

Unions NSW Submission

Senate Standing Committees on Finance and
Public Administration Inquiry into
Commonwealth Electoral Amendment
(Banning Dirty Donations) Bill 2020

13 November 2020



Introduction

1. Unions NSW is the peak body for trade unions and union members in New South Wales with 48 affiliated trade unions and Trades and Labour Councils, representing approximately 600,000 workers across New South Wales. Affiliated trade unions cover the spectrum of the workforce in both the public and private sectors. Unions NSW is a not-for-profit organisation funded by its affiliates.
2. Unions NSW welcomes the opportunity to make a submission in relation to this inquiry into the Commonwealth Electoral Amendment (Banning Dirty Donations) Bill 2020 (**the Bill**). Unions NSW and its affiliated unions have a proud history of engaging in the parliamentary process to protect and represent the interests of union members. Unions NSW frequently makes submissions to inquiries involving industrial relations and other issues which may impact members.
3. Unions NSW and its affiliated unions work to represent and advance the interests of working people in NSW. Much of this work takes place at the workplace level and through the industrial relations system. However, the interests of workers are also inextricably linked to the government of the day and their legislative and policy agendas.
4. As such, Unions NSW and its affiliated unions have a long and proud history of playing an active role in political debate and campaigning at federal, state and local government elections to represent and progress the interests of union members and working people. Elections provide a pivotal point in the electoral cycle when governments and candidates are most directly accountable to their electors. It is also when union members as constituents are able to actively engage in the political process and to collectively prosecute issues which directly affect their social and economic wellbeing. Therefore, unions take an active role in campaigning around key issues during election periods.
5. Few individuals have the financial, social or political capital to effect change on their own. This is why unions and their members have historically pooled their resources to run campaigns collectively. Third-party campaigners, particularly those organisations representing a broad membership base, are a central tenant of the democratic electoral process.
6. The engagement of unions as the collectivised voice of working people in political debate and electoral politics is fundamentally reliant on the implied freedom of political communication

within the *Australian Constitution*. This right is critical in upholding our system of representative government.

7. Unions NSW has been an active voice on electoral funding matters and the importance of third-party campaigners in the electoral process. We have made numerous submissions regarding local, state and federal electoral laws, and Unions NSW and its affiliated unions have mounted two successful High Court cases challenging various aspects of electoral funding laws in NSW.¹

Limit on Donations

8. The Bill imposes a cumulative limit on donations from any source to political parties, MPs, candidates, political campaigners and associated entities of \$3,000 per parliamentary term. This is mostly consistent with Recommendation 7 in the Senate Select Committee Report into the Political Influence of Donations (**the Report**)², although we note not all members of the Committee agreed with this recommendation. We also note that the Recommendation only supported caps on donations to political parties, candidates and associated entities and did not include political campaigners.
9. Unions NSW supports an electoral system that maintains the confidence of the community while upholding democratic values and rights to political expression and communication. Unions NSW acknowledges there is an argument to justify some level of caps on donations that prevents wealthy interests from having an unequal or disproportionate opportunity to participate in and influence the political process.³ However, caps need to be set in a manner and at a level which does not restrict the ability of all participants to fully engage in the electoral process.
10. Furthermore, it is clear that restrictions on political donations, including caps on the amount a donor can contribute, constitute a burden on the freedom of political communication implied by the *Australian Constitution*.⁴ Such restrictions will not be invalid if they are appropriate and adapted to a legitimate purpose consistent with the maintenance of the system of

¹ *Unions NSW v New South Wales* [2013] HCA 58; *Unions NSW v State of NSW* [2019] HCA 1

² Senate Select Committee Report – Political Influence of Donations, June 2018.

³ *McCloy v New South Wales* [2015] HCA 34.

⁴ *Unions NSW v New South Wales* [2013] HCA 58; *McCloy v New South Wales* [2015] HCA 34.

representative and responsible government prescribed by the *Australian Constitution*, as they were found to be in the case of *McCloy v New South Wales (McCloy)*.⁵

11. NSW has one of the most stringent regulatory frameworks for political donations. Currently, no single donor may exceed a cap of \$6,400 a year to a party or group, or a cap of \$2,900 a year in relation to a member, candidate or third-party campaigner. All political donations of \$1000 or more must be disclosed to the NSW Electoral Commission.
12. Whilst Unions NSW does not express a view on the appropriate level at which donation caps should be set, Unions NSW believes the NSW caps are set at a level which does not allow third parties to compete in a high cost media market such as Sydney during election periods.
13. The proposed cap of \$3000 per parliamentary term in the Bill is significantly below the NSW cap. It is also below the applicable cap in Victoria, currently set at \$4,160 for the election period. There is no justification or rationale provided for the level of the cap within the explanatory material provided with the Bill or in the Report. Various submissions were made to the Senate Select Committee on the appropriate level for a cap, including submissions that the cap should be \$1000 per year and submissions that the cap should be \$5000 per year. The Report adopted the lowest figure by recommending a cap of \$3000 per parliamentary term, equivalent to \$1000 per year. There is no reasoning provided in the Report for why these and the lowest figure was adopted.
14. In *Unions NSW v State of NSW* (2019)⁶, the High Court confirmed that a law which burdens the implied freedom of political communication must be justified. However, in that case, no basis was provided in the Expert Panel report for halving the amount third party campaigners could spend in election campaigns, nor had any inquiry been made as to what amount is necessary to allow third party campaigners to reasonably communicate their message. It is concerning that the Report being relied upon to legislate donation caps similarly provides no reasoning or basis as to the appropriate level of the cap.
15. Unions NSW recommends more thought is required on the appropriate level for any donation cap, and careful consideration needs to be given to ensuring that the implied right to political communication is protected and that any such caps are constitutional. As seen in the cases of *Unions NSW v New South Wales* (2013)⁷ and *McCloy*, caps raise constitutional concerns, and any

⁵ *McCloy v New South Wales* [2015] HCA 34.

⁶ *Unions NSW v State of NSW* [2019] HCA 1

⁷ *Unions NSW v New South Wales* [2013] HCA 58

limit on political donations needs to balance the freedom of individuals and organisations to express their political views with limiting the risk of undue influence. Any caps that are eventually legislated could of course end up being subject to constitutional challenge.

16. Consideration should also 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 or political campaigners.
17. Moreover, where a peak council pools funds from its constituent organisations, it should not be regarded that those constituent organisations have made political donations.
18. There would be 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.

Amendment of definition of gift

19. The Bill amends the definition of 'gift' to include tickets or entry fees for fundraising events; membership fees for political parties, associated entities and political campaigners over \$1,000 and interest-free loans. This is mostly consistent with Recommendation 1 in the Report although we note the Recommendation did not include political campaigners. The *Commonwealth Electoral Act 1918* (Cth) (***Electoral Act***) currently excludes annual membership subscriptions paid to a political party from the definition of gift.⁸
20. It is unclear from the Bill and the Report whether these amounts would be included in the proposed \$3000 cap on donations, or whether the obligation is only to disclose these amounts.
21. Many unions are affiliated to the Australian Labor Party and pay a membership fee. Many unions are affiliated to peak councils such as Unions NSW or the ACTU and pay affiliation fees. In addition, union members pay membership fees to their individual unions, some of whom may be captured under the definitions of associated entity and political campaigner in the *Electoral Act*. These amounts are small, but may not always be under \$1000. To include these

⁸ *Commonwealth Electoral Act 1918* (Cth), s287

sorts of fees in the definition of gift would introduce a large administrative burden for many unions and union members for what are relatively small amounts of money.

22. Unions NSW understands that the mischief identified in the Report to which Recommendation 1 was aimed at remedying was large businesses paying subscriptions to be 'members' of major party business forums and events, at a cost of anywhere between \$25,000 and \$110,000 per annum. This is an entirely different character and level to the fees paid by unions to affiliate to the Australian Labor Party or to peak councils, or paid by union members to their union.
23. Unions NSW strongly opposes these amounts being included in any donation cap or obligation to disclose. If the intent is these amounts are disclosed only, the threshold for disclosure should be set higher than \$1000 so that the fees of ordinary union members are not captured. Consultation with unions should be undertaken as to the appropriate disclosure threshold.

Prohibited Donors

24. The Bill prohibits political donations from property developers, the tobacco industry, the banking industry, liquor and gambling businesses, pharmaceutical companies, the mining industry and representative organisations for these industries. This is consistent with Recommendation 9 in the Report, although we note not all members of the Committee agreed with this recommendation.
25. The issue of excluding particular entities from making donations is also fraught with constitutional complexity. The case of *McCloy* found that prohibiting donations from a particular type of donor does constitute a burden on the freedom of political communication implied by the *Australian Constitution*. Such prohibitions will not be invalid if they are appropriate and adapted to a legitimate purpose consistent with the maintenance of the system of representative and responsible government prescribed by the *Australian Constitution*, as they were found to be in this case.
26. Whilst *McCloy* provides a precedent that may mean legislation prohibiting donations from the donors identified in the Bill survives any potential High Court challenge, that case was concerned only with the constitutionality of prohibiting donations from property developers (and not other prohibited donors as defined under the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) (*EFED Act*). The Bill goes further than the *EFED Act* and prohibits donations from the banking, mining and pharmaceutical industries. It also prohibits donations

from the tobacco, liquor and gambling industries. Donations from these industries were prohibited under the EFED Act and are prohibited under its successor, *the Electoral Funding Act 2018 (NSW)*, but these provisions of the legislation have not been tested. Hence, any legislation prohibiting donations from the industries identified in the Bill could become the subject of further constitutional challenge and High Court litigation, as other than restrictions on property developers, the constitutionality of such restrictions are untested.

27. Unions NSW believes there is a strong argument that introducing caps on donations renders prohibiting certain donors unnecessary. If donation caps are in place, these donors are unable to legally donate more than any other donor, and therefore their donations could be no more influential than the donations of anyone else – largely dissipating any concerns about undue influence and corruption. Therefore, it could be argued that such bans on donations from specific groups are unnecessary, and are not reasonably appropriate and adapted to serve a legitimate end.⁹
28. While the prohibition of certain donors may not be consistent with the implied right to freedom of political communication, Unions NSW acknowledges there may be arguably legitimate reasons for the limited prohibition of donors where there is a demonstrably higher risk of corruption than in other areas of official decision making, or 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 and there is a risk that emotive arguments may prevail over rigorous evidence to justify any restrictions.

Real time disclosure of donations

29. Unions NSW believes that real time disclosure of donations would mitigate some of the issues that may arise from uncapped donations and donations from industries that are proposed to be prohibited.
30. 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 uncapped donations and prohibited donations.

⁹ Twomey, Anne --- "McCloy v New South Wales: Developer Donations and Banning the Buying of Influence" (2015) 37(2) Sydney Law Review 275

31. It comes as a surprise to Unions NSW that measures to introduce real time disclosure are not included in the Bill, despite Recommendation 5 of the Report being that the Australian Government amend the *Commonwealth Electoral Act 1918* to require online, continuous real-time disclosure to the Australian Electoral Commission of donations to political parties, candidates and associated entities. We note this recommendation received strong support from most Committee members.
32. Unions NSW supports the establishment for an online centralised disclosure system for donations to political parties, candidates and third party campaigners and for real time disclosure in the six month period before an election.

Financial Administrative Burden to Third Party Campaigners

33. The *Election Funding, Expenditure and Disclosures Act (NSW)* has been amended to require vigorous reporting of all electoral communication expenditure and the setting up of a specific 'campaign account' with the third party campaigner's bank.
34. The new reporting requirements place a significant administrative and financial burden on Unions NSW and other third party campaigners during the 2015 State Elections. We believe the burden would be even more significant for community based organisations seeking to participate during an election period.
35. In order to comply with the new reporting requirements for electoral expenditure, Unions NSW implemented new internal systems for the classification and reporting of election expenditure, including enlisting the services of accounts consultants to aid in ensure compliance with the legislation. It is estimated the increased regulatory reporting requirements of electoral expenditure cost Unions NSW \$70,000.00 in 2015 in external advice. Further, the requirement of expenditure to be individually classified, reported and reformatted for the NSW Electoral Commission has significantly increased the administrative burden on existing Unions NSW staff. Reporting for the 2019 NSW State Election again took up considerable time and administrative resources to comply with the requirements of the Act which we doubt many smaller community based organisation would find difficult if not prohibitive to do.
36. Unions NSW believes the current reporting requirements place a significant and excessive administrative burden on third party campaigners. Unions NSW believes additional administrative funding should be supplied to political parties and third party campaigners to

assist with the stringent reporting requirements or alternatively to streamline the administrative requirements outside normal auditing requirements.

Conclusion

37. Unions NSW and its affiliate unions play a crucial role in the electoral process by providing members with an avenue to collectively pool their resources and raise issues important to them.
38. Any changes to electoral laws need to be carefully considered and on the basis of proper evidence. History shows that changes to electoral laws are often challenged on the basis that restrictions introduced by governments impermissibly burden the implied freedom of political communication. Any restrictions need to be appropriate and adapted to a legitimate purpose consistent with the maintenance of the system of representative and responsible government prescribed by the *Australian Constitution* if they are to survive constitutional challenge.
39. We urge the Committee to:
 - reconsider the level at which any cap on donations is set and ensure there is evidence and reasoning provided as to the appropriate level of caps;
 - consider higher caps for peak councils who pool funds from constituent organisations to campaign collectively;
 - abandon the proposed amendment to the definition of gift. If the amendment is to be made, ensure that membership fees and attendance at fundraisers are not included in any donation cap and that the disclosure threshold is increased after consultation with unions on an appropriate level to ensure the fees of individual union members are not captured;
 - Unions NSW strongly opposes these amounts being included in any donation cap or obligation to disclose. If the intent is that these amounts are disclosed only, the threshold for disclosure should be set higher than \$1000 so the membership fees of ordinary union members are not captured. Consultation should be undertaken as to the appropriate disclosure threshold;

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- reconsider banning donations from the proposed prohibited industries and ensure there is sufficient evidence to justify these restrictions; and
- include provisions in the Bill for an online centralised disclosure system for donations to political parties, candidates and third party campaigners and for real time disclosure in the six month period before an election.