

# COME CLEAN!

## STOPPING THE ARMS RACE IN POLITICAL DONATIONS

A research paper by Colleen Lewis



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DEMOCRACY

JUNE 2016



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**BY ADJUNCT PROFESSOR, COLLEEN LEWIS**

*National Centre for Australian Studies, Monash University*

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Dr Lewis also publishes referred and non-refereed articles, makes submissions to parliamentary committees and royal commissions and contributes opinion and commentary pieces to *The Age* and *The Conversation*.

Her research is focused on accountability and transparency issues and is motivated by the desire to contribute to public debate on these vital pillars of Australia's democracy.

## COME CLEAN! STOPPING THE ARMS RACE IN POLITICAL DONATIONS

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## COME CLEAN! STOPPING THE ARMS RACE IN POLITICAL DONATIONS

# PREFACE

When the John Cain Foundation was considering the front cover for this paper we did not have to strain hard for an arresting title or sub title. The reference to an “arms race in political donations” has its origin in a phrase used by John Faulkner in the introduction to his 2008 Green Paper on electoral reform of donations and funding.

As the newly installed Special Minister of State in the Rudd Government, Senator Faulkner was quick off the mark in wanting to address some of the major challenges that threaten the health and integrity of our democracy. His concerns ranged across inadequate disclosure laws, the influence of third party participants and the potential for policy capture by big donors, the confusion and incoherence of nine different electoral systems across the country, as well as the spiralling cost of electioneering.

Senator Faulkner explicitly stated in his report that, without change, Australia would fall behind world’s best practice. He wrote -

*“The choice before us is whether to seek to adapt ourselves, or to throw up our hands and allow participants in the political system to do what they want. Given the importance of political financing to the conduct of elections, the structure of our political system, and the operation of political parties and other political actors, it is incumbent on governments to engage with these questions, and to take active steps to ensure that our democracy evolves in ways consistent with the expectations and requirements of citizens.”*

Eight years on from this laudable call to arms, the John Cain Foundation, a body committed to a revival of integrity in our political institutions, asks the obvious question – why has there been zero progress on a set of changes that are desperately needed?

In a May 10 2016 editorial The Age also voiced its indignation on behalf of voters –

*“It is altogether dispiriting that nothing has changed...in terms of transparency, accountability and timeliness, the laws remain hopelessly inadequate.”*

This research paper, commissioned by JCF and written by political scientist Adjunct Professor Colleen Lewis (Monash University) has been produced with a view to stimulating voter support for a comprehensive clean-up of our shambolic and inadequate donations laws.

With a lifetime of professional attention to the ways in which we can strength the pillars of Australian democracy, Professor Lewis documents a quite shameful neglect by federal MPs, parliamentary committees, and successive governments. To read her report is to be left wondering if there is any sense of urgency or policy purpose left in Canberra. The revolving door of personnel is particularly instructive.

The Joint Standing Committee on Electoral Matters has managed to install and dispatch five chairpersons in the space of one parliamentary year.

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We see the result in the almost daily revelations that suggest a cowboy culture of attempted vote-buying. In 2016, depressingly, we seem to have arrived at precisely the point feared by Faulkner when he warned of a system “where political players do what they like.” How else to explain the utter sangfroid whereby the Liberal/Labor duopoly regularly hold fundraisers and conferences where ‘special access’ is provided with a large dollar figure attached for the privileged few? Or worse, the \$20 million that Clive Palmer’s PUP party managed to spend at the last election? The list of egregious behaviour involves everything from union slush funds, attempts to game the system in NSW to avoid the ban on money from developers, and perhaps the most jaw-dropping of all – Tony Abbott’s belated admission that, as a younger MP, a well-known millionaire handed him \$5000 in cash as a Christmas present.

It is unsurprising then to see that our trust in politicians and in our institutions is at a record low. Others are watching. Transparency International ranks Australia poorly when it comes to key measures on their Corruption Index. We have fallen six places since 2012 and are now ranked at no 13 against other democracies. What stands out when we are compared with others is that our fragmented approach to political donations escalates “the risk of corruption.”

This should be a red light issue for all MPs and candidates seeking election in 2016. As a former Labor MP, and one whose 2007 campaign attracted generous levels of financing, I have huge respect for those who put their hand up to be part of the representative political process. It was the hardest job I ever did and most of the people I encountered in the national parliament were conscientious, energetic and public spirited. Most MPs I spent time with admitted that they can’t stand the whole business of fund-raising and rattling the tin on behalf of their parties. Equally, few can say they have had no exposure to the potentially corrosive effect of money and politics – either at the periphery or substantially.

We can change this. It will require a serious commitment by our leaders and from all MPs. It starts with the next commonwealth parliament- whatever its make-up.

The measure of leadership and commitment to democratic accountability should be judged against the following criteria: implementation of uniform national laws, caps on donations, a ceiling on public and private expenditure, and timely disclosure.

Australian Electoral Commission records estimate the total cost of the last 2013 federal poll – the cost to run it, as well as payments to candidates – as close to \$200 million. It’s harder to put an accurate figure on the total expenditure of the political parties, unions and other interest groups but the available information suggests that \$20 million was spent on advertising.

With an eight week campaign and ever increasing advertising budgets, who doubts that the figure for 2016 will be even higher? The rules, such as they are, that govern this donations arms race, are no longer adequate or defensible.

That is the rationale for the John Cain Foundation call for a Come Clean election. We urge you all to be a part of this project and help restore a measure of trust to Australian democracy.

**MAXINE MCKEW**  
**DIRECTOR JOHN CAIN FOUNDATION**  
May 2016



## COME CLEAN! STOPPING THE ARMS RACE IN POLITICAL DONATIONS

MELBOURNE AGE EDITORIAL 10TH MAY 2016

# THE AGE

## Reform political donations laws now

**S**even years ago, a Victorian parliamentary inquiry suggested Australia was ranked "among the least regulated jurisdictions in the Western world" in terms of the laws that govern political donations and campaign financing.

It is altogether dispiriting that nothing has changed in the interim. In terms of transparency, accountability and timeliness, the laws remain hopelessly inadequate.

And yet, here we are, once again heading a federal election, when the direction of the nation will be vested in the hands of one major political party, and voters will have no knowledge about the sources of candidates' funding until early next year. The 2015-16 financial returns, detailing donors to the political parties and the parties' financial statements, will not be published by the Australian Electoral Commission until February.

Laws requiring the disclosure of political donations are intended to secure and uphold the integrity of the electoral system and, in turn, the integrity of the decision-making of the government.

The goal is to prevent corruption by exposing those who might seek to wheedle their particular causes to the forefront of policymaking or, indeed, buy influence. Knowledge about who has financed politicians'

campaigns helps to expose potential conflicts of interest. It assists in keeping leaders accountable.

Yet the existing donations disclosure laws are farcical, especially for a nation that purports to be highly developed, technological savvy, politically sophisticated and morally upright.

It is particularly scandalous considering there have been multiple parliamentary hearings, reviews and inquiries at federal and state levels in the past decade, all leading to recommendations for significant reform on electoral donations.

The laws at Commonwealth and state levels are mismatched, and thus open to exploitation. That leaves our democratic process vulnerable. The various inquiries have recommended increased transparency and timeliness.

Real-time (or near-enough) publication of donations and campaign financing would greatly advance the aim of preventing corruption. It is done in the United States; it can be done here.

Victoria's Ombudsman Deborah Glass last year said the failure to improve transparency and the failure to bar certain contributors from the donations system "creates an environment in which allegations of improper conduct can flourish".

Consider, for example, the evidence that emerged before the NSW Independent Commission Against Corruption which detailed how the NSW branch of the Liberal Party received donations from the federal Liberal branch. Some of the funds received had come from property development companies which, like gaming companies and liquor companies, are barred by NSW law from contributing to political parties.

There are patent concerns that politicians might be persuaded to generate favourable decisions and, thus, appease those who have financed their campaigns. But adverse *perceptions* can be damaging, too. The community's confidence in the integrity of the democratic process, in the government itself, might be destabilised on the basis of a perception of a conflict of interest.

Exposing, at the earliest opportunity, who stands behind the money flows, and doing so before the day of the polls, is essential if the process is to have any meaning.

Over many years, *The Age* has called for federal and state governments to embark on fundamental and meaningful reform of the electoral laws. The inquiries have been held, the recommendations have been made. The only thing missing is political will and courage.



## EXECUTIVE OVERVIEW

Australians have been let down by their political leaders, other members of parliament (MPs) and by the federal parliamentary committee system. This harsh assessment is the result of research into political donations laws in this country.

In 2008, a 99-page Electoral Reform Green Paper: Donations, Funding and Expenditure was circulated by the then Special Minister of State, Senator John Faulkner in the hope it would 'open debate and lead to the implementation of reforms that will ensure the Australian electoral system is world's best practice'. It did not.

In 2011, dedicated parliamentary research staff of the Joint Standing Committee on Electoral Matters (JSCEM) wrote a comprehensive 268-page Report on the Funding of Political Parties and Election Campaigns for consideration and debate by members of the Committee, the parliament and, through parliamentary processes, the people.

Learned experts gave freely of their time and considerable knowledge in the form of written submissions to the JSCEM. They also agreed to appear before Committee hearings in person. They were not alone; several institutions made written submissions and appeared before the Committee. There was also input from some MPs and members of the public. A key stakeholder, the Australian Electoral Commission (AEC), made multiple submissions and appeared before the JSCEM on several occasions.

The JSCEM report summarized, in a highly readable fashion, key features of the current scheme and proposed a set of reforms. Thirty well-considered recommendations were made under the following headings: private funding; options for private funding reform; expenditure; public funding; third parties and associated entities; compliance; and other issues.

To date there is little, some might say nothing, to show for the money taxpayers have, knowingly or unknowingly, invested into reforming the funding of federal politics in Australia. Indeed the return on investment over the past eight years is zero. As the AEC points out, 'No legislation relating to political donations and funding has been enacted by [the Federal Parliament] since 2008'. If any private institution had this type of return on their research and development budget they would, by now, have gone out of business.

The failure of the Australian Government to enact any reform, and for such a long period of time, indicates successive governments' complete disdain for the committee process. It also shows a concerning level of disrespect toward all those who contributed their time and expertise to the process.

But the story gets worse. The JSCEM has had five chairpersons in the past 12 months (2015-2016), with some holding the position for only a matter of weeks. This is an appalling response to reforming political donations laws at the federal level.

Equally scandalous is the relegation of this crucially important topic to a Council of Australian Governments' (COAG) dinner, held the evening before the recent 1 April 2016 COAG meeting. Clearly political donations laws are not considered important enough to be placed on COAG's formal agenda. This decision by Australia's state, territory and federal leaders lets the Australian public know, in no uncertain terms, the priority placed on political donations policy by those with the power to reform the system.

## COME CLEAN! STOPPING THE ARMS RACE IN POLITICAL DONATIONS

There is no doubt that the existing disparate arrangement, comprising nine different sets of laws, which reflect the priorities of each political jurisdiction, needs fixing. What is required, and quickly, is a national approach to how politics is funded in this country. This will help prevent members of parliament and the political parties to which most belong manipulating the federated system.

While there are examples of Labor members of parliament and the Labor Party abusing political donations laws, the somewhat recent revelations from the Independent Commission Against Corruption (ICAC) in New South Wales (NSW) into the highly unethical conduct of Liberal Party MPs, the Liberal Party and its federal fund raising arm, the Free Enterprise Foundation, exemplifies how inconsistent state and federal laws can be manipulated for personal and party interests. This example offers a text book case of parliamentarians disregarding their fiduciary duty to the public office-public trust principle, which necessitates that the public interest be placed before personal and party considerations at all times.

While a national approach is required, on its own it is not sufficient, as the danger exists that Australia's political leaders could decide to adopt the lowest common denominator option. To guard against this possibility, reform is also required to the key drivers (the component parts) that would form the framework of a national system. All of Australia's nine political jurisdictions and other parliamentary democracies consider these issues when shaping their political donations regime.

They include:

- *bans on donations;*
- *caps on donations;*
- *disclosure threshold;*
- *sanctions for not complying with the law;*
- *public funding;*
- *private funding; and*
- *a ceiling on the cost of election campaigns.*

Those devising a national approach will have to come to a consensus on what category of donors should be banned, or whether capping all donations to a modest level alleviates the need for bans. Modest in this context being determined by the amount 'ordinary' voters could reasonably afford to donate to a candidate or political party. Sums ranging between \$500 and \$1500 are often nominated.

Decisions are also required on disclosure laws, including the gap that unnecessarily exists between the receipt of donations and the electorate being made aware of who donated to whom and by how much. Political leaders must be aware that this information is necessary prior to votes being cast. Without it, the architects of the current system are forcing voters to make an uninformed decision.

Public money, the amount taxpayer should contribute to election campaigns, is another key determinate, as is private funding. In terms of the latter, the issues that need to be addressed revolve around 'policy capture' and 'policies for sale'. A ruling is also required on whether paying to have privileged access to a prime minister, premier, minister and other political leaders, and for some hours, honours the public office-public trust principle.

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Another important decision relates to the total amount of funding that should be expended on election campaigns. As far back as 2008, former Special Minister of State, John Faulkner alerted his parliamentary colleagues of the need to do something to curb overall spending on electoral matters. Failure to do so, he explained, would increase the pressure on political parties and candidates to intensify their fundraising efforts. Such pressure, Faulkner warned, could 'open the door' to donors who might try to purchase 'access and influence'. It seems that Faulkner's warning has fallen on deaf ears.

This paper makes it abundantly clear that the current state of political donations laws in Australia needs urgent attention. Reform is long overdue and the only thing that seems to be standing in its way is personal and party interests. They should no longer be allowed to take precedence over the public interest.

Taxpayers' lack of trust in MPs and the political process is understandable when they are expected to invest in endless research and development that achieves no outcome. They deserve better than this. The electorate and broader community are entitled to action and that action must result in a national funding regime that all Australians can be proud of, rather than one they shun. The current disparate arrangement fails the public interest (and pub) test.

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# OPTIONS FOR FUNDING POLITICS IN AUSTRALIA

## OPTION 1

### **ADOPT A UNIFORM, NATIONAL APPROACH TO HOW POLITICS IS FUNDED IN AUSTRALIA.**

This option would include: a ban on certain people, groups and institutions making political donations and/or placing modest caps on all forms of donations; implementing real-time disclosure; and placing a ceiling on the amount of private and public monies that can be spent on electoral campaigns.

Because Australia is a federation, it is common for there to be nine distinct sets of laws for many areas of public policy. But some issues transcend a federated arrangement; they require a national approach.

How politics is funded in this country is one of those issues. At stake is people's trust in Australia's democratic political system and its members of parliament.

Transparency International (Australia) recently recommended that this country move to a national political donations system and the highly respected Schott Inquiry into political donations in New South Wales proposed that the premier place on the Council of Australian Governments' agenda the issue of how politics is funded in Australia. Despite Premier Baird's efforts to act on the Inquiry's recommendation, he has failed to convince other political leaders that the issue is worthy of serious discussion.

Political leaders seem incapable of coming together to even examine, in a serious way, this crucial issue. They will not do so unless forced to act by the electorate and media.

Political donations laws need to be placed firmly on the political agenda in the forthcoming federal election and at every state and territory election, until such times as political leaders agree to publicly discuss introducing a national approach to how politics is financed, or alternatively to defend the status quo on the basis that it is in the public interest.

Moving speedily to introduce Option 1 is in the best interest of the nation's political system, its people and its members of parliament. If political leaders can demonstrate, through their actions not words, a preparedness to abide by the fiduciary duty they owe to those who elect them to office, they will be taking the all-important first step to honouring the public office-public trust principle. Through such action, the public interest will be given its rightful place, which is before personal and party interests.

Implementation of this option is clearly in the public interest and therefore should be adopted speedily by all of Australia's political leaders and supported by other members of parliaments. To do otherwise will see the public interest languishing in the same neglected position it has occupied for far too long.



## **OPTION 2**

### **MOVE QUICKLY TO REFORM EXISTING POLITICAL DONATIONS LAWS IN EACH STATE, TERRITORY AND AT THE FEDERAL LEVEL, BUT DO SO SEPARATELY.**

Reform to political donations laws is badly needed in most Australian states, territories and at the federal level. Even if each of Australia's nine jurisdictions acted swiftly to reform their current systems, it is highly unlikely, indeed improbable, they would do so simultaneously and in consultation with other jurisdictions. While some reform is better than no reform, the outcome could only, at best, deliver an improved version of the current, disparate approach to political donations laws.

This option offers no guarantee that members of parliament and political parties would not take advantage of loopholes in a federated system.

Option 2 is rejected because, as past practices have demonstrated, it results in personal and party interests being placed well before the public interest.

**COME CLEAN! STOPPING THE ARMS RACE IN POLITICAL DONATIONS**

# PART A

## ANALYSIS OF AUSTRALIA'S POLITICAL DONATION LAWS

# INTRODUCTION<sup>1</sup>

When devising public policy, governments are often confronted by complex, seemingly unsolvable 'wicked problems' (Churchman 1967; Rittel & Webber 1973). Such problems sit at one end of the public policy spectrum. At the other end are issues that can be classified as self-evident, or to use a colloquial term, 'no brainers'. This conversational expression encapsulates the reality that solutions to some policy matters are so clearly in the public interest that they should proceed quickly from policy formulation to implementation. Reforming Australia's political donations laws and adopting a national approach to the ways politics is funded in this country sits on the self-evident end of the spectrum.

To support this proposition, political funding regulations in each of the Australian states and territories and at the federal level are discussed. There are nine separate jurisdictions, and nine distinct sets of laws that when looked at together are disjointed and inconsistent.<sup>2</sup>

When evaluating Australia's fragmented approach to financing politics,<sup>3</sup> the paper examines key drivers that shape the funding of politics. They include: who (if anyone) should be banned from making donations; caps on donations; disclosure thresholds; and penalties for breaching political funding laws. This information offers a handy snapshot of the status quo.

The paper also discusses the issue of private funding donated to candidates and political parties by individuals, corporations, trade unions, third party donors<sup>4</sup> and associated entities<sup>5</sup> as well as the public monies paid by Australian taxpayers to partially cover the cost of election campaigns. A central issue for private funding is whether uncapped donations and/or those not subject to disclosure thresholds result in a class of donor afforded privileged access to decision-makers, and whether this in turn leads to 'policy capture' (OECD 2016). In relation to public funding the debate centres on whether taxpayers should be expected to fund electoral campaigns and if so, by how much.

In 2008, then Special Minister of State, John Faulkner suggested in the Electoral Reform Green Paper: Donations, Funding and Expenditure that Australia is experiencing an escalating 'arms race' in the lead up to elections, with the greatest beneficiaries perhaps being advertising firms and the media (radio, television, newspapers and online news sites). The rising cost associated with elections has been also examined by Gray and Jones (2010) and Young and Tham (2006) and is examined in this paper with view to canvassing what might be done about it.

<sup>1</sup> The author, Dr Colleen Lewis, wishes to thank Matt O'Rourke for his work as a research assistant and Maureen Bell for cheerfully reading a complete draft. Her insightful comments were greatly appreciated. Many thanks also to Dr Damien Williams who gave valuable expert assistance in the final stages of the paper.

<sup>2</sup> Queensland, New South Wales, Victoria, Tasmania, South Australia, Western Australia, the Northern Territory, the Australian Capital Territory and the Federal level.

<sup>3</sup> The terms political donations, funding politics and financing politics are used inter-changeably in this paper.

<sup>4</sup> Third party donors are defined as 'individuals or organisations that incur "political expenditure" but who are not seeking election' (Faulkner 2008, p.86).

<sup>5</sup> An associated entity is 'an entity that is controlled by a "registered political party", that operates wholly or to a significant extent for the benefit of a registered political party, that is, or on whose behalf another person is, a financial member of a registered political party, that hold, on whose behalf another person holds, voting rights in a registered political party' (Faulkner 2008, p.85).

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The paper also suggests options for the Australian electorate and political leaders to consider when determining if the current system, based on nine separate sets of laws, is in the public interest.

It draws on a series of comprehensive reports by respected international institutions and, in the Australian context, on papers, reports (interim and final), submissions to parliamentary committees and to inquiries, discussions by panels of experts, working papers, media reports and academic articles. Many of them have broached the subject of Australia adopting a national approach to political donations. For example, in a position paper by Transparency International Australia (2016), attention is drawn to the fact that:

*The risks of corruption are heightened by inconsistencies in Commonwealth and State legislation relating to electoral finance disclosure and lobbying (p.1).*

The paper addresses evidence from the New South Wales' Independent Commission Against Corruption, which lay bare how a political party and some of its parliamentary members in NSW manipulated the current patchwork approach to political funding for their personal advantage and that of their party. A national approach, it is argued, would help to plug the gap unashamedly exploited by the Federal Liberal Party to circumvent NSW laws pertaining to political donations.

The Liberal Party and Liberal MPs are not the only ones to have abused political donations laws. The paper also refers to evidence given by the current leader of the Federal Parliamentary Labor Party, Bill Shorten, to the Royal Commission into Trade Union Governance and Corruption (Commonwealth of Australia 2015) (The Heydon Royal Commission) and from the West Australian Royal Commission into Commercial Activities of Government (Government of Western Australia 1992) (commonly referred to as the WA Inc. Royal Commission). The latter exposed scandals involving former Labor Party Premier, Brian Burke.

Before moving on, it is necessary to say something about the structure of the paper, which the reader will see is divided into two equally important parts. Part B concerns the rules and regulations that make up key elements of political donations laws across Australia's states, territories and at the federal level. This information is crucial to understanding the narrative style discussion and arguments put forward in Part A. The decision to divide the paper was reached after writing several drafts that tried unsuccessfully to blend the information contained in Part A and Part B. The problem was the loss of detail that occurred when précisising the rules and regulations outlined in Part B.

## NOT ANOTHER DUST CATCHER

The John Cain Foundation and the author do not want this research paper to suffer the same fate as the many excellent papers, reports and submissions to green papers, parliamentary committees and inquiries into political donations that have gone before it. They are gathering dust on library shelves, victims of political inaction.

In an attempt to avoid this fate, individual members of parliament, political leaders and political parties in all nine jurisdictions are being called on to publicly justify why they continue to retain the current approach to political funding laws. To support their explanation, they need to supply strong evidence that demonstrates to the electorate how nine distinct regimes are in Australia's collective (public) interest. One can only assume that the majority of MPs and political parties believe it is, as successive state, territory and federal governments have failed to come together to discuss seriously this key public policy matter.



## COME CLEAN! STOPPING THE ARMS RACE IN POLITICAL DONATIONS

Should today's political leaders express their support for a national approach to the way politics is financed, they must give the electorate a very firm date that sets down precisely when they will clear the way for the introduction of a national system. The Premier of New South Wales, Mike Baird, raised the matter at the last two COAG meetings. In doing so, he was responding to Recommendation 2 of the Schott Inquiry's Political Donations Final Report – Volume 1 (Schott, Tink & Watkins 2014a), which states:

*That the Premier support co-ordinated national reform of election funding laws, and seek to put the issue on the COAG agenda (p.11).*

Regrettably, his suggestion that government leaders examine, in a meaningful way, the fractured state of political funding laws and move to a national regime failed to attract the interest of other political leaders. Indeed, the issue did not even make it on to the official COAG agenda. Instead it was relegated to a mention at a leaders' dinner held the night before the actual COAG meeting (Nicholls 2015; 2016). The electorate is owed a full explanation as to why this was the case. A crowded COAG agenda is not a satisfactory reason. There are very few public policy matters that are more important to the health of our democratic system than how politics is funded. After all, nearly every other public policy decision is directly or indirectly tied to it.

Before moving on to discuss the issues outlined above, it is important to 'set the scene' for the remainder of the paper. This is done in two stages. The first outlines the paper's framework: the public interest and public office-public trust nexus. All other issues reside within that framework.

The second is to bring to the attention of the electorate and media what can only be described as the absurd process that has accompanied attempts by some, including current and former MPs, to reform Australia's political donation regime at the federal level and to consider a unified national system. If the saga surrounding the Joint Standing Committee on Electoral Matters, outlined below, typifies the best the Australian electorate can expect from its parliamentary committee system and governments, then Australia's democracy is in serious trouble. This chain of events also highlights a process that must never be repeated.

### THE PUBLIC INTEREST AND PUBLIC OFFICE-PUBLIC TRUST NEXUS

The central argument of this paper rests within the public interest and public office-public trust principle. These two concepts are inter-twined, but the least referred to and perhaps least well known of the two is the public office-public trust. It is not a concept that comes up in day-to-day conversation, and is rarely used by the media or referred to by members of parliament when explaining the rationale behind policy decisions. Nevertheless, it is central to making sense of the oft quoted but somewhat imprecise term, the public interest.

The author is aware that using long quotes, and too many of them, is not the best way to hold readers' attention. It is necessary, however, to do so here, as the opinions are from learned people who set out clearly the nature and importance of fiduciary relationships, which are at the heart of the public interest and public office-public trust nexus

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The concept of a fiduciary relationship is the key to understanding what is meant in practice by the public office-public trust principle. A fiduciary relationship is a legal term that refers to obligations on a person that arise as a result of a relationship with another person or persons. In trying to explain how honouring one's fiduciary duty goes to the core of relations between members of parliament and those who elect them to power, this section of the paper relies heavily on a presentation by the Hon. Roger Macknay QC (2012) to the 18th Annual Public Sector Fraud and Corruption Conference and the presentation of the Hon. Tim Smith QC, to the University of Melbourne's School of Government in December 2015.

Macknay, when discussing what is meant by the term fiduciary, explains that even though a generally accepted definition of the concept has 'proven elusive' there are normally elements of trust, confidence, reliance or vulnerability in the relationship. As he says:

*The distinguishing obligation of a fiduciary is the obligation of loyalty, which includes that a fiduciary must act in good faith and must not benefit from a conflict between personal interest and the fiduciary duty (p.1).*

The principles outlined in the following judgement (referred to by Macknay) are particularly instructive and help to highlight the strong link between the public interest and the public office-public trust principle. It also explains why adherence to this principle by MPs is central to restoring people's faith in democracy, which is severely weakened by opaque financing and donations laws.

Referring to the Royal Commission into Commercial Activities of Government and Other Matters (Government of Western Australia 1992) and its second report tabled in November 1992, Macknay (2012) explains that when the Commission laid down what should be the minimum standard of conduct for public officials (elected and appointed) it referred to and 'set considerable store' on a 1952 decision of the Supreme Court of New Jersey, which explained that:

*[Public officers] stand in a fiduciary relationship (that is a relationship of trust) to the people who they have been elected ... to serve ... As fiduciaries and trustees of the public weal they are under an obligation to serve the public with the highest fidelity. In discharging the duties of their office, they are required to ... exercise their discretion not arbitrarily but reasonably, and above all to display good faith, honesty and integrity ... They must be impervious to corrupting influences and they must transact their business frankly and openly in the light of public scrutiny so that the public may know and be able to judge them and their work fairly. When public officials do not so conduct themselves ... their actions are inimical to and inconsistent with the public interest.*

*These obligations are not mere theoretical concepts or idealistic abstractions of no practical force or effect ... the enforcement of these obligations is essential to the soundness and efficiency of our government, which exists for the benefit of the people (pp.3-4).*

## COME CLEAN! STOPPING THE ARMS RACE IN POLITICAL DONATIONS

Another learned judgement, this time by Lord Bingham in the House of Lords (also cited by Macknay 2012) helps to clarify why the public office-public trust principle should guide all decisions made by the people's representatives. As Bingham (in Macknay 2012) made clear:

*It follows from the proposition that public powers are conferred as if upon trust that those who exercise powers in a manner inconsistent with the public purpose for which the powers are conferred betray that trust and so misconduct themselves. This is an old and very important principle (p.12).*

When the Hon. Tim Smith QC (2015) examined the importance of what he describes as the public office-public trust principle, he referred to the attempt by the Hon. Tony Fitzgerald QC AC to have Queensland politicians promise to abide by a series of commitments prior to the last state election. They included that those seeking election:

*Make all decisions and take all actions ... in the public interest without regard to personal, party political or other immaterial considerations;*

*Treat all people equally without permitting any person or corporation special access or influence; and*

*Promptly and accurately inform the public of its reasons for all significant or potentially controversial decisions and actions (p.1).*

Smith (2015) commented that these individual principles:

*Give effect to, and are supported by, one fundamental principle that should guide all the participants in our democracies – those holding public office, those assisting them and we the people. The principle is the “public office public trust principle” [which] requires that when making decisions they must put the public interest first and in priority to their personal interests and other private interests (p.2).*

In making his argument Smith (2015) also referred to a presentation by Sir Gerard Brennan, former chief justice of the High Court, in which Sir Gerard explained:

*The motivation for political action is often complex – but that does not negate the fiduciary nature of political duty. Power, whether legislative or executive, is reposed in members of the Parliament by the public for exercise in the interests of the public and not primarily for the interests of members or the parties to which they belong. The cry “whatever it takes” is not consistent with the performance of fiduciary duty (p.2).*

## COME CLEAN! STOPPING THE ARMS RACE IN POLITICAL DONATIONS

To return to Macknay (2012, p.4), he notes that in Australia the notion of a fiduciary relationship between MPs and those they represent was applied in the eighteenth and nineteenth centuries but then slipped into 'virtual obscurity' for a period of time. A growing lack of confidence in public sector institutions, and the political process more generally has led to a renewed focus on the public office-public trust principle (Macknay 2012, p.12). It is a principle that the electorate must hold members of parliament to before, during and after election to office, and particularly so in relation to Australia's political donation laws as they are critical to the integrity of Australia's political system.

### SOME MIGHT CALL IT A DISGRACE

In December 2008, Senator John Faulkner published the thoughtful Green Paper referred to earlier. This was written and widely distributed in an attempt to raise people's awareness of the issues surrounding political funding in Australia and to have the matter discussed by the broader community, members of parliament and political parties, with a view to moving toward a more open, transparent and accountable national system.

Some two-and-a-half years later, on 11 May 2011, the Australian Senate requested that the Joint Standing Committee on Electoral Matters inquire into:

*Options to improve the system for the funding of political parties and election campaigns with particular reference to:*

- *Issues raised in the Government's Electoral Reform Green Paper – Donations, Funding and Expenditure, released in December 2008;*
- *The role of third parties in the electoral process;*
- *The transparency and accountability of the funding regime;*
- *Limiting the escalating cost of elections;*
- *Any relevant measures at the state and territory level and implications for the Commonwealth; and*
- *The international practices for the funding of political parties and election campaigns, including in Canada, the United Kingdom, New Zealand and the United States of America.*



## COME CLEAN! STOPPING THE ARMS RACE IN POLITICAL DONATIONS

The Committee's well-researched 268-page report was tabled in parliament in early December 2011. The Hon. Bronwyn Bishop MP, the Hon. Alex Somlyay MP, Senator Scott Ryan, Mr Dan Tehan MP and Mr Darren Chester MP, all from the Liberal-National Coalition, issued a dissenting 13-page report.<sup>6</sup> Senator Lee Rhiannon on behalf of the Australian Greens tabled an eight-page dissenting report.<sup>7</sup>

The Committee, chaired by Labor's Daryl Melham, received 37 submissions from 26 people/institutions; nine exhibits, held seven hearings (five in Canberra and one each in Sydney and Melbourne) and heard evidence from 24 people.<sup>8</sup> The Executive Summary included a very useful overview, in table form, which compared the current scheme with the proposed approach. This was followed by 30 recommendations that would, if implemented, have reformed political funding at the federal level and perhaps nudged Australia toward a national political donations system that takes much greater account of the public interest than does the country's present mismatched approach.

### WILFUL NEGLECT

Since then, no action has been taken by governments on either side of the political divide in response to this comprehensive report. Taxpayers' money was wasted on achieving no outcome.

On 15 October 2015, the Senate referred an inquiry into political donations to the JSCEM, the same committee that had written the 268-page report some four years earlier. It was asked to inquire into (among other things):

*How many of the recommendations made by the Joint Standing Committee on Electoral Matters in its 2011 report ... into the funding of political parties and election campaigns were accepted by Government and how many have been implemented?*

*What factors, if any, are contributing to any delays in implementing the accepted recommendations of the report?*

<sup>6</sup> The Liberal-National Coalition members expressed the view that the majority of the Committee's recommendations were 'solely to serve the interests of the Australian Labor Party, the Greens, and their backers such as Get Up'. They specifically opposed:

'Changing the donations disclosure threshold; it should remain at its current level of \$11,900, which is indexed.

Donations to "related political parties" being treated as a donation to the same party.

Altering the definition of "gift" to include attendance at fundraisers.

Moving to six-monthly disclosure for political parties.

Investigating options to introduce a system of expenditure caps' (2011, p.229)

<sup>7</sup> Senator Rhiannon's dissenting report argued that the recommendations in the JSCEM Report did not go far enough. She put forward 13 suggestions based on the Green's desire to have Australian elections 'funded through a combination of public funding and small donations from individuals'. She also proposed 'speedy and transparent public disclosure of donations so that voters would know the source of all donations to political parties. To achieve these ends her report recommended:

'A ban on all donations from all entities other than individuals.

A cap on the amount of money that can be donated in a year from a single individual to a political party or candidates.

Caps on expenditure by political parties, candidates and third parties.

Adequate public funding for political parties, including both funding for election campaigning and for other administrative work of the party, with funding based on the percentage of the vote received by each party. Continuous disclosure of all political donations above \$100, within two weeks of all donations being made'.

Looking to long-term solutions the Greens also recommended that Australia move to full public funding of elections (p.236).

<sup>8</sup> Other members of the Committee were The Hon Bronwyn Bishop MP; Mr Darren Chester MP (from 2/6/11); The Hon Allan Griffin MP; Ms Amanda Rishworth MP; Mr Dan Tehan MP (from 2/6/11); Mr Tony Windsor MP (from 25/5/11); Senator Bob Brown (to 5/7/11); Senator Carol Brown; Senator Helen Polley; Senator Lee Rhiannon (from 5/7/11); and Senator Scott Ryan.

## COME CLEAN! STOPPING THE ARMS RACE IN POLITICAL DONATIONS

In response to this direction, the JSCem wrote to the government and on 3 December 2015 the government presented to parliament (in the Speaker's schedule of outstanding responses) the following advice:

*... given the passage of time and the change of government, the Government does not intend to respond to the report.*

This is an unacceptable - some might think disgraceful - response to a key public policy matter. The issue has dragged on for approximately eight years and the cost to taxpayers extends beyond the JSCem's work.

For example, the AEC submitted five submissions to the 2011 JSCem Inquiry, which gave a 'comprehensive overview' of funding and disclosure structures, and AEC staff appeared at three public hearings, all to no avail. As the AEC (2016) noted in its Submission to the Inquiry into Political Donations:

*No legislation relating to political donations and funding has been enacted by [the federal] Parliament since 2008 (p.9).*

The above saga highlights the wilfully neglectful approach by governments and parliaments to political donations reform at the federal level.

But wait, there is more.

The JSCem has had five (5), yes five chairpersons, in the past 12 months.

- *Mr Tony Smith MP, 9-9-2014 - 21-8-15*
- *Mr Alex Hawke MP, 9-9-15 - 12.10.15*
- *Mrs Jane Prentice MP, 14-10-15 - 22-2-16*
- *Mr David Coleman MP, 22-2-16 - 2-3-16*
- *Mr Scott Buchholz MP, 15-3-16 - present.*

This rapid turnover of chairpersons is an inexcusable approach to policy formulation, implementation and evaluation. It is best described as a farcical response to examining, among other things, how politics is funded in Australia and what reforms are required to ensure that the public interest becomes the foundation and framework for all future action by governments, members of parliament and political parties.

## THE 'INCONSISTENT' STATUS QUO

Transparency International Australia, in its 2016 position paper Political Finance and Donations, makes clear that Australia's fragmented, 'inconsistent' approach to political donations escalates 'the risk of corruption'. This highly-regarded organisation argues that 'there is a need for national consistency'. It points to the 'opportunity' the Australian Government has to take a leadership position in 'the search for national best practice', which includes replacing the current 'piecemeal arrangements' with a unified approach. As evidenced by the chain of events surrounding the JSCEM's 2011 report, referred to above, the Federal Government is showing no interest in reforming the federal political donations regime, let alone spearheading a move that would see the speedy introduction of a best practice, national model.

The Australian Government should publicly support the Transparency International recommendation and do so in the lead up to the forthcoming federal election, as should the Australian Labor Party, all minor parties, networks and independents. If they fail to do so, political leaders from the states and territories need to recall their fiduciary duty to the electorate (and broader community) to honour the public office-public trust principle. Doing so will ensure that their decision is motivated by the public interest, thereby transcending all other interests.

Highly respected senior public servant, Dr Kerry Schott, chaired an inquiry into political donations in NSW. Other members of the 'Panel of Experts' were Mr Andrew Tink AM and the Hon. John Watkins. Their report, commonly referred to as the Schott Report (2014a), did not make a direct recommendation that Australia move toward a national set of laws to regulate political donations. This is understandable as the inquiry was focused on New South Wales. Hence, such a recommendation would be beyond the scope of the inquiry and the power of any NSW government to implement. The Report on the Funding of Political Parties and Election Campaigns (JSCEM 2011) had also canvassed the issue (pp.199-206) and in doing so referred to submissions made to the 2008 Green Paper by Professor Anne Twomey, a constitutional law academic and expert in the political donations area, and former senator for Western Australia, Andrew Murray. Importantly though, the JSCEM (2011) report noted that 'harmonising political financing arrangements' between Australia's nine political jurisdictions 'should be a goal of reforms in this area' (p.206). As the JSCEM report had pointed out:

*A single national funding and disclosure system with a single administering body could help to address concerns about confusion; the administrative burden on individuals, political parties and other groups with reporting obligations and federalism issues (p.199).*

Twomey (2011) had also commented, prophetically as it turns out, that:

*... a uniform approach to political donations would be more effective in addressing some of the potential for circumventing requirements that exists when different systems are operating at the federal and state government levels because if you impose limitations at one level and they do not exist at the other, the money comes in through the back door and the regulation tends to be ineffective (p.199-200).*

She supported the idea of a national system, saying it would be desirable (p.200).

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Andrew Murray (2011, p.199) highlighted the savings that would arise from a national approach. He explained that 'savings and efficiencies' would arise from having 'one rather than nine electoral commissions'. Other savings, he noted, would apply to 'participants and for funding and expenditure'.

Murray acknowledged that the decision to move to a national system would have to be made by Australia's nine political jurisdictions, but went on to argue that:

*The conduct for elections, the regulation of political participants and funding and expenditure ... all should be national (p.202).*

Murray also suggested the adoption of a national scheme should be put to COAG. As highlighted previously, however, it is proving extremely difficult to get the matter listed on the COAG agenda.

There is no denying that getting agreement on a national scheme will require higher-order negotiation skills and a willingness by all political leaders to compromise. But surely our elected representatives are capable of rising to the challenge of placing the national public interest before personal, party and state and territory interests, especially on such a fundamental democratic issue as political donations. Such conduct is not an unreasonable ask or impossible task for our political leaders and other members of parliaments – or is it? One hopes not, for as Premier Baird has made clear, the current suite of inconsistent laws 'creates opportunity for avoidance and potentially undermines any state system' (Nicholls 2015).

### FIXING THE COMPONENT PARTS

This paper now discusses issues underpinning key drivers that shape political donations laws in Australia and in other democracies. To remind the reader, these factors include: banned donors; caps on donations; disclosure thresholds; penalties for not abiding by electoral laws; public funding of election campaigns; and issues surrounding private funding. As will become clearer from reading (Part B), these drivers form the framework of political donations laws in each of Australia's nine political regimes, but what sits within that framework is often vastly different.

The discussion on the component parts, coupled with the information provided in Part B, supports the case for a national approach to political funding. It also supports the view expressed by respected experts in the area, Professors Joo-Cheong Tham and Graeme Orr (2011, p.2) that Australia has a somewhat 'laissez-faire' approach to funding politics. This needs to change.

Given the attitude to reforming political donations laws displayed by political leaders at the recent COAG dinner, it is unlikely that these same leaders will embrace change. If that proves to be the case, this paper will at least give the electorate a snapshot of the status quo and a very useful basis on which to evaluate arguments put forward by any political leader or MP supporting the current arrangement.



## COME CLEAN! STOPPING THE ARMS RACE IN POLITICAL DONATIONS

The author may, however, be doing Australia's political leaders and other MPs a disservice by underestimating exactly where they place the public interest in terms of political donations reform. If that is the case, she strongly recommends that the 2008 Green Paper, the 2011 JSCEM report and, in particular, the Schott Inquiry's Final Report (Schott et al 2014a), and the associated material that informs it (including Schott et al 2014b; 2014c; 2014d; 2014e; Twomey 2014), be used as the foundation for arriving at decisions that will mould a national system. All of these reports canvass similar issues and do so in a comprehensive and thoughtful manner. The Schott Report is emphasised because of its extraordinary depth and breadth of research and level of analysis that accompanies it.<sup>9</sup> It is also the most recent report, having been published in 2014. While it focuses on NSW, all of the substantive arguments it canvasses can be applied to other political jurisdictions.

Another reason for suggesting that these reports be used to inform a national model is to avoid unnecessary repetition; a delaying tactic often used by governments wishing to maintain the status quo for as long as possible. Using these reports will not only save time, it will also save taxpayers' money.

### BANNING SOME DONORS

In the majority of Australia's nine political jurisdictions, any person, corporation, trade union, third party donor and associated entity can donate to a political party or candidate. Only two states - New South Wales and Queensland - disallow certain categories of donors, with NSW being the most restrictive. Refer to Part B of this paper for further details.

The Schott Inquiry, in its Political Donations Final Report Volume 1, (2014a pp.3; & 33-41) canvassed placing a total ban on all donations from private and other sources. It was responding to the suggestion that restoring public trust in NSW's political system could only be achieved by banning all donations.

The panel (Schott et al 2014a) rejected this idea, noting the 'practical difficulties' involved in such an approach. Perhaps the most compelling reason put forward was that a total ban would mean:

*Public funds would have to be provided to all those who seek to contest elections or contribute to public debate, including new parties and third-party campaigners. Clearly it would not be feasible for the State to fund every prospective candidate or third party (p.3).*

Another reason for not accepting the suggestion was that it would breach the implied freedom to political communication in the Australian Constitution, because modest donations allow people to express their political voice (p.3). The panel came to the conclusion that:

*A total ban ... would not be feasible, or constitutional or in the public interest (p.3).*

Even though it discards the idea of a total ban, the Schott Panel (Schott et al 2014a) supported retaining existing bans. These concern anonymous donations of \$1000 or more, donations from the tobacco, liquor and gambling industry, property developers and foreign sources (pp.42-50).

<sup>9</sup> The information published by the Schott Panel of Experts includes transcripts of panel discussions by leading experts in the field, several working papers based on a series of panel discussions and an interim report, as well as the more commonly used material gathered by inquiries and committees to inform their recommendations.

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The reason for banning particular donors is something that the International Institute for Democracy and Electoral Assistance (IDEA) explored in its extensive 2014 report, *Funding of Political Parties and Election Campaigns: A Handbook on Political Finance*. As it explains, the purpose of banning in some instances is to 'completely stop contributions that are seen as particularly damaging to the democratic process' (p.21).<sup>10</sup>

As shown in Part B, the majority of Australia's nine political jurisdictions do not ban donations from particular categories of donors. When they do, they usually target corporations rather than organisations with sufficient power to influence policy outcomes. If it proves difficult to reach agreement about who should and should not be banned from making a political donation, another way of tackling undue influence is through the capping of donations.

### CAPS ON DONATIONS

As with other factors shaping key elements of political donations systems in Australia, there is no consistency in terms of the level at which donations are capped.<sup>11</sup> Caps on donations do not apply at the federal level or in Queensland, South Australia, Tasmania, Western Australia or the Australian Capital Territory and Northern Territory. There are caps on donations in New South Wales and Victoria. It seems that many governments adopt the same approach to caps as they do to bans: they favour the default position of not restricting.

The capping of donations was canvassed in the 2008 Electoral Reform Green Paper (see Faulkner 2008, pp.60-70) and in the JSCEM's 2011 Report on the Funding of Political Parties and Election Campaigns (pp.71-89). It is also discussed in the Final Report - Volume 1 of the Schott Report (2014a, pp.51-57).

Schott et al (2014a, p.51) explain that caps are imposed to address perceptions of corruption and undue influence and to reduce the real risk of corruption. To achieve these outcomes it is necessary to restrict donations to the level of what the politically engaged 'ordinary' voter can afford. Capping to a modest amount, say \$1000, allows the rich and less affluent to show their support for a candidate or party without placing at risk 'the integrity of government decision'. It also addresses the implied freedom of political communication issue discussed in greater detail below.

The Schott Inquiry found widespread support for the use of caps although no consensus about the level at which they should be set. After considering the various arguments put by experts in the political donations area and by members of the public, the Inquiry (Schott et al 2014a) came to the conclusion that:

*Caps are a measured and appropriate way of targeting large donations which clearly pose the greatest risk in terms of corruption and undue influence (p.53).*

<sup>10</sup> IDEA (2014, p.21) outlines the rationale for prohibiting donations from: foreign entities; corporations; public and semi-public entities; trade unions; corporations with government contracts; anonymous donors; and indirect donations. Refer to the report for further details.

<sup>11</sup> Caps extend beyond money; they also include in-kind contributions ('indirect campaign contributions') that include donations of office accommodation, motor vehicles, computers, advertising and the waiving of advertising charges.

## **DISCLOSURE: THE ESSENCE OF DEMOCRACY**

The requirement to disclose publicly who has donated to a political campaign and how much they have given is the foundation of any transparent and accountable political funding regime and is clearly in the public interest. Not everyone, however, agrees. The Schott Inquiry heard arguments that the obligations attached to disclosure requirements place an unreasonable administrative burden on those responsible for disclosing. Those who do not favour disclosure also argue that being forced to disclose could dissuade some potential donors from making a donation. 'Fear of reprisals from friends, associates and the community at large' were given as reasons (Schott et al 2014a, p.96). A cap on donations that only allows modest donations may well lessen that fear.

The JSCEM (2011) received a number of submissions that argued for more transparent disclosure laws. Several reasons were given in support of this position, including:

*A lower threshold would give electors a clearer idea of who was funding political parties and the potential to which a political party might be influenced by those funding it (p.44).*

The Green Paper (Faulkner 2008) also referred to the strong link between disclosure and transparency. It explained that:

*Disclosure is founded on the principle that the public has a right to know the extent and nature of the financial involvement of political parties, independent candidates and other participants in the political process (p.47).*

Despite the importance of disclosure to the democratic process, there is very little consistency in relation to disclosure thresholds across Australia. Indeed, this issue demonstrates just how mismatched political donation laws are in Australia. This is particularly disturbing as disclosure laws are the essence of an open and accountable political donations regime. Such regimes keep safe the 'integrity and fairness of public decision making' (OECD 2016, p.70).

## **DISCLOSURE GAPS: NOT IN THE PUBLIC INTEREST**

The OECD (2016, p.70) points to two advantages of transparency. The first is it acts as 'a guard against corruption and improper influence'. The second is that it promotes timely disclosure. Knowing who donated what to whom months and, in some cases, over a year, after an election, which is what happens in some Australian jurisdictions, makes a mockery of any transparent political donations regime. No legislator (member of parliament) who truly acts in the public interest and honours the public office-public trust principle could fail to support more timely disclosure. If any do not agree, they need to make a case to the public for retention of the current system. The electorate has a right to hear their argument. It cannot be for technical reasons, as the technology exists for disclosure as soon as donations are made. For example, in the United States, the *Federal Electoral Commission Act* stipulates that reports detailing received donations must be made public within 48 hours. In practice, they are usually available within 24 hours (OECD 2016, p.74).

## COME CLEAN! STOPPING THE ARMS RACE IN POLITICAL DONATIONS

In its May 2016 budget the Victorian Government made provision for real-time reporting of medical prescriptions in order to prevent 'doctor shopping' (ABC News 2016). Its silence was deafening, however, in relation to making a similar provision for real-time disclosure of political donations. This is not surprising given the hands-off approach that government takes to political donations policy.

The leader of the NSW Opposition, Luke Foley<sup>12</sup>, when addressing that state's recent ALP conference (February 2016), summed up the issue perfectly when he stated 'disclosure delayed is disclosure denied'. Foley went on to say that NSW Labor 'will be the first political party in Australia to disclose donations when we receive them'. He pledged that 'no later than 12 months prior to the next election New South Wales Labor will disclose the sources and amounts of state donations within seven days. No more delay'.

Foley went on to challenge the Liberals to make the same commitment. This, however, is unlikely to happen because, according to Dr Stephen Kendal (2016, p.3), Premier Baird 'flicked the [Schott] recommendations to a committee ... for its consideration before any action is taken'.

Disclosure is absolutely necessary but on its own it is not sufficient. It is essential that any submitted data be verified and audited. Those undertaking the audit need to be experts in the area, as experience helps irregularities to be more readily identified.

### PENALTIES: THE WET LETTUCE APPROACH

The current penalties for breaching electoral laws across Australia, outlined in Part B, make a mockery of the country's political donations regime. They are set far too low to act as any form of deterrent and, until recently, allowed some breaches of electoral laws to go unpunished.

When Bill Shorten appeared before the Heydon Royal Commission into trade unions in July 2015, he explained to the Commission that during his 2007 campaign to enter parliament, he received approximately \$75,000 in what were previously undisclosed donations. They included a \$40,000 donation that Shorten explained was received from a director of Unibilt who was 'willing to donate a resource, employ a person'. That person acted as Shorten's campaign director from February to November 2007.

Shorten admitted to 'forgetting' to declare the donations. It seems his memory was only jogged a short time before giving evidence to the Commission (Colman 2015).<sup>13</sup> At the time, failure to comply with the law had to be prosecuted within three years, so no penalty was imposed.

Penalties have a preventive element in that they can dissuade people from breaking the law. But to do so, sanctions need to be significant. The reverse is currently the case in Australia in relation to political donations laws.

<sup>12</sup> See <http://www.smh.com.au/nsw/political-donations-nsw-labors-luke-foley-pledges-realtime-reporting-20160212-gmt1ke.html>

<sup>13</sup> Shorten explained to the Commission that he had declared the 2007 donations 'within the last 144 hours or last Friday or Monday or Tuesday' (Hurst 2015).

## **PUBLIC FUNDING**

The public funding rules in Australia present another complicated scenario. They again demonstrate Australia's mismatched and complicated approach to political funding, in particular to taxpayers' contributions to the public funding element of the system. It helps to support the case for a unified approach to how politics is funded in Australia, especially as the subsidy per eligible vote across the nine political jurisdictions ranges from approximately \$1.52 to \$8.00 per vote.

But why should taxpayers bear some of the costs associated with individuals applying for the position of member of parliament or senator, especially when taxpayers then go on to pay the salary, expenses and benefits of all successful applicants? And why should taxpayers contribute to the cost of running political parties when, as Sally Young (2013) points out, public funding has not been accompanied by 'caps on [overall] spending or limits on private donations'.

In effect, what the 'unusual' current public funding system does is spend taxpayers' money without, in most cases, imposing any limits on how much can be raised through private donations or placing a limit on the total amount of money (public and private) that can be spent on an election campaign.

Young also links public funding to welfare payments by arguing that, 'political parties that rail against "big government" are shamelessly hypocritical. They don't want others to be reliant on welfare or public handouts but are heavily so themselves'.

The issue of public funding was discussed by a panel of experts at the Schott Inquiry and was the subject of the inquiry's Working Paper 3 (Schott et al 2014e). While the Working Paper focused on full public funding, many of the arguments it raised apply to financing politics through partial public funding.

The Working Paper outlines several reasons for using taxpayers' money to partially fund elections. As it explained, it can be advantageous to the democratic process, in that it helps to ensure that all those aspiring to office have access to adequate resources. Public funding enables them to stand for election and to inform voters about their policy intentions and what other things they will do for the electorate should they be the successful candidate. By broadening the number and type of person standing for election, public funding helps prevent a situation whereby only those with considerable resources at their disposal can afford to stand for parliament.

Other benefits from public funding include reducing a political party and candidates' reliance on private sources of funding. Mike Baird, in his frank (some might say fearless) and prophetic inaugural speech to the NSW Parliament warned that 'The potential remains today to buy legislation ... and I have formed the view that donations are at a corrosive level in New South Wales'. He went on to promote full public funding so as to 'remove the potential to buy access and legislation' (Schott et al 2014e, p.2). In 2014 then opposition leader, John Robertson (Schott et al 2014e, p.2) also supported the introduction of full public funding for elections. He linked it to good government, claiming that if a policy establishing full public funding for NSW elections was introduced prior to the next election, it would result in 'the cleanest' election 'ever' in NSW.

## COME CLEAN! STOPPING THE ARMS RACE IN POLITICAL DONATIONS

However, as was pointed out in Working Paper 3 (Schott et al 2014e), regardless of whether there is full or partial public funding:

*Some people will always seek to circumvent the restrictions to obtain more campaign resources and gain an electoral advantage (p.2).*

What is needed to prevent political donations systems being abused is cultural change, which results in MPs and political parties always respecting electoral laws and complying with them. The only group that can bring about that change is MPs and the political parties to which they belong.

### PRIVATE FUNDING: WHO BENEFITS?

Donors, contributing large sums of money to political parties (for example, wealthy individuals, trade unions and corporations) maintain that the contributions they make are mere expressions of their desire to participate in the political process; to communicate politically (Walton 2015). This is the essence of the case put forward by Unions NSW to the High Court of Australia (Unions New South Wales and Others v New South Wales 2013) when they challenged an attempt by the NSW Government to confine donations to eligible voters. The unions' challenge was successful with the High Court finding that such a ban would place an unreasonable burden on an 'implied freedom of political communication' in the Australian Constitution.

In a more recent High Court case (Walton 2015), property developer Jeff McCloy challenged the NSW Government's ban on donations from property developers and the cap placed on donations more generally (Walton 2015, pp.7-8). He did so on the basis that the ban breached an implied freedom to political communication. McCloy was unsuccessful. As Walton (2015) explains in the Henry Halloran Trust research report: The Ways of the World: Implications of Political Donations for the Integrity of Planning Systems, the High Court:

*... confirmed that the prevention of both corruption and undue influence [original emphasis] are valid reasons for legislatures to restrict political donations, and that in the final analysis, the Australian Constitution must be interpreted to serve the interests of democracy (p.7).*

A central theme of the Halloran Report is the integrity of the planning process, which it argues is not simply about whether donations are corrupt. Another important consideration is whether they result in undue influence, which may not constitute corruption in a legal sense, but nevertheless have the potential to impact negatively on the impartiality of a planning system. While McCloy's case focused on property developers, the same undue influence argument can be applied to other entities, including third party campaigners and associated entities.



## **PEDDLING PRIVILEGED ACCESS**

Donations are not a one-sided affair. It is not simply a case of donors continually thrusting money onto political parties and candidates in order to express their strong and very expensive desire to communicate politically with parties and candidates, or as the electorate rightly or wrongly perceives, to influence public policy outcomes that advantage the donor. Candidates (new and sitting members) and political parties vigorously solicit donations from certain donors, sometimes to the point where the pursued donor begins to feel like a 'walking ATM'.

Not only can private donors be hounded for donations by political parties, sometimes for truly exorbitant amounts of money, they can have breakfast, lunch or dinner with senior parliamentarians, with the rate charged to attend a function climbing as high as \$20,000, depending on the seniority of the parliamentarians attending the event (Lewis 2014).

This form of 'influence peddling' grants access to very senior parliamentarians who have the power to make significant decisions in many areas of public policy. Those who can afford to pay are granted a far superior level of access to decision-makers than 'ordinary' voters who lack the financial capacity to gain entry to these undemocratic events. And they are undemocratic, for democracy is supposed to be about political equality. This is something that many senior parliamentarians, who willingly (even eagerly) sell access to their work-related time, paid for by the taxpayer, seem to have forgotten. Clearly, MPs need to be reminded that they are elected to parliament in order to make decisions in the public interest. Revisiting their fiduciary duty to voters may lead them back to the public interest path from which too many appear to have strayed.

As the author wrote in 2014, selling money-driven privileged access also treats nearly all voters with disdain. The message, perceived or real is: give me your vote, but unless you pay large sums of money, you are not welcome to dine, for several hours, with me and other senior members of my political party.

Buying privileged access is not peculiar to Australia. It is a problem for democracies around the world and many are concerned about the trust deficit between the elected representatives of the people and those who elect them to office. Part of the reason why the deficit is growing is the perception that members of parliament disproportionately favour the privileged. For example, media attention in the Canadian provinces of British Columbia (BC) and Ontario is currently focused on political donations. The media has revealed that corporations and lobbyists are paying \$10,000 (approximately 20 per cent of the average annual wage) to dine privately with the premier. The bill for dining with the minister responsible for the liquor industry and British Columbia's premier is more expensive and equates to a \$15,000 donation to BC's Liberal Party. The invitation to discuss issues surrounding the liquor industry was at the behest of the responsible minister. Perhaps even more disturbing, is the revelation that the Liberal Premier of Ontario, Kathleen Wynne, admitted that the party she leads 'sets annual fundraising targets for cabinet ministers of up to \$500,000'. Bill Tieleman (2016), in an opinion piece for The Tyee (BC) discussed the above issues and went on to explain:

*It does not matter if ... [the BC Premier] or cabinet ministers say the big donations and special dinners don't affect their decision. The perception that people with money can buy political influence is impossible to erase without meaningful legislative changes.*

## COME CLEAN! STOPPING THE ARMS RACE IN POLITICAL DONATIONS

Something needs to change in Canada. But it also needs to change in Australia. As Katharine Murphy explains in her thought-provoking 2015 article *The Politics We Deserve*, 'Australian politics has to go back to its roots', which she reminds us means going 'back to people'. But there are obstacles in the way:

*Standing between people and their parliament is a toxic swamp of self-interested rent seekers intent on making parliamentarians their puppets. The rent seekers move in at the first whiff of any "reform" debate, eager to annihilate any grey areas and safeguard their interests-stakeholder advancement first, broader public or national interest a distant second (p.22.).*

The only people who can legislate the necessary changes to reverse the priority order outlined in the above quote, are Australia's political leaders; yet they are unwilling to come together to do so. Until they do, trust in members of parliament and the political process will continue to spiral.

### PREVENTING POLICY CAPTURE

Poorly regulated systems, the OECD (2016, p.15) points out, allows powerful and influential corporations, unions, lobbyists, and various interest groups, to exert undue influence on the policy process: to 'capture' it. When this happens inappropriate, not fit for purpose policies are approved and implemented by governments. The consequences are significant for, as Althaus, Bridgman and Davis (2012) explain, public policy pervades all aspects of people's lives.

In order to protect the trustworthiness of the public policy process and lessen the risk of policy capture by the rich, powerful or influential (OECD 2016, p.17), it is important to address the possibility that some members of parliament and political parties will be more receptive to the wishes of donors than the general electorate, and when that happens it occurs at the expense of the public interest. As Murphy (2015) convincingly points out:

*There are entirely viable alternatives to the current system of funding and disclosure, yet the major parties can't seem to come to terms on prescriptions that would strengthen their position at the expense of the puppet masters. In this obstinacy they are the ultimate boiling frogs (p.24).*

The OECD (2016) Report warns that those who donate to political campaigns may expect a sort of 'reimbursement for donations made during an election' (p.22), which could lead to policy capture (p.24). To do all that is possible to prevent this, policy makers need to implement laws that provide a framework that minimises opportunities to game the system. In Australia, this involves moving to a national political donations regime and coming to a consensus on key drivers that would form the framework for such a policy. At the risk of sounding repetitive, this must be done according to the public office-public trust principle..

### ARE WE WITNESSING AN ARMS RACE?

In the 2008 Green Paper (referred to previously), then Senator John Faulkner raised the issue of an electoral campaigning 'arms race'. He warned that Australia's democracy was facing new challenges, one being the accelerating expenses associated with electioneering.

## COME CLEAN! STOPPING THE ARMS RACE IN POLITICAL DONATIONS

The primary expense for political parties is tied to electoral campaigning, and this mainly takes place through media advertising, the costs of which, Faulkner (2008) pointed out some eight years ago, are 'increasing at rates far in excess of inflation' (p.9). They continue to rise.

Senator Rhiannon made known her concerns in the previously mentioned dissenting report to the JSCEM (2011). She argued that:

*Over the last three decades the scale of spending in Australian elections has sky rocketed, with both major parties engaging in a funding arms race that has seen a rapid increase in the amount of money spent in Australian and state elections. The spending increase has outstripped the availability of public funding, and thus private donations to major political parties have increased markedly, particularly from business and lobby groups who are most affected by government legislation (p.233).*

She went on to point out that the rise in political donations has led to a culture where:

*... large donors have gained privileged access to ministers and MPs, and policy decisions have benefitted large donors such as property developers (p.234).*

This Senator Rhiannon explained has:

*[Led to the] perception that corporate donors are buying influence. In some cases there is evidence that this perception accurately reflects the real relationship between politicians and donors (p.234).*

A sensible way to stop the arms race is to put a ceiling on what can be expended on election campaigns.

## COME CLEAN! STOPPING THE ARMS RACE IN POLITICAL DONATIONS

# CONCLUSION

The Australian community has made known its 'disgust' with elements of this country's political donations system. However reforming it requires the silent majority to cease being silent. Political donations need to become an election issue at every federal, state and territory election, until such times as this country's political leaders establish a national approach to how politics is funded in Australia.

The difficulty the Australian community faces in achieving such an outcome rests on convincing those with a vested interest in maintaining the status quo to reform the system. But the prospect of achieving meaningful and speedy reform is hampered somewhat by the reality that moving to a national political donations policy comes with a sting.

The sting emanates from the fact that most of the beneficiaries of the status quo are the same group of people invested with the legislative power to rectify the current deficiencies in Australia's electoral laws. These include: the 'laissez-faire' approach to banning particular groups of donors and to caps on donations; the antiquated and undemocratic approach blanketing receipt of donations and their disclosure; and the grossly inadequate, some might believe laughable sanctions for breaching electoral laws. It is not surprising that the public has so little trust in political leaders, members of parliament, political parties and the political process when they deliver such muddled public policy. Perhaps voters need reminding that ultimate power rests with them and, like their elected representatives, they should use that power in the (national) public interest.

The author is not politically naïve and appreciates that asking governments to support and implement a national approach is fraught with challenges for them on many levels, but as referred to often in this paper, there are public office-public trust principles that can guide them through the very real maze of conflicting priorities and loyalties. Reaching a consensus on adopting a national approach to political funding laws would demonstrate to the electorate, in every political jurisdiction, that their representatives understand and accept that election to parliament obliges them to always prioritise the public interest when making decisions that affect the public.

While changing the system to a national one is a necessary step to a more open, transparent and equitable system, it does not go far enough. There needs to be an independent mechanism for overseeing the system, which goes beyond the Australian Electoral Commission. There is also a need for a national anti-corruption commission with the coercive powers required to shine an accountability spotlight onto political donations laws in the way that ICAC in NSW has been able to do at the local government and state level.

# PART B

## POLITICAL DONATION RULES BY JURISDICTION

## COME CLEAN! STOPPING THE ARMS RACE IN POLITICAL DONATIONS

# COMMONWEALTH

### BANNED DONORS

There are no banned donors at the Commonwealth level.

### CAPS ON DONATIONS

No caps apply

### DISCLOSURE THRESHOLD/RULES

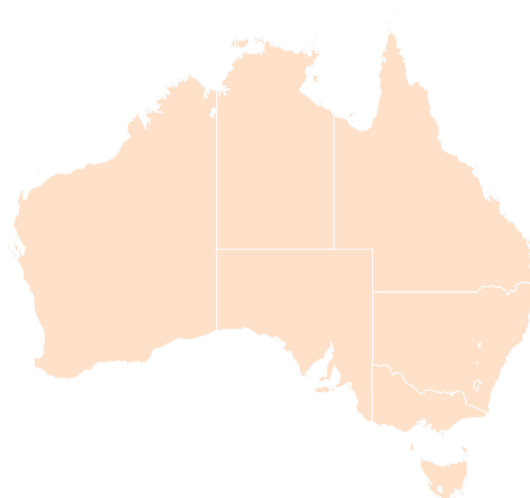
The Commonwealth disclosure threshold is indexed, starting with the 'more than \$10,000' amendment made in 2005. It is currently (July 2015-June 2016) 'more than \$13,000'. ([http://www.aec.gov.au/Parties\\_and\\_Representatives/public\\_funding/threshold.htm](http://www.aec.gov.au/Parties_and_Representatives/public_funding/threshold.htm))

Donors (that is, any person or organisation that makes a donation to a political party, candidate, or third party for the benefit of a political party) must lodge either a 'donor to political party return' or 'election donor return', subject to the disclosure threshold. Body corporates are held to be a single entity, and donations are aggregated across the group for a single return. ([http://www.aec.gov.au/Parties\\_and\\_Representatives/financial\\_disclosure/guides/donors/index.htm](http://www.aec.gov.au/Parties_and_Representatives/financial_disclosure/guides/donors/index.htm))

Federal, state and territory branches of political parties are counted as separate for the purposes of disclosure. The AEC notes that several state and territory jurisdictions have their own disclosure schemes. These are separate to the federal funding and disclosure scheme administered by the AEC. ([http://www.aec.gov.au/Parties\\_and\\_Representatives/financial\\_disclosure/guides/political-parties/index.htm](http://www.aec.gov.au/Parties_and_Representatives/financial_disclosure/guides/political-parties/index.htm))

### PENALTIES FOR NOT COMPLYING WITH THE LAW

Failure to lodge a return by the due date incurs a fine of \$5,000 for agents of a political party and \$1,000 in all other cases. The fine for lodging a false or misleading return is \$10,000/\$5,000, respectively. This has not changed since 2005. ([http://www.aec.gov.au/Parties\\_and\\_Representatives/financial\\_disclosure/guides/election-donors/appendix3.htm](http://www.aec.gov.au/Parties_and_Representatives/financial_disclosure/guides/election-donors/appendix3.htm)) ([https://www.legislation.gov.au/Details/C2016C00222/Html/Text#\\_Toc446513616](https://www.legislation.gov.au/Details/C2016C00222/Html/Text#_Toc446513616)) (<https://www.legislation.gov.au/Details/C2005C00337>)





## COME CLEAN! STOPPING THE ARMS RACE IN POLITICAL DONATIONS

### PUBLIC FUNDING

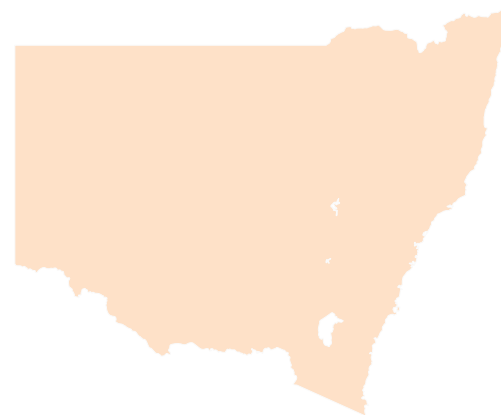
Federal electoral funding is calculated by multiplying formal first preference votes by the rate of payment. The rate of payment is indexed every six months and is currently (January-June 2016) 262.259 cents, or roughly \$2.62.

FEDERAL ELECTION YEAR	RATE OF PAYMENT (IN CENTS)
2016	262.259
2013	248.8
2010	231.191
2007	210.027
2004	194.397
2001	179.026
1998	162.210
1996	157.594
1993	100.787 (HoR) / 50.393 (Senate)
1990	91.223 (HoR) / 45.611 (Senate)
1987	76.296 (HoR) / 38.148 (Senate)
1984	61.2 (HoR) / 30.6 (Senate)

([http://www.aec.gov.au/Parties\\_and\\_Representatives/public\\_funding/Current\\_Funding\\_Rate.htm](http://www.aec.gov.au/Parties_and_Representatives/public_funding/Current_Funding_Rate.htm))

## COME CLEAN! STOPPING THE ARMS RACE IN POLITICAL DONATIONS

# NEW SOUTH WALES



### BANNED DONORS

NSW bans donations from:

- *property developers*
- *tobacco industry business entities*
- *liquor or gambling industry business entities*
- *close associates of any of the above; and*
- *industry representative organisations of the above if the majority of members are prohibited donors.*

Definitions of these groups can be found at the link below. ([http://www.elections.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0006/129750/EF\\_00-0077\\_FactSheet-Prohibited\\_Donors.pdf](http://www.elections.nsw.gov.au/__data/assets/pdf_file/0006/129750/EF_00-0077_FactSheet-Prohibited_Donors.pdf))

A person who is a prohibited donor and who makes a payment to a party for a membership of the party or for affiliation with the party is permitted to pay less than \$1,000 per financial year to the party for these purposes. Any amounts paid to a party by a person for these purposes in a financial year that are \$1,000 or more are prohibited. ([http://www.elections.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0006/129750/EF\\_00-0077\\_FactSheet-Prohibited\\_Donors.pdf](http://www.elections.nsw.gov.au/__data/assets/pdf_file/0006/129750/EF_00-0077_FactSheet-Prohibited_Donors.pdf))

### CAPS ON DONATIONS

NSW caps political donations. Multiple donations, to the same party/candidate or to other members/candidates endorsed by that party, within a financial year from the same donor are aggregated with regard to donation caps. It is unlawful to accept a donation that exceeds the cap.

### CAPS FOR POLITICAL DONATIONS DURING THE 2011 AND 2015 NSW STATE ELECTIONS

\$5,000 to or for the benefit of a registered political party

\$5,000 to or for the benefit of a group

\$2,000 to or for the benefit of an unregistered party

\$2,000 to or for the benefit of a candidate

\$2,000 to or for the benefit of an elected member

\$2,000 to or for the benefit of a third-party campaigner

## COME CLEAN! STOPPING THE ARMS RACE IN POLITICAL DONATIONS

### **CAPS FOR POLITICAL DONATIONS MADE BETWEEN 1 JULY 2015 AND 30 JUNE 2016**

\$5,800 to or for the benefit of a registered political party

\$5,800 to or for the benefit of a group

\$2,500 to or for the benefit of an unregistered party

\$2,500 to or for the benefit of a candidate

\$2,500 to or for the benefit of an elected member

\$2,500 to or for the benefit of a third-party campaigner

([http://www.elections.nsw.gov.au/fd/political\\_donations/caps\\_on\\_political\\_donations](http://www.elections.nsw.gov.au/fd/political_donations/caps_on_political_donations))

A party subscription paid to a party is not subject to the caps on political donations, up to the maximum subscription amount. The maximum subscriptions are:

- *for membership of a party the maximum subscription allowed is \$2,000 per member*
- *for an affiliation with a party the maximum subscription allowed is:*
- *\$2,000 if the amount of the subscription is not based on the number of affiliate members, or*
- *\$2,000 multiplied by the number of affiliate members if the amount of the subscription is based on the number of affiliate members*

([http://www.elections.nsw.gov.au/fd/political\\_donations/caps\\_on\\_political\\_donations](http://www.elections.nsw.gov.au/fd/political_donations/caps_on_political_donations))

## COME CLEAN! STOPPING THE ARMS RACE IN POLITICAL DONATIONS

### CAPS ON ELECTORAL EXPENDITURE

<b>Parties with more than 10 Legislative Assembly candidates in a general election</b>	<b>Cap</b>
2011 State Election	\$100,000
27 March 2011 – 28 March 2015	\$111,200
2015 State Election	\$100,000
29 March 2015 – 23 March 2019	\$122,900
<b>Parties with Legislative Council candidates in a general election</b>	<b>Cap</b>
2011 State Election	\$1,050,000
27 March 2011 – 28 March 2015	\$166,600
2015 State Election	\$1,050,000
29 March 2015 – 23 March 2019	\$1,288,500
<b>Independent groups of candidates in Legislative Council general elections</b>	<b>Cap</b>
2011 State Election	\$1,050,000
27 March 2011 – 28 March 2015	\$166,600
2015 State Election	\$1,050,000
29 March 2015 – 23 March 2019	\$1,288,500
<b>Party candidates in Legislative Assembly general election</b>	<b>Cap</b>
2011 State Election	\$100,000
27 March 2011 – 28 March 2015	\$111,200
2015 State Election	\$100,000
29 March 2015 – 23 March 2019	\$122,900
<b>Non-grouped candidates in Legislative Council general election</b>	<b>Cap</b>
2011 State Election	\$150,000
27 March 2011 – 28 March 2015	\$166,700
2015 State Election	\$150,000
29 March 2015 – 23 March 2019	\$184,200
<b>Independent candidates in Legislative Assembly general election</b>	<b>Cap</b>
2011 State Election	\$150,000
27 March 2011 – 28 March 2015	\$166,700
2015 State Election	\$150,000
29 March 2015 – 23 March 2019	\$184,200

([http://www.elections.nsw.gov.au/fd/electoral\\_expenditure/caps\\_on\\_electoral\\_expenditure](http://www.elections.nsw.gov.au/fd/electoral_expenditure/caps_on_electoral_expenditure))

## COME CLEAN! STOPPING THE ARMS RACE IN POLITICAL DONATIONS

### DISCLOSURE THRESHOLD/RULES

'Small political donations' – that is, donations of less than \$1,000 – need not be disclosed. Donations of \$1,000 or more, or multiple donations that total more than \$1,000, must be disclosed. ([http://www.elections.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0009/129852/Disclosures\\_Donations\\_Expenditure.pdf](http://www.elections.nsw.gov.au/__data/assets/pdf_file/0009/129852/Disclosures_Donations_Expenditure.pdf))

Disclosures are made at the end of each financial year. Political parties, elected members, candidates and groups, third-party campaigners and major political donors, must make disclosures. A declaration of disclosures will only be accepted by the New South Wales Electoral Commission (NSWEC) if it has been certified by a registered company auditor (unless exempt). (<http://www.elections.nsw.gov.au/fd/disclosure>)

Political donations and electoral expenditure included in a declaration of disclosures must be vouched for by providing with the declaration the following (except for major political donors): copies of the accounts or receipts for electoral communication expenditure, and copies of advertising and printed election material, and the receipt and acknowledgement book containing copies of each receipt and acknowledgement slip issued to political donors. (<http://www.elections.nsw.gov.au/fd/disclosure>)

### PENALTIES FOR NOT COMPLYING WITH THE LAW

The penalty for exceeding donation caps is 400 penalty units, 2 years imprisonment or both. A penalty unit is \$110 in NSW. (<http://www.legislation.nsw.gov.au/#/view/act/1981/78/full>)

### PUBLIC FUNDING

Public funding is available to candidates contesting state elections, but not local elections. Three funds (Election Campaigns, Administration, and Policy Development) administer reimbursement to candidates, parties and members of Parliament. ([http://www.elections.nsw.gov.au/fd/public\\_funding](http://www.elections.nsw.gov.au/fd/public_funding))

'Electoral Communication Expenditure' (advertising, campaign staff, travel and accommodation, research for campaign) is capped in NSW. The capped period begins 1 October in the year before the election (on the day of the writ's issue in the instance of a by-election). Public funding in NSW is a percentage of the party/candidate's expenditure within the funding cap. Percentages differ depending on the type of party/candidate.

### ASSEMBLY PARTIES

- *An Assembly party is a party that endorsed more than 10 candidates in the Legislative Assembly general election.*
- *For expenditure within the first 10% of the party's expenditure cap, 100% of the actual expenditure incurred by the party; and*
- *For expenditure within the next 10-90% of the party's expenditure cap, 75% of the actual expenditure incurred by the party; and*
- *For expenditure within the last 90-100% of the party's expenditure cap, 50% of the actual expenditure incurred by the party.*

## COME CLEAN! STOPPING THE ARMS RACE IN POLITICAL DONATIONS

### COUNCIL PARTIES

- *A Council party is a party that endorses between up to 10 candidates in the Legislative Council general election.*
- *For expenditure within the first one third of the party's expenditure cap, 100% of the actual expenditure incurred by the party; and*
- *For expenditure within the next one third of the party's expenditure cap, 75% of the actual expenditure incurred by the party; and*
- *For expenditure within the last third of the party's expenditure cap, 50% of the actual expenditure incurred by the party.*
- *Endorsed Legislative Assembly Candidates*
- *For expenditure within the first 10% of the candidate's expenditure cap, 100% of the actual expenditure incurred by the candidate; and*
- *For expenditure within the next 10-50% of the candidate's expenditure cap, 50% of the actual expenditure incurred by the candidate.*

### INDEPENDENT LEGISLATIVE ASSEMBLY CANDIDATES

- *For expenditure within the first 10% of the candidate's expenditure cap, 100% of the actual expenditure incurred by the candidate; and*
- *For expenditure within the next 10-80% of the candidate's expenditure cap, 50% of the actual expenditure incurred by the candidate.*
- *Independent Legislative Council Candidates*
- *For expenditure within the first one third of the candidate's expenditure cap, 100% of the actual expenditure incurred by the candidate; and*
- *For expenditure within the next one third of the candidate's expenditure cap, 75% of the actual expenditure incurred by the candidate; and*
- *For expenditure within the last one third of the candidate's expenditure cap, 50% of the actual expenditure incurred by the candidate*

([http://www.elections.nsw.gov.au/fd/public\\_funding/election\\_campaigns\\_fund](http://www.elections.nsw.gov.au/fd/public_funding/election_campaigns_fund))



# QUEENSLAND

## BANNED DONORS

Candidates may not accept gifts of foreign property during the candidacy period.

Any foreign gift not returned within six weeks of receipt is forfeited to the state.

Anonymous gifts of more than \$200 are forfeited to the state.

([http://www.ecq.qld.gov.au/\\_\\_data/assets/pdf\\_file/0018/34614/FDR-State-Candidates-and-Agents.pdf](http://www.ecq.qld.gov.au/__data/assets/pdf_file/0018/34614/FDR-State-Candidates-and-Agents.pdf))

## CAPS ON DONATIONS

No caps apply.

## DISCLOSURE THRESHOLD/RULES

'Gifts' (how the Queensland Electoral Commission (QEC) terms 'donations' over \$200) must be disclosed when exceeding \$1,000. The *Electoral Reform Amendment Bill 2013* changed this threshold to \$12,400. (<https://www.legislation.qld.gov.au/Bills/54PDF/2013/ElectoralReformAB13.pdf>) but as of 14 May 2015 the threshold has returned to \$1,000. (<https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/E/ElectoralA92.pdf>)

Disclosure returns must be submitted within 15 weeks of the election. Disclosure returns must include:

- *electoral expenditure incurred by or with the candidate's authority;*
- *total amount of gifts including fundraising contributions and gifts in kind received by or on behalf of the candidate;*
- *number of entities and persons who made gifts including fundraising contributions and gifts in kind received by or on behalf of the candidate;*
- *prescribed details of entities and persons who made gifts including fundraising contributions and gifts in kind received by or on behalf of the candidate;*
- *loans received by or on behalf of the candidate other than from a financial institution;*
- *prescribed details of each loan other than from a financial institution received by or on behalf of the candidate. ([http://www.ecq.qld.gov.au/\\_\\_data/assets/pdf\\_file/0018/34614/FDR-State-Candidates-and-Agents.pdf](http://www.ecq.qld.gov.au/__data/assets/pdf_file/0018/34614/FDR-State-Candidates-and-Agents.pdf))*

## COME CLEAN! STOPPING THE ARMS RACE IN POLITICAL DONATIONS

### PENALTIES FOR NOT COMPLYING WITH THE LAW

There are penalties for infringing funding and disclosure laws. Infringement notices imposing monetary penalties for offences can be issued. These offences include:

- *failure to give a return;*
- *giving a false or incomplete return;*
- *failure to keep proper records.*

Unpaid penalties are enforced through the State Penalties Enforcement Registry.

The penalty for failing to submit a return is 100 penalty units in the case of registered party agents, and 20 in all other cases (a penalty unit is currently \$117.80). The penalty for submitting an incomplete return is 20 penalty units. The penalty for submitting a false return is 200 penalty units for the agent of a party, 100 units for the agent of a candidate and 50 in all other cases. The penalty for misleading the person making a claim is 20 penalty units.

([http://www.ecq.qld.gov.au/\\_\\_data/assets/pdf\\_file/0018/34614/FDR-State-Candidates-and-Agents.pdf](http://www.ecq.qld.gov.au/__data/assets/pdf_file/0018/34614/FDR-State-Candidates-and-Agents.pdf))

([http://www.ecq.qld.gov.au/\\_\\_data/assets/pdf\\_file/0020/34616/FDR-State-Third-Parties-Handbook.pdf](http://www.ecq.qld.gov.au/__data/assets/pdf_file/0020/34616/FDR-State-Third-Parties-Handbook.pdf))

(<https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/E/ElectoralA92.pdf>)

## COME CLEAN! STOPPING THE ARMS RACE IN POLITICAL DONATIONS

### PUBLIC FUNDING

Candidates qualify to claim election funding if they poll at least 6% (4% before the *Electoral Reform Amendment Bill 2013*) of the formal first preference vote in the electorate contested. Public funding for candidates at state elections in Queensland is a reimbursement scheme. Election funding cannot exceed actual campaign related expenditure.

If a candidate endorsed by a registered political party and the party both claim to have incurred the same expenditure, the Act provides that the expenditure is incurred by the party.

FINANCIAL YEAR	FUNDING AMOUNT (IN DOLLARS)	
	Party	Candidate
2015/16	3.034	1.516
2014/15	2.991	1.495
2013/14	2.9	1.45
2012/13	For this period, election funding was reimbursed as a percentage of campaign expenditure, within a capped amount.	
2011/12		
2010/11		1.64455
2009/10		1.59596
2008/09		1.54737
2007/08		1.7636
2006/07		1.43431
2005/06		1.39413
2004/05		1.35862
2003/04		1.32498
2002/03		1.28106
2001/02		1.23995
2000/01		1.17267

([http://www.ecq.qld.gov.au/\\_data/assets/pdf\\_file/0018/34614/FDR-State-Candidates-and-Agents.pdf](http://www.ecq.qld.gov.au/_data/assets/pdf_file/0018/34614/FDR-State-Candidates-and-Agents.pdf))

([http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/FlagPost/2014/May/Queenslandelectorallaws](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2014/May/Queenslandelectorallaws))

## COME CLEAN! STOPPING THE ARMS RACE IN POLITICAL DONATIONS

# SOUTH AUSTRALIA



### BANNED DONORS

There are no banned donors in South Australia.

### CAPS ON DONATIONS

No caps apply.

### DISCLOSURE THRESHOLD/RULES

Donations to a candidate, political party or associated third party of more than \$5,000 must be reported to the Electoral Commissioner. The disclosure period begins 30 days after the previous election and ends 30 days after the current election.

A special return must be made to the Electoral Commissioner within 7 days of a receiving a gift or donation with a value of more than \$25,000.

Donations of \$200 or more cannot be made anonymously.

A political party cannot receive more than \$500 for entry to a 'relevant event' (that is, a fundraiser for the party or an event promoted as offering access to a Minister of the Crown/Member of SA Parliament, or a member of staff of same). (<https://www.legislation.sa.gov.au/LZ/C/A/ELECTORAL%20ACT%201985/CURRENT/1985.77.UN.PDF>)

### PENALTIES FOR NOT COMPLYING WITH THE LAW

Failing to submit a return of donations to the Electoral Commissioner within the given time carries a maximum penalty of \$10,000 for political parties and \$5,000 for all other cases.

Submitting an incomplete return has a maximum penalty of \$1,500.

Submitted a false or misleading return, or providing false or misleading information to a person submitting a return, has a maximum penalty of \$10,000. (<https://www.legislation.sa.gov.au/LZ/C/A/ELECTORAL%20ACT%201985/CURRENT/1985.77.UN.PDF>)

### PUBLIC FUNDING

Candidates must receive more than 4% of the vote or be elected to receive public funding.

Candidates who are incumbent members of parliament receive \$3 per eligible vote in public funding. Candidates who are not incumbent members of parliament receive \$3.50 per eligible vote for the first 0-10% of the total primary vote, after which (10.01-100%) they receive \$3 per vote. (<https://www.legislation.sa.gov.au/LZ/C/A/ELECTORAL%20ACT%201985/CURRENT/1985.77.UN.PDF>)

# TASMANIA



## **POLITICAL DONATIONS**

Tasmania has no laws relating to political donations.

## **CAMPAIGN EXPENDITURE**

It does have laws relating to expenditure.

A candidate's expenditure cannot exceed the expenditure limit. This limit was \$10,000 in 2005 and increases by \$500 each year (making it currently \$15,500). A candidate who incurs expenditure not exceeding \$1,000 over this limit is liable to be fined 0.05 penalty units per \$1 over the expenditure limit (a single penalty unit is currently indexed at \$154). A candidate who incurs expenditure exceeding \$1,000 over this limit is liable to be fined 150 penalty units. ([http://www.justice.tas.gov.au/about/legislation/value\\_of\\_indexed\\_units\\_in\\_legislation](http://www.justice.tas.gov.au/about/legislation/value_of_indexed_units_in_legislation))

An election expenditure return must be submitted within 60 days of the election results' declaration. All expenditure over \$20 must be accompanied by an invoice or receipt. The penalty for not submitting a return is 200 penalty units. Submitting a false or misleading return incurs a fine of 300 penalty units or 12 months imprisonment.

In 2013, Parliament passed an amendment that banned parties incurring expenditure from promoting or procuring the election of a candidate, regardless of whether they are a candidate endorsed by the party. Only the candidate and their electoral agent may incur expenditure; the penalty is 200 penalty units or 6 months imprisonment. ([http://www.thelaw.tas.gov.au/tocview/index.w3p;cond=;doc\\_id=51%2B%2B2004%2BAT%40EN%2B20160406000000;histon=Y;pdfauthverid=;prompt=;rec=;rtfauthverid=;term=;webauthverid=](http://www.thelaw.tas.gov.au/tocview/index.w3p;cond=;doc_id=51%2B%2B2004%2BAT%40EN%2B20160406000000;histon=Y;pdfauthverid=;prompt=;rec=;rtfauthverid=;term=;webauthverid=))

## **PUBLIC FUNDING**

Tasmania has no public funding for state elections.

## COME CLEAN! STOPPING THE ARMS RACE IN POLITICAL DONATIONS

# VICTORIA



### BANNED DONORS

There are no banned donors in Victoria.

### CAPS ON DONATIONS

The holder of a 'relevant licence' (or a related company under section 50 of the *Corporations Act*) cannot make a donation to a registered political party that exceeds \$50,000 in a single financial year. This refers to a licence granted under the *Casino Control Act* or the *Gambling Regulation Act*. ([http://www.austlii.edu.au/au/legis/vic/consol\\_act/ea2002103/s216.html](http://www.austlii.edu.au/au/legis/vic/consol_act/ea2002103/s216.html))

### DISCLOSURE THRESHOLD/RULES

There is no requirement for disclosure in Victoria. However, the larger parties are organised on a State basis, with State branches being registered federally as well as the national organisations: federal disclosure laws apply to federally registered political parties. Therefore, as the larger parties are also registered under Victorian law, it is possible to learn about donations to Victorian parties by examining the disclosures of the Victorian branches of the federally registered parties. Additionally, under Section 222 of Victoria's *Electoral Act 2002*, Victorian registered parties have to provide the Victorian Electoral Commission (VEC) with a copy of their annual return to the AEC. ([http://www.austlii.edu.au/au/legis/vic/consol\\_act/ea2002103/s222.html](http://www.austlii.edu.au/au/legis/vic/consol_act/ea2002103/s222.html))



## COME CLEAN! STOPPING THE ARMS RACE IN POLITICAL DONATIONS

### PENALTIES FOR NOT COMPLYING WITH THE LAW

Under Section 217 of the *Victorian Electoral Act 2002*, if the amount by which the total amount or value of the political donations to a registered political party exceeds \$50,000, the excess is forfeited to the state. ([http://www.legislation.vic.gov.au/domino/web\\_notes/ldms/pubstatbook.nsf/f932b66241ecf1b7ca256e92000e23be/3264bf1de203c08aca256e5b00213ffb/\\$FILE/02-023a.pdf](http://www.legislation.vic.gov.au/domino/web_notes/ldms/pubstatbook.nsf/f932b66241ecf1b7ca256e92000e23be/3264bf1de203c08aca256e5b00213ffb/$FILE/02-023a.pdf))

Under Section 222 of the *Victorian Electoral Act 2002* the registered officer of a registered political party must give to the VEC a copy of the annual return provided on behalf of the registered political party under section 314AC of the *Commonwealth Electoral Act 1918* as soon as the annual return has been provided under that section. Penalties and offences are outlined below in Section 217 and Section 218 of the *Victorian Electoral Act 2002*:

*Offence: Giving a statement containing particulars that are false or misleading to the knowledge of the registered officer/candidate.*

*Penalty: 120 penalty units (currently \$18,200.40) for a registered officer; 60 penalty units (currently \$9,100.20) for a candidate. As well, the court may order a refund of the public funding payment.*

*Offence: Deliberately providing false or misleading information to a person required to give a statement.*

*Penalty: 10 penalty units (currently \$1,516.70)*

[http://www.austlii.edu.au/au/legis/vic/consol\\_act/ea2002103/s217.html](http://www.austlii.edu.au/au/legis/vic/consol_act/ea2002103/s217.html) [http://www.austlii.edu.au/au/legis/vic/consol\\_act/ea2002103/s218.html](http://www.austlii.edu.au/au/legis/vic/consol_act/ea2002103/s218.html)

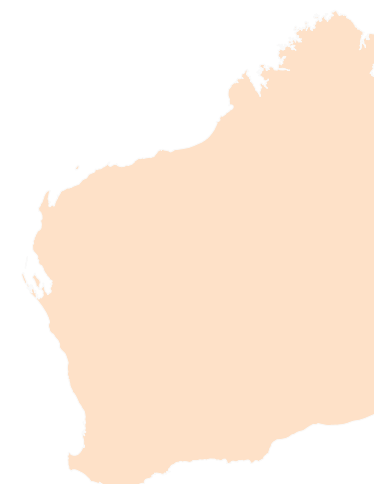
### PUBLIC FUNDING

Candidates who receive more than 4% of first preference votes currently receive \$1.66 per vote. It is indexed to the CPI (every 6 months). Public funding goes to the party for party candidates, and to the candidate for independent candidates. ([http://www.austlii.edu.au/au/legis/vic/consol\\_act/ea2002103/s211.html](http://www.austlii.edu.au/au/legis/vic/consol_act/ea2002103/s211.html))

To get public funding, the party or independent candidate has to submit an audited statement of expenditure to the VEC. Only certain types of expenditure can be included (mainly advertising). The statement does not have to detail the expenditure, but does have to state whether this expenditure exceeds the public funding entitlement or is less than the entitlement. If the expenditure is less than the entitlement, the party or candidate only receives the amount spent. As identified above, there are substantial penalties for deliberately providing false or misleading information in a statement. ([http://www.austlii.edu.au/au/legis/vic/consol\\_act/ea2002103/s209.html](http://www.austlii.edu.au/au/legis/vic/consol_act/ea2002103/s209.html))

## COME CLEAN! STOPPING THE ARMS RACE IN POLITICAL DONATIONS

# WESTERN AUSTRALIA



### BANNED DONORS

There are no banned donors in Western Australia.

### CAPS ON DONATIONS

No caps apply.

### DISCLOSURE THRESHOLD/RULES

Anonymous donations of more than \$2,300 must be disclosed. A return for the previous financial year must be lodged by 30 November.

Parties and candidates must disclose gifts and electoral expenditure for the campaign period. For incumbents, this period begins 30 days after the previous polling day and ends 30 days after the current polling day. For new candidates, it begins a year prior to the day of nomination and ends 30 days after the current polling day.

### PENALTIES FOR NOT COMPLYING WITH THE LAW

Fraudulent or misleading returns carry the following penalties:

- *\$15,000 for party agents*
- *\$7,500 for those not a party agent*
- *\$1,500 for those supplying false information to the person submitting the return*

(<https://www.elections.wa.gov.au/candidates-and-parties-funding-and-disclosure/submitting-return>)

### PUBLIC FUNDING

Candidates who receive more than 4% of first preference votes are eligible for public funding. The amount is indexed and is currently \$1.85607 per vote. If eligible electoral expenditure is less than the amount that would be reimbursed, the lesser amount is paid. (<https://www.elections.wa.gov.au/candidates-and-parties-funding-and-disclosure/submitting-return#ElectionFunding>)

# AUSTRALIAN CAPITAL TERRITORY



## BANNED DONORS

There are no banned donors in the Australian Capital Territory (ACT).

## CAPS ON DONATIONS

No caps apply on donations in the ACT.

The *Electoral Amendment Act 2015* commenced on 3 March 2015. This removed the cap on donations entirely (previously, it had been capped at \$10,000).

## DISCLOSURE THRESHOLD/RULES

Donations over \$1,000 must be disclosed.

Under the *Electoral Amendment Act 2015*:

- *donations may be received from organisations and persons not enrolled for ACT purposes and irrespective of their place of residence*
- *Associated entities of a political party are not considered part of that party in terms of the expenditure cap. They are subject to an independent expenditure cap.*

The electoral expenditure cap decreased to \$40,000 (indexed by CPI for future elections), down from \$60,000. The following groups are considered distinct and independent in terms of the expenditure cap:

- *Candidates for party groupings (up to a maximum of 25 candidates)*
- *Non-party candidates*
- *Third party campaigners*
- *Associated entities*

Anonymous gifts (that is, gifts under \$1,000) may not exceed \$25,000 in total. This cap previously applied only to gifts that were less than \$250.

Changes have been made to the timing for the regular reporting of gifts so that:

- *In an election year, if the value of the gift or gifts received from a person reaches \$1,000 in the financial year between 1 April and 30 June, the declaration must be made to the Electoral Commissioner by 7 July;*
- *In an election year, if the value of the gift or gifts received from a person reaches \$1,000 in the financial year after 30 June and before the end of polling day, the declaration must be made to the Electoral Commissioner 7 days after the total amount received from the person reaches \$1,000; and*

## COME CLEAN! STOPPING THE ARMS RACE IN POLITICAL DONATIONS

- *In a non-election year, or in the first quarter (1 January until 31 March) of an election year, if the value of the gift or gifts received from a person reaches \$1,000 in the financial year, the declaration must be made to the Electoral Commissioner within 30 days of the end of the financial quarter in which the total amount received from the person reached \$1,000.*

Disclosure returns must be submitted by 31 August.

The capped expenditure period lasts from 1 January until the end of polling day. For the 2016 election, it is the period from 1 January 2016 until the end of polling day (15 October 2016).

An ACT registered political party may not use payments received of more than \$10,000 in a financial year from a related party, for the purposes of incurring ACT electoral expenditure.

([http://www.elections.act.gov.au/funding\\_and\\_disclosure/new\\_electoral\\_campaign\\_finance\\_laws\\_in\\_the\\_act2](http://www.elections.act.gov.au/funding_and_disclosure/new_electoral_campaign_finance_laws_in_the_act2))

### PENALTIES FOR NOT COMPLYING WITH THE LAW

Part 17 of the *ACT Electoral Act 1992* (pp.228-249) identifies and categorises many electoral offences and related penalties. The Act contains 3 bribery and improper influence offences, 3 protection of rights offences, 17 campaigning offences, 2 electronic voting offences, 1 voting fraud offence, 6 electoral papers offences, and 5 official functions offences.

Minor amendments of the *Electoral Act 1992* which took effect on 27 April 2016 increased penalty units for individuals committing an offence from \$100 to \$150 and for corporations from \$700 to \$750.

Penalties for electoral offences at the upper end range from 50 penalty units, imprisonment for 6 months or both. There are also penalty units for less serious offences which incur up to 30, 10 or 5 penalty units. These offences and penalties include:

Breaching the cap on electoral expenditure, which incurs a penalty equal to twice the amount by which the electoral expenditure exceeds the expenditure cap.

Failure to submit a disclosure return which incurs a fine of 50 penalty units for reporting agents of parties.

Submitting an incomplete return incurs a fine of 20 penalty units.

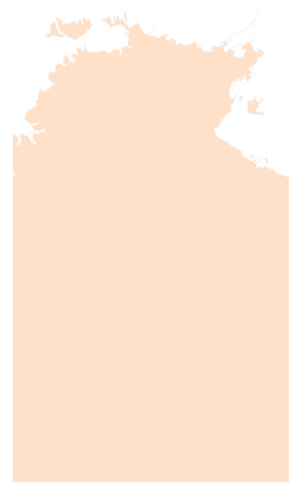
Submitting a fraudulent return, or fraudulent information given to the person submitting the return, incurs a fine of 50 penalty units, imprisonment for six months, or both.

<http://www.legislation.act.gov.au/a/1992-71/default.asp>

### PUBLIC FUNDING

Parties and candidates who receive more than 4% of first preference votes will receive \$8 per vote in public funding. This election funding is indexed for future elections. Public funding has risen from \$2 per vote in the 2012 election. ([http://www.elections.act.gov.au/funding\\_and\\_disclosure/new\\_electoral\\_campaign\\_finance\\_laws\\_in\\_the\\_act2](http://www.elections.act.gov.au/funding_and_disclosure/new_electoral_campaign_finance_laws_in_the_act2))

# NORTHERN TERRITORY



## **BANNED DONORS**

There are no banned donors in the Northern Territory.

## **CAPS ON DONATIONS**

No caps apply.

## **DISCLOSURE THRESHOLD/RULES**

Parties must disclose all amounts received during the financial year, as well as the details of donors who gave \$1,500 or more. Candidates must disclose all gifts, along with the details of donors who gave \$200 or more. (<http://www.ntec.nt.gov.au/FinancialDisclosure/Pages/Candidates.aspx>) (<http://www.ntec.nt.gov.au/FinancialDisclosure/Pages/Registered-Political-Parties.aspx>)

For parties, returns are due 16 weeks after the end of the financial year. The Northern Territory Electoral Commission (NTEC) makes these available on 1 March the following year.

For candidates, returns are due 30 days after polling day. The NTEC makes these available 25 weeks after polling day. (<http://www.ntec.nt.gov.au/FinancialDisclosure/Pages/Candidates.aspx>) (<http://www.ntec.nt.gov.au/FinancialDisclosure/Pages/Registered-Political-Parties.aspx>)

## **PENALTIES FOR NOT COMPLYING WITH THE LAW**

Failing to complete a return, late submission or lodging an incomplete or false return all carry a fine of 200 penalty units (or 12 months imprisonment) for persons and 1000 penalty units for body corporates. (<http://www.ntec.nt.gov.au/FinancialDisclosure/Pages/Financial-Disclosure-Offences.aspx>)

## **PUBLIC FUNDING**

NT has no public funding. (<http://www.ntec.nt.gov.au/MediaAndPublications/ElectionReportsAndSubmissions/Documents/Compliance%20Review%20Report%20on%20Political%20Disclosure%20Returns.pdf>)

## COME CLEAN! STOPPING THE ARMS RACE IN POLITICAL DONATIONS

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