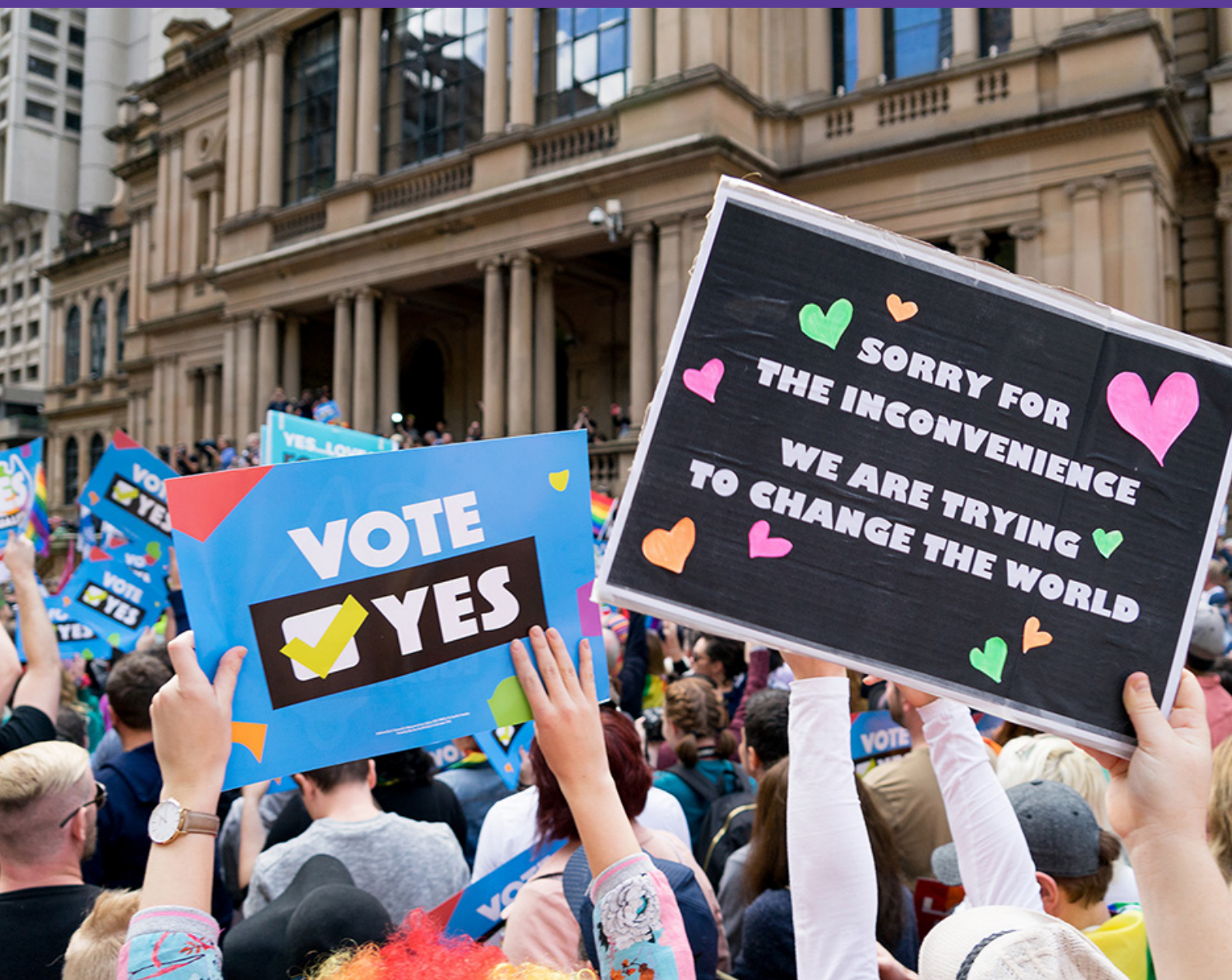


Regulating charities in Australian elections

Recommendations for Commonwealth reform



This report was researched and written on the unceded land of the Gadigal people. The author pays their respects to Aboriginal Elders past and present, and acknowledges that sovereignty has never been ceded.

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The author would like to thank Kimberly La at the Human Rights Law Centre for research assistance in developing this report

Cover photo: Marriage Equality protest by Felman/Shutterstock.com



Executive summary and recommendations

The Albanese Government has committed to legislating reforms to Commonwealth electoral laws prior to the next federal election, including greater transparency of political donations and placing limits on donations and expenditure.

A central challenge for reform is designing changes that reasonably account for the different kinds of entities that make up a healthy electoral system. This includes a category of groups called ‘third parties’ – entities that do not field candidates for election but incur electoral expenditure and include unions, business groups, charities and not-for-profits.¹

How third parties are regulated is critical for our democracy. Good regulation can enable third parties to participate and provide an alternative voice and source of information for voters in election debates. Poor regulation can result in third parties having disproportionate influence or allow political actors to use third parties to circumvent their own restrictions.

There is a particularly strong public interest case for having charities participate in elections, given they often serve under-represented parts of the community or the natural environment, are bound by law to pursue their charitable purpose, and are prohibited from promoting or opposing political candidates. However, regulating charity advocacy in elections is complex due to the interactions between electoral law and charity law, meaning that a one-size-fits-all approach is likely to reduce charity participation. This is a

classic example of how equal treatment is not the same as equitable treatment.

The report proposes three common sense principles to underpin third party regulation:

1. fostering proportionate influence from a diversity of voices;
2. maintaining public trust; and
3. preventing loopholes and avoidance of regulation.

It then examines Australian Electoral Commission data to identify the scale of third party expenditure, finding that increases in third party expenditure have simply kept pace with increases in political party expenditure. The data also indicates that charities have accounted for **less than one percent of total expenditure at a Commonwealth level and even less at a state and territory level**, although state and territory data is limited.

The remainder of the report looks at how the three principles could be applied in practice through various policy mechanisms, including the definition of electoral expenditure, real-time donations disclosure, and spending and donation caps – all of which are expected in some form in upcoming legislation from the Albanese government.

The report examines existing state legislation for alternative models but finds that various aspects are highly uncondusive to charity participation in elections and should not be replicated at a Commonwealth level. Due to time limitations, the report does not examine any international evidence or case studies.

¹ ‘third party’ in lower case refers in a general sense to this type of entity, whereas ‘Third Party’ refers to the type of entity as defined in the relevant electoral act.

We note that attention and analysis recently have focused on how electoral reforms could impact the playing field in contests between first-time candidates (often termed 'new entrants') and existing political parties. While this is a matter of significant public interest, it is beyond the scope of this report.

Recommendations

The report makes the following recommendations to the Australian Parliament with respect to upcoming electoral reforms:

1. Reforms should protect the involvement of charities in federal elections, particularly given how under-represented their voices have been historically.
2. The definition of electoral expenditure that applies to Third Parties should not be changed, or if it is changed, it should not be broadened. The definition that applies to Significant Third Parties should be reverted to be the same as the definition for Third Parties.
3. The threshold for achieving Third Party status should be independent of the disclosure threshold, and instead it should be triggered when an entity reaches \$20,000 in electoral expenditure.
4. Third Parties should not be subject to real-time disclosure but should instead have to submit a return within 6 weeks of an election; and Significant Third Parties should disclose monthly in the lead-up to an election, and once in the final few days prior to the election.
5. If donation caps are implemented, charities registered under the ACNC should be exempt as recommended by JSCEM.
6. If spending caps are implemented, they should apply to all entities, including third parties and charities that are third parties.

Introduction

Charities have a long history of engaging in Australian elections as part of pursuing their charitable purpose. Environmental groups like the Australian Conservation Foundation were pivotal in turning the damming of the Franklin River into a major issue in the 1983 federal election, resulting in a shift in the federal government's policy position and subsequent legislation to protect the Franklin River as a world heritage area.

More broadly, the High Court has also recognised the role of third parties in Australian elections. In *Unions NSW v New South Wales [No 2]*, the High Court found that “*there is nothing... which supports the submission that the Constitution impliedly privileges candidates and parties over the electors as sources of political speech*”. They added that the implied freedom to political communication.

*extends not only to communications by representatives and potential representatives to the people whom they represent. It extends also to communications from the represented to the representatives and between the represented.*²

The question is not whether third parties, including charities, should have a role in Australian elections but rather how their participation should be appropriately regulated as part of a healthy democracy to ensure that they occupy neither a marginal place on the sidelines nor a dominating one that drowns out other voices.

Principles to guide reform

We propose a set of three principles to guide the Australian Parliament in navigating this policy challenge based on common themes from the policy positions of political parties, parliamentarians, integrity groups and civil society groups.

1. **Fostering proportionate influence from a diversity of voices.** Healthy electoral systems have a range of voices active in election debates. Third parties exert neither disproportionate influence nor are they completely marginal to political parties and candidates.
2. **Maintaining public trust.** Regulation of third parties fosters public trust in our electoral system, including as a result of appropriate transparency measures.
3. **Preventing loopholes and avoidance of regulation.** Third parties are not used as a vehicle for political actors or vested interests to avoid regulation.

These principles must be taken together in policy design and can sometimes be in tension. How these principles are balanced is a central challenge in the regulation of third parties.

² *UnionsNSW vs NSW [No2] (n88)*

How third parties are currently regulated

Different Australian jurisdictions regulate third parties differently. All jurisdictions have authorisation requirements for electoral communications, and most have some form of prohibition on foreign donors. We will not examine those in this report.

The table below summarises how key policy mechanisms are applied to third parties. Note that the threshold for becoming a third party is based on the amount of electoral expenditure the entity incurs.

	Cth	QLD	NSW	Vic	SA	Tas	NT	ACT	WA
Threshold for becoming a Third Party	\$16,300*	\$6,000	\$2,000	\$4,670	\$10,000	\$5,000	\$1,000	\$1,000*	n/a
Threshold for becoming a Significant Third Party	\$250,000	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
"Electoral expenditure" defined with dominant purpose test of influencing how people vote ³	Yes	Yes	Yes	Yes	No	Yes	No ⁴	No	No
Spending cap	No	Yes	Yes	No	No	No	No	Yes	Yes
Donation cap	No	Yes	Yes	Yes	No	No	No	No	No
Type of return due	Annual	Election	Annual + half yearly	Annual	Half yearly	Election	Annual + election Periodic returns are due with increasing frequency before an election	Yes Election	Yes
'Real-time' disclosure of donations used on political expenditure	No	Yes \$1,000 or more Within 7 days	Yes in lead-up to election (~6 months) Within 21 days	Yes \$1,170 or more Within 21 days	Yes More than \$5,000 Within 30 days	No	No	No (yes for parties)	Yes More than \$2,600 Within 7 days

³ Victoria uses the term 'political expenditure' for Third Parties. South Australia uses the term 'political expenditure' for all entities.

⁴ [Factsheets](#) from the NT Electoral Commission state that material with an awareness raising purpose does not constitute electoral matter. However, the author could not find any such provisions in the Electoral Act 2004

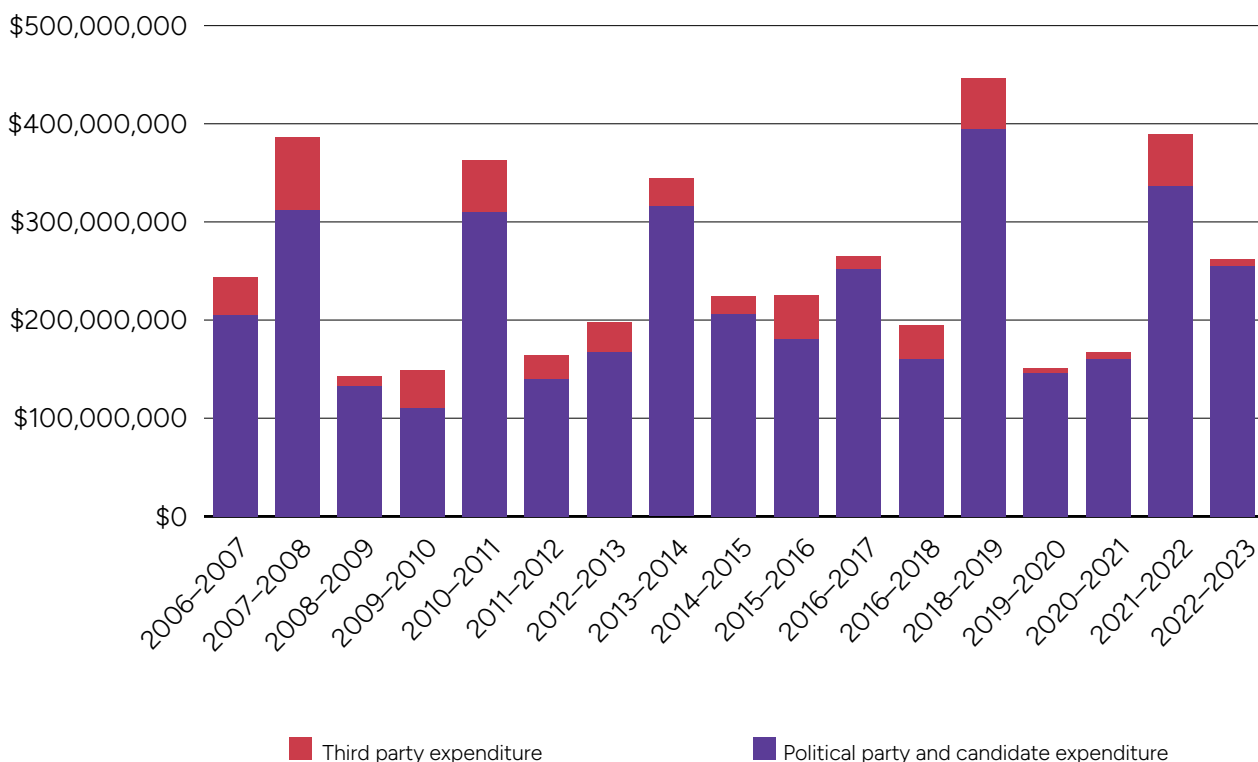
Third party and charity spending in context

Third party vs political party expenditure

Data from the Australian Electoral Commission suggests that total third party expenditure has not significantly changed over the past two decades, both in absolute terms and relative

to political party expenditure. There was a drop in third party expenditure in non-election years from 2019, likely due to a narrowing of the definition of electoral expenditure in 2018, which made it less likely that third party campaigning outside of an election context would be classified as electoral expenditure.

Figure 1. Third party vs political party and candidate expenditure, Commonwealth: 2006–2023



Notes: Includes political party, Third Party and Significant Third Party annual returns as well as candidate and senate group election returns. Excludes spending from Clive Palmer’s political parties to remove that outlier. Figures adjusted for inflation.

Composition of third party expenditure

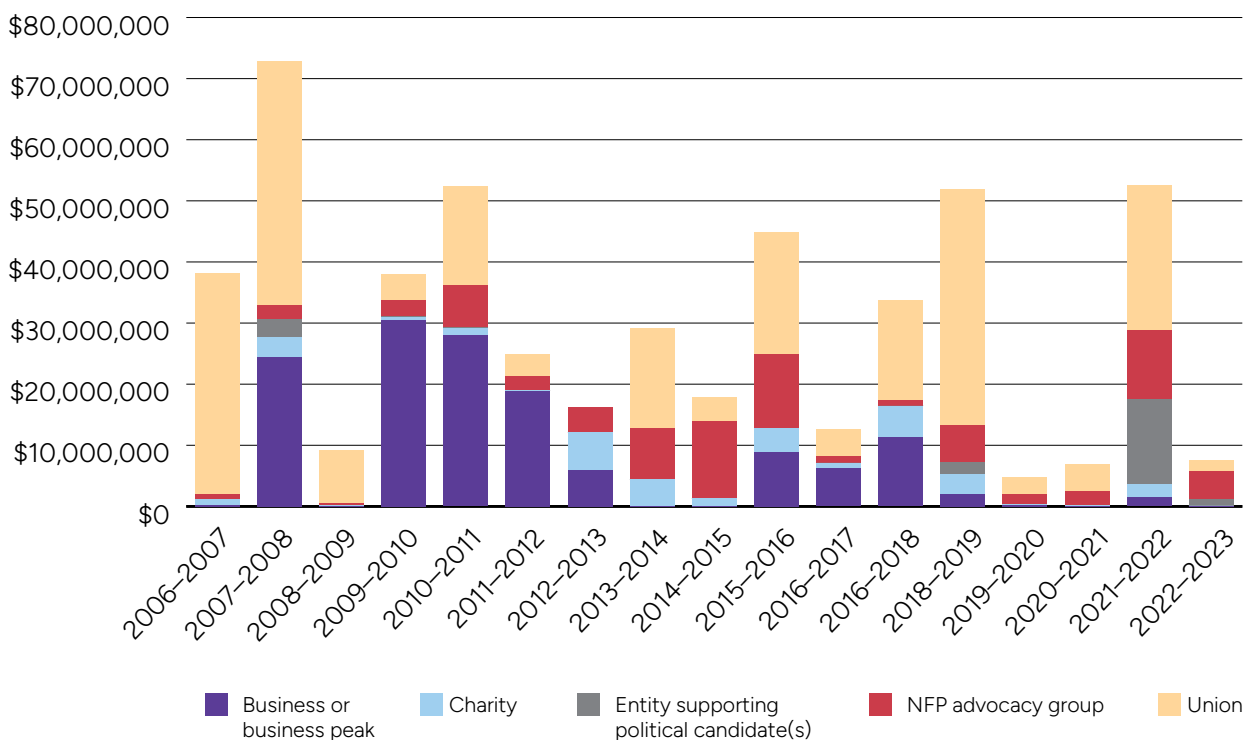
There is more variation, however, when looking at the composition of third party expenditure by entity type. Key things that stand out include:

- Unions have consistently been significant spenders, only being outspent in 2009–2012 when business groups ran major campaigns, including against the Mining Super Profits Tax.
- Business expenditure has dropped off since that period, especially after 2018.

If they have undertaken expenditure, it has either been largely non-electoral, or they have not been compliant with disclosure requirements.

- Since 2011, there has been growth in spending by not-for-profit advocacy groups, notably GetUp and, more recently Advance.
- 2021–2022 saw significant spending by groups supporting the election of independent candidates, especially Climate 200.
- Spending by charities has remained consistently small compared to other third parties.

Figure 2: Third party expenditure by entity type, Commonwealth: 2006–2023

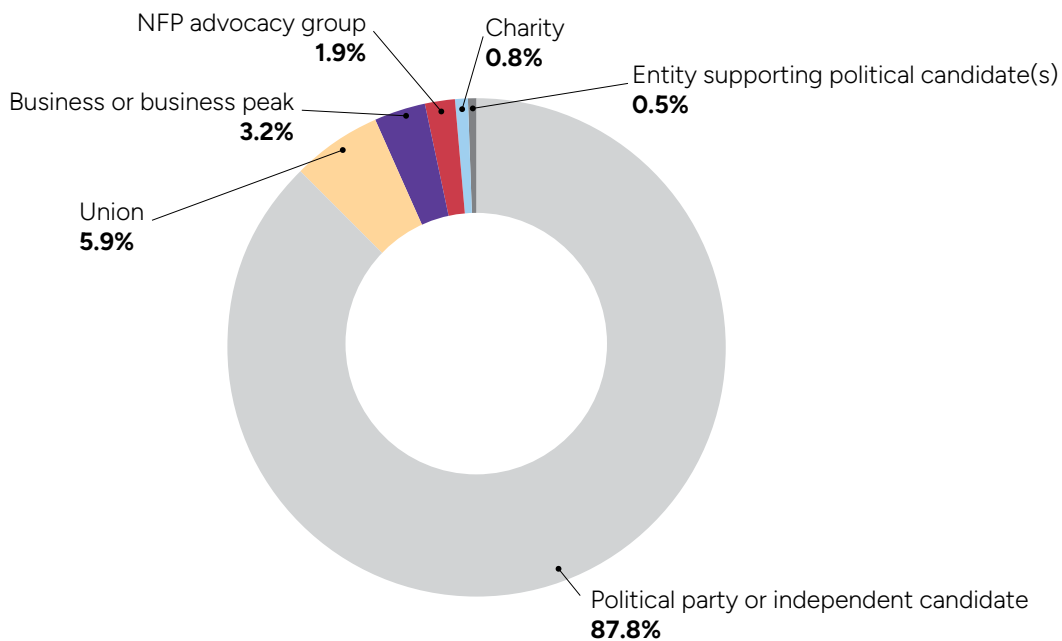


Notes: includes Significant Third Party expenditure. Excludes some entities which could not be identified. Figures adjusted for inflation. 'Entity supporting political candidate(s)' includes groups such as Kooyong 200, Climate 200, EMILY'S List and Voices for Farrer. 'NFP advocacy group' includes groups such as GetUp, Advance, and Smart Voting. 'Charity' only includes groups registered with the Australian Charity and Not-for-profits Commission. 'Business or business peak' includes industry peaks that have a not-for-profit legal structure.

If we look at aggregate spending across the entire 2006–2023 period, we can see that political parties and candidates have incurred the lion’s share of spending – close to 90%. Unions are the next biggest spending group, followed by businesses and business peaks. In contrast, charities incurred less than one percent of all expenditure across this period.

Australian charities clearly represent a very small proportion of the share of paid voice in our federal elections. **It is critical that any changes to regulations focus the burden of compliance on the major players, and do not intentionally or inadvertently diminish the role of charities in our electoral system given the role they play in public interest advocacy in line with their charitable purposes.**

Figure 3: Proportion of electoral expenditure by entity type, 2006–2023



Notes: Includes Significant Third Party expenditure. Excludes some entities which could not be identified. Figures adjusted for inflation. Excludes spending from Clive Palmer’s political parties to remove that outlier.

Charity spending in state jurisdictions

Data at the state and territory level is much more limited. Only Victoria, Queensland and the ACT have publicly accessible datasets that include third party expenditures (some other jurisdictions have data available on the website of their electoral commission but not in a format that allows for analysis).

The data that is available, however, suggests that charities have occupied an even smaller share of paid voice in some state elections than at the Commonwealth level. Charity

expenditure was less than a quarter of a percent or less than half a percent in the most recent Victorian and Queensland state elections respectively. Alarming, in Victoria in 2022, only one charity was listed as having incurred political expenditure

Further research on state level expenditure is needed, especially to assess possible changes to expenditure patterns after the introduction of particular reforms. Regardless, taking caution in enacting any reforms would be prudent given the potential of further diminishing the involvement of a diverse range of voices in election debates.

Figure 4: Proportion of electoral expenditure by charities in state election periods

	Non-charity entities		Registered charities	
	Electoral expenditure	Proportion of total expenditure	Electoral expenditure	Proportion of total expenditure
Victoria 2022 election year	\$82,680,248	99.7%	\$219,205	0.3%
QLD 2020 state election event	\$35,144,339	99.6%	\$156,272	0.4%
ACT 2020 territory election event	\$2,644,411	98.9%	\$28,030	1.1%

Notes: that the Victorian figures are from 2022–23 annual returns, which included the 2022 election, whereas, the QLD figures are from election returns covering the period from the issue of writs until election day. This explains why the amounts spent in QLD look much smaller than in Victoria. When comparing between jurisdictions it is better to look at the proportions rather than the absolute figures.

Recommendation 1:

Reforms should protect the involvement of charities in federal elections, particularly given how under-represented their voices have been historically

The definition of electoral expenditure

Determining what is captured by the definition of “electoral expenditure” for political parties and candidates is relatively simple. Fundamentally, their activities revolve around seeking public office and (re)election and expenditure they incur can be viewed in this light. Similarly, all income political parties and candidates receive is fundamentally for the purpose of contesting elections: it may be spent on administration or policy research, but the ultimate end of those activities is to get candidates (re)elected.

Determining which expenditure is “electoral expenditure” for the purposes of the Electoral Act for third parties is more difficult. For the most part, third parties have a non-electoral purpose and engage in elections only insofar as that will further those other purposes. This is particularly the case for charities: under the Charities Act 2013, charities are required to have a purpose that is of public benefit, and they are prohibited from having a political purpose⁵.

If electoral expenditure is defined too broadly, it risks capturing expenditure that is non-electoral, which goes beyond the scope of the electoral regulatory system. Defining it too narrowly poses the opposite problem.

Therefore, what kind of expenditure should be captured as part of a regulatory regime? It is worth considering the types of expenditure that entities can incur in relation to an election.

Activities can be considered as sitting on a spectrum of how overtly electoral they are. On one end is policy advocacy directed at candidates and parties, such as briefings, private letters and representations. On the other end is an activity that expressly supports or opposes a candidate or candidates, such as ‘how to vote cards’ or TV ads telling people to vote out their sitting MP. It is important to note that activities with a dominant purpose of educating the public can also incidentally influence voters, even if that was not

Nature of activity	policy advocacy directed at candidates and parties without communicating to voters	information directed at voters about candidates and their policies with a dominant educational purpose	information directed at voters with a dominant purpose of influencing their vote	expressly supporting or opposing a candidate or candidates
Examples	policy briefing to candidates; private letters and correspondence	policy forum on an issue where candidates are invited to present to members of the community; corflutes saying ‘climate action now’	scorecard ranking candidates on their housing policy distributed shortly before the election; * corflutes saying ‘vote climate’	how to vote card; radio ad urging people to vote against the sitting MP

* It is possible for a policy scorecard ranking candidates on their policy positions to not be considered electoral matter because it has a dominant educational purpose – this would depend on the particulars of the material including who the audience is and the proximity to the election.

5 [Charities Act 2013, Section 11\(b\)](#)

the intended purpose of the communication – and this is not considered electoral matter under the Commonwealth Electoral Act 1918.

In line with the principle that a healthy electoral system has proportionate influence from a diversity of voices, it seems reasonable that **the kind of expenditure for which there should be limits and for which there should be transparency of how it is funded is expenditure that is seeking to influence how people vote.** Expenditure on activities that involve no public communication or public communication for an educational purpose should not be within scope.

This is in keeping with the existing Commonwealth definition of electoral expenditure that applies to third parties (the definition that applies to significant third parties changed in late 2021 under the Morrison government where it was expanded to be “anything in relation to an election”⁶). The definition of Third Party electoral expenditure has a number of important features:

- a dominant purpose test to only capture material that has the dominant purpose of influencing voters
- material with the dominant purpose of educating the public or raising awareness of an issue is not electoral expenditure, and that there can be only one dominant purpose
- material that expressly promotes or opposes a political entity or candidate is presumed to be electoral matter unless proven otherwise.⁷

The definitions of electoral expenditure for third parties used in Queensland⁸, NSW⁹ and Victoria¹⁰

vary in some respects, but they all share a dominant purpose test regarding influencing how people vote.

This is in contrast to definitions that exist in some state jurisdictions which capture activity that incidentally influences electors even if that was not the intended (or dominant) purpose. For example, in South Australia, political expenditure is defined as expenditure “for the purposes of the public expression of views on an issue in an election by any means”¹¹. Or in the ACT where the definition of electoral matter includes matter that “contains an express or implicit reference to, or comment on... an issue submitted to, or otherwise before, the electors in relation to the election”.¹²

In 2021 the Morrison government changed the definition of electoral expenditure for Significant Third Parties, broadening it to be anything “in relation to an election”.¹³ This definition is so broad and open to interpretation that it does not serve the intended purpose of capturing activity that is within the scope of electoral regulation. It would be better to revert it to be the same definition that applies to Third Parties.

Recommendation 2:

The definition of electoral expenditure that applies to Third Parties should not be changed, or if it is changed, it should not be broadened. The definition that applies to Significant Third Parties should be reverted to be the same as the definition for Third Parties.

6 See [Electoral Legislation Amendment \(Political Campaigners\) Bill 2021](#)

7 [Commonwealth Electoral Act 1918](#), section 4AA

8 [Queensland Electoral Act 1992](#), section 199(5) and 199(6)

9 NSW Electoral Funding Act 2018, section 7(3). Guidelines from the NSW Electoral Commission state that [materials that refer to the election are assumed to be electoral matter](#), however this is not reflected in the Act and has been the cause of some confusion for charities in NSW.

10 [Victorian Electoral Act 2002, section 206](#). The term ‘political expenditure’ applies to third parties and is defined as “any expenditure for the dominant purpose of directing how a person should vote at an election, by promoting or opposing (a) the election of any candidate at the election; or (b) a registered political party; or (c) an elected member”.

11 SA [Electoral Act 1985](#), section 130A

12 ACT [Electoral Act 1992](#), section 4(2)(e)

13 Section 287AB(3), [Electoral Act 1918 \(Commonwealth\)](#)

Charities and telling people who to vote for

Charities are prohibited from having a purpose of supporting or opposing a candidate. However, while charities do not support or oppose political parties and candidates, they do support or oppose the policy positions politicians take on their issues. Sometimes, supporting or opposing a politician's position on an issue will include advocacy aimed at influencing how people vote (ie electoral matter). This is important and legitimate advocacy for charities to engage in.

The way charities commonly interpret the prohibition on having a political purpose is that they must refrain from explicitly telling people to vote or not vote for a particular candidate. This is in keeping with guidance from the charities regulator¹⁴, the Australian Charities and Not-for-profits Commission (ACNC).

There have been rare occasions when a charity has communicated to people who they should vote for but this is usually met with swift action from the regulator and stakeholders important to the charity. For example, within a week of the CEO of Guide Dogs Victoria making headlines in 2022 for promoting the re-election of Josh Frydenberg, she was stood down by her board.¹⁵

Instead of explicitly telling people who to vote for, charities often produce material that ranks candidates based on a policy issue. These scorecards are then distributed online or published in print, including as advertising. This is commonly considered electoral matter under the Commonwealth definition.

Who will cover the basics? Election Report Card.

See where the major parties stand on issues that matter.

Every South Australian should be able to access life's basics. That's why SACOSS developed our 'Cover the Basics' platform of policies. It outlines key areas for commitment by all parties in the lead-up to this state election. Our Report Card scores the parties on their responses and policies in these critical areas.

LIBERAL

LABOR

RENTAL AFFORDABILITY Action to make rents and energy use more affordable	★★★★☆	★★★★☆	
DIGITAL INCLUSION A plan and investment to ensure no one is left behind	★★★★☆	★★★★☆	
CONCESSIONS Removing poverty premiums and barriers to access	★★★★☆	★★★★☆	
PUBLIC HEALTH Investing in disease prevention and health promotion	★★★★☆	★★★★☆	
WATER Fixing the drinking water supply in regional and remote areas	★★★★☆	★★★★☆	
PROTECTION AND SUPPORT Helping vulnerable and disadvantaged South Australians	★★★★☆	★★★★☆	

What about the other parliamentary parties?

We asked the cross-bench parties to specifically support the 10 SACOSS policies that require legislation to implement – that is, where they could be directly voting on the policy. The Greens supported all ten legislative policies proposed by SACOSS, and SA-BEST supported 7.5.

For full details on all the responses, see www.sacoss.org.au/2022-party-report-card

Authorised by Ross Womersley, 47 King William Road Unley, on behalf of the South Australian Council of Social Service

Image: Election report card from the South Australian Council of Social Service for the 2022 state election. The report card was published in a newspaper in the lead up to the election. SACOSS declared this as political expenditure

14 Australian Charities and Not-for-profits Commission, "Charities, Campaigning and Advocacy", accessed 2 June 2024. <https://www.acnc.gov.au/tools/guides/charities-campaigning-and-advocacy>

15 Guardian Australia, "Guide Dogs Victoria CEO stood down after endorsing Josh Frydenberg in election ads", 26 April 2022. <https://www.theguardian.com/australia-news/2022/apr/26/guide-dogs-victoria-ceo-stood-down-after-endorsing-josh-frydenberg-in-election-ads>

Threshold for becoming a Third Party

Currently, the threshold for becoming a Third Party is the same as the donation disclosure threshold (\$16,300 in 2023–24). If the donation disclosure threshold is lowered to \$1,000 as many advocates recommend, this would mean that any entity that spends as little as \$1,000 could be subject to the reporting and other requirements under the Electoral Act. In the future this could include a whole range of burdensome obligations such as real-time disclosure. There is no discernible public benefit to this, especially given it would likely result in many groups that would otherwise only incur a small amount of electoral expenditure to instead opt out of incurring any at all.

JSCEM recognised this and recommended changes to the definition of Third Party

to clarify that an organisation qualifies as a third party if 'the amount of electoral expenditure incurred by or with the authority of the person or entity during the financial year is more than \$20,000'¹⁶

This 'decoupling' of the disclosure threshold and the threshold to register as a Third Party would ensure that the regulatory system captures only entities spending a meaningful amount of money..

Recommendation 3:

The threshold for achieving Third Party status should be independent of the disclosure threshold, and instead it should be triggered when an entity reaches \$20,000 in electoral expenditure.

¹⁶ [Recommendation 14](#) of the JSCEM final report, Conduct of the 2022 Federal Election and Other Matters

Disclosure timeframes

The public policy purpose of real-time disclosure for political candidates is to allow for electors to make an informed choice at the ballot box by making transparent who is funding their campaign. This is an in-principle requirement of all candidates and should apply regardless of whether the candidate is likely to get 1% of the primary vote or 50%.

The imperative for transparency around funding of third parties is different given they do not field candidates for public office. Rather, the purpose is to allow for public scrutiny of the funding sources of entities that are seeking to influence voters. It follows that transparency is not necessarily needed in all cases but is required relative to the influence of a third party – the greater the influence or potential influence, the more important it is that there is transparency of funding sources. Influence can be hard to measure but expenditure can serve as a useful proxy.

Further, it should be noted that transparency applies a regulatory burden that involves a cost which can be borne unevenly by different types of entities. This is not to say regulation is never justified, but rather that the cost-benefit of regulation needs to be considered and that the blanket application of rules can have the unintended consequence of diminishing the diversity of participants in the electoral system.

Case study:

Nature Conservation Council NSW

The Nature Conservation Council NSW (NCC) is the peak body for environmental groups in NSW, representing over 200 member groups across the state. It is registered with the ACNC as a charity and has the purpose of conserving the natural environment. In 2023 it had around 20 full-time equivalent staff and a turnover of \$4m.

Leading up to the 2023 state election, the NCC determined there was an opportunity to secure commitments from political parties and candidates on the issue of native forest logging in line with its charitable purpose. Senior staff at the NCC reviewed materials published by the NSW Electoral Commission for guidance. They decided it was necessary to seek legal advice to ensure they fully understood and complied with their legal obligations and managed to get pro-bono advice from a firm. Drawing on this advice, they developed an election procedure for staff and volunteers outlining their obligations to:

- register as a Third Party campaigner and establish a campaign account
- disclose all donations above \$1,000 within 21 days of using the donation to incur electoral expenditure
- ensure they did not receive more than the capped amount from a single donor
- communicate to their donors regarding the donors' disclosure obligations and obligations to not exceed the donation cap
- determine which expenditure constitutes electoral expenditure and then track all expenditure, and create a record of the decision-making about the purpose of the expenditure. Additional legal advice was needed to determine if particular activities constituted electoral expenditure.
- ensure expenditure did not exceed the electorate cap or statewide cap

The NCC estimates that seeking legal advice, establishing the procedure and following the procedure took 3 hours of senior staff time per week for 3 months, equivalent to approximately \$8000 in staff costs and more than 120 hours of work. They received 3 rounds of pro-bono legal advice. They ended up incurring \$90,000 of electoral expenditure in the 2023 election.

While they express support for robust electoral regulation, they are concerned about it presenting a barrier to participation for smaller groups.

"We were able to manage our compliance responsibilities as one of the larger environmental charities in NSW, but sadly none of our smaller, community-based member groups incurred electoral expenditure because the compliance burden was simply too great. Elections shouldn't only be the domain of the most well-resourced and influential organisations – everyone should be able to participate and advocate on the issues that matter to them.

"A particular challenge was understanding the definition of electoral expenditure. We appreciate the complexity of clearly defining communications material as either electoral or not, but it really took a lot of time and legal advice to make sure we were doing the right thing in disclosing some expenditure but not others. In our case we took a cautious approach with materials, spending and authorisations. I can't see how a smaller charity could manage the compliance load and especially do this to disclose donations in real-time."

– Executive Officer, Nature Conservation Council NSW

The compliance burden of real-time disclosure was raised by a range of groups and political parties throughout JSCEM's inquiry into the 2022 election, leading the Committee to recommend that *"the Australian Government introduces a new system of administrative funding to recognise the increased compliance burden associated with a reformed system"*.¹⁷ The author of this report assumes that this system of administrative funding is intended for political parties and would not extend to third parties.

It is not clear how the public benefits from having a charity that spends \$30,000 on two newspaper ads comply with the same disclosure requirements as a political party or candidate that spends millions on an election campaign – particularly if the political party is receiving administrative funding to help it manage its disclosure requirements. This will simply result in fewer small to medium-sized third parties (including charities) participating in elections.

Case study: Human Rights Law Centre

The Human Rights Law Centre has worked to educate charities and not-for-profits about their legal obligations when undertaking advocacy in an electoral context. In the lead up to the 2022 election they published a guide on Commonwealth Electoral Law¹⁸ for the not-for-profit sector and spoke at a number of sector briefings.

"At the Human Rights Law Centre, we have worked with many partner and client charities that struggle to meet the compliance burden of state electoral laws. Of primary concern has been state disclosure obligations that require them to track and disclose donations in real-time, which in practice doesn't give them enough time to assess whether a tactic is truly electoral expenditure. We've seen organisations walk away from important advocacy because they can't put the resources into compliance or risk being penalised if they get it wrong."

– Acting Legal Director,
Human Rights Law Centre

¹⁷ Recommendation 8 of [JSCEM's interim report](#) of its inquiry into the 2022 federal election

¹⁸ Human Rights Law Centre, "Not-for-profits' guide to complying with Commonwealth electoral laws", accessed 27 May 2024. <https://www.hrlc.org.au/commonwealth-electoral-law>

A fairer approach would be to regulate third parties proportionate to their expenditure and potential influence. This would allow the electoral system to maintain involvement from a diversity of voices while meeting public expectations around transparency for the bigger spenders. Given there are already two categories of third parties based on levels of expenditure, it would be reasonable to have less onerous disclosure requirements for Third Parties and greater disclosure requirements for Significant Third Parties.¹⁹

Regarding concerns of third parties being used as an avoidance measure by political actors, it is worth noting that any donations that political parties or candidates receive from third parties should still be disclosed by the recipients in real-time – whatever the time-frame ends up being for political parties and candidates. Additionally, requiring donors to political parties and candidates to disclose their gifts in real-time should be considered.

A similar model exists in the ACT where political parties and candidates are required to disclose in real-time (monthly up until 1 July 2024 and changing to weekly from that date) but third parties are not required to make real-time disclosures.

Recommendation 4:

Third Parties should not be subject to real-time disclosure but should instead have to submit a return within 6 weeks of an election; and Significant Third Parties should disclose monthly in the lead up to an election, and once in the final few days prior to the election.

Finally, it should be said that transparency alone is a weak tool for addressing the disproportionate influence of vested interests on election outcomes via third party organisational structures. In the case of third parties spending large sums on targeted advertising to voters, the vast majority of voters will never go to the Electoral Commission website to inspect how the ad they see is being funded, nor will they read articles from journalists who investigate the matter. The voter will be influenced, consciously or unconsciously, and they will cast their vote. If transparency alone is relied upon to curb the electoral influence of vested interests, the most likely outcome is that community voices are suppressed, while well-resourced and determined interest groups continue to flood the electorate with advertising.

¹⁹ A Third Party is an entity that incurs over \$16,300 but less than \$250,000 in electoral expenditure. A Significant Third Party is an entity that incurs \$250,000 or more or one-third of its revenue or more in electoral expenditure.

Donation and spending caps

Donation and spending caps on third parties, political parties and candidates are a critical part of ensuring we have a healthy electoral system with proportionate influence from a diversity of voices, to ensure that third parties are not used by political actors to avoid regulation, and to maintain public trust and confidence in our democracy. Whether or not spending and donation caps are fair, particularly with regard to the contest between different types of candidates (incumbent vs non-incumbent, or independent vs major party candidates) rests on small but important policy details. How to ensure a level playing field between different types of political candidates is a matter of significant public interest but is beyond the scope of this discussion paper.

Discriminatory impacts on charities

In the past two decades there have mainly been three types of entities classified as third parties: charities and not-for-profits, industry groups and associations, and unions. Of these three, only charities and not-for-profits rely on donations for their income. This means that donation caps applied to third parties would disproportionately impact charities and not-for-profits, while having little to no impact on unions and industry groups. Donation caps applied to all third parties would thus discriminate against charities and not-for-profits and restrict their issue-based advocacy during elections.

Further, given that charities are already heavily regulated to ensure they are not undertaking partisan political activity, a donation cap on third parties would impact the only type of third party that is already restricted from expressly supporting or opposing a political candidate. It is unclear how this serves any public benefit.

JSCEM acknowledged this in its inquiry into the 2022 federal election, leading it to recommend that

charities registered under the Australian Charities and Not-for-profits Commission be exempt from the donation caps recommended in the Committee's interim report into the 2022 federal election, but that these caps be applied to political parties and candidates, along with associated entities, other third parties and significant third parties.²⁰

This recommendation was endorsed by the committee members who submitted additional comments to the majority report: Senators David Pocock, Larissa Waters and Kate Chaney MP.

Recommendation 5:

If donation caps are implemented, charities registered with the ACNC should be exempt as recommended by JSCEM.

The more equitable way to regulate third party involvement in election campaigns is to cap expenditure because this would apply equally to all kinds of third parties regardless of their

²⁰ [Recommendation 13](#) of the JSCEM final report, Conduct of the 2022 Federal Election and Other Matters

income source. It would be reasonable for third party spending caps to be somewhat lower than political party spending caps given third parties have historically outnumbered political parties at the Commonwealth level. Exactly what the amount should be is beyond the scope of this paper.

Recommendation 6:

If spending caps are implemented they should apply to all entities, including third parties and charities that are third parties.

Anti-avoidance measures

It is critical that there are no loopholes that allow political parties or candidates to circumvent caps by setting up a third party entity to campaign on their behalf. The existence of “super PACs” (political action committees) in the United States and their impact on democracy

provides an important warning for the Australian context. Spending caps can go a significant way to preventing this. However, a spending cap alone would still allow for determined actors to set up multiple third party entities to spend up to the cap and, in the aggregate, exceed the spending of political parties or candidates, particularly if they concentrated their spending in a small handful of seats.

One way to prevent this would be to set a cap on how much any individual can donate rather than a cap on how much a recipient can receive from a given donor. If donations are capped for the recipient then a small network of wealthy individuals could set up a large number of third party entities to campaign for particular parties or candidates. This would not be possible if the cap was set for how much an individual can give in total irrespective of how it is split amongst recipients.



Conclusion

Charities make vital contributions to Australian elections. They inform voters about candidates' policy positions, providing an independent voice and engaging communities across the country in the electoral process. Elections also present a key opportunity for charities to secure policy commitments from candidates and elevate issues important to the community into the political debate. They fundamentally differ from political parties and other third parties and are restricted from highly partisan activities of promoting or opposing candidates.

How charities are regulated in elections is a complex issue. There is no question that they should be regulated, but treating them the same as political parties or other third parties will likely further diminish their participation and shut them out of the electoral process.

A more nuanced approach would recognise these differences and tailor regulations so that they are proportionate to the risks they seek to mitigate, ensuring that the burden falls on the biggest players who have the most influence. Thankfully, this can be done within the existing regulatory framework in Commonwealth electoral law. Whether upcoming reforms take a nuanced approach that protects charity participation in federal elections will be a question of political will rather than technical feasibility. The eyes of the charity sector and members of the community will be on parliament in the months to come.

About the Stronger Charities Alliance

The **Stronger Charities Alliance**, previously known as the Hands Off Our Charities Alliance, consists of close to 140 charities and was formed in 2017 in response to several bills that would have silenced charities' voices on issues of national and public importance.

The Alliance envisions a thriving not-for-profit sector where charities are empowered to advocate for lasting change in pursuit of their charitable purposes.

Together, our members represent millions of Australians concerned with a wide range of issues, including education, social welfare, human rights, international development, animal welfare, the environment, health, climate change, disability rights and philanthropy. Our organisations, the issues we work on, and the communities we represent are diverse, but we all share a fundamental commitment to serving the public interest.

The Alliance is convened by the Australian Democracy Network.

For a list of current member charities, please see our website:

<https://www.strongercharities.org.au/about-us/>