.

"Surely all sorts of bodies could be argued as running proxy campaigns for other parties", Professor Twomey said. "If a law is directed at preventing unions from running campaigns but not others, it would be quite vulnerable to constitutional challenge".⁵

An [article](#) in the *Sydney Morning Herald* on 15 September noted Anne Twomey's opinion that there were "real constitutional issues" with the Bill.⁶ Again, one of these issues related to the proposed "affiliated organisation" provisions. The article stated:

[One] section of the bill mandates that election spending by "affiliated organisations", such as those unions affiliated to Labor, must be counted as part of the party's expenditure cap.

"This forces affiliated unions either to be voiceless during campaigns, or to reduce the capacity of the ALP to advertise during an election, or end their affiliation with the ALP", Professor Twomey said.

While there was an argument in this case that the "legitimate end" was the achievement of a level playing field by removing an unfair advantage from Labor, "the alternative argument would be that this law singles out bodies to prevent them from expressing political views during an election campaign, breaching any implied freedom."

5. Proposed Greens amendment

Another recent [article](#) noted that the NSW Greens were proposing an amendment to the Bill that "would allow affiliated unions to spend money on election advertising without it counting against the party's expenditure cap, but only if the campaign is issues-based and not advocating a party vote".⁷

6. Summary of constitutional issues

Assuming that the implied freedom of political communication applies to the proposed laws (see e-brief 1/2012), it is necessary to consider whether the laws would infringe upon the implied freedom by reference to the two-stage test outlined in *Lange* (and modified in *Coleman v Power*), namely:

- (1) Does the law effectively burden freedom of communication about government or political matters in its terms, operation or effect? If it does,
- (2) Is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

6.1 Does the law effectively burden freedom of communication about government or political matters in its terms, operation or effect?

The proposed law would reduce the amount of money that a party (in particular, the Labor Party) could spend for the purposes of an election campaign by the amount of money that any affiliated organisations of the party (in the case of the Labor Party, trade

unions) spend during a campaign. It could be argued that, in this way, the law would limit a party's ability to communicate to voters during a campaign, and it would therefore burden freedom of communication about government or political matters.

It could also be contended that the provisions would constrain the amount that affiliated organisations could spend during a campaign. This is because such organisations will be aware that any money that they spend will limit the amount the party can spend within its expenditure cap. It could therefore be argued that the law would limit affiliated organisations' capacity to communicate with voters.

On the other hand, it could be argued that a party and its affiliates should be treated as one entity for the purposes of election campaigning (in effect, as one voice). Viewed in this way, there is no interference with the freedom to communicate about government or political matters because the entity is able, within the limits of the expenditure caps, to spend as much on election campaigning as other participants in the process.

6.2 Is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

The Government has taken the view that affiliated organisations (as defined in the Bill) are so intimately connected with a party that their electoral communication expenditure should, for the purposes of the scheme, be treated as expenditure by the party. The Government has said the purpose of the amendments is to protect the

integrity of the scheme for capping electoral expenditure by political parties – in other words, to create a more level playing field. This, it would be argued, is a legitimate end.

The Government would also argue that the law is appropriate and adapted to serve this legitimate end and does so in a manner which is compatible with the maintenance of the system of representative and responsible government. It could argue that there is no other way of achieving a level playing field. It could also point out that these amendments are not expressed to apply to any particular party and they are really no different to the existing provisions which require the aggregation of expenditure for parties that are "associated" (see s 95G(2)).

On the other side, it could be argued that the laws do not serve a legitimate end (or they are not appropriate and adapted to serve that end) because they are discriminatory and would create an uneven playing field by reducing the amount that a party with affiliated organisations could spend during an election campaign. It could be contended that it is wrong to treat the expenditure of affiliates as if it were the expenditure of a party, as affiliates may be distinct entities, which have different funding sources, members, and agendas. Even if affiliates would be likely to run a campaign for a party, as Twomey states, "surely all sorts of bodies could be argued as running proxy campaigns for other parties".⁸

In addition, it could be argued that the laws are not appropriate and adapted to serve a legitimate end because the laws would apply to *all* electoral expenditure by affiliated organisations. It may be submitted that, unless the Greens amendment is adopted, the laws will apply to expenditure by an

affiliate even if the affiliate was campaigning on a particular issue rather than advocating a vote for a party. This, it could be argued, is inconsistent with the stated aim of the provisions namely to target organisations that are intimately connected with a party *and which* are "campaigning on behalf of a party".

7. Conclusion

As was concluded in e-brief 1/2012, significant issues of interpretation remain to be clarified in relation to the implied freedom of political communication. Furthermore, the issues identified in this paper can only be resolved by the High Court.

¹ *Election Funding and Disclosures Amendment Act 2010* (NSW).

² Hon Barry O'Farrell MP, *LA Hansard*, 12 September 2011, p5,432

³ Hon Barry O'Farrell MP, *LA Hansard*, 9 November 2010, p27,355

⁴ Hon Barry O'Farrell MP, *LA Hansard*, 9 November 2010, p27,357

⁵ 'Clamp on union donations', *The Australian*, 13 September 2011, p7

⁶ S Nicholls, 'Law specialist points to flaws in political donations bill', *Sydney Morning Herald*, 15 September 2011

⁷ S Nicholls, 'Unions pledge to fight bill banning political donations', *Sydney Morning Herald*, 14 September 2011

⁸ 'Clamp on union donations', note 5.

Information about Research Publications can be found on the Internet at the:

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