

A LIMITED LICENCE TO CAMPAIGN

Restrictions on third-party campaigning will undermine Australian liberal democracy, argues **Andrew Norton**

For a non-election year, we've seen a lot of political advertising in 2011—and little of it is from the political parties. We've seen Cate Blanchett and the coal industry present opposing sides of the carbon tax debate. The pokies lobby and GetUp! jostled over plans to limit betting on poker machines. And the tobacco industry is fighting a noisy media campaign against plain packaging laws for cigarettes.

But if supporters of tighter campaign finance law have their way, large-scale 'third-party' campaigns like these could face severe restrictions. There is a real risk that a federal parliamentary review of campaign finance law, which is due to report in late September 2011, will recommend following regulatory precedents set by NSW and Queensland. In both states, third-party political expenditure is capped during state campaign periods. Third parties have much lower caps than political parties.

Third-party campaign restrictions are attractive for political parties at the national level. The Liberals remain politically traumatised by the Australian Council of Trade Unions' (ACTU) anti-WorkChoices campaign through 2006 and 2007. They will seriously consider proposals to mute opposition to future industrial relations reforms. Labor has been hit by several third-party campaigns since 2010, and its national secretariat is now calling for these campaigns to be curtailed. A government experiencing bad polling would surely be tempted to suppress a major source of negative advertising. NSW and Queensland Labor embraced strict campaign finance regulation only as election defeat loomed.

Political parties treating electoral and campaign finance law as a spoil of office is hardly new. But typically, there were political constraints on how far this could go. Every government knew that it was a future opposition, and had an eye to how it would get back to power after a defeat. Self-interested changes to the law typically met with hostile responses from disadvantaged parties and the media. These restraints have helped keep Australian electoral and campaign law fair and clean by international standards.

Anti-third party campaign finance laws will not be checked by this process of scrutiny and resistance. The political parties share a common interest in curtailing third parties, which seem emboldened by recent campaign successes. For various reasons, media and academic commentators on campaign finance law mostly support additional controls on third parties. So instead of self-serving campaign finance laws facing critical examination, political parties are being encouraged to regulate their political opponents. Third parties could soon find themselves weakened relative to political parties. This would be a bad outcome for Australia as a liberal democracy, which needs a strong civil society capable of challenging government.

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The current law

Existing federal law on third parties is complex and bureaucratic, but in practice it is a nuisance rather than a major obstacle to political activity.¹ It requires third parties spending \$11,900 or more a year on various forms of political expenditure to report how much they spend, along with the names and addresses of donors whose gifts of \$11,900 or more financed that expenditure. So it is a system, like the rest of current federal campaign finance law, based on disclosure rather than prohibition. It lets voters decide whether donations are problematic.

For a disclosure system to be effective in informing voters, some third-party regulation is necessary. Otherwise, front third-party organisations could be used to by-pass political party disclosure provisions. The main problem with the Commonwealth law is that its definition of political expenditure is very wide, and so catches non-partisan political activity. The main third parties are unions, industry groups, environmental organisations, and activist bodies like GetUp! While these groups have political leanings, they represent their own views and interests. They have not been established to get around campaign finance rules applying to political parties.

Third-party law is moving well beyond what is necessary to protect the integrity of the political party disclosure system.

In NSW and Queensland, laws passed since late 2010 go much further than the federal disclosure system. In state campaign periods, third parties are limited in how much they can spend on their election campaigns (federal campaigns are excluded from the caps). The statewide third party cap is \$500,000 in Queensland and \$1,050,000 in NSW. These caps are much lower than the corresponding limits, \$7.1 million and \$9.3 million respectively, on political parties that contest all seats (not counting payments to candidates).

Though Queensland's cap looks more restrictive, it applies only when a third party

advocates a vote for or against a party or candidate, while in NSW indirect influencing voters 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 but is likely to be included in NSW. 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 a token statewide media presence.

Queensland and NSW have also introduced caps on donations for state elections. In each state, donors can give a maximum donation of \$2,000 a year to a third party, compared to \$5,000 to a political party. In NSW, a donor can support a maximum of three third parties per year. NSW also prohibits a range of persons and organisations from donating at all. Only people on the electoral roll can donate, effectively excluding most non-citizens. A range of industries, including tobacco, property development, and for-profit liquor and gambling, are also forbidden donors. Though Queensland has none of these additional restrictions—it even exempts third parties from a ban on foreign-sourced donations applying to political parties—it does change its definition of regulated activity. For donations, gifts supporting campaigns that may indirectly influence voting are included in the cap. So for issue campaigns that may influence voting, Queensland third parties are regulated in their fundraising but not in their expenditure.

Limiting the capacity of third parties

In NSW and Queensland, third-party law is moving well beyond what is necessary to protect the integrity of the political party disclosure system or to inform voters about donors. There is a new policy objective of reducing the political opportunities of third parties relative to political parties. This goal has support at the national level as well. In a submission to the federal parliamentary review of campaign finance, the national ALP secretariat argued that political parties and candidates are the primary participants in electoral contests, and that 'as a consequence, third parties must

necessarily take a secondary place in a regulated political environment.² They complained that in the 2010 federal election the combined expenditure of third parties, including those representing the mining industry, tobacco industry, childcare industry, and retailers were significant compared to political parties. The submission recommends setting expenditure limits for third parties at ‘significantly lower’ levels than the limits for political parties.

In NSW and Queensland, the third-party expenditure limits are significantly below the limits set for political parties (see Table 1). In NSW, a political party can spend nine times as much per voter as a third party. And in Queensland, a political party can spend 14 times as much per voter as a third party. If similar laws had been in place federally, in the six to 12 months before 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 federal political expenditure disclosure laws, and the main business fighting fund declared \$13.2 million. Depending on when the capped expenditure period starts, it could radically reduce the size of each third-party campaign.

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 Australian Electoral Commission estimates of number of voters in each state at 31 May 2011.

Political parties are naturally concerned with the balance of influence during campaigns. But a contest for the attention of voters during an election campaign should be seen in the context of the overall balance of power between governments and third parties. Third-party campaigns usually arise only when a 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.

As it has legislative power, the government is the more powerful party, no matter what financial resources a third party may possess. A third-party campaign is usually a final attempt to appeal to the ultimate arbiters in a democracy, the electorate. Effectively, the ALP national secretariat submission argues that in government the party should be granted substantial immunity from large-scale, organised opposition in the later part of its term.

Expenditure caps create substantial problems in a liberal democracy.

Expenditure caps therefore create substantial problems in a liberal democracy. While not abolishing freedom of speech for third parties, spending restrictions restrict third parties to small campaigns and whatever free media coverage they can generate. This is particularly problematic for unpopular third parties with few or no defenders. For example, both major parties now support plain packaging laws for cigarettes, leaving tobacco companies largely friendless in political life. Though the media still report the industry’s views, it rarely does so only without critical commentary. The tobacco industry can get its message directly to a mass audience only 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. 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 ACTU is an example. Expressing similar sentiments to the ALP national secretariat, the Liberal Party’s 2007 election campaign director characterised the anti-WorkChoices campaign as an ‘extremely unhealthy development’ intervention by a ‘third external force’ with greater resources than either major political party.³ 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 replace it. In the WorkChoices case, the government legislated against the interests of a major institution in Australian society and contrary to public opinion.⁴ Whatever the substantive merits of the WorkChoices debate, the democratic system is not flawed when policies with minority support can be overturned.

Simply hearing an unconvincing message more often will not make it any more attractive.

Campaign freedom for third parties is consistent with the ALP national secretariat's point that political parties have a primary role in election campaigns. This is inherently the case, as third parties do not run candidates. Recognising the actual choice being made, media news coverage is and will likely remain overwhelmingly about the major parties. Although third parties have a larger share of total political content in advertising than in news, it is hard to argue that political parties are being overwhelmed. In 2007, the political parties spent \$100 million, double the total third-party political expenditure. This was despite the WorkChoices issue bringing out the two richest third parties, the unions and business. If voters are not hearing the messages of major political parties, it is because they have stopped listening, not because the political parties are being drowned out by other political voices.

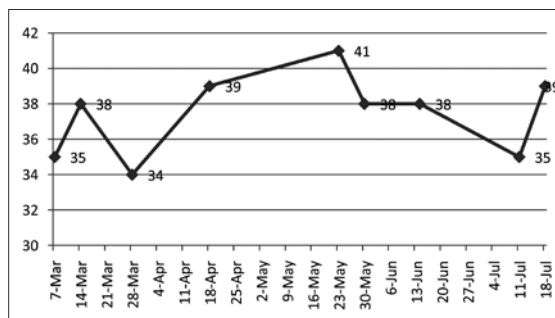
A self-regulating political system

Big advertising budgets do not give third parties an automatic power of veto over government policy. As even supporters of expenditure caps concede, the idea that campaign expenditure buys votes is 'untenable.'⁵ Democratic politics is about persuasion, and especially so for third parties, which lack government's coercive powers. Simply hearing an unconvincing message more often will not make it any more attractive. Third parties need to make arguments that resonate with the public, and survive the challenges they receive.

Many third-party campaigns are directed against the government, and so immediately engage a formidable opponent. Leading government figures are guaranteed media coverage for their views, and governments can use taxpayer funds for their own advertising campaigns. Indeed, government advertising is a significant loophole in campaign finance regulation. We could end up with a system in which third parties face low caps on advertising expenditure, while governments face no restrictions at all.

As the examples at the beginning of this article suggest, frequently third-party campaigns hit counter-campaigns by other third parties. While the unions outspent business on WorkChoices, the extensive issue polling suggests there was a public opinion stalemate on a basic 'for or against' question.⁶ The WorkChoices campaigns may have kept industrial relations in voters' minds, but those minds were not changed. The third-party and government advertising in 2011 on the carbon tax has to date not led to any decisive shifts in opinion (see Figure 1). Large campaigns can ensure that most voters are aware of a third-party's perspective, but they cannot guarantee a political win.

Figure 1: Support for carbon tax 2011



Question: Do you support or oppose the Government's proposal to introduce a carbon pricing scheme from 1 July 2012, which will require industries to pay a tax based on the amount of carbon pollution they emit?

Source: Essential Research

The media are another important source of scrutiny of third-party campaign messages. As with the recent carbon tax debate, extensive reporting and commentary on an issue exists alongside paid advertising. As well as creating an advantage for the government relative to third parties, capping campaign expenditure benefits the editorial agenda of the media relative to third parties (though there is a commercial cost from less advertising). Once third parties exhaust their limited campaign spending entitlements, media gatekeepers will control their access to the public. The news judgments and biases of journalists and editors will inevitably affect who gets reported and how they are presented. At a time when many people question the concentration of media ownership in Australia, it seems odd that there is also a proposal to give those same media owners more control on what gets presented to a mass audience.

A laissez-faire approach to political campaign expenditure does not mean that third parties are unchecked in their influence. The free speech approach is to create a self-regulating system, where people with different views have to compete with each other to persuade the public.

Placing limits on third-party expenditure weakens self-regulation by suppressing one important type of player in the political system, while leaving untouched two others, the government and the media.

Preserve our liberal democratic system

Compared to other countries, Australia has had relatively liberal campaign finance laws. Until recently, no government regulated who should get a say or how much they could give or spend. This reflected a liberal understanding of politics: a key political problem is checking the power of those in government, and that is most reliably done if the civil society is unrestricted in its political rights. Trends in campaign finance law undermine this liberal tradition. The rules of the political game are being rewritten to favour political parties, particularly the governing political party, which is most likely to face third-party campaigns. We are moving towards a limited licence to campaign against government policy. Citizens will be able to complain only as much as their rulers permit. Australia will be a less liberal, and less democratic, country as a result.

Endnotes

- 1 Federal law is described in more detail 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) and Andrew Norton, '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 (July 2011). This article draws on material in that submission.
- 2 Australian Labor Party (National Secretariat), Submission to the Joint Standing Committee on Electoral Matters, Inquiry into the Funding of Political Parties and Election Campaigns (June 2011).
- 3 Cited in Andrew Norton, *Diminishing Democracy: The Threat Posed by Political Expenditure Laws*, as above, 5.
- 4 Andrew Norton, 'The End of Industrial Relations Reform?' *Policy* 23:4 (Summer 2007–08), 20–27.
- 5 Joo-Cheong Tham, Submission to JCSEM's Inquiry into 2010 Federal Election, 95.
- 6 Andrew Norton, 'The End of Industrial Relations Reform?' as above.