



16 October 2014

Dear Members of Parliament,

Re: Elections Funding, Expenditure and Disclosures Amendment Bill 2014

I write on behalf of the Executive of the NSW Society of Labor Lawyers (**Labor Lawyers**) to express our concerns about the *Elections Funding, Expenditure and Disclosures Amendment Bill 2014 (the Bill)*, introduced this week.

Our chief concern is that the most recent Bill does not propose any changes to 96D of the *Election Funding, Expenditure and Disclosures Act*, which was re-inserted into the Act by the passage of legislation earlier this year. We made clear our concerns about s96D in our 12 June 2014 letter to all Members of the Legislative Council. At that point, it was unclear whether the Government's attempt to reinstate s96D in the wake of the High Court's decision in *Unions NSW*, was done in ignorance of that decision, or as a deliberate challenge to the High Court's authority. There can now be no argument that the Government is deliberately ignoring and/or flouting High Court authority, because it proposes to maintain s96D despite having now received advice from numerous sources (including legal experts who addressed the Premier's Panel) that section 96D is unconstitutional.

We take the opportunity to repeat the concerns raised in our June 2014 letter, about the inconsistency between section 96D and the High Court's decision in *Unions NSW & Ors v State of NSW* [2013] HCA 58. We again urge the Government to amend section 96D.

Our concerns with s 96D(1)

Section 96D(1) reads:

"96D Restrictions on persons from whom donations can be accepted

(1) It is unlawful for a political donation to a party, elected member, group, candidate or third-party campaigner to be accepted unless the donor is:

(a) an individual who is enrolled on the roll of the electors for State elections, on the roll of the electors for federal elections or on the roll of the electors for a local government election, or

(b) an entity that has a relevant business number.

In [Unions NSW & Ors v State of NSW](#) [2013] HCA 58, the High Court considered how the implied freedom of political communication (found in the Australian Constitution) bears on electoral funding laws. The High Court concluded that freedom of political communication means that political donations cannot be restricted to individuals on the electoral roll.¹ Section 96D(1)(a) flies in the face of the High Court's decision, by purporting to do exactly what the High Court said should not be done.

We are also concerned about the further limitations that section 96(1)(b) places on who can make political donations. Under s 96(1)(b), the only non-electoral donations that can be received are those from entities with an ABN or another business number recognised by ASIC.² This is presumably an attempt to ensure that local action groups including anti-development, anti-mining and single issue informal groups cannot donate.

¹ See *Unions NSW & Ors v State of NSW* [2013] HCA 58 at [30] (per French CJ, Hayne, Crennan, Kiefel and Bell JJ) [144], [148], [149] (per Keane J).

² See 96D(2) of the Bill



The specific issue raised by s96(1)(b) was not considered by the High Court in *Unions NSW*. However, the Court's general reasoning is easily applied to the proposed s 96(1)(b):

- Section 96D(1)(b) is selective in its prohibition and the basis for the selection is not identified and not apparent.³
- There is no obvious anti-corruption purpose served by s 96(1)(b).⁴
- It might be assumed that some of the affected entities have a legitimate interest in political matters, similarly to many individuals who are not on the electoral roll.⁵ As the High Court said in *Unions NSW*:

Political communication may be undertaken legitimately to influence others to a political viewpoint. It is not simply a two-way affair between electors and government or candidates. There are many in the community who are not electors but who are governed and are affected by decisions of government. Whilst not suggesting that the freedom of political communication is a personal right or freedom, which it is not, it may be acknowledged that such persons and entities have a legitimate interest in governmental action and the direction of policy (at [30]).

- A complete prohibition on political donations might be understood to further the anti-corruption purposes of the legislation, if such a measure could be justified as a proportionate response to identified corruption. However, the current, incomplete prohibition in s 96D is inexplicable and amounts to an unjustifiable burden on freedom of political communication.⁶

Conclusion

Based on the Court's reasoning in *Unions NSW* we consider it highly likely that, if challenged, section 96D would be declared invalid.

Yours sincerely

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³ See *Unions NSW & Ors v State of NSW* [2013] HCA 58 at [53].

⁴ *Ibid*, at [53]-[56].

⁵ *Ibid*, at [56].

⁶ *Ibid*, at [59]-[60].