Dear Panel,

Further submission to the inquiry by the Panel of Experts – Political Donations

This further submission is in response to a request by Andrew Tink AM, a member of the Expert Panel, for elaboration of the recommendation I made at page 171 of my report for the New South Wales Electoral Commission, Establishing A Sustainable Framework for Election Funding and Spending Laws in New South Wales (2012) (‘the Report’).

This recommendation deals with an important issue concerning the fairness and effectiveness of caps on election spending – campaigns that are co-ordinated amongst different political actors (political parties, candidates, groups of candidates and third-party campaigners).

As the Report discussed at page 168-170, section 95G(6) of the Election Funding, Expenditure and Disclosures Act 1981 (NSW) – which was struck down by the High Court in the Unions NSW decision¹ – was informed by the legitimate aim of dealing with this issue. Whilst the end was proper, the means was profoundly defective: section 95G(6) was based on the flawed assumption of co-ordinated electoral campaigns between the Australian Labour Party and its affiliated trade unions; it was unfair in scope by being both over and under-inclusive; and it undermined freedom of party association and the vitality of the party system.

¹ Unions NSW v New South Wales [2013] HCA 58.
At pages 170-171 of the Report, I proposed an alternative approach to the issue of co-ordinated campaigns and caps on election spending. The text is reproduced below.

An Alternative Approach

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

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

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

(6) Where—

(a) during a regulated period any controlled expenditure is incurred in a particular part of the United Kingdom by or on behalf of a third party, and

(b) the expenditure is so incurred in pursuance of a plan or other arrangement whereby controlled expenditure is to be incurred by or on behalf of—

(i) that third party, and

(ii) one or more other third parties, respectively in connection with the production or publication of election material which can reasonably be regarded as intended to achieve a common purpose falling within section 85(3), the expenditure mentioned in paragraph (a) shall be treated for the purposes of this section and Schedule 10 as having also been incurred, during the period and in the part of the United Kingdom concerned, by or on behalf of the other third party (or, as the case may be, each of the other third parties) mentioned in paragraph (b)(ii).

The above provisions provide useful guidance but have significant limitations. Both deal only with campaigns co-ordinated amongst third parties and do not apply to campaigns co-ordinated between political parties and candidates, and third parties (whether they are individuals or groups). The Canadian provision has other shortcomings: it provides for a prohibition rather than aggregation of spending; it is also too narrow in scope as it is triggered only when there is either collusion or a purpose to circumvent the spending limits rather than when there is a co-ordinated electoral campaign.
Recommendation 40: Sections 95G(6) and 95G(7) of the EFED Act should be repealed.

Recommendation 41:

- A provision should be inserted into the EFED Act that aggregates the ‘electoral expenditure’ of political parties, candidates, groups of candidates and third-party campaigners (whether they be individuals or groups) when there is a co-ordinated campaign for the purpose of New South Wales State elections.
- Factors to be considered in determining whether there is a co-ordinated campaign between a political party and a third-party campaigner should include:
  - whether the third-party campaigner is an office bearer of the party; and
  - whether the third-party campaigner is a member of the party (whether as an individual or as an organisation).

As elaboration of the above analysis, I have also reproduced below section 350 of the Canada Elections Act 2000 (Canada) and section 85(3) of the Political Parties, Elections and Referendum Act 2000 (UK).

Section 350 of the Canada Elections Act 2000 (Canada)

350. (1) A third party shall not incur election advertising expenses of a total amount of more than $150,000 during an election period in relation to a general election.

(2) Not more than $3,000 of the total amount referred to in subsection (1) shall be incurred to promote or oppose the election of one or more candidates in a given electoral district, including by

(a) naming them;

(b) showing their likenesses;

(c) identifying them by their respective political affiliations; or

(d) taking a position on an issue with which they are particularly associated.

(3) The limit set out in subsection (2) only applies to an amount incurred with respect to a leader of a registered party or eligible party to the extent that it is incurred to promote or oppose his or her election in a given electoral district.

(4) A third party shall not incur election advertising expenses of a total amount of more than $3,000 in a given electoral district during the election period of a by-election.

(5) The amounts referred to in subsections (1), (2) and (4) shall be multiplied by the inflation adjustment factor referred to in section 414 that is in effect on the issue of the writ or writs.
Section 85(3) of the Political Parties, Elections and Referendum Act 2000 (UK)

(3) “Election material” is material which can reasonably be regarded as intended to—
(a) promote or procure electoral success at any relevant election for—
(i) one or more particular registered parties,
(ii) one or more registered parties who advocate (or do not advocate) particular policies or
who otherwise fall within a particular category of such parties, or
(iii) candidates who hold (or do not hold) particular opinions or who advocate (or do not
advocate) particular policies or who otherwise fall within a particular category of candidates,
or
(b) otherwise enhance the standing—
(i) of any such party or parties, or
(ii) of any such candidates, with the electorate in connection with future relevant elections
(whether imminent or otherwise); and any such material is election material even though it
can reasonably be regarded as intended to achieve any other purpose as well.

Another way to deal with the issue of co-ordinated election campaigns in relation
caps on election spending is provided by section 205H of the Electoral Act 1992
(ACT), reproduced below.

Limit on electoral expenditure—third-party campaigner acting in concert with others

(1) A third-party campaigner must not act in concert with another person to incur electoral
expenditure in relation to an election in the capped expenditure period for the election that
is more than the expenditure cap for the third-party campaigner for the election.
(2) If a third-party campaigner contravenes subsection (1), the third-party campaigner is
liable to pay a penalty to the Territory equal to twice the amount by which the electoral
expenditure exceeds the third-party campaigner's expenditure cap for the election.
(3) The commissioner may recover an amount payable under subsection (2) from the third-
party campaigner.
(4) In this section:
"act in concert"—a person acts in concert with someone else if the person acts under an
agreement (whether formal or informal) with the other person to campaign with the object,
or principal object, of having a particular party, MLA or candidate elected.
The provision recommended by the Report and section 205H of the *Electoral Act 1992* (ACT) do not suffer from the defects of (now-repealed) section 95G(6) of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) in that both apply:

- when there is co-ordination *in fact* while section 95G(6) applied when there was spending by an ‘affiliated organisation’ (as defined by repealed section 95G(7)) based on the assumption that there was always co-ordination in terms of the election campaigns of the ‘affiliated organisations’ and the relevant political party;
- to *all* co-ordinated campaigns whilst section 95G(6) only captured campaigns coordinated between ‘affiliated organisations’ and the relevant political party;
- to *all* political parties and not just the Australian Labour Party which is the only party that presently has ‘affiliated organisations’.

These features of the provision recommended by the Report and section 205H of the *Electoral Act 1992* (ACT) not only make these provisions more meritorious in principle but, as will be seen below, are of significance in terms of their constitutional validity.

The High Court decision in *Unions NSW* demonstrates that an aggregation provision like section 95G(6) of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) clearly implicates the freedom of political communication implied under the *Commonwealth Constitution*. In that decision, the High Court found that section 95G(6) breached the implied freedom— it effectively burdened the freedom under the 1st limb of the *Lange* test but failed to be reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the prescribed system of representative government under the 2nd limb of the test.

Both the provision recommended by the Report and section 205H of the *Electoral Act 1992* (ACT) undoubtedly place a burden on the implied freedom of political communication. The central question, as in *Unions NSW*, is whether they conform
with the 2\textsuperscript{nd} limb of the \textit{Lange} test and are, therefore, not in breach of the implied freedom.

In \textit{Unions NSW}, the majority and Keane J concluded that section 95G(6) failed to be reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the prescribed system of representative government under the 2\textsuperscript{nd} limb of the \textit{Lange} test in different ways.

The conclusion of the majority on this question is found in paragraphs 64-65 of the judgment, reproduced below:

\begin{quote}
[64] It may be inferred that it is the purpose of s 95G(6) to reduce the amount which a political party affiliated with industrial organisations may incur by way of electoral communication expenditure and likewise to limit the amount which may be spent by an affiliated industrial organisation. What cannot be deduced is how this purpose is connected to the wider anti-corruption purposes of the EFED Act, or how those legitimate purposes are furthered by the operation and effect of s 95G(6). Industrial organisations are identified in the EFED Act as potential donors to political parties or candidates, and as likely to themselves expend monies on political communication. They are not identified as prohibited donors and the defendant did not seek to justify s 95G(6) and \textit{the targeting of industrial organisations and the parties with whom they are affiliated} by analogy with the provisions of Div 4A. There is therefore nothing in the provision to connect it to the general anti-corruption purposes of the EFED Act. (emphasis added)

[65] Absent a legislative purpose for s 95G(6) which is conformable with those of the EFED Act, no further consideration can be given as to whether the provision is justified. The provision is invalid.
\end{quote}

What was central to the conclusion of the majority that the purpose of section 95G(6) was not connected to those of the EFED Act was its selective scope – ‘the targeting of industrial organisations and the parties with whom they are affiliated’.

Whilst Keane J employed different reasoning in concluding that section 95G(6) was in breach of the implied freedom of political communication, the significance of the
selective scope of section 95G(6) was similarly apparent from his Honour’s decision.

Paragraph 167 of this decision (reproduced below) makes this clear:

[167] The effect of sub-ss (6) and (7) of s 95G is that certain sources of political communication are treated differently from others. For example, third-party campaigners are not subject to the aggregation provisions. The effect of this differential treatment is to distort the free flow of political communication by favouring entities, such as third-party campaigners, who may support a political party, but whose ties are not such as to make them affiliates under the rules of that party even though they may promulgate precisely the same political messages. Political communication generated by electoral communication expenditure by organisations affiliated with a party is disfavoured relative to political communication by entities which, though actively supportive of, and indeed entirely ad idem with, a given party, are not affiliated with it. To discriminate between sources of political communication in this way, in the sense of the term used by Mason CJ in ACTV and discussed above in relation to s 96D, is to distort the flow of political communication.

As discussed above, the provision recommended by the Report and section 205H of the Electoral Act 1992 (ACT) do not, however, have the vice of selectivity built into section 95G(6). This makes them far less likely to be in breach of the implied freedom of political communication.

As the same time, they are informed by legitimate objectives. This was well-explained in the report of the Australian Capital Territory Parliament’s Select Committee on the Amendments to the Electoral Act 1992:

The Committee also considers that the aggregated expenditure provisions in ss 205G and 205H have a sound policy basis in terms of aiming to ensure that parties, non-party candidates and third party campaigners are not able to effectively avoid limits on campaign expenditure through affiliation with other entities whose purpose is to promote a particular candidate or party. The Committee considers that an important aim of the caps on campaign expenditure is to promote, as far as possible, a ‘level playing field’ for all candidates who aspire to be members of the Legislative Assembly. A second important aim is to minimise the risk or perception of undue influence in the political process. At the same time the freedom to participate in the election
process must be protected.²

Given these aims and the differences between section 205H of the *Electoral Act 1992* (ACT) and section 95G(6), the Committee concluded that there was no need to amend section 205H given that it was not bedeviled by the constitutional difficulties that affected section 95(6).³

I hope this further submission has been helpful in terms of the Panel’s inquiry.

Yours sincerely,

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² Select Committee on Amendments to the *Electoral Act, Voting Matters* (30 June 2014) [4.53].

³ Ibid [4.54].