
Campaign finance regulation of third parties

Submission to the
Joint Standing
Committee on
Electoral Matters
Inquiry into the
Funding of
Political Parties
and Election
Campaigns

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Amendments in this version:

Page 9: Clarification that laws on foreign donors are proposed only.

Page 19: Queensland political party caps amended to exclude spending on candidates, to create direct comparability with NSW figures.

Summary of recommendations

Recommendation 1: That section 314AEB of the *Commonwealth Electoral Act 1918* should only apply to associated entities.

Recommendation 2: That only expenditure on advertising that advocates a vote for or against a political party or candidate should count towards the disclosure threshold.

Recommendation 3: That if recommendation 2 is not implemented, section 314AEB(1)(a)(ii) on the public expression of views on an issue in an election be deleted.

Recommendation 4: That if section 314AEB(1)(a)(ii) is not deleted, an exemption is created for commentary on issues.

Recommendation 5: That if section 314AEB(1)(a)(ii) is not deleted, it apply only in an election year.

Recommendation 6: That donors to third parties have the same legal protections as donors to political parties.

Recommendation 7: That the threshold for third parties entering the disclosure system be increased to at least \$50,000.

Recommendation 8: That the threshold for disclosable donations to third parties remain at \$11,900.

Recommendation 9: That if the thresholds for expenditure reporting or donations disclosure is lowered, an advertising campaign be launched to warn citizens that political activism exposes them to conviction.

Recommendation 10: There should be no campaign expenditure limits on third parties.

Recommendation 11: If third party campaign expenditure limits are imposed on third parties, the limited activity should be restricted to advocating a vote for or against a political party or candidate, as in Queensland.

Recommendation 12: If third party campaign expenditure limits are imposed, the caps should apply only during a set campaign period.

Recommendation 13: If third party campaign expenditure limits are imposed, the caps should be high enough that the third party can communicate with all voters.

Recommendation 14: That no caps apply on donations to third parties.

Recommendation 15: That if caps are imposed on donations to third parties, only donations intended to fund advertising that advocates a vote for or against a political party or candidate should be included in the cap.

Recommendation 16: That if caps are imposed on donations to third parties, the same cap as for political parties is used.

Current law and trends

Under current Commonwealth law, third parties are subject to complex donations and expenditure disclosure laws (see appendix A for a list). However, third parties are otherwise unrestricted in their political activities.

However, the trend is towards greater regulation. In the last year, for state campaign purposes New South Wales and Queensland have imposed caps on donations to third parties and expenditure by third parties. NSW also bans some donors from supporting third parties for state campaign purposes, as in a more limited way for federal elections and issues would the long-stalled *Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill*. Summaries of NSW and Queensland third party law are at appendices B and C. Members of the federal parliament are on the public record supporting stronger regulation of third parties.

My view is that a liberal democracy like Australia should have a strong presumption against regulating third party political activity. I have explained my reasons for this in two papers for the Centre for Independent Studies, [Diminishing Democracy: The Threat Posed by Political Expenditure Laws](#) (July 2009) and [Democracy and Money: The Dangers of Campaign Reform](#) (June 2011). The summary version is that these laws restrict or deter legitimate political activity and expression of views, and imbalance the political system in favour of political parties, especially the governing political party. So opposition to third party campaign finance regulation is a matter of supporting individual rights and the overall functioning of the political system.

While my position is generally against campaign finance regulation of third parties, even from a pro-regulation perspective there are significant problems with current and proposed legislation. I hope that the recommendations in this submission can help reduce confusion, compliance costs, and unintended collateral damage from third party regulation.

This submission draws on the two earlier publications, but so far as I am aware there is no other paper that gives an overall picture of third party regulation trends in Australia, taking into account the recent NSW and Queensland changes.

Arguments for third party regulation – the current Commonwealth system

To close gaps in political party regulation

A major rationale for campaign finance law is that donations can lead donors to have ‘undue influence’ over policymakers. The problem that disclosure fixes is secrecy. If the media and voters can identify the financial supporters of political parties, they can decide whether or not influence is likely, and if so whether it is problematic.¹

Under this rationale for campaign finance law, there is no inherent case for regulating third parties. By legal definition, third parties are not running for public office. They have no government positions that require a disinterested approach. They have no government powers that they can exercise. Apart from conducting opinion polls, every activity requiring a political expenditure disclosure is already public: the public expression of views on a candidate or party; the public expression of views on an election issue; the printing, production, publication, or distribution of an election advertisement, handbill, pamphlet, poster, or notice (materials that require the ‘written and authorised’ statement); and the broadcast of political matter on TV or radio (materials that require the ‘spoken and authorised’ statement).²

The undue influence case for regulating third parties is an incidental one. This is that if political parties are regulated but third parties are not, donors who want to remain secret will shift their gifts to partisan third parties. However, in Australia this possibility is already covered by the ‘associated entity’ rules, which cover third parties controlled by a political party or operating wholly or to a significant benefit of one or more political parties. Associated entity rules should leave most non-partisan issue-based third parties free to operate without regulation.

From the perspective of this justification for campaign finance law, third parties are currently over-regulated. Technically, under Commonwealth and Queensland law there is a disclosure trigger in public expression of any views on an election issue. These views could be very general (eg issue X is important), not held by any party (eg spending on X should be less, when all parties stand for more spending) or involve multiple perspectives (eg forums on issues). The lack of a

¹ In my view this is the correct approach. Most policy decisions involve a mixture of private interests and broader public justifications. Democratic politics exists to choose between competing claims and arguments, and it is not for the campaign regulations to prejudge issues. See Andrew Norton, *Democracy and Money: The Dangers of Campaign Finance Reform*, Centre for Independent Studies Policy Monograph 119 (June 2011), .2-3.

² *Commonwealth Electoral Act 1918*, section 314AEB and *Broadcasting Services Act 1992*, schedule 2, subclause 4(2). ‘Political matter’ in this legislation has a broader meaning than ‘issue in an election,’ so the extent of the disclosure requirement depends partly on what form of media is used.

partisan intent or effect is not relevant under the current statute. But if issue spending lacks any partisan intent or effect, it is hard to see how it is relevant to a system designed to expose secret influence on politicians.

Furthermore, the current federal disclosure system is poorly designed to identify undue third party influence. While third parties must categorise their political expenditure in various ways, there is no requirement or formal opportunity to disclose which party, politician, or issue the spending was directed towards. This contrasts with the associated entity provisions, where the party connection must be stated. The most critical information in deciding whether or not there could be some third party attempt at improper influence is missing.

'Accountability' and 'scrutiny' of third parties

The current federal third party laws were created by the Howard government. In a 2005 speech, Senator Eric Abetz, then the minister responsible for electoral law, complained about how much money the Wilderness Society, the Australian Conservation Foundation, the RSPCA, GetUp! and the Australian Council of Trade Unions (ACTU) spent campaigning against the government. He announced that he was considering an 'accountability regime' for these groups, which turned out to be the disclosure regime implemented in 2006.³ After the 2007 federal election, Liberal Party federal director Brian Loughnane told the National Press Club that the 'well resourced' activist group GetUp! should be 'subject to proper levels of scrutiny.'⁴

However disclosure of political expenditure adds little to the scrutiny and accountability of third parties. Third party campaigns are typically exposed to scrutiny and accountability at the time they are conducted. For example, the recent 'Carbon Cate' climate change policy advertising attracted significant media attention and public commentary. 'Accountability' in this context is the campaign or its argument being criticised by others. Spending details released many months later by the AEC typically adds little or nothing to the previous discussion of the substantive issues (though the big campaigners may have their advertisements shown again for free, as a news item linked to disclosure). A six month disclosure cycle, as proposed under the *Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill*, will not change this situation. Given their expense, most campaigns are relatively brief and the debate occurs while they are running, not at a later date.

'Accountability' and 'scrutiny' of third party donors

The main purpose of calculating political expenditure is not to hold the third parties accountable, since that can be more immediately and usefully done in the context of their campaigns. Rather, the purpose of calculating political

³ Eric Abetz, 'Electoral Reform: The Howard Government's Agenda,' *The Sydney Papers* (Summer 2006), 67–68. The speech was given on 4 October 2005.

⁴ Brian Loughnane, 'The 2007 federal election,' address to the National Press Club (19 December 2007).

expenditure is to set the threshold at which donors to third parties must be disclosed. Donor names are the only substantive new information the third party disclosure system can produce.

Judging campaigns

Though not relevant to an influence disclosure rationale for campaign finance law, knowledge of third party funding sources could help evaluate the credibility of some third party messages. For example, commercial interests may work through other groups that appear to have more authority on an issue, through claimed expertise, grassroots support (so-called ‘astroturfing’), or some other attribute. It is a matter of competing heuristics: most people don’t have the time or skill to assess whether a political message or argument is convincing, so they fall back on informational short-cuts. While knowledge of funding sources does not provide any conclusive evidence on the merits of an argument, it does alert people to possible biases in sources that otherwise seem credible.

However, third party donor disclosure laws provide little new information. The written and authorised or spoken and authorised messages often reveal, or can lead to, funding sources. Unlike with third party donor laws, there is no delay in this information being disclosed—the campaign and disclosure are simultaneous. And unlike the third party donor laws, there are no problems matching campaigns and donors, since the two pieces of information appear in the same advertisements.

Partly as a result of these requirements, in Australia very little third party political advertising has mysterious backers. The most prominent recent example of a group which was partly a front organisation is the Alliance of Australian Retailers, which opposes compulsory plain packaging of cigarettes. Though in representing retailers it openly has a vested interest in the issue, it is financed by another vested interest, the cigarette manufacturers. However, the Alliance already discloses more detail about its funding arrangements than is required under disclosure laws.⁵

With an issue campaign, the policy goal and who might benefit from it are usually obvious; the point of the campaign is public rather than private influence. So even without formal disclosure it is not hard to guess who might be paying, and to draw the relevant conclusions. Refusal to reveal funding sources is likely to be counter-productive, distracting from the core message with a side-issue about lack of transparency. So in recent debates, we have seen direct advertising from the Australian Coal Association on climate change and from British American Tobacco on plain packaging laws.

Holding donors accountable

In most cases, third parties are not fronts and their donors are not trying to win secret favours from politicians. They are simply people having a say on an issue

⁵ For example, its advertising mentions its funding sources.

important to them, as they should be entitled to do in a liberal democratic system. It is not clear that donors should be held ‘accountable’ for their views, since the third party is already in the public sphere taking and responding to criticism of those views. People financially support third parties partly because they don’t have the time, skills or opportunity to articulate their views in public places. ‘Accountability’ for donors in this context means suffering some penalty for the views they hold, and fear of such penalties is a deterrent to political participation. The possible value of donor information in a limited number of cases needs to be balanced against donors being intimidated into not expressing their views.

Many people have good reasons for not wanting their names associated with political activism. Public servants and other people with politically sensitive employment are constrained in expressing political views. Other people could reasonably be concerned that employers, clients or customers would view them less favourably due to their political views. Opinion surveys show that a significant minority of Australians deliberately purchase or boycott products for political, ethical or environmental reasons.⁶ Such boycotts could affect employees and other shareholders, a concern that might cause donors to reconsider giving. There are also potential social costs in having unfashionable or controversial political views. Private donations allow people to express their political beliefs at low risk to other aspects of their lives, or to the lives of people associated with them.

Other than setting a reasonably high threshold for disclosure, current electoral law does little to protect third party donors. Blatant intimidation of or discrimination against donors to political parties is illegal under electoral law, but there is no such protection for donors to third parties—though in some cases anti-discrimination law may provide some redress.⁷ The donors who pose the least threat to the integrity of the political process have the weakest legal protection.

⁶ For a summary and analysis of two such polls, see: <http://andrewnorton.info/2007/05/25/political-shopping/>.

⁷ *Commonwealth Electoral Act 1918*, section 327.

⁷ *Commonwealth Electoral Act 1918*, section 327.

'Foreign' donors

The *Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill* would ban foreign-sourced donations to third parties, if the donor's main purpose was to support political expenditure. Though this idea is intuitively appealing to many people, its practical effect would be to obstruct political participation by people with a legitimate interest in Australian politics, while doing almost nothing to disrupt the political activities of the 'vested interests' that are the usual targets of campaign finance law.

A ban on foreign-sourced donations would not prevent donations from foreign companies with an interest in Australia. They could simply draw on the Australian bank accounts of their subsidiaries operating in Australia, as they mostly do now. A ban on foreign-owned companies donating would be administratively extremely difficult for political and third parties, as there is no easily-accessible public register of companies by the ultimate national identity of their majority shareholders. It would also create perverse incentives for local companies to lobby for special treatment, at the expense of the Australian employees, Australian customers, and any minority Australian shareholders of foreign-owned companies.

While foreigners with bank accounts in Australia would be unaffected by the proposed ban, Australians living overseas would be banned from giving if they draw on funds located outside Australia. The Australian diaspora, estimated at more than 800,000 people, could lose an important political right unless they have maintained an Australian bank account.⁸ While foreigners living in Australia could draw on Australian bank accounts, they would breach the proposed law if their representative organisations drew on foreign donations. For example, foreign students have made political representations in recent years about their mistreatment while in Australia. They could potentially break the proposed law if their campaigns were financially supported by their parents.

Though stopping short of fully excluding foreigners, the parochial politics behind this proposed amendment seem anachronistic. We live in an era of global issues and movements. Most major social, environmental and economic reforms in Australia over the last few decades are local versions of changes also occurring in other Western countries. Some third parties involved in politics operate in many countries including Australia, for example Greenpeace, the World Wildlife Fund and Oxfam. Technically, these organisations moving money within their own organisation into Australia could breach this law.

Further, if 'foreign' influence is so worrying, it seems arbitrary to single out donations. A donation to a third party is less direct foreign influence on Australian politics than the foreign ideas and views imported every day via television, radio, the internet, newspapers, magazines and books. And nothing in

⁸ Graeme Hugo, Dianne Rudd, and Kevin Harris, *Australia's Diaspora: Its Size, Nature and Policy Implications* (Committee for Economic Development of Australia, 2003).

current or proposed campaign finance law stops foreign organisations or individuals directly purchasing media space to promote their views. Prohibiting just one form of political activity, donations that indirectly finance communication to the public, seems arbitrary.

Setting the expenditure disclosure threshold

The *Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010* would lower the threshold for expenditure disclosure to \$1,000, from \$11,900 after indexation for 2011-12.

The proposed \$1,000 threshold would catch very minor political activity by individuals or small groups. \$1,000 would buy an advertisement a few centimetres high and wide in *The Age*, or print a few thousand leaflets. Activism on this scale poses no plausible threat to the integrity of policy processes. It is political self-expression more than a serious campaign to influence voting. A letter to the editor or a call to a talkback radio station could reach more people.

Yet the \$1,000 threshold poses significant risks to individuals who may not understand that political activity exposes them to conviction and other serious penalties. Current federal law makes it an offence not to keep the required records, not to submit the required returns, or to file an incomplete return. These are strict liability offences, so the absence of any intent to break the law would not be a defence. Current fines are \$1,000 for third parties, but the reform bill would increase these fines to \$13,200.⁹ For foreign donations, the proposed penalties are even more severe, with fines up to \$26,400 or 12 months jail, or both.

Given the non-existent or trivial potential harms from the lack of disclosure on small-scale political activity, and severity of the punishments, a high threshold is desirable. There is no reason to believe that \$11,900 is too low—indeed, it should be increased so that it only covers organisations conducting mass media campaigns, most of which will have or can afford advice from political professionals. The threshold for reporting to political activity to the AEC should be at least \$50,000. That would leave ordinary citizens and small community groups free to conduct political activity with minimal bureaucracy and without threat of prosecution.

If the threshold is lowered, there should be a major advertising campaign to warn people that political activism exposes them to criminal charges.

Setting the donations disclosure threshold

Current third party disclosure law and the *Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010* use a single dollar amount,

⁹ *Commonwealth Electoral Act 1918* (section 315) and amending provisions in the *Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010*.

\$11,900 and \$1,000 respectively, as the threshold for an organisation entering the disclosure system, and for donors having to declare political gifts. However, different thresholds are possible (they are different in NSW). The two thresholds deal with different issues. If a third party is too small to exercise any real influence, whether or not its donors are influential within it is of little public interest or concern.

While \$1,000 is a common donations disclosure threshold, there is no research that shows that this is an important threshold for influence. However, for any third party large enough to media impact it seems unlikely that \$1,000 would in itself buy influence. The existing \$11,900 threshold poses a minimal risk of leaving suspicious donations undisclosed, while eliminating or substantially reducing compliance complexity and costs for small political groups and their supporters. At \$11,900, most groups will have no donors they need to declare. It will also reduce bureaucratic burdens on donors, who have to report separately to the AEC (even at the current threshold, many donors are unaware of their obligations, and there is significant non-compliance).

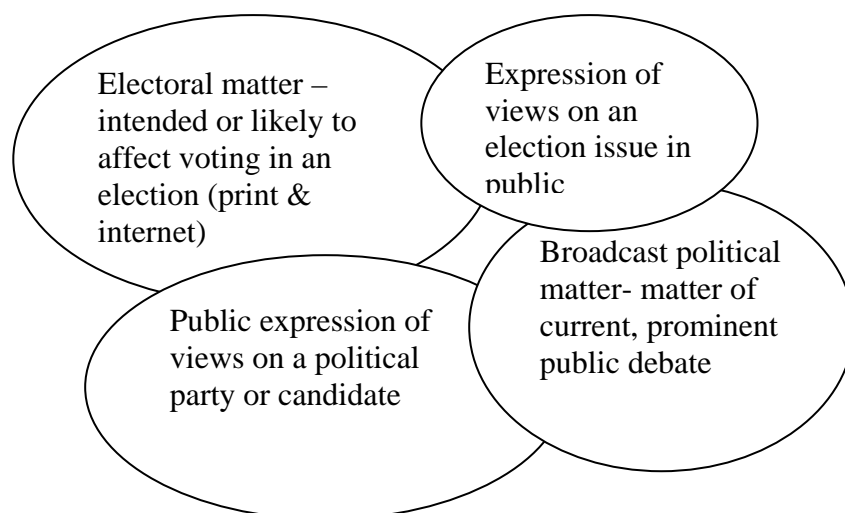
Bureaucratic problems with the current third party disclosure regime

Calculating political expenditure

Conceptually, section 314AEB of the *Commonwealth Electoral Act*, the key third party provision, mixes overlapping categories of political expenditure. Two categories refer to *what* the expenditure does, and another two refer to legislative provisions on *how* the money is spent, though these have purposive underpinnings that can include the first two categories. Carrying out an opinion poll, another disclosure item in section 314AEB, is arguably distinct though polling may be conducted for public release in pursuit of a political cause.

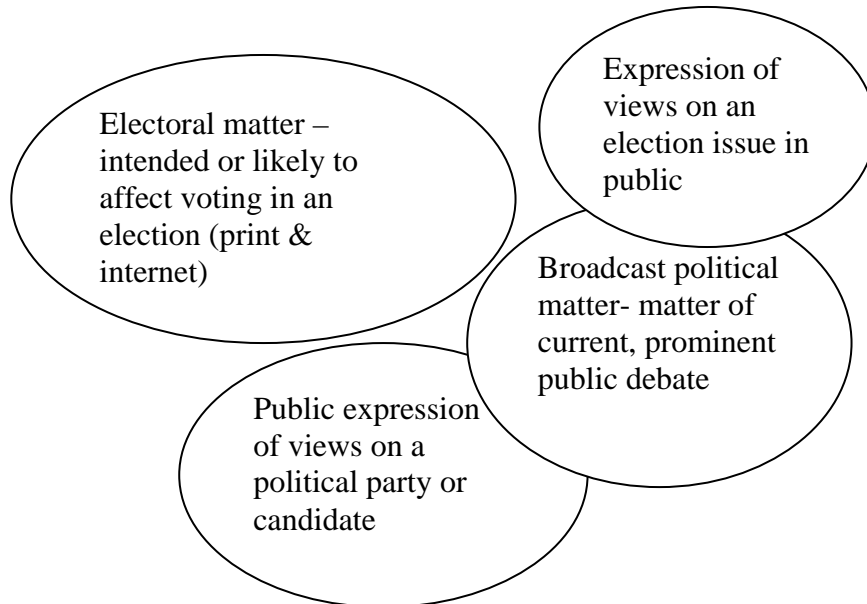
The categories by purpose are the public expression of views on a candidate or party and the public expression of views on an election issue. The categories by type are the printing, production, publication, or distribution of an election advertisement, handbill, pamphlet, poster, or notice (materials that require the 'written and authorised' statement); and the broadcast of political matter on TV or radio (materials that require the 'spoken and authorised' statement), and opinion polling. Figure 1 shows the conceptual overlap.

Figure 1: Conceptual overlap of section 314AEB



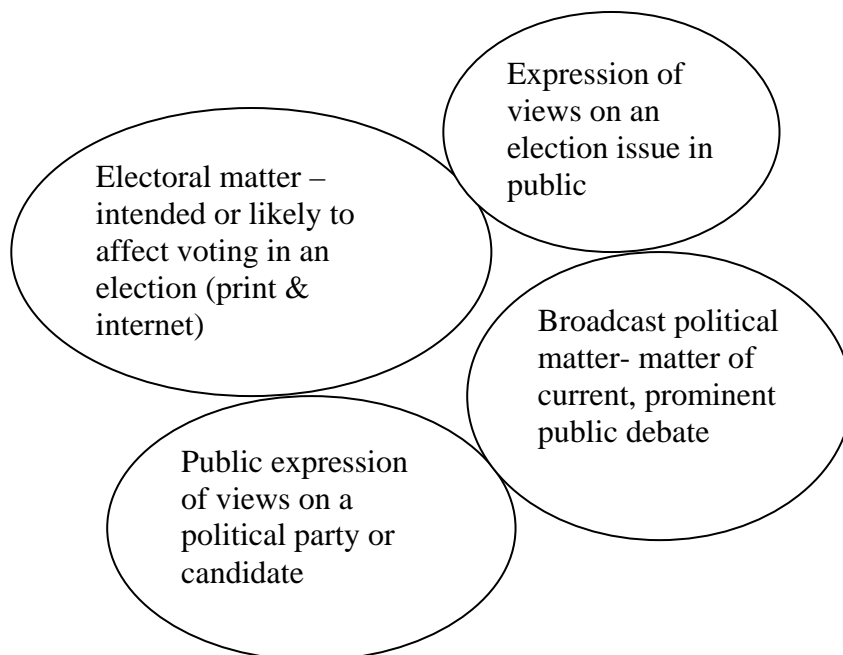
The legislation partially untangles the categories, by stating that disclosable expenditure on electoral matter refers to expenditure other than expenditure disclosed on election issues or a political party or candidate. This can be seen in figure 2.

Figure 2: Legal distinctions in section 314AEB



The AEC disentangles further, separating broadcast political matter from the two purpose categories, though it is not clear that this is required by the legislation, other than through the need to avoid double counting in the total.

Figure 3: AEC interpretation of section 314AEB



Because third parties are required to allocate expenditure between overlapping categories, none of the sub-categories produce reliable numbers. Complex

distinctions need to be made. This raises the issue of whether a simpler test could be devised.

Status of commentary rather than advocacy

There has been considerable confusion over to what extent the laws cover commentary on parties, candidate or issues. On the plain meaning of the statute, media and other public commentary is included. Submissions to a previous review from both major newspaper publishers, News Ltd and Fairfax, called for a specific exemption for media reporting.¹⁰ For example, section 328A(2) of the *Commonwealth Electoral Act* creates an exemption for 'general commentary' on a website.

Prior to the submission date for the first set of declarations under the Howard government's amendments, the AEC issued what it called a 'funding and disclosure guidance note.' It said that disclosure was required only when the 'primary and dominant' purpose was to express views on an election issue, and gave the following example:

Expenditure on the publication of a political or policy opinion piece in a newspaper may be an adjunct to your normal activity of reporting and commenting on the news and issues and so is not political expenditure. The publication of that same opinion piece in a journal or website whose objective is to see the election of a particular government, or to further a particular policy line, may well give rise to reportable expenditure.

The guidance note went on to offer another example distinguishing between the same article published in a trade union journal as part of the union's normal reporting and commenting on issues to its members, and as part of some special journal that may be reportable expenditure.¹¹ Not surprisingly, the ACTU says that it is 'virtually impossible' to make these subtle distinctions in an organisation routinely involved in advocacy. And the AEC has not repeated its original advice, creating doubt what status the AEC accords it.

Uncertainty as to what constitutes an 'issue in an election'

Commentary on political parties or election candidates is in itself easily identified. However whether an issue is an 'issue in an election' is not always clear. This requirement was carried over from earlier disclosure laws that applied only to the official campaign period. In its original context, this provision caused no significant uncertainty. The question of what constituted an 'issue in an election' could be answered in retrospect, as disclosure was not required until

¹⁰ Available at www.dpmc.gov.au/consultation/elect_reform/submissions.cfm#submissions, submissions 24 and 49.

¹¹ Australian Electoral Commission, 'Funding and Disclosure Guidance Note: Annual Return Relating to Political Expenditure' (no date but downloaded in early 2008), 3.

after the election was over. Third parties just needed to check whether their issues had been a subject of dispute between parties or candidates.

Under the current disclosure regime, what counts as an 'issue in an election' has to be determined prospectively. Due to annual reporting (every six months, if the current reform bill passes), third parties must disclose spending and donors for *future* election issues. Only once in the three-year election cycle will third parties clearly know whether they have obligations under the law. At other times, the law requires them to guess which issues will be election issues two or three years later. The move to annual disclosure seriously undermined the law's certainty.

Despite the considerable difficulty in knowing whether or not a disclosure obligation exists, not submitting an expenditure return or submitting an incomplete return is a strict liability offence, so the absence of any intent to break the law is not a legally valid defence.¹² Even commentators who support much stricter regulation of campaign finance think that the prospective nature of 'issue in an election' disclosure is a problem.¹³

Clarifying the purpose of the provision

Because categories overlap, the itemised expenditure information generated by section 314AEB is of little value in itself. It is the total amount that counts, as it determines which third parties come within campaign finance law and which do not. Compliance costs and the risk of unintentional breach could be reduced with a simpler method of determining whether the threshold has been reached.

One option is to include only the two categories (electoral matter and political matter) that third parties must otherwise identify, as requiring the written or spoken and authorised messages. Spending in these categories is also relatively easy to verify. Broadcast 'political matter' is interpreted broadly, and so may catch issue campaigns unrelated to partisan politics. However, overall this definition would be much easier to follow, and clearly exclude commentary.

Another option is to use the *Queensland Electoral Act 1992* provision of 'campaign purposes', covering only advertising that directly or indirectly promotes or opposes a candidate or party, or influences voting. There are similar definitions in NSW law (see appendix C). This definition excludes material that covers political topics but is not designed to influence voting, but does not entirely avoid uncertainty. Whether a campaign will influence voting at a subsequent election is a matter on which reasonable people will disagree. Though it is more important to have good laws than uniform laws, some overlap with regulation in other jurisdictions helps to reduce complexity and risk for third parties operating federally and in more than one state.

¹² *Commonwealth Electoral Act 1918*, section 315.

¹³ Eg Joo-Cheong Tham, *Money and Politics: The Democracy We Can't Afford* (Sydney: UNSW Press, 2010), 57.

A third option is to cover only advertising that directly mentions political parties or candidates. This is the simplest option, with no ambiguous category covering advertising that may or may not subsequently influence voting, and general political commentary is excluded. This option most closely aligns with the policy objective of letting voters decide whether or not undue influence is being exercised on a political party. Donors to partisan campaigns are more likely to be seeking secret influence than donors to general issue campaigns. This option also aligns with my recommendations on the capping of donations and campaign expenditure, discussed in subsequent sections. For these reasons, this is my preferred option.

Recommendations on current federal third party regulation

Recommendation 1: That section 314AEB of the *Commonwealth Electoral Act 1918* should only apply to associated entities.

Recommendation 2: That only expenditure on advertising that advocates a vote for or against a political party or candidate should count towards the disclosure threshold.

Recommendation 3: That if recommendation 2 is not implemented, section 314AEB(1)(a)(ii) on the public expression of views on an issue in an election be deleted.

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Recommendation 9: That if the thresholds for expenditure reporting or donations disclosure is lowered, an advertising campaign be launched to warn citizens that political activism exposes them to conviction.

Future Commonwealth reforms: capping third party expenditure

Though there are not yet any formal proposals to cap federal campaign expenditure, such caps are already in place in Queensland and New South Wales. In Queensland, the statewide third party cap is \$500,000, and in NSW the statewide cap is \$1,050,000 (see appendix B for a more detailed comparison). These are much lower than the corresponding caps on political parties, \$7.1 million and \$9.3 million respectively, for parties that contest all seats (not counting payments to candidates). As with federal third party law, the main rationale for regulating third parties is to avoid people using third parties to bypass regulation of political parties.

Expenditure caps largely neutralise the campaign spending races between the major parties (and to a significant extent minor parties, due to public funding changes that I do not discuss in this submission). But they strongly tip the political system against third parties. As table 1 shows, in NSW a political party can spend around nine times as much as a third party, and in Queensland a political party can spend about 14 times as much as a third party. However, in Queensland capped campaigns are narrowly defined as those advocating a vote for or against a party, while in NSW indirect influence is also covered. So in Queensland an issue campaign carefully framed to avoid directly advocating a vote, despite it supporting the stance of one party, could escape the cap, while in NSW it is likely to be included. To use a topical example, an anti-carbon tax advertisement that did not mention voting would probably be capped under NSW law, because it impliedly supports the Coalition, but uncapped under Queensland law. However for Queensland campaigns with a partisan message, the laws are very tough on third parties. The combination of a low cap and multiple media markets effectively denies third parties more than token statewide media presence.

Table 1: Capped spending per voter

State	Third party cap per voter	Political party cap per voter
NSW	\$0.23	\$2.01
QLD	\$0.18	\$ 2.60

Note: Based on AEC estimates of number of voters in each state at 31 May 2011.

Avoiding the effects of expenditure caps

As the Liberal Party has pointed out in relation to trade unions, third parties running similar or coordinated campaigns can mitigate the cap's effects. In NSW, it would be unsurprising if the new Liberal government tried to legislate against unions behaving this way. But there are obvious difficulties in pursuing this logic, as it could mean that third parties could lose their legal right to campaign due to

the actions of other third parties that they do not and cannot control. As these third parties may have some causes they share and others that they do not, a combined expenditure cap could seriously restrict a third party's capacity to represent its members.

Another workaround for campaign expenditure restrictions would be to form a single-issue political party, so giving the third party the same rights as political parties. Ironically, instead of third parties being established to by-pass political party regulation, third parties could establish political parties to by-pass third party regulation.

Limiting opposition to government

The deeper problem with expenditure caps, however, is that political parties use them to limit opposition to their policies. If similar laws had been in place federally, in the six to twelve months prior to an election, the caps on NSW rates would have been around \$3.2 million, and around \$2.6 million on Queensland rates. In 2007-08 the ACTU declared \$15.8 million under the political expenditure disclosure laws, and the main business fighting fund declared \$13.2 million. So depending on the definition used in the expenditure cap, it could radically reduce the size of third party campaigns.

Aggravating the problem, government advertising campaigns are outside campaign finance law. Though there are codes of practice for government advertising, except in the ACT these have no legislative basis.¹⁴ Promises to restrict taxpayer-funded political advertising have little credibility. When the Rudd government's proposed mining tax hit political trouble, a broad exemption provision in the government advertising guidelines was used to authorise a \$38 million campaign.¹⁵ The campaign occurred within what would have been the capped expenditure period for third and political parties, had NSW and Queensland law applied.

One of the claimed rationales for expenditure caps is to equalise campaign contests between political parties.¹⁶ But third party caps further unbalance an already very unequal contest between the government and third parties. Third party campaigns usually arise only when the government is acting, or proposing to act, in ways seriously contrary to the interests of the third party, or the people whose interests or views it represents. The third party campaign is usually a final attempt to appeal to the ultimate arbiters in a democracy, the electorate. Effectively, the position of the political parties that introduce these caps is that in government they should be able to act with substantial immunity from large-scale, organised opposition. And any opposition campaigns that do arise can be

¹⁴ Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* (Sydney: Federation Press, 2010), 251–254.

¹⁵ Katharine Murphy and Michelle Grattan, 'Taxpayers fund mine defence,' *The Age* (29 May 2010).

¹⁶ Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure* (December 2008), 64.

countered with taxpayer-funded campaigns in favour of the government position.

Expenditure caps therefore raise two substantial problems in a liberal democracy. While not completely abolishing freedom of speech for third parties, they limit third parties to small campaigns and whatever free media coverage they can generate. This is particularly problematic for unpopular third parties with no or few defenders. For example, both major parties now support plain packaging laws for cigarettes, and while the media still reports the views of tobacco companies they are not seen as a worthy cause. The only way the tobacco industry can directly get their message to a mass audience is via paid advertising. In effect, expenditure caps favour whatever views happen to be dominant or mainstream at a given time.

Flowing on from limits on freedom of speech, expenditure caps weaken the mechanisms for scrutiny and accountability of government. While for governments this may be the purpose of campaign finance law, for the political system it is a negative development. It undermines the checks and balances of the liberal-democratic system, which relies on political capacity being decentralised, both within the formal institutions of government and in the civil society. Governments need to fear the democratic sanctions of loss of seats or office. And as every government is a future opposition, they should think carefully about the political system they are creating, not just their immediate political challenges.

For governments to be concerned about opposition, we need organisations capable of running large campaigns if the need arises, and/or helping oppositions to secure office through providing money or other resources. The anti-WorkChoices campaign run by the Australian Council of Trade Unions (ACTU) is an example. The Liberal Party's 2007 election campaign director characterised this as an 'extremely unhealthy development' intervention by a 'third external force' with greater resources than either major political party.¹⁷ But this was the liberal democratic system operating as designed. To work effectively, democracies must allow opposition political groups to assemble a greater political force than the government of the day, and have it replaced. In the WorkChoices case, the government legislated against the interests of a major institution in Australian society and contrary to public opinion.¹⁸ Whatever the substantive merits of the WorkChoices debate, democracy is not flawed when policies with minority support can be over-turned.

Underlying the open 'undue influence' critique of third party campaigning is an implicit assumption that politicians would legislate in the public interest, if only they were not swayed by donations or backlash campaigns against their policies. A number of journalists objected to the anti-mining tax campaign on essentially

¹⁷ Cited in Andrew Norton, *Diminishing Democracy: The Threat Posed by Political Expenditure Laws*, CIS Issue Analysis 114 (Sydney: The Centre for Independent Studies, 31 July 2009), 5.

¹⁸ Andrew Norton, 'The End of Industrial Relations Reform?' *Policy* 23:4 (Summer 2007-08), 20-27.

these grounds, for example.¹⁹ However, the public interest is not something into which the political class has privileged insight. In a democracy, the public interest is not a clear and stable concept that can be identified before or above the political process. It is a vague and shifting concept that is produced by the political process through debating alternative policies. Part of the purpose of the political process is to decide—temporarily, given shifting debates and political fortunes—which of these arguments are most convincing.

Simply because third party campaigns are unlimited in their spending does not mean they are unlimited in their influence. Sometimes they come up against entrenched public opinion. All the money spent by unions, business and the government campaigns on WorkChoices had little effect on opinion. Polling on a basic ‘for or against’ question showed no significant change over nearly two years.²⁰ The unions won less by shaping opinion than by keeping the issue prominent in people’s mind—highlighting the importance of campaigns being able to continue over time rather than being limited by expenditure caps.

On other occasions where opinion is less formed, political competition means that no view is automatically dominant. In April 2011, for example, the Australian Hotels Association and GetUp! jostled through paid advertising over proposed pokies regulation. Political competition can neutralise or counteract campaign spending. This is already well understood from election campaigns; the millions of dollars spent by the major parties during election campaigns rarely shift party preferences by more than a few percentage points because voters go in both directions.

Every third party campaign will upset someone; there would be no need for them if there wasn’t any controversy surrounding the subject. But it is very unhealthy for a democracy when governments start prescribing the terms in which their critics will be allowed to oppose them. People who dislike third parties or their campaigns need to tackle them on the substantive issues, rather than using campaign finance law to limit third party activity.

If third party campaign expenditure restrictions are imposed, the spending that is covered should be narrowly defined so that is reasonably incidental to capping political party spending (ie, so that third parties are not just fronts to get around the caps on parties). Advocating or opposing a vote for a political party should be the test. Third parties should not be restricted in their campaigns on issues important to them, even if it may influence voting. The cap should apply only during the campaign period. The cap should be high enough that the third party could communicate with all voters—whatever cap applies to political parties would satisfy this criterion. Except for a low cap, the new Queensland provisions are a possible model to follow.

¹⁹ George Megalogenis, ‘Trivial Pursuit: Leadership and the end of the reform era,’ *Quarterly Essay* Issue 40 (2010), 54; Peter Hartcher, ‘Give us \$52 million and we will decide who runs the country,’ *Sydney Morning Herald* (2 February 2011); Katharine Murphy, ‘Public defenceless against influence-peddling arms race,’ *Age* (16 April 2011) Megalogenis argued that miners could campaign against the tax after it had been passed by Parliament.

²⁰ Andrew Norton, ‘The End of Industrial Relations Reform,’ as above.

Recommendations on expenditure limits

Recommendation 10: There should be no campaign expenditure limits on third parties.

Recommendation 11: If third party campaign expenditure limits are imposed on third parties, the limited activity should be restricted to advocating a vote for or against a political party or candidate, as in Queensland.

Recommendation 12: If third party campaign expenditure limits are imposed, the caps should apply only during a set campaign period.

Recommendation 13: If third party campaign expenditure limits are imposed, the caps should be high enough that the third party can communicate with all voters.

Future Commonwealth reforms: capping donations

Though there not yet any formal federal proposals to impose caps on political donations, Greens leader Bob Brown is on the public record supporting a \$1,000 cap.²¹ New South Wales and Queensland have already capped donations to third parties, to \$2,000 per year when the donation is related to state election campaigns. New South Wales has restricted donors to supporting only three third parties per year (see appendix C for a comparison of capping regimes in the two states). In Queensland, a broader definition applies to the cap in donations than for the cap on expenditure. The cap applies to donations that indirectly influence voting, not just advocating a vote for or against a party (so essentially the same definition as applies generally in NSW). So the cap may affect donations that finance campaigns that are not expressly partisan, but support a position associated with one party.

As with expenditure caps, donation caps exacerbate rather than mitigate a power imbalance between third parties and political parties, especially with the governing political party that is often in an adversary position with a third party. The cap for donations to political parties in Queensland and NSW is \$5,000. So compared to political parties generally, third parties have a lower donations cap, no public funding, and a much lower expenditure cap. The governing political party also has access to funds for taxpayer-funded advertising. The donation caps, in conjunction with other campaign finance measures, look very much like a cynical attempt by political parties to suppress the political activity of their critics and opponents.

For citizens, donation caps mean that they are limited in how much they can donate to campaigns on issues that may be of critical importance to them—livelihoods affected by a carbon tax, workplace relations laws, or bans on live cattle exports; personal lives affected by gay marriage not being permitted; the future of the planet, or any other subject that people feel strongly about. It is hard to see what legitimate public policy end is served by imposing such restrictions. This kind of activism is not a distortion of the political process; it is central to democratic political life. Though the entire electorate is the ultimate judge of who governs, it is the people who care most about issues that drive politics.

Donation caps also have unequal consequences between third parties. Third parties that rely on donations are disadvantaged relative to third parties that can fund their own campaigns. Ironically from the perspective of justifications for campaign finance law, traditional vested interests such as unions and business can carry on much as before under donations caps (they are the biggest declared spenders under federal disclosure law; see appendix D). Spending your own money on your own campaign is not a donation. But groups oriented towards the

²¹ ABC News, 'Greens expect backlash after record donation,' ABC Online (8 January 2011).

public interest typically rely more heavily on gifts to finance their work. Their fundraising will be restricted.

Administrative difficulties

Campaign finance law is more complex for third parties than political parties. Political parties exist to contest elections, but most third parties do not. Elections are typically incidental to third party operations, and occasional rather than routine. While unions and business are the biggest third-party spenders federally, election campaigning is not their main purpose. Federal third party expenditure disclosure shows that while some third parties are active in every election, others campaign only when an election issue happens to concern them. Campaign finance law becomes very complex as it tries to regulate organisations set up for other purposes.

A general cap on donations could be disastrous for third parties. A charity that restricted itself to donations of \$2,000 or less a year could seriously undermine its core activities. They would have to abandon political activity to escape the cap. To protect donations for other third party purposes, NSW and Queensland law tries to isolate donations for state campaign activity, with only the latter counted towards the cap. But donations to third parties are often general, and not for any specific activity. Donors to organisations with minor or irregular political activity may not know that their money could be spent on an election campaign. Even highly political third parties like GetUp! encourage general donations. Donors may prefer not to choose exactly how their money is used. They delegate decisions about how to best utilise the organisation's resources to the third party's officials.

In Queensland, donors must now specifically indicate that their donation can be used for 'campaign purposes', the direct or indirect influence of voting. Third parties can only finance campaign spending from a dedicated bank account, and donations can be placed in that account only if donors indicate their intentions. In Queensland this means that donor-reliant third parties must fundraise specifically for Queensland state elections. In NSW, the test of when a donation counts towards the political donations cap is less clear. Political donations received for the purposes of financing electoral communication expenditure must be paid into a dedicated bank account. However the legal definition of a political donation refers not to the donor's intention but to how the third party uses the donation. Donors must be informed, but their consent is not clearly required. This could cause problems for non-consenting donors, who may unintentionally reach or exceed the maximum of three third parties they can support each year. Donations classified as political donations must also be reported separately by the donor to the NSW electoral authorities.²²

Because donations caps apply all year every year, and not just in campaign periods, they raise some of the same issues as the 'issue in an election' problem

²² *Election Funding, Expenditure and Disclosures Act 1981* (NSW) (sections 85(1)(d), 95C, 96AA, 96C).

in federal disclosure law. Early in a government's term it is hard to know what might influence voting in several years time. However, the focus on advertising in NSW and Queensland law means that routine commentary is not covered.

Donation caps remedies

As the problems and injustices third party donation caps cause are much more obvious than the problems and injustices they solve, I strongly recommend that they not apply. Associated entity rules can be used catch third parties set up to evade regulation of political parties.

If third party donation caps are imposed, they should apply to narrowly defined political activity, the same as the campaign expenditure cap in Queensland: advocating a vote or against a political party or candidate. Only funds raised specifically for this purpose should be included in the cap; otherwise donor-reliant third parties are disadvantaged relative to third parties that have other income streams. The donation cap should be the same for political parties and third parties.

Recommendations on donation caps

Recommendation 14: That no caps apply on donations to third parties.

Recommendation 15: That if caps are imposed on donations to third parties, only donations intended to fund advertising that advocates a vote for or against a political party or candidate should be included in the cap.

Recommendation 16: That if caps are imposed on donations to third parties, the same cap as for political parties is used.

Appendix A: Actual and proposed third party disclosure laws, Commonwealth Electoral Act 1918

	CURRENT LAW	PROPOSED REFORMS 2010
Disclosure period	Each year	Every 6 months
Disclosure threshold	\$11,500	\$1,000
Disclosure applies to	Total value of expenditure and individual value of gift	Total value of expenditure and individual value of gift
General disclosure obligation	Itemised political expenditure Source of gifts	Itemised political expenditure Source of gifts
Disclosure trigger #1	Public expression of views on political party or candidate	Public expression of views on political party or candidate
Disclosure trigger #2	Publicly expressing views on election issue	Publicly expressing views on election issue
Disclosure trigger #3	Printing, publication or distribution of electoral material.	Printing, publication or distribution of electoral material.
Disclosure trigger #4	Broadcast of political matter.	Broadcast of political matter.
Disclosure trigger #3	Opinion poll or other research on election or voting intentions.	Opinion poll or other research on election or voting intentions.
Expenditure itemisation	Items #3 to #5, except insofar as already covered by #1 and #2.	Items #3 to #5, except insofar as already covered by #1 and #2.
Timing of expenditure return	Once every year-before 20 weeks after the end of the financial year.	Twice a year-before 8 weeks after the end of the reporting period, defined as either the first 6 months of the financial year or the full financial year.
Penalty for not submitting expenditure return.	Conviction and fine of up to \$1,000 (strict liability offence)	Conviction and fine of up to \$13,200 (strict liability offence)
Anonymous donations	Permitted	Not permitted unless under \$50 at events in specific circumstances where gift enabled political expenditure.
Penalty for	N/A	Payment of expenditure to

receiving and spending anonymous donations.		Commonwealth unless returned within 6 weeks. 12 months jail or \$26,400 fine or both. Normal need to prove intent.
Foreign donations	Permitted	Not permitted if the donation enabled the political expenditure and the donor's main purpose was to finance the political expenditure.
Penalty for receiving and spending foreign donations.	N/A	Payment of expenditure to Commonwealth unless returned within 6 weeks. 12 months jail or \$26,400 fine or both. Normal need to prove intent.
Donor disclosure	Name and address of donors provided at least one gave more than \$10,500, including trustees of trust fund or executive committee of unincorporated association. Date and value of donation that enabled the political expenditure, in whole or in part.	Name and address of donors provided at least one gave more than \$1,000 or there was a permitted anonymous gift, including trustees of trust fund or executive committee of unincorporated association. Date and value of donation that enabled the political expenditure, in whole or in part. If permitted anonymous given, function details where gift was received.
Timing of donor return	Once every year-before 20 weeks after the end of the financial year.	Twice a year-before 8 weeks after the end of the reporting period, defined as either the first 6 months of the financial year or the full financial year.
Publication of donor return	Yes	Yes
Penalty for not submitting donor return.	Conviction and fine of up to \$1,000 (strict liability offence).	Conviction and fine up to \$13,200 (strict liability offence)
Records kept	3 years	3 years

Appendix B: Third party expenditure caps, NSW and Queensland

	Queensland	NSW
General category	Electoral expenditure for Queensland state election.	Electoral communication expenditure for NSW state election.
Statewide cap	\$500,000 for registered third parties, \$10,000 otherwise.	\$1,050,000 for registered third parties, \$525,000 otherwise.
Seat cap	\$75,000	\$20,000
Period of cap	From 2 years after election or when writs issued for the election.	From 1 October the year before the election to the election.
Broad meaning	Advocates a vote for or against a party or candidate.	Promoting or opposing, indirectly or directly, the election of a party or candidate, or for the purpose of influencing, directly or indirectly, voting at an election.
Media covered	Broadcast, publishing in journal or internet, theatre or other place of entertainment of an advertisement. Other material requiring written and authorised message (eg pamphlets aimed at influencing election or how-to-vote cards)	Advertisement on radio, TV, internet, cinemas, newspapers, billboards, posters, brochures, how-to-vote cards and other election material (not defined).
Production of advertisement	Included.	Included.
Distribution costs (eg direct mail)	When addressed to 'particular entities'.	All relating to election.
Opinion polls	Included.	Not included in cap, but included in disclosure.
Employing staff	Not included.	Included.
Office accommodation	Not included.	Included.
Travel costs	Not included.	Not included in cap, but included in disclosure.
Fundraising costs	Not included.	Not included in cap, but included in disclosure.
Disclosure threshold	\$200 in electoral expenditure.	\$2,000 in electoral communication

		expenditure during capped expenditure period.
Publication of expenditure	No, but available at Electoral Commission Queensland.	Yes, on Election Funding Authority website.
Where capped expenditure must come from	Separate campaign account established in accordance with Act. Cannot receive donations that are not political donations. Can receive other payments.	Separate campaign account established in accordance with Act. Donations for purpose of electoral communication expenditure must be paid into account. No specific prohibition on other payments into account, but regulations may impose them.

Appendix C: Third party capping and disclosure of donations, Queensland and New South Wales

	Queensland	NSW
General definition for cap	Gift with statement by donor that gift is intended for use for campaign purposes (promoting or opposing a political party or candidate, influencing, directly or indirectly, voting at an election).	Gift which was used or was intended to be used, directly or indirectly, to finance electoral expenditure (promoting or opposing a political party or candidate, influencing directly or indirectly, voting at an election).
General definition for disclosure	As above, plus expenditure on political purposes: publication of electoral matter, expressing views on election issue, gifts to parties or candidates. (Not clear whether QLD state election issues only.)	As above
Intention of donor for capped donation	Required, except for in kind gifts during an election for campaign purposes.	Not required, but 3 rd party must issue a receipt to donor that notifies them of their own disclosure requirements.
Intention of donor for disclosure	Required for political donations, for spending on political purposes the test is that the	Not required, but 3 rd party must issue a receipt to donor that

	donation enabled the expenditure.	notifies them of their own disclosure requirements.
Registration required to accept donations	No (but must still pay into state campaign account if donation received).	Yes
Where donation to be paid	State campaign account.	State campaign account. (but can be diverted to other accounts).
Banned donors/donations	None.	Tobacco industry, for-profit liquor and gambling industry, property developer, non-citizens.
Anonymous donations	Cannot be paid into state campaign account.	Not of \$1,000 or more.
Entry fee to fundraiser	First \$200 exempt.	Included.
Indirect campaign contributions	Includes provision of service for no consideration or inadequate consideration (except volunteer labour). Counted towards cap and disclosure.	Includes provision of service for no consideration or inadequate consideration (except volunteer labour). Counted towards cap and disclosure.
Disclosure threshold for third party	\$1,000 in expenditure on political purposes (publication of electoral matter, expressing views on election issue, gifts to parties or candidates).	\$2,000 in electoral communication expenditure during capped period (1 October to election).
Disclosure of donations to authorities	Donations of \$1,000 or more.	Donations of \$1,000 or more.
Disclosure of donations to public	On application to Electoral Commission Queensland.	On Election Funding Authority website.
Disclosure period	Within 15 weeks of polling day, for whole period since last election.	Year ending 30 June.
Donation cap	\$2,000 to each third party.	\$2,000 to each third party, not more than 3 third parties a year.
Donor cap period	Each financial year.	Each financial year.

Appendix D: Political expenditure by ideological affiliation

	2006-07	2007-08	2008-09	2009-10	Total	% of total 2006-2010
Unions	23,679,102	27,825,532	6,147,032	3,235,158	60,886,824	55%
Environmental groups	432,951	2,102,549	98,173,00	243,918	2,877,590	3%
GetUp!	555,234	1,277,011	237,183	1,962,406	4,031,834	4%
Miscellaneous left-wing groups	186,824	35,066	0	15,773	237,663	0%
Miscellaneous right-wing groups	17,035	1,366,338	0	78,441	1,461,814	1%
Business and industry groups	32,070	16,341,962	11,170	22,207,532	38,592,734	35%
Liberty Party associated entities	28,527	2,004,066	0	0	2,032,593	2%
Pollsters	132,831	0	0	0	132,831	0%
Unclassified individuals and organisations		381,465	0	0	381,465	0%
Total	25,064,574	51,333,987	6,493,558	27,743,228	110,635,347	100%

Source: Australian Electoral Commission, Summary of Political Expenditure Returns Classifications by Andrew Norton