Committee Secretary
Joint Standing Committee on Electoral Matters
By email: em@aph.gov.au

6 September 2019

Dear Secretary,

Submission to Joint Standing Committee on Electoral Matters' Inquiry into and report on all aspects of the conduct of the 2019 Federal Election and matters related thereto

My submission to the Committee's inquiry into the 2019 Federal Election calls for a fundamental reform of Commonwealth political finance laws – specifically:

1. Effective transparency of political funding
2. Caps on election spending
3. Caps on political donations
4. A fair system of public funding of political parties and candidates
5. Ban on overseas-sourced donations and donations from foreign governments
6. Stricter limits on government advertising in period leading up to election
7. Stricter regulation of parliamentary entitlements
8. Measures to harmonise federal, State and Territory political finance laws
9. An effective compliance and enforcement regime
10. A vigilant civil society

The analysis underlying this 10-point plan is found in my article, 'Democracy before Dollars: The problems with money in Australian politics and how to fix them' published this year in the *Australian Quarterly* (attached). This article formed the basis of the Senate Occasional Lecture I gave this year.

Specific analysis of the sixth dot-point (Stricter limits on government advertising in period leading up to election) is provided by the article, 'Government advertising may be legal, but it's corrupting our electoral process', *The Conversation,* 10 April 2019 (attached). Detailed reasons for these recommendations are also provided in my submission to JSCEM's inquiry into 2010 federal election (which is attached).

In developing a detailed reform blue print for the Commonwealth political finance laws, the New South Wales political finance laws provide an excellent starting point as New South Wales presently has the most robust regime of political finance laws in Australia. In this respect, I have attached a report I wrote for the New South Wales Electoral Commission entitled *Establishing A Sustainable Framework for Election Funding and Spending Laws in New South Wales* (2012) which made 56 recommendations concerning the New South Wales regime. Many of these recommendations were adopted in the final report of the New South Wales Panel of Experts on Political Donations (chaired by Dr Kerry Schott).

I hope this material will be of assistance to the Committee.

Thank you.

Yours sincerely,

Professor Joo-Cheong Tham
Melbourne Law School
[redacted]

VOL 90 ISSUE 2 APR–JUN 2019

AQ

AUSTRALIAN QUARTERLY

Democracy before dollars

The problems with money in Australian politics and how to fix them

INCLUDING: DR ALAN FINKEL AO | PROF EMMA JOHNSTON AO | PROF JOO-CHEONG THAM & MORE

ISSN 1443-3605
04 >
9 771443 360020

STATE OF THE NATION:
The Human Factor

ANTARCTICA:
More important than ever

OUR DECOMPOSING DEMOCRACY

CONTENTS

AQ
VOL 90 ISSUE 2 APR–JUN 2019

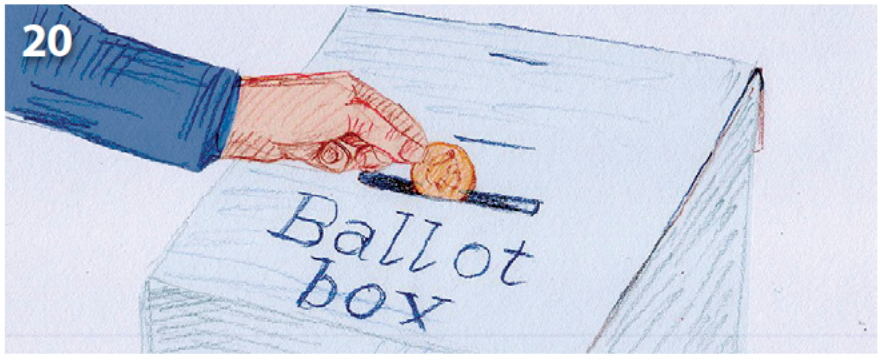
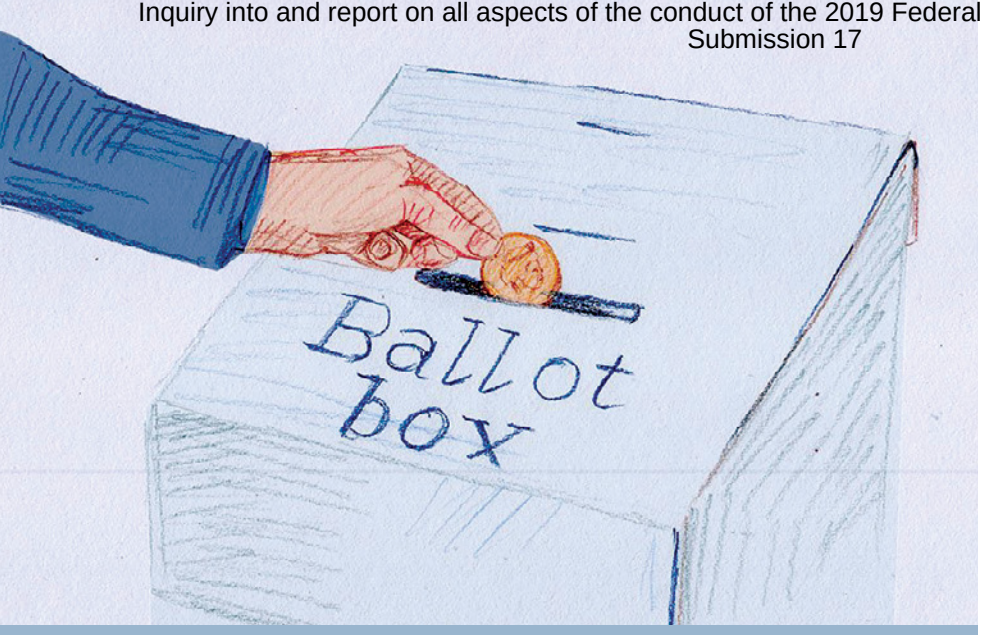


IMAGE CREDITS: Please see article placements

COVER IMAGE: © Feodora Chiosea



Democracy before dollars:

The problems with money in Australian politics and how to fix them

There is a deep paradox at the heart of representative democracy: it is a form of rule by the people that distances itself from the people. The central justification for representative government is popular sovereignty. As the Universal Declaration of Human Rights proclaims, '(t)he will of the people shall be the basis of the authority of government'.[1] Yet as representative, not direct, democracy,[2] there is structured distance between 'the people' and those who exercise governmental power.

ARTICLE BY: **PROF JOO-CHEONG THAM**

The aspiration of representative democracy is that this distance is bridged by strong mechanisms of accountability and responsiveness, as well as an ethos based on the public interest, all of which seek to ensure that government officials rule 'for the people'. The obvious risk is that this distance becomes a gulf and that public officials govern for a few, rather than 'for the people' – that an oligarchy operates rather than a democracy.

It is a startling fact that many Australians believe – and increasingly so – that government functions as an oligarchy. Survey evidence shows that perceptions that '[p]eople in government look after themselves' and '[g]overnment is run for a few big interests' have risen significantly since the 2000s, so much so that in 2017 more than 70% of respondents agreed with the first statement and more than half with the second.[3]

And since 2016, there has been a 9% increase in perceptions that federal members of parliament are corrupt (85% saying 'some' are corrupt, 18% responding that 'most/all' are corrupt).[4]

Capitalism vs democracy

These perceptions of oligarchy would have surprised Plato who had Socrates say that 'democracy comes into being after the poor have conquered their opponents, slaughtering some and

It is a startling fact that many Australians believe – and increasingly so – that government functions as an oligarchy.

banishing some, while to the remainder they give an equal share of freedom and power'.[5] Surviving the passage of time is, however, the insight that democracies carry the risk of class domination. But it is the wealthy, rather than poor, who are controlling the levers of power. The most potent danger of oligarchy in contemporary times is plutocracy.

A risk is not, however, an inevitability. Whether democracies warp into plutocracies turns fundamentally on how society is organised. And here, democracy fights with one hand tied behind its back in economies organised according to capitalist principles – where the means of production, distribution and consumption are privately owned and driven essentially by the profit motive.

This occurs, firstly, because democratic principles are not seen to apply to the private sector – a most significant part of society – even though power is routinely exercised by private entities. Notably, in most workplaces, there is a system of 'private government'[6] where the power of employers over their workers can often be dictatorial, where, as John Stuart Mill puts it, the great majority are 'chained . . . to conformity with the will of an employer'[7] – and yet we are socialised to consider this as a realm where democracy should not travel.

And in the 'public' sphere where democratic principles (popular control; political equality; the public interest) are supposed to apply, these principles are in constant threat of being subverted. Under capitalism, what Albert Einstein considered 'the predatory phase of human development',[8] 'the members of the legislative bodies are selected by political parties, largely financed or otherwise influenced by private capitalists who, for all practical purpose, separate the electorate from the legislature'.[9]

Indeed, businesses have power through direct contributions to parties – and through ownership of the means of production, distribution and exchange. It is power through ownership (private property rights) that gives rise to what Lindblom in the classic study, *Politics and Markets*, described as the 'privileged position of business'.[10]

This implies tremendous power in the market *and* in the political sphere.

Democratic principles are not seen to apply to the private sector – a most significant part of society – even though power is routinely exercised by private entities.

Businesses have power in the political sphere because political representatives rely heavily on the decisions of businesses for their electoral success. As Lindblom has observed, '[b]usinessmen cannot be left knocking at the doors of the political systems, they must be invited in.'[11]

These dynamics profoundly shape understandings of the 'public interest'. For Einstein, they meant that 'the representatives of the people do not sufficiently protect the interests of the underprivileged sections of the population'.[12] Their effects can, in fact, be deeper – when the 'public interest' is equated to the demands of the most powerful businesses, the corruption of representative systems by capitalism is well underway, if not complete.

Transparent failures in the funding of political parties

Even barring fundamental reorganising of society, democracies have a range of tools to insulate the political process from plutocratic control. Choices can be made whether to vigilantly guard against the threats of capitalism against democracy; to neglect them and allow them to fester; or worse, to be complicit in the disenfranchisement of the public.

The actions of the political elite at the national level have tended to fall towards the latter end of the spectrum with laissez-faire regulation of political

Contributors to political parties can give as much as they wish and parties can receive as much as they wish. **The result has been a corruption of the political process.**

party funding the most-favoured position.

As a result, Australia's democracy has been seriously undermined in three major ways. First, through secrecy in political funding. While federal political parties are subject to annual obligations where they are required to disclose their income, expenditure and debts, this is not a scheme that achieves transparency – it is a non-disclosure scheme. It is notorious for its lack of timeliness with contributions disclosed up to 18 months after they were made.

For instance, the $1.75 million donation made by the former Prime Minister, Malcolm Turnbull, to aid the Liberal Party's 2016 federal election campaign was disclosed more than 13 months after it was made.[13] In recent years, more than half of the major parties' income is not itemised as a result of a high disclosure threshold (the level at which contributions need to be itemised) which applies to each contribution made (hence, allowing for 'splitting' of contributions).[14]

Such secrecy should not surprise us. Senator Eric Abetz, when sponsoring 2006 amendments that weakened the

federal disclosure scheme, said that he hoped for 'a return to the good old days when people used to donate to the Liberal Party via lawyers' trust accounts'.[15]

The second way in which Australia's democracy has been undermined by political contributions stems from the fact that at the federal level, there are virtually no limits on political contributions – contributors to political parties can give as much as they wish and parties can receive as much as they wish. The result has been a corruption of the political process.

It is not quid pro quo corruption (where money is directly exchanged for a favourable decision) which is the principal danger, though the shroud of secrecy means we cannot rule this out. The predominant danger is corruption through undue influence.[16] Such corruption occurs when influence over the political process is secured by virtue of the payment of money. In these situations, the essential ingredient of corruption is present: the exercise of power on improper grounds (the payment of money) resulting from the receipt of a benefit.

Such corruption is present with the sale of access and influence by the major parties – what former Prime Minister, Tony Abbott characterised as a 'time-honoured' practice.[17]

Less obvious, but of more significance, is what the High Court has described as 'clientelism'. As the High Court describes it, clientelism 'arises from an office holder's dependence on the financial support of a wealthy patron to a degree that is apt to compromise the expectation, fundamental to representative democracy, that public power will be exercised in the public interest'.[18]

Risk of clientelism clearly arises with the dependence of major parties on corporate contributors and, in the case of Australian Labor Party, its reliance on trade union funds. And it is most emphatically present in the way in which the major parties have actively cultivated business donors with strong links with the Chinese Communist Party Government. The three most notable donors, Huang Xiangmo, Chau Chak Wing and Zhu Minshen, secured access to the highest levels of political office, including meetings with Prime Ministers Rudd, Gillard, Abbott and Turnbull, after donating millions of dollars to their parties.[19] As Clive Hamilton rightly notes, '(d)onations to political parties are the most obvious channel of influence for the CCP (Chinese Communist Party) in Australian politics'.[20]

The third way in which laissez-faire regulation of political party funding has undermined Australia's democracy is through unfairness – departures from the ideal of political equality. Corruption through undue influence is bound up with unfairness.

Jeff Kennett, former Liberal Premier of Victoria captured this well in relation to the sale of access and influence:

> "The professionalism of selling time has risen to such a level that it has corrupted the democratic process; it corrupts the principle [that] all people are equal before the law."[21]

There is unfairness when power follows the giving of money, as well as when the giving of money follows power. Corporate contributions almost universally flow to the major parties, the parties likely to be in government. And even with the major parties, incumbency can give rise to a significant fund-raising advantage. The coming New South Wales State Elections, for instance, will see the New South Wales Liberal Party having raised more than

Donations to political parties are the most obvious channel of influence for the CCP (Chinese Communist Party) in Australian politics.

Political lobbying shares the trinity of vices resulting from laissez-faire regulation of political party funding: **secrecy; corruption; unfairness.**

three times the amount received by the New South Wales Labor Party, most probably because of its incumbent status.[22]

With no limits on election campaign spending, such unfairness in fund-raising easily translates into unfairness in the electoral contests, with political parties favoured by corporate sponsors enjoying a significant spending advantage.

The very same absence of spending limits enables Clive Palmer to pour more than $50 million into the coming federal election, potentially outspending the Liberal Party and also the Australian Labor Party. With an estimated wealth of $1.8 billion, Palmer's spending shows how big money in elections is small change for the mega-rich.[23]

The (almost) lawless world of political lobbying

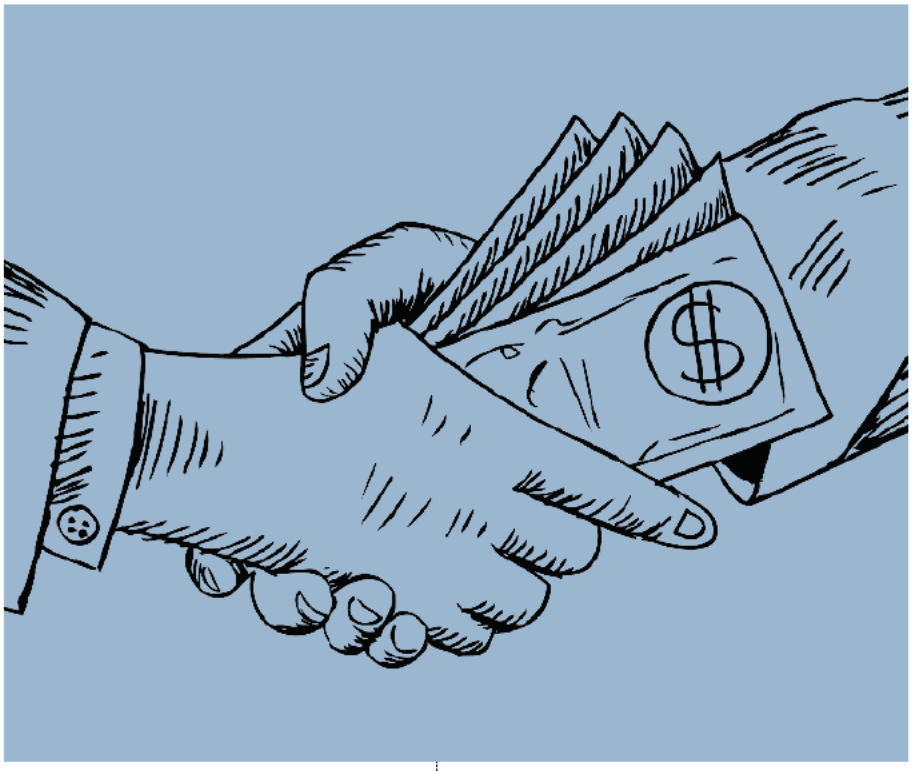
Money influences politics not only through political contributions but also through political lobbying – attempts to influence the political process through communication with public officials. After all, political lobbying is invariably a funded political activity; and political lobbying and political contributions are often deployed as different strategies directed at the same goal of influencing the political process.

Laissez-faire regulation of political lobbying shares the trinity of vices resulting from laissez-faire regulation of political party funding: secrecy; corruption; unfairness.[24]

The Australian Government Lobbyists Register[25] makes a tepid gesture towards transparency. While it reveals some information about commercial lobbyists (lobbyists who act on behalf of third parties), it fails to fully disclose who is engaging in lobbying, particularly through its exclusion of in-house lobbyists (of companies, trade unions and other non-government organisations).[26]

There are other signal defects: the register fails to disclose who is being lobbied; the subject matter of lobbying; and the timing of the lobbying. All this is exacerbated by lax enforcement by the Department of the Prime Minister and Cabinet: there has not been the suspension or removal of registration of a single lobbyist since 2013, despite the Department identifying at least 11 possible breaches.[27] Such lax enforcement does not appear to be problematic for the Department. According to its Secretary, the Lobbyists Register and its Code 'is an administrative initiative, not a regulatory regime'.[28]

In the wake of secrecy comes the risk of corruption and misconduct. This is hardly a remote risk, as the various findings of misconduct made by the Western Australia Crime and Corruption



Commission in relation to the lobbying activities of former Western Australia Premier, Brian Burke, make clear.[29]

Far from it, there is a sense that this risk is growing in proportion to the number of former Ministers and senior public servants who are employed in the private sector after leaving public sector employment (which is known by the technical term, 'post-separation employment'). This is now a well-established pathway with more than a quarter of former Ministers and Assistant Ministers taking up roles in peak organisations, large corporations, lobbying and consulting firms since 1990.[30]

As the New South Wales Independent Commission Against Corruption (NSW ICAC) has observed, '(c)onflicts of interest are at the centre of many of the post-separation employment problems.'[31] First, the prospect of future employment can give rise to these conflicts: public officials, including Ministers, may modify their conduct, by going 'soft' on their responsibilities or, generally, making decisions favourable to prospective private sector employers, in order to improve their post-separation employment prospects.[32]

Conflicts might also arise when public officials are lobbied by former colleagues or superiors: it is the prior (and possibly ongoing) association that can compromise impartial decision-making.

The Commonwealth Lobbyists Code of Conduct does acknowledge the risks of post-separation employment. For instance, clause 7.1 states that former federal Ministers and Parliamentary Secretaries 'shall not, for a period of 18 months after they cease to hold office, engage in lobbying activities relating to any matter that they had official dealings with in their last 18 months in office'.

The inadequacy of this measure is, however, vividly illustrated by the case of Andrew Robb, former Trade Minister, who took up an $880,000 consultancy with Chinese firm, Landbridge, immediately after he departed Parliament.[33] There is at the very least, a reasonable perception of a conflict of interest between Robb's duties when Trade Minister, which included the negotiation of the China-Australia Free Trade Agreement, and the prospect of such employment by a firm that would benefit from this agreement. This was a possibility that would have been clearly discussed prior to Robb's retirement from Parliament, given the timing of his retention by Landbridge.

Yet, neither the post-separation ban in the Lobbyists Code of Conduct or its twin in the Statement of Ministerial Standards[34] effectively deals with this conflict: they apply only to 'lobbying activities' but not to lobbying-related activities such as providing political

There has not been the suspension or removal of registration of a single lobbyist since 2013, despite **the Department identifying at least 11 possible breaches.**

intelligence; and are restricted to matters in which the former Ministers have had 'official dealings', a restriction that excludes many matters that would have fallen within Robb's ministerial portfolio but about which he may not have had 'official dealings'.

And then there is unfair access and influence from failing to properly regulate lobbying. Secret lobbying, by its nature, involves such access and influence. When lobbying or the details of the lobbying are unknown at the time when the law or policy is being made, those engaged in that lobbying are able to put arguments to decision-makers that other interested parties are not in a position to counter simply because they are not aware that those arguments have been made.

Secrecy, for one, seems to be integral to the power wielded by what has been labeled the 'most powerful lobby group' – Pharmacy Guild of Australia.[35] The influence wielded by the Pharmacy Guild, particularly through lobbying,[36] has prompted Stephen Duckett, former Secretary of what is now the Commonwealth Department of Health, to characterise the pharmacy industry as "a classic example of what economists call 'regulatory capture': the regulator acts in the interest of the regulated, rather than the public interest".[37]

Even without secrecy, unfair access and influence can result from lobbying through the creation of 'insiders' and 'outsiders' to the political process. The former consists of a tightly circumscribed group that includes commercial lobbyists and in-house lobbyists of companies, trade unions and non-government organisations. The latter is the rest of us.

Not all are equal, of course, within the group of 'insiders' and here the 'privileged position of business' speaks with a loud voice. Witness, for instance, the almost ritualistic trips made by Prime Ministers to the New York residence of Rupert Murdoch.[38] Consider too that where ministerial diaries are published (Queensland and New South Wales),

Secrecy, for one, seems to be integral to the power wielded by what has been labeled the 'most powerful lobby group' – Pharmacy Guild of Australia

IMAGE: © Alex Proimos-Wiki

The dirtiest companies must spend the most on politics if they are not to be regulated out of existence, so **politics comes to be dominated by the dirtiest companies.**

most disclosed meetings held by senior ministers were with businesses or industry peak bodies.[39]

And here, unfairness is bound up with corruption when privileged access to the political system is bought, for example, through securing the services of former Ministers. As the NSW ICAC has observed:

> *The problem arises when the lobbyist is someone who claims to have privileged access to decision-makers, or to be able to bring political influence to bear. The use of such privilege or influence is destructive of the principle of equality of opportunity upon which our democratic system is based. The purchase or sale of such privilege or influence falls well within any reasonable concept of bribery or official corruption.*[40]

A toxic environment

When it comes to money in politics, there is what George Monbiot has identified as the Pollution Paradox:

The dirtiest companies must spend the most on politics if they are not to be regulated out of existence, so politics comes to be dominated by the dirtiest companies.[41]

Perhaps nothing more vividly illustrates this paradox in Australia than the vice-like grip that fossil fuel companies have on its politics. The power of the 'fossil fuel order'[42] or 'fossil fuel power network'[43] has been clearly facilitated by the use of money in politics. For example:

- These companies are amongst the largest contributors to the major parties;[44]
- The success of the $22 million advertising campaign by mining companies against the Rudd government's resource super profits tax is part of political folklore – so much so that '(i)t's now become routine for industry groups to threaten a 'mining tax style campaign' every time they don't get their way with government',[45]
- Its employees and lobbyists have included former ALP ministers Nick Bolkus, Greg Combet, Craig Emerson, Martin Ferguson; former National party leaders, John Anderson and Mark Vaile; and former Liberal Party ministers, Helen Coonan[46] and Ian Macfarlane;[47] and
- Published ministerial diaries indicate that these companies enjoy disproportionate access to Ministers in Queensland and New South Wales.[48]

IMAGE © Monika Flueckiger-wiki

With such power comes profound impact. Under the Howard government, climate change policy was determined by fossil fuel lobbyists (many of whom were former senior public servants) who likened themselves to organised crime through a self-styled label – greenhouse mafia.[49]

After making political contributions to the Queensland Liberal National Party and the Liberal Party of Australia, and engaging commercial lobbyists, including former Queensland ALP Treasurer, Damien Power and former National Party Queensland Premier Rob Borbidge, mining company Adani secured significant policy concessions for its proposed Carmichael mine (including deferment of mining royalties and compulsory acquisition of land).[50] And perhaps the most singular fact – fossil fuel companies have played an instrumental role in ousting two out of the five prime ministers we have had since 2007, Kevin Rudd[51] and Malcolm Turnbull.[52]

The health of our living world very much turns on the health of our democracy.

Ten-point plan for democratic regulation of funding of federal election campaigns

1. Effective transparency of political funding

- Comprehensive:
  - i) low disclosure threshold with amounts under threshold aggregated;
  - ii) covers key political actors (including third parties)
- Timeliness: e.g. UK system of quarterly report + weekly reports during election campaign
- Accessibility: requires analysis of trends etc (e.g. through reports by electoral commissions)

2. Caps on election spending

- Comprehensive:
  - i) cover all 'electoral expenditure';
  - ii) covers key political actors (including third parties)
- Applies 2 years after previous election – allow limits to apply around 6 months
- Two types of limits:
  - i) national;
  - ii) electorate
- Level set through review and harmonised with levels of caps and public funding

3. Caps on political donations

- Comprehensive: i) cover all 'political donations; ii) covers key political actors (including third parties)
- Gradually phase in to set cap at $2000 per annum and private funding around 50% of total party funding
- Exemption for party membership (including organisational membership fees) with level at $200 per member (similar to section 26 of Election Funding Act 2018 (NSW))

4. A fair system of public funding of political parties and candidates

- Election funding payments with 2% threshold and calculated according to tapered scheme
- Annual allowance calculated according to number of votes and party members
- Party development funds for political parties starting up
- Level set through review and harmonised with levels of caps and public funding – with public funding around 50% of total funding
- Increases in public funding to be assessed through a report by Australian Electoral Commission
- Replace tax deductions for political donations with system of matching credits with credits going to political parties and candidates

5. Ban on overseas-sourced donations and donations from foreign governments

- No case for banning donations for those who are foreign-born
- Ban overseas-sourced donations
- Ban donations from foreign governments

6. Stricter limits on government advertising in period leading up to election

- Needed to deal with spike in 'soft' advertising in election period
- Caps on amount spent on government advertising 2 years after previous election

7. Stricter regulation of parliamentary entitlements

- Needed to deal with incumbency benefits through entitlements that can be for electioneering
- Ban use of printing and communication allowance 2 years after previous election

8. Measures to harmonise federal, State and Territory political finance laws

- Minimalist: anti-circumvention offence (like section 144 of Election Funding Act 2018 (NSW))
- Maximalist: harmonising political finance regulation in terms of concepts, provisions etc

9. An effective compliance and enforcement regime

- Measures to build a culture of compliance:
  - a) Governance requirements for registered political parties;
  - b) Party and Candidate Compliance Policies (tied to public funding);
- Key: an adequately resourced Australian Electoral Commission which adopts a regulatory approach toward political finance laws
- Anti-corruption commission able to investigate breaches of these laws that fall within meaning of 'corrupt conduct' or if referral from Australian Electoral Commission (as currently provided NSW ICAC Act).

10. A vigilant civil society

- A network of media and non-government organisations committed to 'following the money'
- Public subsidies for such scrutiny
- Strategic collaborations between scrutiny organisations and statutory agencies

IMAGE: © ElementS Digital

Ten-point plan for democratic regulation of funding of political lobbying

1. Register of Lobbyists

- Cover those regularly engaging in political lobbying (repeat players) including commercial lobbyists and in-house lobbyists
- Require disclosure of identities of lobbyists, clients, topics of lobbying and expenditure on lobbying

2. Disclosure of lobbying activity

- Quarterly publication of diaries of ministers and shadow ministers and their chiefs of staff which includes disclosure of who these public officials are meeting together with meaningful detail as to subject-matter of meetings
- Lobbyists on register of lobbyists to make quarterly disclosure of contact with public officials including disclosure of identities of public officials and subject-matter of meetings

3. Improved accessibility and effectiveness of disclosure

- Register of lobbyists and disclosure of lobbying activity to be integrated with disclosure of political contributions and spending
- Annual analysis of trends in such data by an independent statutory agency (e.g. Australian Electoral Commission or federal anti-corruption commission)

4. Code of conduct for lobbyists

- Code of conduct to apply to those on Register of Lobbyists
- Duties under the Code to include duties of legal compliance; duties of truthfulness; duties to avoid conflicts of interest; and duties to avoid unfair access and influence.

5. Stricter regulation of post-separation employment

- Ban on post-separation employment to extend to lobbying-related activities (including providing advice on how to lobby)
- Requirement on the part of former Ministers, parliamentary secretaries and senior public servants to disclose income from lobbying-related activities if they exceed a specified threshold

6. Statement of reasons and processes

- A requirement on the part of government to provide a statement of reasons and processes with significant executive decisions
- This statement should include: a list of meetings that are required to be disclosed under the Register of Lobbyists and Ministerial diaries; a summary of key arguments made by those lobbying; a summary of the recommendations made by the public service; and if these recommendations were not followed, a summary of the reasons for this action.

7. Fair consultation processes

- A commitment on the part of government to fair consultation processes (processes based on inclusion, meaningful participation and adequate responsiveness)
- Guidelines to be developed to give effect to this commitment (like the UK Cabinet Office's Consultation Principles)
- Statement of reasons and processes (above) should include extent to which these guidelines have been met

8. Resourcing disadvantaged groups

- Government support for advocacy on the part of disadvantaged groups including ongoing funding and dedicated services
- Support should be provided in a way that promotes advocacy independent of government and ensures fair access to the political process

9. An effective compliance and enforcement regime

- Education and training for lobbyists and public officials
- Independent statutory agency (e.g. Australian Electoral Commission or federal anti-corruption commission) to be responsible for compliance and enforcement

10. A vigilant civil society

- A network of media and non-government organisations committed to 'following the money' spent on political contributions and political lobbying
- Public subsidies for such scrutiny
- Strategic collaborations between scrutiny organisations and statutory agencies

IMAGE: © Handshake - Henkster-sxc

Democracies are, by nature, communities. They are not random collections of individuals, but a 'we' that considers itself 'a people'. Democracy is the process of *collective* self-determination.

IMAGE: © Mark Dixon-Flickr

Towards democratic regulation of money in politics

Borrowing the words of former Prime Minister, Malcolm Turnbull, we need 'root and branch reform' of the regulation of money in Australian politics.[53] In my book, *Money and Politics: The Democracy We Can't Afford*, I identified four democratic principles to govern such regulation:

1) Protecting the integrity of representative government (including preventing corruption);
2) Promoting fairness in politics;
3) Supporting political parties in performing their democratic functions; and
4) Respecting political freedoms.[54]

These principles are the anchor-points for the two 10-point-plans in this article; one on the funding of election campaigns and the other on political lobbying. The 10-point-plan on political lobbying is based on a discussion paper I wrote with Yee-Fui Ng for the New South Wales Independent Commission Against Corruption, *Enhancing the Democratic Role of Direct Lobbying in New South Wales*.[55]

These reforms can be developed in a way consistent with constitutional requirements, including freedom of political communication implied under the Commonwealth Constitution. While the High Court has struck down several measures for breaching this freedom,[56] it has equally made clear that the objectives of preventing corruption and promoting fairness are legitimate objectives and that measures will not be in breach of the freedom if they are properly justified according to these objectives.[57]

There is no fatal constitutional obstacle to rebalancing the contest between democracy and oligarchy – particularly plutocracy – by implementing these plans.

Coda: A democratic ethos of community, care and compassion

Regulation alone will not solve the ills of money in Australian politics. What is absolutely essential is a democratic ethos – a deep orientation towards democratic principles. This implies an orientation towards the four principles identified above – of cardinal importance to what Tocqueville characterised as the 'spirit of democracy' is the commitment to equality.[58]

Other principles underlying the democratic ethos are less explicit and warrant spelling out. They stem from a fundamental truth – democracies are, by nature, communities. They are not random collections of individuals, but a 'we' that considers itself 'a people'. Democracy is the process of *collective* self-determination. That is why we easily interchange reference to the

In democracies, we are *all* bound by a public trust to maintain and sustain these institutions. **It is not just public officials who have this responsibility.**

public interest with the interest of the *community*.

And that is why, what Hugh Mackay, one of Australia's sages, correctly recognised as a moral obligation to nurture and sustain supportive communities is at the same time a *democratic* obligation.[59] This is fundamentally an obligation founded upon an ethic of care.

As philosopher G. A. Cohen has noted, central to the principle of community is that 'people care about, and, where necessary and possible, care for, one another, and, too, care that they care about one another'.[60]

Going beyond caring for our personal relationships, the democratic ethic of care extends to the health of our political institutions. In democracies, we are *all* bound by a public trust to maintain and sustain these institutions. It is not just public officials who have this responsibility.[61]

As John Stuart Mill recognised more than a century and a half ago, for any system of government to survive

IMAGE: © Belle Co

This 'radical culture-shift in the direction of more compassion' includes **'institutions winning back our trust by restraining their lust for wealth or power'.**

and thrive, the people under such government must be willing and able to do what is required to maintain the system and for the system to fulfill its purposes.[62] Under a system of government committed to democratic principles, we all have an obligation to participate in and sustain what Ralph Miliband has characterised as 'the practice and habit of democracy'.[63] As Mackay has warned us, 'to disengage is to abdicate your role as a citizen'.[64]

In a way, the democratic ethic of care gives fuller meaning to the third (neglected) principle of the French Revolution – fraternity. And through fraternity, we can also more clearly see the connection between democracy and compassion.

As the Dalai Lama correctly understood, fraternity means 'love and compassion for others'.[65] Urging a Revolution of Compassion, his Holiness, a self-proclaimed disciple of Karl Marx,[66] specifically argued that such a revolution 'will breathe new life into democracy by extending solidarity'.[67]

Of one with the Dalai Lama is Hugh Mackay who, in his important book *Australia Reimagined*, urges more compassion in our discourse and institutions. For Mackay, this 'radical culture-shift in the direction of more compassion' includes 'institutions winning back our trust by restraining their lust for wealth or power in favour of a more sensitive engagement with the society that gives them their social license to operate'.[70]

All this might sound strange to many (as it would have to me a few years back). There may be a sense that I have travelled too far from the topic of money in Australian politics. If so, perhaps a thought experiment might help:

Imagine if fossil-fuel companies (and their lobbyists) had in the past two decades used (or for that matter, not used) the immense privileges their wealth conferred upon them in accordance with an ethic of care for Australia's democracy – imagine an Australia where these companies exercised their power with a strong sense of compassion. AQ

AUTHOR:

Joo-Cheong Tham is a Professor at the Melbourne Law School. His research spans the fields of labour law and public law with a focus on law and democracy; and the regulation of precarious work. He is the author of *Money and Politics: The Democracy We Can't Afford* and key reports on political funding and lobbying for the New South Wales Electoral Commission and the New South Wales Independent Commission Against Corruption.

REFERENCES

Democracy before Dollars: The problems with money in Australian politics and how to fix them

1 Universal Declaration of Human Rights, art 21(3).
2 John Stuart Mill, *Considerations on Representative Government* (1861).
3 Danielle Wood and Kate Griffiths, 'Who's in the Room? Access and Influence in Australian Politics' (Grattan Institute, 2018) 14, Figure 1.2.
4 https://app.secure.griffith.edu.au/news/2018/08/20/griffith-research-shows-trust-in-government-slides/
5 Quoted in Raymond Williams, *Keywords* (1976) 83.
6 Elizabeth Anderson, *Private Government: How Employers Rule Our Lives (And Why We Don't Talk About it)* (2017). See also Julian Sempill, 'The Lions and the Greatest Part: The Rule of Law and the Constitution of Employer Power' (2017) 9 *Hague Journal on the Rule of Law* 283, 284-291 and 309-312.
7 John Stuart Mill, 'Chapters on Socialism' in John Stuart Mill, *On Liberty with The Subjection of Women and Chapters on Socialism* (edited by Stefan Collini) (1989) 227.
8 Albert Einstein, 'Why Socialism', *Monthly Review* (May 1949) reprinted in *Monthly Review* (May 1998).
9 Ibid.
10 Charles E Lindblom, *Politics and Markets: The World's Political-economic Systems* (1977) ch 13. See also Julian Sempill, 'What Rendered Ancient Tyrants Detestable: The Rule of Law and the Constitution of Corporate Power' (2018) 10 *Hague Journal on the Rule of Law*.
11 Ibid 175.
12 Albert Einstein, 'Why Socialism', *Monthly Review* (May 1949) reprinted in *Monthly Review* (May 1998).
13 https://www.abc.net.au/news/2018-02-01/donations-political-turnbull-election-millions-foreign-donations/9380014
14 http://cdn.getup.org.au/1955-1611_Dark_Money_Full_Report_(1).pdf. The indexed threshold currently stands at $13 800 per annum.
15 Richard Baker, 'Are our politicians for sale?', *The Age*, 24 May 2006, 15.
16 Joo-Cheong Tham, *Money and Politics: The Democracy We Can't Afford* (2010) 4–6.
17 'Lobbying is a Legitimate Part of our Democracy', *The Australian*, 6 May 2014, 15.
18 *McCloy v New South Wales* (2015) 257 CLR 178 [36].
19 Clive Hamilton, *Silent Invasion: China's Influence in Australia* (2018) Chapter 4.
20 Ibid 86.
21 Royce Millar, 'Brumby in rethink on fund-raising', *The Age*, 8 December 2009, 1.
22 Nigel Gladstone, 'Liberal donations from events triple Labor ahead of NSW election', *Sydney Morning Herald*, 31 December 2018.
23 Max Koslowski, 'Palmer set to top Labor, Libs with $50m poll spend', *The Age*, 18 January 2019, 4–5. For those doubtful of any unfairness resulting from Palmer's spending given the unlikelihood of his United Australia Party securing a single parliamentary seat, just imagine if those opposing Palmer's policies had the same budget – imagine if the hundreds of workers made redundant by Palmer's company, Queensland Nickel, who are still fighting to receiving their full entitlements, had $50 million to highlight their plight.
24 'Lobbying activities' and 'Lobbyist' are defined in cl 3 of the Australian Government's Lobbying Code of Conduct (2013): https://lobbyists.pmc.gov.au/docs/lobbying_code_of_conduct.pdf
25 https://lobbyists.pmc.gov.au
26 Lobbying Code of Conduct, cl 3.5.
27 Australian National Audit Office, Management of the Australian Government's Register of Lobbyists (Report No 27, 2018): https://www.anao.gov.au/work/performance-audit/management-australian-government-register-lobbyists
28 https://www.themandarin.com.au/88434-pmc-shrugs-off-audit-of-toothless-federal-lobbying-rules/
29 Western Australian Crime and Corruption Commission, *Report on the Investigation of Alleged Misconduct concerning Dr Neale Fong, Director General of the Department of Health* (2008) 5; Western Australian Crime and Corruption Commission, *Report on the Investigation of Alleged Public Sector Misconduct Linked to the Smiths Beach Development at Yallingup*, (2007) 6–7.
30 See Danielle Wood, Kate Griffiths and Carmela Chivers, *Who's in the Room? Access and Influence in Australian Politics* (2018) 20–22.
31 NSW ICAC, *Managing Post Separation Employment* (1997) 7.
32 Ibid 9-11.
33 https://www.smh.com.au/national/liberal-andrew-robb-took-880k-china-job-as-soon-as-he-left-parliament-20170602-gwje3e.html
34 Clause 2.25 of https://www.pmc.gov.au/sites/default/files/publications/statement-ministerial-standards_1.pdf
35 https://www.smh.com.au/politics/federal/the-pharmacy-guild-the-most-powerful-lobby-group-youve-never-heard-of-20150401-1mckxl.html
36 https://grattan.edu.au/wp-content/uploads/2015/06/823-Premium-Policy4.pdf
37 https://grattan.edu.au/news/turnbull-government-backs-pharmacies-over-consumers-yet-again/
38 Tony Wright, 'The worker's mate has a day on the piste with Kerry', *The Age*, 18 February 2010, 6; Mark Kenny, 'Gillard to lunch with Murdoch', *The Advertiser*, 5 March 2011, 4; James Glenday, 'Prime Minister Tony Abbott pushes for enhanced business ties on New York visit', *ABC News*, 10 June 2014.
39 Danielle Wood, Kate Griffiths and Carmela Chivers, *Who's in the Room? Access and Influence in Australian Politics* (2018) 18.
40 NSW ICAC, *Report on Investigation into North Coast Land Development* (1990) 29.
41 George Monbiot, *Out of the Wreckage: A New Politics for An Age of Crisis* (2018) 134.
42 David Ritter, 'Beautiful weather: The social politics of global warming' 89(4) (Oct-Dec 2018) *Australian Quarterly* 3, 8.
43 Quentin Beresford, *Adani and the War Over Coal* (2018) 5.
44 Hannah Aulby and Mark Ogge, Greasing the Wheels: The systemic weaknesses that allow undue influence by mining companies on government: a Queensland case-study (2016) 7–8. See also https://www.marketforces.org.au/politicaldonations2019/
45 https://www.theaustralian.com.au/business/business-spectator/the-man-who-killed-rudds-mining-tax/news-story/851da8b4dc89dc8f1d34b236eba50737; https://www.smh.com.au/business/a-snip-at-22m-to-get-rid-of-pm-20110201-1acgj.html
46 https://www.smh.com.au/national/nsw/csg-industry-hires-wellconnected-staffers-20150515-gh2rq3.html
47 https://www.abc.net.au/news/2016-09-26/ian-macfarlane-appointed-to-run-queensland-mining-lobby/7876942
48 Danielle Wood, Kate Griffiths and Carmela Chivers, *Who's in the Room? Access and Influence in Australian Politics* (2018) 18–19.
49 Clive Hamilton, *Scorcher: The Dirty Politics of Climate Change* (2007) ch 1.
50 Hannah Aulby and Mark Ogge, *Greasing the Wheels: The systemic weaknesses that allow undue influence by mining companies on government: a Queensland case-study* (2016) 24–29; Danielle Wood, Kate Griffiths and Carmela Chivers, *Who's in the Room? Access and Influence in Australian Politics* (2018) 23.
51 https://www.smh.com.au/business/a-snip-at-22m-to-get-rid-of-pm-20110201-1acgj.html
52 https://www.abc.net.au/news/2018-08-28/alex-turnbull-says-coal-miners-have-undue-influence-on-liberals/10170908
53 https://www.sbs.com.au/news/turnbull-calls-for-donation-prohibition
54 Joo-Cheong Tham, *Money and Politics: The Democracy We Can't Afford* (2010) ch 1.
55 https://www.icac.nsw.gov.au
56 *ACTV v Cth* (1992) 177 CLR 106; *Unions NSW v NSW* (2013) 304 ALR 266; *Unions NSW v NSW* [2019] HCA 1.
57 *McCloy v NSW* (2015) 257 CLR 173; *Unions NSW v NSW* [2019] HCA 1.
58 Alexis de Tocqueville, *Democracy in America* (7th ed, translated by Henry Reeve, 1874) 347
59 https://www.australiaday.com.au/events/australia-day-address/2019-speaker-hugh-mackay/
60 G A Cohen, *Why Not Socialism?* (2009) 34–35.
61 For the High Court's recognition of public office as public trust, see *R v Boston* (1923) 33 CLR 386.
62 John Stuart Mill, 'Considerations of Representative Government' in *On Liberty and Other Essays* (edited by John Gray) (1991) 207–8.
63 Ralph Miliband, *Socialism for a Sceptical Age* (1994) 90.
64 Hugh MacKay, *Australia Reimagined: Towards a More Compassionate, Less Anxious Society* (2018) 246.
65 The Dalai Lama, *A Call for Revolution: An Appeal to the Young People of the World* (written by Sofia Stril-Rever from private conversations with His Holiness) (2017) 28.
66 The Dalai Lama, *A Call for Revolution: An Appeal to the Young People of the World* (written by Sofia Stril-Rever from private conversations with His Holiness) (2017) 31.
67 The Dalai Lama, *A Call for Revolution: An Appeal to the Young People of the World* (written by Sofia Stril-Rever from private conversations with His Holiness) (2017) 244.
68 Hugh Mackay, *Australia Reimagined: Towards a More Compassionate, Less Anxious Society* (2018).
69 *https://www.australiaday.com.au/events/australia-day-address/2019-speaker-hugh-mackay/*
70 *https://www.australiaday.com.au/events/australia-day-address/2019-speaker-hugh-mackay/*

Our decomposing democracy

1 Australian Bureau of Statistics Population projections 2017.
2 Anne Davies, *The Guardian*, 12 Dec 2017.
3 Leaflet outlining arguments FOR and AGAINST published under the authority of FL Ley, Chief Electoral Officer 6 April 1967.
4 Robert Menzies address to the National Press Club, Menzies MS 4936, NLA.
5 *CLOSER LOOK SERIES*, Parliamentary Education Office, www.peo.gov.au
6 Australian Electoral Commission: Electoral results by Divisions as quoted by Carr, Adam, http://psephos.adam-carr.net/ Wikipedia.
7 *Ibid.*

ESTABLISHING A SUSTAINABLE FRAMEWORK FOR ELECTION FUNDING AND SPENDING LAWS IN NEW SOUTH WALES

A Report Prepared for the New South Wales Electoral Commission

November 2012

By Dr Joo-Cheong Tham*

* Associate Professor, Melbourne Law School. I owe a debt of gratitude to Clara Jordan-Baird for her excellent research assistance in preparing this report. Special thanks too to Frank Dolhai, Lorraine Nurney and Lauren Loz of the New South Wales Election Funding Authority, who greatly assisted by providing figures used in this report. Thanks too to those who agreed to be interviewed for this report - it has significantly benefited from their collective wisdom.

TABLE OF CONTENTS

LIST OF RECOMMENDATIONS

Recommendation 1: The *Election Funding, Expenditure and Disclosures Act 1981* (NSW) ("EFED Act") should be integrated with the *Parliamentary Elections and Electorates Act 1912* (NSW) ("PE & E Act") into a single electoral Act for New South Wales.

Recommendation 2: The following should be statutorily recognised as the central objects of New South Wales laws regulating election funding and spending:

- Protecting the integrity of representative government (including preventing corruption);
- Promoting fairness in politics;
- Supporting political parties to discharge their democratic functions; and
- Respecting political freedoms (in particular, freedom of political expression and freedom of political association).

Recommendation 3: The key statutory functions of the agency responsible for NSW election funding and spending laws are the:

1) Administration of such laws;
2) Provision of education and information in relation to such laws;
3) Provision of advice and research in reviewing such laws; and
4) The exercise of law-making functions as specified by such laws.

Recommendation 4: Parliamentary leaders of each political party represented in the New South Wales Parliament and members of the Joint Standing Committee on Electoral Matters shall be consulted prior to the appointment of the NSW Electoral Commissioner and other members of the statutory agency responsible for administering NSW election funding and spending laws.

Recommendation 5: Members of the statutory agency administering NSW election funding and spending laws should not be party-appointments.

Recommendation 6: Section 22AB(3) of the PE & E Act should be retained.

Recommendation 7: NSW election funding and spending laws should stipulate that the responsible statutory agency is not subject to the direction or control of the relevant Minister

in respect of the performance of its responsibilities and functions, and the exercise of its powers.

Recommendation 8: NSW election funding and spending laws should recognise the following as guiding principles to govern the functions of the New South Wales Electoral Commission ("NSWEC"):

(i) The principle of independence;
(ii) The principle of impartiality and fairness; and
(iii) The principle of accountability.

Recommendation 9: The NSW Election Funding Authority should be abolished with its functions to be performed by the NSW Electoral Commission.

Recommendation 10: NSW election funding and spending laws should adopt principles-based legislation in relation to the areas of administration and securing compliance.

Recommendation 11: The NSW Joint Standing Committee on Electoral Matters shall conduct periodic reviews of the NSW election funding and spending laws informed by the annual reports of the NSWEC.

Recommendation 12: NSW election funding and spending laws should detail a public process to govern the issuing of guidelines by the NSWEC.

Recommendation 13: The guidelines of the NSWEC shall be tabled before each House of the New South Wales Parliament.

Recommendation 14: The guidelines of the NSWEC shall be disallowable by either House of the New South Wales Parliament (like regulations).

Recommendation 15: The provisions relating to local government elections should be separated from those applying to State elections.

Recommendation 16: NSW laws regulating election funding and spending should provide for a separate part dealing with provisions applicable to third-party campaigners and donors.

Recommendation 17: Registration should be compulsory for political parties, candidates, groups of candidates and third-party campaigners.

Recommendation 18: Registers should be kept for a period lasting three electoral cycles and should be open to public access during that time.

Recommendation 19: The requirements as to what information is provided in applications for registration and what information should made public through the registers should be determined by the NSWEC through its guidelines.

Recommendation 20: The scheme of agents under the EFED Act should be abolished.

Recommendation 21: Members of groups of candidates should be jointly and severally liable for the obligations of these groups.

Recommendation 22: Unincorporated political parties and third-party campaigners should be deemed as bodies corporate for the purposes of NSW election funding and spending laws.

Recommendation 23: The management of donations and expenditure should be governed by principles-based legislation with the guidelines of the NSWEC prescribing specific requirements.

Recommendation 24: NSW election funding and spending laws should expressly state that the guidelines of the NSWEC can prohibit campaign accounts from having money other than that relating to NSW State elections.

Recommendation 25:

- The EFED should provide for specific provisions dealing with 'associated entities' (entities which are either controlled by one or more political parties; or that operates wholly or to a significant extent for the benefit of one or more political parties); and
- The disclosure obligations of 'associated entities' should be identical to those of political parties.

Recommendation 26: Third-party campaigners should be required to disclose:

- electoral expenditure incurred in a capped expenditure period; and
- political donations received for the purposes of incurring that expenditure.

Recommendation 27: The concept of 'electoral communication expenditure' should be removed from NSW election funding and spending laws.

Recommendation 28: The exception to 'electoral expenditure', when such expenditure is not incurred for the dominant purpose of promoting or opposing a party or the election of a candidate or candidates or influencing the voting at an election, should be repealed.

Recommendation 29:

- Statutory provisions stipulating the specific details of disclosure should be repealed; and
- The detail of such requirements should be determined by the guidelines of the NSWEC.

Recommendation 30: The NSWEC should compile annual reports that provide analysis of the trends in political donations received and electoral expenditure incurred by political parties, elected members, candidates, groups of candidates, elected members and third-party campaigners.

Recommendation 31: The NSWEC should engage in regular reviews of its disclosure website incorporating consultation with relevant stakeholders.

Recommendation 32: In the three months prior to polling day, there should be continuous disclosure of political donations.

Recommendation 33: The NSWEC should publish an election report providing up-to-date analysis of the trends in political donations received and electoral expenditure incurred by political parties, elected members, candidates, groups of candidates, elected members and third-party campaigners three months prior to polling day.

Recommendation 34: NSW election funding and spending laws should aggregate the donations received by a political party and its 'associated entities' so that the total amount of these donations are subject to the cap applying to the political party.

Recommendation 35: The caps on political donations should not apply to transfers of political donations from NSW political parties to their candidates if the transfers comprise of political donations raised for State elections which are equal or lower than the candidate caps.

Recommendation 36: The caps on political donations in relation to third-party campaigners shall apply only to political donations used for incurring electoral expenditure in the capped expenditure period.

Recommendation 37: Section 96D of the EFED Act should be repealed.

Recommendation 38: The prohibitions found in Division 4A, Part 6 of the EFED Act (Prohibition of property developer donations etc) should be repealed.

Recommendation 39: The electoral expenditure of associated entities during the capped expenditure period should be aggregated towards the cap on electoral expenditure of the respective political party.

Recommendation 40: Sections 95G(6) and 95G(7) of the EFED Act should be repealed.

Recommendation 41:

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

Recommendation 42:

- The sub-cap applying to political parties in relation to electoral expenditure in particular electorates should be abolished; and
- The electoral expenditure of a political party for a particular electorate shall be aggregated towards the caps applying to its endorsed candidates.

Recommendation 43: Section 95I(3) of the EFED Act should be repealed.

Recommendation 44:

- Electoral expenditure of a political party and third-party campaigner shall be treated as being incurred in a particular electorate if it may reasonably be regarded as encouraging or persuading voters to do either or both of the following:
    (a) to vote for a candidate in that electorate (whether or not the name of the candidate is stated);
    (b) not to vote for a candidate in that electorate (whether or not the name of the candidate is stated).
- Electoral expenditure of a political party and third-party campaigner shall be treated as being incurred in a particular electorate if it:
    (a) explicitly mentions the name of a candidate in the election in that electorate or the name of the electorate; or
    (b) is communicated to electors in that electorate and is not mainly communicated to electors outside that electorate.

Recommendation 45: Payments under the Election Campaigns Fund should have:

- The following eligibility criteria:
    - for candidates, at least 4% of first preference votes received;
    - for political parties, at least 2% of first preference votes cast as a whole for Legislative Assembly elections; or at least 2% of first preference votes cast in Legislative Council elections;
- The amount of payments should be based on the number of first preference votes received under a tapered scheme – these amounts should be provided by way of an entitlement.

Recommendation 46: Payments under the Administration Fund should have:

- The following eligibility criteria:
    - for candidates, at least 4% of first preference votes received;
    - for political parties, at least 2% of first preference votes cast as a whole for Legislative Assembly elections; or at least 2% of first preference votes cast in Legislative Council elections;

- A condition of receipt of payments are internal systems to ensure that these payments are directed at 'administration expenditure' – this condition should be effected through Candidate and Party Compliance Policies;
- The maximum amounts of payments should be based on the number of first preference votes received under a tapered scheme and the number of party members.

Recommendation 47: Payments under the Policy Development Fund should have:

- the current eligibility criteria;
- A condition of receipt of payments is internal systems that ensure these payments are directed at 'policy development expenditure' – this condition should be effected through Candidate and Party Compliance Policies;
- The maximum amounts based on first preference votes (no need for a tapered scheme as payments are only available to parties not eligible for the Administration Fund).

Recommendation 48:

- The NSW Joint Standing Committee on Electoral Matters shall conduct a review of the level of public funding, the level of the caps on political donations, and the level of the caps on election spending and the period to which they apply, after every State election beginning with the 2014 State election;
- This review shall seek to develop a methodology for determining the appropriate levels of public funding and caps;
- It shall be informed by a report by the NSW Electoral Commission.

Recommendation 49: A scheme of Candidate and Party Compliance Policies should be introduced.

Recommendation 50: Section 110B of the EFED Act that provides for Compliance Agreements should be retained.

Recommendation 51: The audit requirements under NSW laws regulating election funding and spending should be determined by the NSWEC through its guidelines.

Recommendation 52:

- There should be an integrated provision providing for the powers currently available in sections 110 and 110A of the EFED Act that applies to all suspected breaches of Act;
- The exercise of these powers should be subject to a statutory internal review process.

Recommendation 53: The criminal offences in sections 96H(1), 96HA, 96H(2) and 96I of the EFED Act should be maintained.

Recommendation 54: It should be a strict liability criminal offence to lodge incomplete declarations.

Recommendation 55:

- A civil penalty regime similar to that provided under ACT and Queensland laws regulating election funding and spending should be adopted in NSW together; and
- This regime should be accompanied with powers to recover penalties, including recovery from public funding.

Recommendation 56:

- Lodgement of a declaration of disclosure that is false or misleading in a material particular should be subject to a civil penalty.
- This penalty will not apply if the organisation or person can demonstrate that reasonable steps have been taken to ensure that the declaration is not false or misleading in a material particular.

LIST OF TABLES

I A HISTORIC OPPORTUNITY

For nearly three decades, the funding and spending of elections in New South Wales was regulated through the *Election Funding Act 1981* (NSW). This Act – pioneering at its time - had two key planks: disclosure obligations and a public funding scheme.[1]

From 2008 onwards, four pieces of legislation were enacted, radically reshaping the regulation of election funding and spending in New South Wales. The *Election Funding Amendment (Political Donations and Expenditure) Act 2008* (NSW) introduced a system of biannual disclosure while the *Election Funding and Disclosures Amendment (Property Developers Prohibition) 2009* (NSW) placed a ban on political donations from property developers and close associates.

In late 2010, the most significant of these four laws was enacted. The *Election Funding and Disclosures Amendment Act 2010* (NSW) enacted caps on political donations, caps on electoral communication expenditure and reconfigured (and substantially increased) public funding of election campaigns. It also extended the ban on political donations from property developers and their close associates to gambling, liquor and tobacco companies (and their close associates). The Act also changed the disclosure system back to an annual scheme.[2]

The last of this tetralogy is the *Election Funding, Expenditure and Disclosures Amendment Act 2012* (NSW). Passed in early 2012, this Act restricted political donations to those on electoral rolls - a restriction that involved banning organisational affiliation fees to political parties, notably, membership fees paid by trade unions affiliated to the NSW ALP – and put in place a provision whereby the spending of affiliated organisations was aggregated to their respective political parties.[3]

---

[1] See Ernest Chaples, 'Election Finance in New South Wales: the First Year of Public Funding' (1983) 55(1) *Australian Quarterly* 66. For a detailed account of this Act prior to the 2008 changes, see Amanda Olsson, *Election Finance in New South Wales: The Establishment, Amendment and Application of Measures Adopted in New South Wales, Australia to Regulate Election Campaign Financing* (VDM Publishing, 2008).

[2] There were two key parliamentary committee reports leading to this legislation: Legislative Council Select Committee on Electoral and Political Party Funding, Parliament of New South Wales, *Electoral and Political Party Funding in New South Wales* (2008); Joint Standing Committee on Electoral Matters, Parliament of New South Wales, *Public Funding of Election Campaigns* (2010).

[3] Legislative Council Select Committee on the provisions of the Election Funding, Expenditure and Disclosures Amendment Bill 2011, Parliament of New South Wales, *Inquiry into the provisions of the Election Funding, Expenditure and Disclosures Amendment Bill 2011* (2012).

With little doubt, these laws brought about a paradigm shift in the regulation of election funding and spending in New South Wales (and Australia more generally). A laissez-faire situation was transformed into one of tight regulation; an electoral context where election funding and spending patterns were determined principally by the calculations and resources of the competing political parties and candidates was changed to one where such flows of money were governed by laws directed at enhancing the integrity of New South Wales' democracy. Predictably, such a shift has occasioned significant changes to how participants in New South Wales' elections conduct their campaigns and their internal financial affairs; indeed, this was the aim of the laws.

Unfortunately, a rather rickety legislative vehicle was chosen for this challenging endeavour. In essence, the current Act, the *Election Funding, Expenditure and Disclosures Act 1981* (NSW), is the 31 year-old *Election Funding Act 1981* (NSW) *plus* the various amendments made since 2008. Instead of these game-changing rules being enacted through a new Act, they were enacted as amendments to this decades-old Act. The result is a poorly integrated Act that lacks internal coherence, is overly complex and prescriptive in some areas while scant on detail in others. This has profound consequences for the ability to effectively comply with the Act and also its legitimacy.

The present review of the *Election Funding, Expenditures and Disclosure Act 1981* (NSW) by the Joint Standing Committee on Electoral Matters of the New South Wales Parliament ("JSCEM")[4] provides a historic opportunity to establish a sustainable framework for New South Wales election funding and spending laws, a framework that endures over some time by enhancing the quality of democracy in New South Wales.

This report proposes a framework comprising of 56 recommendations. At its foundation is the proposal for enacting a new Act that carefully integrates the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) with the *Parliamentary Electorates and Elections Act 1912* (NSW).[5] Four central objectives should underline provisions of this Act that deal with election funding and spending. These provisions should:

1) Protect the integrity of representative government;
2) Promote fairness in politics;

---

[4] See Appendix One for relevant terms of reference of this inquiry.
[5] See Part III: A Single Electoral Act for New South Wales – Proceed with Caution.

3) Support political parties to discharge their democratic functions; and
4) Respect political freedoms.[6]

The report proposes a single electoral commission responsible for the administration of electoral law in New South Wales, including the administration of the State's election funding and spending laws (the New South Wales Electoral Commission); the current functions of the New South Wales Election Funding Authority should be performed by the Commission with the authority abolished.[7]

The key functions of the Commission in the area of election funding and spending laws are: the administration of such laws; provision of education and information in relation to such laws; provision of advice and research in reviewing such laws; and the exercise of law-making functions as specified by such laws.[8] The performance of these functions should be governed by the principles of independence, impartiality and fairness, and accountability.[9]

The report recommends principles-based legislation in the areas of administration and securing compliance, with adoption of such legislation accompanied by enhanced accountability measures. It also recommends separating out the provisions relating to State elections from those applying to local government elections, and separating the provisions applying to political parties, candidates and groups of candidates from those applicable to donors and third-party campaigners.

In terms of specific measures regulating election funding and spending, the report recommends compulsory registration of political parties, candidates, groups of candidates and third-party campaigners. At the same time, it strongly argues for the abolition of the current scheme of agents for political parties, elected members, candidates, groups of candidates and third-party campaigners**.** The provisions relating to the management of accounts should be governed by principles-based legislation with guidelines issued by the New South Wales Electoral Commission prescribing specific requirements in this area.

---

[6] See Part IV: The Central Objects of Election Funding and Spending Laws in New South Wales.
[7] See Part V: A Single Electoral Commission: Key Functions and Guiding Principles, Section C.
[8] See Part V: A Single Electoral Commission: Key Functions and Guiding Principles, Section A.
[9] See Part V: A Single Electoral Commission: Key Functions and Guiding Principles, Section B.

A range of recommendations are made in relation to the disclosure scheme, the caps and prohibitions relating to political donations, and the caps on election spending. Amongst the more significant recommendations is reform of the statutory definitions of 'political donations' and 'electoral expenditure'. This report recommends that the concept of 'electoral communication expenditure' should be removed from NSW election funding and spending laws; it also advocates repealing the 'dominant purpose' caveat to 'electoral expenditure'; it further recommends that disclosure obligations, caps on political donations and caps on election spending apply to third-party campaigners only in relation to electoral expenditure incurred during the capped expenditure period.

The report also recommends that the concept of 'associated entities' should be introduced in relation to disclosure obligations, caps on political donations and caps on election spending. Crucially, it strongly argues that key provisions of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) be repealed: the restriction of political donations to those on the electoral rolls (including the ban on organizational affiliation fees); the prohibition of political donations from property developers, gambling, liquor and tobacco companies; and the aggregation rule regarding affiliated organizations.

Another important recommendation of the report is that JSCEM review the level of the caps on political donations, the level of the caps on election spending and the period to which they apply, and the level of public funding after every State election commencing from the 2015 State Election. This review should be informed by a report by the New South Wales Electoral Commission and should seek to develop methodologies for determining these various levels.

Finally, the report lays down a set of recommendations in relation to compliance. It recommends a compliance regime comprising an integrated suite of measures: measures to promote voluntary compliance; Candidate and Party Compliance Policies; compliance agreements; audit requirements; investigative powers; and a penalty regime consisting of criminal, civil and administrative penalties.

II METHODOLOGY USED FOR THIS REPORT

In completing this report, a review of legislative and parliamentary material and secondary literature relevant to the regulation of election funding and spending in New South Wales was undertaken. A similar review was conducted in relation to the regulation of election funding and spending in other Australian jurisdictions. Research was also conducted into the election funding and spending legislation of Canada, New Zealand, United Kingdom and the United States.

In order to gain an assessment of the impact of the regulation of election funding and spending in New South Wales, interviews were conducted with representatives from the New South Wales branches of the Australian Labor Party (ALP), Christian Democratic Party, Family First, Greens, Liberal Party, National Party; and the Shooters and Fishers Party. Invitations to participate in interviews were also issued to the 18 third-party campaigners who ranked amongst the top ten donors and top ten spenders in terms of electoral expenditure in the 2011 State General Elections. Interviews were conducted with the eight organisations that accepted these invitations.

In order to more fully understand the issues relating to the New South Wales Election Funding Authority ("EFA"), interviews were conducted with all the Australian electoral commissioners (including the New South Wales Electoral Commissioner). Discussions were also had on various occasions with relevant staff of the EFA and the New South Wales Electoral Commission ("NSWEC").

Several points should be made at the outset. First, the report focuses on the key features of a sustainable *framework* for NSW election funding and spending laws – its primary concern is the *architecture* of these laws. This means that it does not deal with - or only briefly touches upon - many questions of detail. Second, the recommendations of the report should be read and taken together. They form related parts of a larger whole – the framework of NSW election funding and spending laws.

Third, this document is an independent report. While commissioned by the NSWEC, the views it puts forth do not necessarily represent those of the NSWEC or the New South Wales Electoral Commissioner; conversely, the views of the NSWEC or the Commissioner do not necessarily represent those of the author. Indeed, as will be clear later, the report takes a

different position on key issues from that of the NSWEC and the New South Wales Electoral Commissioner ("NSW Electoral Commissioner").

It should finally be noted that this report is focused on the regulation of funding and spending in New South Wales *State elections*. Such regulation as applies to New South Wales local government elections falls outside its scope simply because the author has previously completed a report for the EFA on this topic in December 2010. This report entitled, *Regulating the Funding of Local Government Election Campaigns*, is available on the EFA's website[10] and was also submitted as an annexure to the submission of the New South Wales Electoral Commissioner (NSW Electoral Commissioner) to JSCEM's review of the *Parliamentary Electorates and Elections Act 1912* (NSW) and the *Election Funding, Expenditure and Disclosures Act 1981* (NSW).[11]

[10] Joo-Cheong Tham, *Regulating the Funding of New South Wales Local Government Election Campaigns* (2010) <http://efa nsw.gov.au/__data/assets/pdf_file/0020/84224/Regulating_the_Funding_of_NSW_Local_Government_Election_Campaigns_final.pdf>.

[11] NSW Electoral Commissioner, Submission No 18 to the Joint Standing Committee on Electoral Matters, Parliament of New South Wales, *Review of the Parliamentary Electorates & Elections Act 1912 and the Election Funding, Expenditure and Disclosure Act 1981,* 12 June 2012, Annexure 7 <http://www.parliament.nsw.gov.au/prod/parlment/committee nsf/0/e30620bfe58f1c13ca257a2200004a30/$FILE/ATTL703H.pdf/Submission%2018%20-%20Electoral%20Commission%20of%20NSW.pdf> ('Submission of NSW Electoral Commissioner').

III A SINGLE ELECTORAL ACT FOR NEW SOUTH WALES – PROCEED WITH CAUTION

In his submission to JSCEM's review of the *Parliamentary Electorates and Elections Act 1912* (NSW) and the *Election Funding, Expenditure and Disclosures Act 1981* (NSW), the NSW Electoral Commissioner strongly put the view that 'New South Wales should have one piece of electoral legislation which encompasses the conduct of both State and Local Government elections and the regulation of campaign finance and expenditure'.[12]

There are compelling reasons for this view. First, the administration of elections under the *Parliamentary Electorates and Elections Act 1912* (NSW) and the regulation of election funding and spending deal with the same subject matter, the regulation of elections.

Second, a single comprehensive Act facilitates compliance by providing a single legislative point of reference for candidates, political parties, third-party campaigners and donors. There is currently a close intersection at various points between the *Parliamentary Electorates and Elections Act 1912* (NSW) ("PE & E Act") and the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) ("EFED Act") that makes the existence of two Acts clumsy and confusing.

What is arguably the most vivid example concerns the registration of parties: parties can be registered for the purposes of the EFED Act but that Act cross-references to the registration scheme under Part 4A of the PE & E Act.[13] Another example concerns who is a 'candidate': under the EFED Act, 'candidate' refers to 'a person nominated as a candidate in the election *in accordance with the Parliamentary Electorates and Elections Act 1912* or in accordance with the Local Government Act 1993 (as the case requires)'.[14] Less obviously, there is also a connection between access to the electoral rolls (which is governed by the PE & E Act)[15] and the regulation of election funding and spending, with the restriction of political donations to individuals on electoral rolls implying a need for recipients of donations to be able to check whether prospective donors are on the electoral rolls.[16]

---

[12] Submission of NSW Electoral Commissioner, above n11, 7.
[13] PE & E Act s 66B. The confusion arising in this context was referred to by NSWEC staff: Discussion with New South Wales Electoral Commission staff (Sydney, 8 June 2012).
[14] EFED Act s 4.
[15] PE & E Act ss 39-44.
[16] See Interview with Anthony D'Adam, Senior Industrial Officer, Public Service Association (Sydney, 20 August 2012).

These reasons have added cogency if, as is recommended by this report, there is to be a single electoral commission responsible for administering both elections and the regulation of election funding and spending laws.[17]

The process of integrating the PE & E Act with the EFED Act should, however, be undertaken with care. The Acts clearly have different legislative histories. There are also some differences in the statutory definitions. For example, 'candidate' for the purpose of Part 6 (Political donations and electoral expenditure) of the EFED Act has an extended meaning.[18] While both Acts deal with the general subject matter of elections, there are important differences. There are different time-horizons, with the provisions of the PE & E Act generally centering on polling day (e.g. who can vote during polling day? who are the contestants during polling day?) while many of the provisions of the EFED Act apply on a continuous basis, especially the regulation of 'political donations'. With its focus on the regulation of election funding and spending, the EFED Act also involves more intensive regulation of the internal affairs of political parties (and third-party campaigners) especially in terms of financial management.

> *Recommendation 1*: The *Election Funding, Expenditure and Disclosures Act 1981* (NSW) should be integrated with the *Parliamentary Elections and Electorates Act 1912* (NSW) into a single electoral Act for New South Wales.

[17] See Part V: A Single Electoral Commission: Key Functions and Guiding Principles, Section C.
[18] Rather than ceasing at the end of the polling day, the status of person as a 'candidate' ends 30 days after that date: EFED Act s 84(3).

IV THE CENTRAL OBJECTS OF ELECTION FUNDING AND SPENDING LAWS IN NEW SOUTH WALES

The EFED Act currently lacks a statement of its central objects - this is a remarkable omission. A statement of objects is vital as it provides the key rationales for the Act, paving the way for greater clarity, understanding and confidence on the part of the public. A statement also lays down clear benchmarks for evaluating the implementation and impact of the Act. Moreover, it guides the performance of functions by the responsible statutory agency, a matter that is of greater significance if – as is recommended by this report – the NSWEC is to be given increased legislative power.[19]

This report proposes four central objects for the laws regulating election funding and spending in New South Wales:

- Protecting the integrity of representative government (including preventing corruption);
- Promoting fairness in politics;
- Supporting political parties to discharge their democratic functions; and
- Respecting political freedoms (in particular, freedom of political expression and freedom of political association).

These principles are relatively uncontroversial. In their key report, *Public Funding of Election Campaigns,* JSCEM recommended that these purposes be enshrined in the object clause of legislation reforming the electoral and political finance regime.[20] The NSW Electoral Commissioner has also endorsed these purposes,[21] most recently in his submission to the current JSCEM's review of the PE & E Act and EFED Act.[22]

---

[19] See Part VI: Principles-based Legislation in Administration and Securing Compliance.
[20] Joint Standing Committee on Electoral Matters, above n2, 3.
[21] See also Joint Standing Committee on Electoral Matters, above n2, 58-60.
[22] See Submission of NSW Electoral Commissioner, above n11, 71-73.

Recommendation 2: The following should be statutorily recognised as the central objects of New South Wales laws regulating election funding and spending:

- Protecting the integrity of representative government (including preventing corruption);
- Promoting fairness in politics;
- Supporting political parties to discharge their democratic functions; and
- Respecting political freedoms (in particular, freedom of political expression and freedom of political association).

V A SINGLE ELECTORAL COMMISSION: KEY FUNCTIONS AND GUIDING PRINCIPLES

A *Key Functions*

Key functions refer to the primary tasks of the statutory agency responsible for NSW election funding and spending laws. There are, in this context, four key functions:

1) Administration of such laws;

2) Raising public awareness and provision of education and information regarding these laws;

3) Provision of advice and research in reviewing such laws; and

4) The exercise of law-making functions as specified by such laws.

The first three functions are relatively uncontroversial and are currently performed by the various Australian electoral commissions (see Appendix Two). The function of administering election funding and spending laws is central, obvious and uncontroversial. When directed at those regulated by these laws, the function of providing education and information about the laws is clearly connected with the function of administering them – such educational and informational activities are essential to securing voluntary compliance.[23] This function, however, goes beyond those regulated and extends to the general public[24] and other public bodies, in particular, Parliament and other government departments.[25]

As to the function of providing advice and research in reviewing NSW election funding and spending laws, all laws – including these ones - should be kept up-to-date and relevant to contemporary circumstances. This requires regular review and such review should clearly involve input from the public agency most expert in the area. It is this that provides the core justification for this key function. Indeed, this is a function currently carried out by the EFA

---

[23] See Part XIX: Compliance, Section A.
[24] See *Commonwealth Electoral Act 1918* (Cth) s 7(1)(c); *Electoral Act 1992* (ACT) s 7(1)(c*); Electoral Act 2004* (NT) s 309(1)(d); *Electoral Act 1992* (Qld) s 7(1)(d), (e); *Electoral Act 1985* (SA) s 8(1)(c); *Electoral Act 2004* (Tas) s 9(1)(c); *Electoral Act 2002* (Vic) s 8(1)(f); *Electoral Act 1907* (WA) s 5F(1)(d).
[25] See *Commonwealth Electoral Act 1918* (Cth) s 7(1)(d); *Electoral Act 1992* (ACT) s 7(1)(d*); Electoral Act 2004* (NT) s 309(1)(e); *Electoral Act 1992* (Qld) s 7(1)(g); *Electoral Act 2004* (Tas) s 9(1)(d); *Electoral Act 1907* (WA) s 5F(1)(e).

through its annual reports to the New South Wales Parliament[26] and through its submissions to parliamentary inquiries into State elections.

Research is vital to the input of the EFA being properly grounded. Hence, the importance of section 25 of the EFED Act which provides that:

> The Authority may carry out, or arrange for the carrying out of, such research into election funding, political donations, electoral expenditure and other matters to which this Act relates as the Authority thinks appropriate and may publish the results of any such research.[27]

The final function - the exercise of law-making functions – is the most controversial. There is a strong view here that it is generally *not* the role of electoral commissions, but that of Parliament, to exercise such powers. As put by the ACT Electoral Commissioner, Phil Green:

> I don't see us as law makers, I see us as law enforcers . . . our job is to administer laws that are given, not to make them . . . the making of laws is properly the province of Parliament.[28]

On the other hand, it is clear that electoral commissions *do* exercise law-making powers – that is, they have the power to prescribe legal rules (and not just administer them). The most obvious example concerns the power to redistribute electoral districts.[29] In all Australian jurisdictions, electoral commissioners are centrally involved in the exercise of such power. This power is most certainly an exercise of (delegated) legislative power as it results in the determination of certain legal rules, the boundaries of electoral districts; it is also a power that has an obvious significance in terms of election outcomes – a party could gain or lose office as a result of the redrawing of electoral boundaries.

---

[26] EFED Act s 107.
[27] See also *Commonwealth Electoral Act 1918* (Cth) s 7(1)(e), (f); *Electoral Act 1992* (ACT) s 7(1)(e), (f); *Electoral Act 2004* (NT) s 309(1)(f),(g); *Electoral Act 1992* (Qld) s 7(1)(h), (i); *Electoral Act 1985* (SA) s 8(1)(d); *Electoral Act 2002* (Vic) s 8(1)(g); *Electoral Act 1907* (WA) s 5F(1)(f),(g).
[28] Interview with Phil Green, ACT Electoral Commissioner (Telephone Interview, 5 September 2012). See also Interview with Julian Type, Tasmanian Electoral Commissioner (Telephone Interview, 5 September 2012); Interview with Liz Williams, Acting Victorian Electoral Commissioner (Melbourne, 6 September 2012).
[29] The Australian position can be contrasted with the US situation where the power to redistribute is generally conferred upon bodies made up of party-political appointments, see Colin A Hughes and Brian Costar, *Limiting Democracy: The Erosion of Electoral Rights in Australia* (University of New South Wales Press, 2006) 10.

Another example of law-making power – this time under the EFED Act - is the ability of the EFA to issue guidelines under section 24. This section provides as follows:

> **24 Guidelines**
>
> (1) The Authority may, from time to time, determine and issue guidelines, not inconsistent with this Act or the regulations, for or with respect to any matters dealt with in this Act (except this Part and Part 2).
>
> (2) In the operation and application of this Act (except this Part and Part 2), regard shall be had not only to the provisions of this Act and the regulations but also to the guidelines determined under subsection (1), and in particular, the Authority shall have regard to those guidelines when dealing with applications, claims, caps and disclosures referred to in section 23.

This section confers upon the Authority delegated legislative power – the power to prescribe legal rules in the form of guidelines in relation to most of the EFED Act. That these guidelines are not to be inconsistent with the provisions of the Act and its regulations does not detract from the fact that the power to issue them is legislative power; such circumscription does not alter the *nature* of the power but its *scope.*

In such circumstances, the absolutist position of *not* conferring law-making powers upon electoral commissions is not defensible. Rather, attention is more properly directed at the areas to which such law-making powers are justified. As will be elaborated below, this submission takes the view that legislative power should be conferred on the statutory agency responsible for NSW election funding and spending laws in *limited respects* and that such power should be accompanied by enhanced accountability mechanisms.[30] As such, these powers should be a key statutory function.

> *Recommendation 3*: The key statutory functions of the agency responsible for NSW election funding and spending laws are the:
>
> 1) Administration of such laws;
> 2) Provision of education and information in relation to such laws;
> 3) Provision of advice and research in reviewing such laws; and
> 4) The exercise of law-making functions as specified by such laws.

[30] See Part VI: Principles-Based Legislation in Administration and Securing Compliance.

B *Guiding Principles*

'Guiding principles' in this context refers to the standards applicable to the discharge of the key functions – they govern how these functions are performed. The principles that apply to the discharge of functions by electoral authorities in the area of election funding and spending laws are similar to those that apply to the administration of elections, a point on which there was strong agreement amongst the electoral commissioners.[31] Three principles are of particular importance:

1) Independence;
2) Impartiality and Fairness;
3) Accountability.

1 *Principle of Independence*

This principle/Independence is clearly crucial in relation to electoral commissions. Indeed, Orr, Mercurio and Williams have gone further to argue that the independence of electoral authorities is the *single most important factor* in ensuring free and fair elections.[32]

In understanding the principle of independence, it is important to distinguish between its various aspects. One concerns the subject-matter of independence - independence in relation to *what*. The answer must be independence in performing its key functions as prescribed by the law.

Another aspect of the principle of independence is independence from *whom*. There is consensus here that electoral commissions should be independent of the government of the day and those being regulated (e.g. political parties and candidates) in performing their

---

[31] Interview with Phil Green, ACT Electoral Commissioner (Telephone Interview, 5 September 2012); Interview with Julian Type, Tasmanian Electoral Commissioner (Telephone Interview, 5 September 2012); Interview with Liz Williams, Acting Victorian Electoral Commissioner (Melbourne, 6 September 2012); Interview with Ed Killesteyn, Australian Electoral Commissioner (Melbourne, 4 September 2012); Interview with David Kerslake, Queensland Electoral Commissioner (Telephone Interview, 6 September 2012); See also Julian Type, 'Electoral management bodies: independence and accountability in Australia and New Zealand' (Paper presented at the Conference on Building Key Principles into the Design of the Future Electoral Management Body: Tunisian and International Perspectives, United Nations Development Program, Tunis, 27 February 2012).

[32] Graeme Orr, Bryan Mercurio and George Williams, 'Australian Electoral Law: A Stocktake' (2003) 2(3) *Election Law Journal* 383, 399.

functions. There should be, in this respect, 'freedom from all partisanship'[33] or 'non-partisanship'.[34]

There should also be a distinction between institutional and behavioural aspects of independence.[35] The latter can exist without former. This is illustrated by former Australian Electoral Commissioner Colin Hughes' observation that federal electoral officials acted independently (behavioural independence) whilst housed in a branch of a federal department (institutional dependence). In his words:

> The continuities over the first hundred years of federal electoral administration – initially (1902) with an ordinary departmental structure, then (1977) under statutory officers, and most recently (1984) under a statutory commission – are quite remarkable and likely to be maintained. One of the most striking continuities is the degree of independence that has prevailed throughout that period.[36]

Conversely, legislative provisions – the focus of this report - can provide institutional independence but cannot guarantee behavioural independence. Behavioural independence is the product of legislative provisions *as well as* the leadership of the Commissioner and the culture and practices of Commission. It also depends on the culture and practices of those to whom the Commissioner is accountable, in particular, Parliament and the relevant Minister; all parliamentarians, including the relevant Minister, have a duty of care to respect the independence of the Commission.

---

[33] Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* (Federation Press, 2010) 90.
[34] Interview with Ed Killesteyn, Australian Electoral Commissioner (Melbourne, 4 September 2012).
[35] See Paul Dacey, 'What do "Impartiality", "Independence" and "Transparency" Mean? Some Thoughts from Australia' (Paper presented at the Conference on Improving the Quality of Election Management, New Delhi, 24-26 February 2005) 6. For application of this distinction in the context of administrative tribunals reviewing migration decisions, see Yee-Fui Ng, 'Tribunal Independence in the Age of Migration Control' (2012) 19(4) *Australian Journal of Administrative Law* 203.
[36] Colin Hughes, 'The Independence of the Commissions: The Legislative Framework and the Bureaucratic Reality' in Graeme Orr, Bryan Mercurio and George Williams (eds), *Realising Democracy: Electoral Law in Australia* (Federation Press, 2003) 205, 205-206. See also Colin Hughes, 'Institutionalising Electoral Integrity' in Marian Sawer (ed), *Elections - Full, Free and Fair* (Federation Press, 2001) 142, 156.

As several electoral commissioners emphasised,[37] independence is a question of degree. In part, this reflects the contexts in which the electoral commissions currently operate. It is also dictated by structural necessity: electoral commissions are a part of the Executive, one of three branches of government (the other being the legislature and the judiciary); by its nature, it cannot be fully independent of the Executive.

Considerations of principle also suggest that there is no 'absolute notion of independence'[38] for two reasons. The first is the rule of law - as with all public bodies in Australia, the powers of electoral commissions are governed by the law. The second is the principle of accountability (discussed below). As a general rule, the more significant the powers conferred upon a public body, the more stringent should be the accountability mechanisms that apply to it.[39] As Australian Electoral Commissioner, Ed Killesteyn opined: 'there is probably an argument . . . that the more independent you are the more accountable you need to be'. In a similar vein, the Western Australian Commissioner for Public Sector Standards has said of accountability officers (including the Western Australian Electoral Commissioner) that '(t)he greater their independence from the Executive Government, the greater the need for accountability officers themselves to be held accountable for their actions'.[40] Hence the paradox of independence: greater autonomy comes with an increased obligation to be accountable.

This report will now examine the principle of independence in relation to the key areas of:

- Legislative power;
- Appointment;
- Termination; and
- Performance of functions.[41]

---

[37] Interview with Warwick Gately, Western Australian Electoral Commissioner (Telephone Interview, 5 September 2012); Interview with Phil Green, ACT Electoral Commissioner (Telephone Interview, 5 September 2012).
[38] Interview with Ed Killesteyn, Australian Electoral Commissioner (Melbourne, 4 September 2012).
[39] See Interview with Ed Killesteyn, Australian Electoral Commissioner (Melbourne, 4 September 2012).
[40] Office of the Public Standards Commissioner, Western Australia, *Accountability Officers of the Western Australian Parliament: Accountability and Independence Principles* (2006) 5.
[41] For an excellent discussion of the independence of Australian electoral commissions, see Norm Kelly, *Directions in Australian Electoral Reform: Professionalism and Partisanship in Electoral Management* (ANU E Press, 2012) Chapter 3. See also Roger Beale, Philip Green and Dawn Casey, Elections ACT, Submission No 4 to the Standing Committee on Administration and Procedure, *Inquiry into the feasibility of establishing the position of Officer of the Parliament*, 20 July 2011, 6-13.

(a) Independence and Legislative Power

Does the principle of independence necessitate the conferral of legislative power upon electoral commissions? Former Australian Electoral Commissioner Colin Hughes has commented in relation the Australian Electoral Commission that:

> some might think that 'independence' could mean the ability to pursue the AEC's own interpretation of general principles like those which might be implicit in a goal of 'free and fair' elections or 'one vote, one value' . . . within a loose framework of statutory provisions and broad discretions.[42]

Hughes' comments were arguably in response to views like those of the intergovernmental organisation, International IDEA (International Institute for Democracy and Electoral Assistance).[43] According to International IDEA, the power to independently develop the electoral regulatory framework under the law is a key aspect of the independence of electoral commissions.[44] Applying the benchmarks laid down by International IDEA, Norm Kelly has concluded 'Australian electoral administrations have their independence threatened (because) they have virtually no independent ability to improve or amend the electoral systems they administer'.[45]

These are problematic views. They involve a conceptual elision: the question of 'independent *from*' (executive, regulated bodies like political parties) is conflated with 'independent *to'*. The imperative of 'independent from' is a necessary condition of impartiality and fairness.[46]

The issue of 'independent to', however, goes to the question of what functions should the electoral agency have. This involves considerations different from the question of being 'independent from'. The function of making laws, in particular, raises a different (complex)

---

[42] Colin Hughes, 'The Independence of the Commissions: The Legislative Framework and the Bureaucratic Reality' in Graeme Orr, Bryan Mercurio and George Williams (eds), *Realising Democracy: Electoral Law in Australia* (Federation Press, 2003) 205, 206.
[43] For information on International IDEA, see International Institute for Democracy and Electoral Assistance, *International IDEA* (23 October 2012) <http://www.idea.int/>.
[44] Alan Wall, Andrew Ellis et al, *Electoral Management Design: The International IDEA Handbook* (International Institute for Democracy and Electoral Assistance, 2006) 9.
[45] Norm Kelly, 'The Independence of Electoral Management Bodies: The Australian Experience' (2007) 59(2) *Political Science* 17, 31. See also Norm Kelly, 'Australian Electoral Administration and Electoral Integrity' in Joo-Cheong Tham, Brian Costar and Graeme Orr (eds), *Electoral Democracy: Australian Prospects* (Melbourne University Press, 2011) 99, 103-104; Kelly, above n41, 29.
[46] See Part V: A Single Electoral Commission: Key Functions and Guiding Principles, Section B(2).

set of issues which have – at its heart – which institution is the legitimate law-making body in the area of electoral regulation, a discussion picked up below.[47]

Even if the principle of independence requires a power to make laws to be conferred upon the electoral commissions, whether or not such power *should* be conferred depends on its compatibility with other guiding principles, such as the principle of accountability and the principle of impartiality and fairness. The principle of independence, while crucial - perhaps even paramount - is not the only principle to be considered.

Of note here is how the *absence of discretion* has been seen by some as providing electoral commissions with a strong (conclusive?) defence of their impartiality and fairness. A common understanding of the way in which Australian electoral commissions carry out their functions is given by former Australian Electoral Commissioner, Colin Hughes when he stated that '(e)lectoral administration, carrying out duties and exercising discretions, is tightly constrained by statutory detail'.[48] With little discretion provided under this 'bureaucratic model',[49] a compelling response to accusations or allegations of bias, partiality or unfairness would be to point out how decisions were mandated by the law. As explained by the current Australian Electoral Commissioner, '(o)ne of the best protections I think that a commission has against arguments of bias or prejudice are the rules are laid out in legislation because you simply follow them'.[50]

That said, the advantage this model provides in terms of perception of impartiality might very well be outweighed by its drawbacks. The submission of the NSW Electoral Commissioner, for instance, has argued that:

> If it can be said that Electoral Commissions in Australia can be described as administrators, rather than regulators, this reflects the strictures of the tradition of excessively detailed electoral legislation under which they have operated. Moreover, it under-sells the independence and expertise of the Commissions.[51]

---

[47] See Part VI: Principles-based Legislation in Administration and Securing Compliance.
[48] Hughes, above n42, 206.
[49] See Colin Hughes, 'The Bureaucratic Model: Australia' (1992) 37 *Journal of Behavioral and Social Sciences* 106.
[50] Interview with Ed Killesteyn, Australian Electoral Commissioner (Melbourne, 4 September 2012).
[51] Submission of NSW Electoral Commissioner, above n11, 19.

These points are more closely examined in this report through its consideration of whether NSW election funding and spending laws should be in the form of principles-based legislation.[52]

(b) Independence and Appointment Process

Under the EFED Act, the NSW Election Funding Authority comprised three persons:

- the NSW Electoral Commissioner who is the Chairperson of the EFA[53] and is appointed by the Governor;[54] and
- two other members, both appointed by the Governor, with one nominated by the Premier and the other nominated by the Leader of the Opposition in the Legislative Assembly.[55]

Vesting the power to appoint electoral commissioners and members of commissions in the Governor reflects the norm in Australia. Most jurisdictions also insist that the parliamentary leaders of each political party represented in Parliament be consulted prior to the appointments being made;[56] in Queensland, the obligation to consult extends to consulting the relevant parliamentary committee (see Appendix Two). At the very least, both should apply in relation to the NSW Electoral Commission as it enhances the prospect of an appointment that is seen to be impartial and fair and adds legitimacy to the process of appointment.[57] Other options worth considering are JSCEM having the power to veto the appointment of the NSW Electoral Commissioner[58] and the appointment of the commissioner being ratified by the New South Wales Parliament, as suggested by the NSW Electoral Commissioner[59]

Recommendation 4: Parliamentary leaders of each political party represented in the New South Wales Parliament and members of the Joint Standing Committee on

---

[52] See Part VI: Principles-based Legislation in Administration and Securing Compliance.
[53] EFED Act s 7.
[54] PE & E Act s 21AA.
[55] EFED Act s 6.
[56] See *Electoral Act 1992* (ACT) ss 12(3), 22(2); *Electoral Act 2004* (NT) s 314(2); *Electoral Act 1992* (Qld) ss 6(7), 22(2)-(3); *Electoral Act 2004* (Tas) ss 8(2), 14(2); *Electoral Act 1907* (WA) s 5B(3).
[57] The current Australian Electoral Commissioner has observed that the appointment process of the Australian Electoral Commissioners is currently less than transparent because consultation is not required: Interview with Ed Killesteyn, Australian Electoral Commissioner (Melbourne, 4 September 2012).
[58] Submission of NSW Electoral Commissioner, above n11, 37.
[59] Interview with Colin Barry, New South Wales Electoral Commissioner (Sydney, 22 August 2012).

> Electoral Matters shall be consulted prior to the appointment of the NSW Electoral Commissioner and other members of the statutory agency responsible for administering NSW election funding and spending laws.

The membership of the NSW EFA is unusual in having members that are appointed upon nomination of the governing party and the Opposition.[60] Two reasons can be given for this composition: the need for a 'balanced' EFA and the need for the EFA to have expertise regarding how NSW political parties operate. Both reasons strongly lack plausibility.

(i) An Imbalanced Composition

The rationale based on 'balance' goes along these lines: having the governing party and the Opposition represented in the EFA results in an EFA that is balanced (impartial and fair) in its administration of election funding and spending laws.

This rationale is highly questionable. Even on its own terms, it cannot assure balance as many political parties are not represented including parliamentary parties like the Greens, Christian Democratic Party, Greens and the Shooters and Fishers Party. This rationale is based on the two-party model; a model which the Tasmanian Electoral Commissioner correctly pointed out 'tends to pre-suppose there are only two parties and marginalizes those parties which are not part of the model'.[61] The result, as put by the NSW Electoral Commissioner, is that 'the optics look a little bit one sided'.[62]

There are more fundamental difficulties with the 'balance' rationale. It fails to secure independence on the part of the EFA; in fact, it embeds a lack of independence from the leading parties in a structural sense. As the Victorian Electoral Commissioner noted, an independent electoral authority should not have members that are 'participants in the electoral process or have a connection with or be perceived to have a connection with participants in electoral process'.[63]

---

[60] The current members appointed in this way are Kirk McKenzie and Edward Pickering: Election Funding Authority of New South Wales (NSW), *2010/11 Annual Report* (2011) 9.
[61] Interview with Julian Type, Tasmanian Electoral Commissioner (Telephone Interview, 5 September 2012).
[62] Interview with Colin Barry, New South Wales Electoral Commissioner (Sydney, 22 August 2012).
[63] Interview with Liz Williams, Acting Victorian Electoral Commissioner (Melbourne, 6 September 2012).

This lack of independence necessarily results in the perception of partiality, unfairness and bias. This vividly arises when the EFA, which is responsible for approving prosecutions, has to determine whether or not to prosecute either the governing party or the Opposition. As Norm Kelly rightly observes, '(t)his places the authority's two nominated members in a position of potentially starting action against their own party colleagues – a clear conflict of interest'. [64] A conflict of interest also arises when the EFA is deciding to prosecute 'unrepresented' parties – members nominated by the governing party and the Opposition may, in such situations, be deciding to prosecute their party's competitors.

There is also a risk of collusion. As noted by Julian Type, the Tasmanian Electoral Commissioner, 'party appointees are probably vulnerable to allowing each other quid pro quos in that if one of them becomes aware of a possible infraction by the other then rather than the matter being prosecuted; they're probably vulnerable to turning a blind eye to the misbehaviour of the other party'.[65]

All this is not to suggest impropriety on the part of the party-nominated members of the EFA. The words of NSW Legislative Council Select Committee on Electoral and Political Party Funding capture well the difficulties with having such members:

> The Committee of is the view that partisan appointments to the EFA should cease, to remove any *perception of bias* in the operation of the EFA. The Committee underscores that there is no evidence of impropriety on the part of the EFA, but that partisan appointments give rise to this perception.[66]

[64] Kelly, above n 41, 11.
[65] Interview with Julian Type, Tasmanian Electoral Commissioner (Telephone Interview, 5 September 2012).
[66] Legislative Council Select Committee on Electoral and Political Party Funding, above n2, 213 (emphasis added).

(ii) Composition not Necessary for Expertise in Affairs of Political Parties

The goal of the EFA having expertise in the operations of NSW political parties is a legitimate one but the means employed here are wrong. Given that only the governing party and the Opposition are 'represented', the expertise secured predominantly relates to these parties.

More importantly, the EFA should – and does – secure such expertise through its operational experience.[67] It also secures it through adequate stakeholder consultation. As Australian Electoral Commissioner, Ed Killesteyn observed:

> you need strong relationships and understanding and dialogue with the people who are your stakeholders. If you don't have that good consultation, that good dialogue, then inevitably you lose an ability to work with them in …. a co-operative . . . way.[68]

As noted by David Kerslake, the Queensland Electoral Commissioner, 'being independent and impartial doesn't mean that you have to be aloof'.[69]

> *Recommendation 5*: Members of the statutory agency administering NSW election funding and spending laws should not be party-appointments.

Removing the requirement for party-appointments raises the question as who should replace the members of the EFA appointed in this manner. It is probably best to approach this question by identifying the attributes and skills that such members should have (rather than specifying possible office-holders). They should, firstly, have the attributes that allow them to give effect to the guiding principles of independence, impartiality and fairness, and accountability. As to their skills, these members should have demonstrated experience and ability to develop the strategic directions of a complex organisation like the NSWEC. Given the increased focus of election funding and spending laws on compliance, it is also desirable that these members have skills in this area (e.g. auditing skills, forensic accounting skills, legal skills).

---

[67] Interview with Julian Type, Tasmanian Electoral Commissioner (Telephone Interview, 5 September 2012).
[68] Interview with Ed Killesteyn, Australian Electoral Commissioner (Melbourne, 4 September 2012).
[69] Interview with David Kerslake, Queensland Electoral Commissioner (Telephone Interview, 6 September 2012).

(c) Independence and Termination of Appointment Process

Section 22AB(3) of the PE & E Act deals with the termination of appointment of the NSW Electoral Commissioner:

> The Electoral Commissioner may be suspended from office by the Governor for misbehaviour or incompetence, but cannot be removed from office except in the following manner:
>
> (a) The Minister is to cause to be laid before each House of Parliament a full statement of the grounds of suspension within 7 sitting days of that House after the suspension.
>
> (b) An Electoral Commissioner suspended under this subsection is restored to office by force of this Act unless each House of Parliament at the expiry of the period of 21 days from the day when the statement was laid before that House declares by resolution that the Electoral Commissioner ought to be removed from office.
>
> (c) If each House of Parliament does so declare within the relevant period of 21 days, the Electoral Commissioner is to be removed from office by the Governor accordingly.

While this provision vests in the Governor the power to initiate the removal of the Commissioner from office, it also requires both Houses of Parliament declaring by resolution that the Commissioner should be removed. This position is similar to the position in other jurisdictions (see Appendix Two). It is highly appropriate in that it provides an important structural mechanism to guarantee the independence of the Commissioner from the governing party through the requirement of parliamentary resolutions – and it underscores the principal accountability that the Commissioner has to Parliament.[70]

Recommendation 6: Section 22AB(3) of the PE & E Act should be retained.

[70] See Part V: A Single Electoral Commission: Key Functions and Guiding Principles, Section B(3).

(d) Independence and Performance of Functions

A crucial aspect of independence in relation to electoral commissions is independence from Ministerial directions in relation to the performance of their functions. In some States and Territories, for instance South Australia, Western Australia and Australian Capital Territory,[71] such independence is based on conventions, not legislative provisions. In Tasmania[72] and Victoria, [73] on other hand, there are express statutory provisions stipulating that the Commission is not subject to direction or control of the relevant Minister. Such provision should be adopted in relation to NSW election funding and spending laws – especially given the accountability of the Commission to the relevant Minister.[74]

> *Recommendation 7*: NSW election funding and spending laws should stipulate that the responsible statutory agency is not subject to the direction or control of the relevant Minister in respect of the performance of its responsibilities and functions, and the exercise of its powers.

2 *Principle of Impartiality and Fairness*

This principle is currently reflected in section 22(2) of the EFED Act. This provision states that:

> It is the duty of the Authority to exercise its functions under this Act in a manner that is not unfairly biased against or in favour of any particular parties, groups, candidates or other persons, bodies or organisations.

The interviews with electoral commissioners provided insightful elaboration on the meaning of the principle of impartiality and fairness. Liz Williams, the Acting Victorian Electoral Commissioner stated that impartiality meant 'dealing with everyone in a fair and equitable manner and treating everyone, providing everyone with the same information, conducting investigations in the same way, the same processes, the same procedures, consistency in the

---

[71] See Interview with Kay Mousley, South Australian Electoral Commissioner (Telephone Interview, 6 September 2012); Interview with Phil Green, ACT Electoral Commissioner (Telephone Interview, 5 September 2012); Interview with Warwick Gately, Western Australian Electoral Commissioner (Telephone Interview, 5 September 2012).
[72] *Electoral Act 2004* (Tas) s 10.
[73] *Electoral Act 2002* (Vic) s 10.
[74] See Part V: A Single Electoral Commission: Key Functions and Guiding Principles, Section B(3). A similar recommendation has been made by the ACT Electoral Commission, see Beale, Green and Casey, Elections ACT, above n41, 9.

administration across all the participants'.[75] In the words of other commissioners, what was required was 'consistency'[76] and 'parity of treatment'.[77]

Importantly, the principle of impartiality and fairness should be understood in the context of the rule of law.[78] It requires 'objective application of the law'.[79] Highlighting this, some Commissioners emphasised how impartiality and fairness required electoral commissions to be 'frank and fearless in their duties',[80] in particular to enforce the law 'without fear or favour'. [81] In addition, the South Australian and Victorian Electoral Commissioners emphasised how impartiality and fairness included scrupulous adherence to the rules of procedural fairness (laws of natural justice).[82]

The principle of impartiality and fairness is important as it is key to *fair* elections. Indeed, impartiality and fairness can be seen as the aim to which the principle of independence seeks to secure. [83] The principle of independence demarcates the areas that the electoral commissions should be 'free from' but says little as to what this autonomy is directed at. Arguably, the aim of impartial and fair administration of electoral laws is the substantive goal of independence. Without deprecating the principle of independence, it is perhaps best seen as an instrumental principle – as an essential means to secure impartiality and fairness on the part of the electoral commissions.

Given the necessary link between independence, on one hand, and impartiality and fairness, on the other, the structural mechanisms for the latter rely upon those put in place to buttress independence. Impartiality and fairness are also facilitated by key accountability mechanisms,

---

[75] Interview with Liz Williams, Acting Victorian Electoral Commissioner (Melbourne, 6 September 2012).
[76] Interview with Julian Type, Tasmanian Electoral Commissioner (Telephone Interview, 5 September 2012).
[77] Interview with Ed Killesteyn, Australian Electoral Commissioner (Melbourne, 4 September 2012); Dacey, above n35, 4.
[78] See Hughes, above n42, 206-208.
[79] Interview with Ed Killesteyn, Australian Electoral Commissioner (Melbourne, 4 September 2012); Dacey, above n35, 3.
[80] Interview with Liz Williams, Acting Victorian Electoral Commissioner (Melbourne, 6 September 2012).
[81] Interview with Phil Green, ACT Electoral Commissioner (Telephone Interview, 5 September 2012).
[82] Interview with Kay Mousley, South Australian Electoral Commissioner (Telephone Interview, 6 September 2012); Interview with Liz Williams, Acting Victorian Electoral Commissioner (Melbourne, 6 September 2012).
[83] Similar sentiments expressed by Phil Green, ACT Electoral Commissioner: Interview with Phil Green, ACT Electoral Commissioner (Telephone Interview, 5 September 2012).

in particular, those of transparency,[84] and effective review mechanisms in the area of compliance.[85]

3 *Principle of Accountability*

In this context, there are three dimensions of the principle of accountability:

- To whom should the NSWEC be held accountable?
- In relation to what should it be held accountable?
- In what ways should it be held accountable?

Electoral commissions – including the NSWEC – are subject to a complex framework of accountability with four distinct lines of accountability: they are accountable to Parliament, the relevant Minister, those regulated, the electorate and the general public. The principle of accountability operates differently with these lines of accountability and its varied application needs to be carefully understood.

(a) Accountability to Parliament

The principal accountability of electoral commissions should be to Parliament *as an institution.* This was emphasised by all the Commissioners even when their legislative contexts did not expressly state this to be the case.[86] For instance, the NSW Electoral Commissioner took the view that he reported to Parliament even though the lines of accountability are 'blurred'. This view finds strong support in the obligation of the EFA to provide its annual reports to the President of the Legislative Council and Speaker of the Legislative Assembly, reports which are then tabled in each House of Parliament;[87] and also in the central role of the New South Wales Parliament in the removal of the Commissioner from office.[88]

---

[84] See Part V: A Single Electoral Commission: Key Functions and Guiding Principles, Section B(3).
[85] See Part XIX: Compliance.
[86] See, for example, interview with Interview with Kay Mousley, South Australian Electoral Commissioner (Telephone Interview, 6 September 2012); Warwick Gately, Western Australian Electoral Commissioner (Telephone Interview, 5 September 2012).
[87] EFED Act s 107.
[88] See Part V: A Single Electoral Commission: Key Functions and Guiding Principles, Section B(1).

Parliamentary accountability is the principal form of accountability applicable to electoral commissions for two reasons. First, Parliament is typically a key institution for holding public officials accountable in parliamentary democracies like New South Wales. Second, it is the mechanism of accountability most compatible with principles of independence and impartiality. It would be wrong to have the other main mechanism of accountability – accountability to the relevant Minister – as the principal form of accountability. This would squarely undermine the principle of independence and the principle of impartiality and fairness; such accountability by its nature means that electoral commissions are not independent of the governing party and gives rise – at the very least – to a reasonable perception of bias towards the governing party.

Electoral commissions are accountable to Parliament for the discharge of their functions as specified by law. As put by the Australian Electoral Commissioner, 'you are accountable to Parliament for the implementation of the laws that Parliament has passed'.[89]

How then should electoral commissions be held accountable for this? Transparency is crucial, a matter emphasised by various commissioners.[90] The Australian Electoral Commissioner emphasised, in particular, the need to be transparent about the way in which decisions are made:

> Making sure that you are open about the way in which you've made decisions, explaining the decisions that you make and the reasons that you're making them and ensuring that those decisions are very strongly grounded in the legislation.[91]

Transparency is, in fact, a key means of ensuring the accountability of electoral commissions not only to Parliament but also to the relevant Minister, regulated bodies and individuals as well as the electorate and general public.

In terms of specific parliamentary mechanisms, the most effective way seems to be through a committee on electoral matters of both Houses of Parliament – a joint parliamentary

---

[89] Interview with Ed Killesteyn, Australian Electoral Commissioner (Melbourne, 4 September 2012).
[90] Interview with Ed Killesteyn, Australian Electoral Commissioner (Melbourne, 4 September 2012); Interview with Kay Mousley, South Australian Electoral Commissioner (Telephone Interview, 6 September 2012); Interview with Julian Type, Tasmanian Electoral Commissioner (Telephone Interview, 5 September 2012); Interview with Phil Green, ACT Electoral Commissioner (Telephone Interview, 5 September 2012); Interview with Bill Shepheard, Northern Territory Electoral Commissioner (Telephone Interview, 12 September 2012).
[91] Interview with Ed Killesteyn, Australian Electoral Commissioner (Melbourne, 4 September 2012).

committee. This committee should be recognised in NSW electoral laws as recommended by the NSW Electoral Commissioner and can be modeled upon the existing Joint Standing Committee on Electoral Matters.[92]

In the area of election funding and spending laws, JSCEM can effectively hold the NSWEC to account in various ways: its annual reports should be reviewed by the committee, and the Commissioner should regularly appear before the committee in order to explain the operations of the NSWEC and be available for questioning by the committee. Further, as will be suggested below, the committee should also review guidelines made by the NSWEC.[93]

It should be emphasised here that the power of this committee - and Parliament more generally - to hold the NSWEC accountable should be exercised with full regard for the principle of independence, and the principle of impartiality and fairness that apply to the NSWEC. In particular, this power should not be exercised in a partisan fashion; otherwise, there will be a risk to the perception of independence and impartiality on the part of the NSWEC.

(b) Accountability to the Relevant Minister

Like accountability to Parliament, this line of accountability also relates to the discharge of functions by the NSWEC. But there are crucial differences in the manner in which accountability is effected. Such accountability is not effected in the same way as accountability to Parliament; rather it operates in the context of the NSWEC being *principally* accountable to Parliament.

While formally part of the executive, the NSWEC is not accountable to the relevant Minister in the same way as an ordinary government department. In particular, it should not be subject to the directions and control of the relevant Minister. This would be incompatible with the principle of independence[94] as well as the principle of impartiality and fairness; it would involve being directed by one side of politics, the governing party. This is a matter that should

---

[92] See NSW Parliament, *Joint Standing Committee on Electoral Matters* <http://www.parliament.nsw.gov.au/electoralmatters?open&refnavid=LA5_2>.
[93] See Part VI: Principles-based Legislation in Administration and Securing Compliance, Section C.
[94] See Part V: A Single Electoral Commission: Key Functions and Guiding Principles, Section B(1).

be emphasised as several commissioners pointed out the tension between the independence of electoral commissions and their set up – in crucial ways – as a government department.[95]

The acting Victorian Electoral Commissioner characterised accountability to the relevant Minister as 'very much informational'.[96] Being accountable in this sense is restricted to providing an account (of the Commission's activities). Understood in this limited fashion, accountability to the relevant Minister will not undermine the principles of independence and impartiality and fairness; nor would it risk undermining the primary accountability the NSWEC has to Parliament. Such an understanding should allow the 'hybrid' situation[97] of the NSWEC being simultaneously accountable to New South Wales Parliament and the relevant Minister to be effectively managed in accordance to its guiding principles.

(c) Accountability to Those Regulated, the Electorate and the General Public

This heading can be briefly discussed. The accountability of the NSWEC to those regulated is secured through the transparency of its decisions and policies; it is also secured through the mechanisms of impartiality and fairness, especially the rules of procedural fairness and effective review processes. As to the accountability of the NSWEC to the electorate[98] and general public, this is largely secured through parliamentary accountability and transparency.

4 *The Case for Codifying the Guiding Principles*

In the interviews conducted with the Australian electoral commissioners, it was striking how there was a strong degree of agreement regarding key principles applying to their activities, notably, the principles of independence, impartiality and fairness, and accountability.

---

[95] Interview with David Kerslake, Queensland Electoral Commissioner (Telephone Interview, 6 September 2012); Interview with Bill Shepheard, Northern Territory Electoral Commissioner (Telephone Interview, 12 September 2012).
[96] Interview with Liz Williams, Acting Victorian Electoral Commissioner (Melbourne, 6 September 2012).
[97] Interview with Julian Type, Tasmanian Electoral Commissioner (Telephone Interview, 5 September 2012).
[98] Interview with Warwick Gately, Western Australian Electoral Commissioner (Telephone Interview, 5 September 2012).

In addition, most of the electoral commissioners strongly supported an express legislative statement spelling out these guiding principles.[99] Yet none of the Australian electoral statutes clearly spell out these principles, except for the EFED Act in relation to the principle of impartiality and fairness.

Stating these principles in legislation does not, of course, guarantee their fulfillment - as Tasmanian Electoral Commissioner, Julian Type, correctly observed, 'you can't legislate for good judgment'.[100] Nevertheless, there are compelling grounds to do so. As David Kerslake, the Queensland Electoral Commissioner, observed, such an express statement would send a message to the public.[101] More than this, codification of these principles would more fully structure the discharge of functions by the NSWEC, including the discretion it wields. It will also establish touchstones to govern the relationships between NSWEC and other bodies, in particular, the New South Wales Parliament, the Joint Standing Committee on Electoral Matters and the relevant Minister.

> *Recommendation 8*: NSW election funding and spending laws should recognise the following as guiding principles to govern the functions of the New South Wales Electoral Commission:
>
> (i) The principle of independence;
>
> (ii) The principle of impartiality and fairness; and
>
> (iii) The principle of accountability.

---

[99] Interview with Phil Green, ACT Electoral Commissioner (Telephone Interview, 5 September 2012); Interview with Warwick Gately, Western Australian Electoral Commissioner (Telephone Interview, 5 September 2012); Interview with David Kerslake, Queensland Electoral Commissioner (Telephone Interview, 6 September 2012); Interview with Liz Williams, Acting Victorian Electoral Commissioner (Melbourne, 6 September 2012). Expressing similar sentiments, Ed Killesteyn, the Australian Electoral Commissioner, stated that:

> One of the glaring absences in the Commonwealth Electoral Act is the notion of independence, it's not specifically stated anywhere in the Commonwealth Electoral Act that the AEC is an independent organization. And one could suggest that if there was going to be some changes so in that respect that is that they ought to enshrine in the legislation the notion of independence.

Interview with Ed Killesteyn, Australian Electoral Commissioner (Melbourne, 4 September 2012).

[100] Interview with Julian Type, Tasmanian Electoral Commissioner (Telephone Interview, 5 September 2012).

[101] Interview with David Kerslake, Queensland Electoral Commissioner (Telephone Interview, 6 September 2012).

C *Integrating the Functions of the EFA into the NSWEC*

Currently, the EFA is a statutory authority separate from the NSWEC. Its operations are, however, closely integrated with those of the NSWEC. The NSW Electoral Commissioner, who heads the NSWEC, is also the Chair of the EFA. Neither the EFA nor the NSWEC can employ staff;[102] the staff of the EFA is provided through the administrative unit of the NSWEC.[103]

A central recommendation made by NSW Electoral Commissioner is that the functions of the EFA should be subsumed within a single electoral commission. In his words:

> Given the functions of the EFA, the regulatory model as established in 1981 is no longer appropriate . . . it is my view that the entity that is the EFA should be subsumed into a new NSW Electoral Commission that delegates to the Electoral Commissioner the responsibility for administering elections while the Commission entity is responsible for enforcing compliance with electoral laws in relation to both the elections and campaign finance processes.[104]

Should the recommendation of the NSW Electoral Commissioner be adopted?

The following analysis examines the four main considerations relevant in determining this issue:

1 The subject matter of administering election funding and spending laws;

2 The functions and skills involved in such administration;

3 The risk to the perception of impartial administration of elections; and

4 Resource considerations and economies of scale.

---

[102] EFED Act s 22(3).
[103] The staff are not directly employed by the NSWEC as the Commission cannot employ staff: PE & E Act s 21A(5). The staff are employed in the Government Service under the *Public Sector Employment and Management Act 2002* (NSW).
[104] Submission of NSW Electoral Commissioner, above n11, 77.

1 *The Subject Matter of Administering Election Funding and Spending Laws*

One of strongest arguments for integrating the EFA into a single electoral commission is that the subject matter of election funding and spending falls squarely within the broader subject matter of elections. As put by the NSW Electoral Commissioner:

> As the electoral process and campaign finance are inextricably intertwined, the schemes would be best governed holistically by a single entity, with membership holding appropriate expertise, rather than treated as parallel worlds that occasionally collide.[105]

Having two separate authorities in this situation, according to the NSW Electoral Commissioner, was confusing for stakeholders.[106]

A contrary view holds that the regulation of election funding and spending is less to do with the regulation of elections; rather it is concerned with the regulation of integrity or accountability.[107] The difficulty with this view is that it seems to assume that a particular kind of regulation can have only a single characterisation rather than multiple characterisations. But regulation of election funding and spending is concerned *both* with the regulation of elections and the regulation of integrity or accountability. Indeed, the same point can be made about the regulation of elections (narrowly understood): such regulation has been characterised as the process of putting into effect the rules governing electoral *integrity*.[108]

2 *The Functions and Skills Involved in Administering Election Funding and Spending Laws*

There are three questions under this heading, each which should be carefully distinguished:

- Are the *functions* involved in the administering of election funding and spending laws dissimilar from those involved in administering electoral laws more generally?
- Are the *skills* involved in the administering of election funding and spending laws dissimilar from involved in administering electoral laws more generally?

---

[105] Ibid 77.
[106] Interview with Colin Barry, New South Wales Electoral Commissioner (Sydney, 22 August 2012).
[107] Interview with staff of New South Wales Election Funding Authority (Sydney, 8 June 2012); Interview with David Kerslake, Queensland Electoral Commissioner (Telephone Interview, 6 September 2012).
[108] See, for example, the Electoral Integrity Project at The Electoral Integrity Project, *Home* <http://www.electoralintegrityproject.com/>.

- If yes to either or both of the above questions, does that warrant a separate authority for administering election funding and spending laws in New South Wales?

With the first question, it has been said that the administration of election funding and spending laws is more focussed on compliance when compared with the running of elections.[109] Several Commissioners, for example, have pointed out that it is rare to run prosecutions in relation to the administration of elections.[110]

All of this is true but that does not equate to a *difference in functions.* As noted by Julian Type, the Tasmanian Electoral Commissioner, both the administration of election funding and spending laws and the administration of elections involve a compliance function.[111] Indeed, this function is a necessary component of the broader function of administering electoral laws. There is, therefore, no compelling argument based on difference in functions for a separate authority to administer NSW election funding and spending laws.

It is, however, fair to say that the administration of election funding and spending laws involves more compliance activity than the running of elections. This greater focus on compliance does require a set of skills different from those involved in the running of elections. While being agnostic as to whether there should be a separate authority to administer election funding and spending laws,[112] the Australian Electoral Commissioner, Ed Killesteyn, stated that 'there are other more important issues that would be relevant in making a decision about whether you would want a separate authority or not'. The more important issues, according to the Commissioner, concerned 'the capacity of the organization to conduct forensic investigations of compliance' built upon a range of skills including auditing, accounting and specialised information technology skills (e.g. data mining).[113]

---

[109] Discussion with staff of New South Wales Election Funding Authority (Sydney, 8 June 2012).
[110] Interview with Phil Green, ACT Electoral Commissioner (Telephone Interview, 5 September 2012); Interview with Liz Williams, Acting Victorian Electoral Commissioner (Melbourne, 6 September 2012); Interview with staff of New South Wales Election Funding Authority (Sydney, 16 August 2012).
[111] Interview with Julian Type, Tasmanian Electoral Commissioner (Telephone Interview, 5 September 2012).
[112] The Australian Electoral Commissioner said in this respect: there is 'nothing inherently advantageous simply because of the fact that it may be separate or not': Interview with Ed Killesteyn, Australian Electoral Commissioner (Melbourne, 4 September 2012).
[113] Interview with Ed Killesteyn, Australian Electoral Commissioner (Melbourne, 4 September 2012). For some of the relevant skills, see also KPMG, *Fair Work Australia: Process Review of Fair Work Australia's investigations into the Health Services Union* (2012) 24-29.

The ACT Electoral Commissioner, Phil Green, was also of the view that the skills involved in administering election funding and spending laws differed from those involved in the running of elections. In his words:

> our main skills are - in lots of ways - in event management, if you think of an election as an event. What we do is we hire people and we hire premises and we do materials and we buy things and we move things around and we do advertising, and the regulatory side of what we do in terms of regulating the activities of political parties is very much a minor aspect . . . [of] our main skill set which is this event management thing.[114]

Do these differences in required skills warrant a separate authority to administer election funding and spending laws in New South Wales? For the ACT Electoral Commissioner, these differences meant it was desirable 'in having if not a separate authority at least a separate distinct unit within the electoral commission that was only looking at this kind of work'.[115]

The view taken by this report is that while such differences count as an argument *for* a separate authority, they do not count as an argument *against* a single electoral commission that administers all electoral laws. Differences in the requisite skill-sets do not provide a compelling reason to *prefer* a separate authority for administering election funding and spending laws to a single Electoral Commission whose functions include such administration. This is because these differences can be accommodated through a separate authority *but also* through a single electoral commission - complex organisations tend to have different areas of expertise and there is no compelling reason why a single Electoral Commission with adequate resources and qualified staff cannot have the requisite skills in the running of elections and the administration of election funding and spending laws.

3 *The Risk to the Perception of Impartial Administration of Elections*

This heading concerns an important argument for maintaining a separate body. The argument is that the increased compliance activity involved in administering election funding and

---

[114] Interview with Phil Green, ACT Electoral Commissioner (Telephone Interview, 5 September 2012). Similar comments were made by some NSW EFA staff: Interview with staff of New South Wales Election Funding Authority (Sydney, 16 August 2012).
[115] Interview with Phil Green, ACT Electoral Commissioner (Telephone Interview, 5 September 2012).

spending laws inevitably involves the prosecution of political parties and candidates. Such prosecution - by its nature - involves adversarial proceedings with those alleged in breach of the laws. This, in turn, is said to give rise to a risk that the *perception* of impartiality of the electoral commission in administering elections will be undermined.[116]

It is true that such a risk attends the compliance activity involved in administering election funding and spending laws. It is, however, a risk that attends *all compliance activity* undertaken by electoral commissions whether in the area of election funding and spending laws or not. As the Tasmanian Electoral Commissioner observed, it is an 'occupational hazard' of electoral commissions.[117]

The hazard arises from the fact that electoral commissioners are administering rules in the deeply important – and controversial – area of elections where, as the acting Victorian Electoral Commissioner correctly pointed out, 'the stakes are high'.[118] In this context, electoral commissioners are invariably making political decisions that risk undermining the perception of their impartiality. As NSW Electoral Commissioner, Colin Barry, observed:

> we (the electoral commissions) are in the political game, I mean it's a little bit like the test cricket umpires saying we are above the game of cricket. Well you are actually in the game of cricket or you are not… the important thing is that your integrity is preserved because you are not favouring one side or the other.[119]

It is also moot whether this risk is more acute with election funding and spending laws as compared to running of elections. The Queensland Electoral Commissioner, David Kerslake, for instance, was of the view that election funding and spending laws are more politicised than electoral laws more generally.[120] On the other hand, the Australian Electoral

---

[116] Interview with Liz Williams, Acting Victorian Electoral Commissioner (Melbourne, 6 September 2012); Interview with staff of New South Wales Electoral Commission (Sydney, 8 June 2012).
[117] Interview with Julian Type, Tasmanian Electoral Commissioner (Telephone Interview, 5 September 2012).
[118] Interview with Liz Williams, Acting Victorian Electoral Commissioner (Melbourne, 6 September 2012).
[119] Interview with Colin Barry, New South Wales Electoral Commissioner (Sydney, 22 August 2012).
[120] Interview with David Kerslake, Queensland Electoral Commissioner (Telephone Interview, 6 September 2012).

Commissioner, Ed Killesteyn considered that 'there are just as many politically sensitive decisions that you make in dealing with elections as you would with funding matters'.[121]

Moreover, the risk that the administration of election funding and spending laws poses to the perception of impartiality of the NSWEC in administering elections should be kept in perspective. All the parties interviewed were asked the following question:

> Do you think that the performance of functions by the NSW Election Funding Authority in relation to the funding of election campaigns risks undermining the perception of impartiality on the part of the NSW Electoral Commission in administering elections?

All said no except for the Shooters and Fishers Party.[122]

The Honourable Robert Borsak of the Shooters and Fishers Party, while emphasising that the EFA has been 'scrupulously fair', took the view that administration of elections should be separate for the administration of election funding and spending laws because 'the perception may develop over time that the administration of money is something that is going to corrupt the administration of the electoral process in New South Wales'.[123]

All that said, the risk to the perception of the impartial administration of elections that attends to the compliance work involved in administering election funding and spending laws should be taken seriously and needs to be effectively managed. This can be done by having separate bodies running elections and administering election funding and spending laws. But such an option is not the only one. A single electoral commission can also manage this risk operationally through separate units with different personnel administering elections to those involved in compliance activity. Another option – one advanced by the NSW Electoral Commissioner – is that decisions regarding prosecution are made by the Commission and not

---

[121] Interview with Ed Killesteyn, Australian Electoral Commissioner (Melbourne, 4 September 2012).
[122] The Honourable Reverend Fred Nile of the Christian Democratic Party did add the following caveat: 'the new reporting and funding regime with all its inherent complexities and hence difficulties in administering together with the options of very substantial penalties raises the question of whether partiality may arise in the future in relation to prosecuting breaches that may be discovered': Interview with the Honourable Reverend Fred Nile, Member of the Legislative Council, Parliament of New South Wales, State President and National President of the Christian Democratic Party (Sydney, 17 August 2012).
[123] Interview with the Honourable Robert Borsak, Member of the Legislative Council, Parliament of New South Wales and Party Agent, Shooters & Fishers Party NSW (Sydney, 21 August 2012).

by the Commissioner alone.[124] Given the other ways in which this risk can be managed, it does not provide a strong argument for a separate authority administering election funding and spending laws in New South Wales.

4 *Resource Considerations and Economies of Scale*

This set of considerations cuts both ways and does not lead to preferring a separate authority for administering election funding and spending laws over a single electoral commission, and vice-versa.

In smaller jurisdictions, a separate body administering election funding and spending laws is said not to be justified given the costs involved and the economy of scale achieved through a single electoral commission. Several of the commissioners that supported a separate national authority for administering election funding and spending laws[125] or a separate one in larger jurisdictions were not of the same view when it came to smaller jurisdictions.[126]

This argument does not, however, apply with the same force to the New South Wales, the largest State jurisdiction. While there might be efficiencies in having a single electoral commission performing functions including the administration of election funding and spending laws in New South Wales,[127] this advantage would be somewhat diminished given that a separate authority would still be a substantial organisation.

---

[124] Interview with Colin Barry, New South Wales Electoral Commissioner (Sydney, 22 August 2012).
[125] The Australian Electoral Commissioner, Ed Killesteyn, said that:

> If there was anything that we could do both from an elections management body and a funding authority to have one single body that manages both federal and state in a harmonized way then that would be probably the most significant reform to the way in which electoral administration happens in this country. Highly unlikely but that would be a great reform.

Interview with Ed Killesteyn, Australian Electoral Commissioner (Melbourne, 4 September 2012).
[126] Interview with David Kerslake, Queensland Electoral Commissioner (Telephone Interview, 6 September 2012); Interview with Phil Green, ACT Electoral Commissioner (Telephone Interview, 5 September 2012); Interview with Bill Shepheard, Northern Territory Electoral Commissioner (Telephone Interview, 12 September 2012).
[127] Interview with Liz Williams, Acting Victorian Electoral Commissioner (Melbourne, 6 September 2012).

5 *Conclusion*

The report is of the view that there should be a single electoral commission – the NSWEC – that performs all functions relating to electoral laws including those regarding election funding and spending laws. The subject matter of administering election funding and spending laws falls within the broader subject matter of elections, and the functions involved in such administration are not dissimilar from those involved in the running of elections. While the skills involved are different, they can be accommodated in a large organisation like the NSWEC. While it is true that there is a risk to the perception of impartial administration of elections due to the compliance activity undertaken in administering election funding and spending laws, such a risk attends compliance activity more generally and can be managed through appropriate internal practices. Finally, there is no compelling reason based on resource considerations and economies of scale to prefer a separate authority (or a single electoral commission).

> *Recommendation 9*: The NSW Election Funding Authority should be abolished with its functions to be performed by the NSW Electoral Commission.

VI PRINCIPLES-BASED LEGISLATION IN ADMINISTRATION AND SECURING COMPLIANCE

In his submission to the JSCEM inquiry, the NSW Electoral Commissioner stated his preference 'for **one** simplified, modernised, principles-based Electoral Act'[128]. Putting aside situations where 'there is no real consensus (as to principles); or where there is a real potential for a conflict of interest involving or within NSWEC',[129] the position of the Commissioner was that 'a complex modern electoral system can confidently reduce the contents of its principal legislation to principles which are to be fleshed out by an election authority as a trusted integrity agency'.[130]

The submission of the Commissioner explained the meaning of principles in this context through a tripartite distinction between principles, standards and rules. In the words of the submission:

> Law, whether set by contract, treaty, statute or precedent, can be classified into three forms:
>
> - Principles - norms expressed at a high level of generality. Principles most obviously express values and goals, and express the fundamental obligations that all should observe;
> - Rules - typically narrow, specific and relatively mechanical; and
> - Standards - supply a set of criteria to delimit a decision-maker's discretion, and tend not to be mechanically applicable.[131]

In explaining the reasons for this recommending principles-based legislation, the Commissioner said that:

> Principles-based electoral drafting, twinned with delegation of rule-making to the NSWEC in suitable areas, would make for more streamlined and flexible electoral rule-making.[132]

---

[128] Submission of NSW Electoral Commissioner, above n11, 9 (emphasis in original).
[129] Ibid 17-18.
[130] Ibid 18. This part of the Commissioner's submission drew upon the report by Graeme Orr: Graeme Orr, *Modernising the Electoral Act: Legislative Form and Judicial Role* (report prepared for the NSW Electoral Commission) (2011) 3-19.
[131] Submission of NSW Electoral Commissioner, above n11, 16.

Further elaborating, the Commissioner said that:

> It is arguable that the highly prescriptive nature of the current NSW electoral legislation makes it susceptible to becoming quickly outdated, and requires regular amendments to be made to update particular provisions from time to time. A less prescriptive regime would ensure greater flexibility for processes to be updated to reflect community expectations, advances in technology and changes in modern management techniques, without the need for Parliament to consider amendments to legislation.[133] The PE&EA should be sufficiently prescriptive to ensure that electoral administrators uphold key principles, while leaving the detailed administrative arrangements as the administrative responsibility of the Electoral Commissioner, to adapt where necessary.[134]

In other words, '(t)he aim (of principles-based legislation) is to relieve Parliament from legislating the *detail* of electoral administration in suitable areas, to achieve flexibility and expertise'.[135]

There are, in fact, two distinct rationales for principles-based legislation in relation to laws regulating election funding and spending. First, there is principle of institutional expertise which stipulates that decision-making powers should reside with the institution which is most expert in the area. This implies that the NSWEC is to have power to make decisions - including law-making powers - where its expertise is predominant. We see this principle reflected in the NSW Electoral Commissioner's suggestion that NSW laws regulating election funding and spending should 'delegate only in areas of limited contention, where the NSWEC's *technical expertise is predominant*'.[136]

The second rationale is that the goal of such laws must be flexible and adaptable: flexibility is required to deal with the varied circumstances of political parties, candidates, groups of

---

[132] Ibid 19-20.
[133] For example, the Commonwealth Joint Standing Committee on Electoral Matters recently recommended that the Electoral Act be amended 'to provide a flexible regime for the authorisation by the Australian Electoral Commission of approved forms, which will: allow for a number of versions of an approved form; enable forms to be tailored to the needs of specific target groups; and facilitate online transactions': Joint Standing Committee on Electoral Matters, Parliament of Australia, *Report on the Conduct of the 2007 Federal Election and Matters Related Thereto* (2009) 273-275.
[134] Submission of NSW Electoral Commissioner, above n11, 14.
[135] Ibid 21 (emphasis in original).
[136] Ibid 22.

candidates, third-party campaigners and donors, while adaptability is necessary as circumstances change as do technology and management techniques.

Adopting principles-based legislation in the context of NSW election funding and spending laws will clearly mean *increased* legislative power being conferred upon the NSWEC. At first glance, this comes up against the general rule that it should be the New South Wales Parliament that exercises legislative power, a rule that traces its source to the principle of democratic legitimacy.

Yet this *general* rule has exceptions with legislative power delegated by the New South Wales Parliament in certain areas. The most obvious in relation to NSW electoral laws is the power of the Governor to make regulations under both the EFED Act and the PE & E Act.[137] As noted above, the NSWEC – like other electoral commissions – is also centrally involved in the exercise of legislative power through the process of electoral redistributions; and the EFA currently has power to issue guidelines which have the force of law.[138]

In other words, this general rule does not prevent the NSWEC from having law-making powers. Hence, the question remains: *should principles-based legislation be adopted in the relation to NSW election funding and spending laws with increased legislative power being conferred upon the NSWEC?*

The report takes the view that there is no general case for adopting principles-based legislation in this area - neither of the rationales suggested for such legislation provides such a general argument. There is, however, a qualified case for adopting such legislation in the areas of administration and securing compliance. The adoption of principles-based legislation in these areas should, at the same time, be accompanied by enhanced mechanisms of accountability, in particular to the New South Wales Parliament.

---

[137] EFED Act s 117; PE & E Act s 176.
[138] See Part V: A Single Electoral Commission: Key Functions and Guiding Principles, Section A. Another example of such power from outside the realm of electoral regulation is the power of the Independent Pricing and Regulatory Tribunal to issue determinations of pricing that govern the prices of services provided by government monopoly services, see *Independent Pricing and Regulatory Tribunal Act 1992* (NSW).

A *Principle of Institutional Expertise*

It is, of course, true that the NSWEC has expertise in the regulation of election funding and spending. But it is not true that its expertise is *generally* predominant.

This point can be made clear through the example of caps on 'political donations'. Under a principles-based legislation, the statute would probably stipulate that there should be caps on 'political donations' with the goal of preventing corruption and promoting fairness.[139] It would, however, leave the rules as to whom the caps apply to, what level they are set and what money they capture to the exercise of discretion by the NSWEC. It is difficult, however, to accept that these questions are ones where the NSWEC's expertise is predominant; a more accurate characterisation is one of shared expertise by NSWEC and other bodies, in particular, the New South Wales Parliament.

The area in which the NSWEC's expertise is predominant is in *the administration of election funding and spending laws and securing compliance with these laws.* In these areas, the legislation should – as a general rule – stipulate the relevant principles and standards while leaving it to the NSWEC to determine the rules through guidelines.

This is *not* a prescription for the legislation as a whole to be principles-based; it only recommends principles-based legislation in designated areas. This is a position which has close affinity with the 'balanced approach' called for by the NSW Electoral Commissioner, an approach that would:

1) delegate only in areas of limited contention, where the NSWEC's technical expertise is predominant; and
2) frame the NSWEC's discretion within the new electoral legislation with sufficiently clear principles and standards.[140]

Areas that can be considered machinery provisions to secure compliance should be governed by principles-based legislation.[141] These areas would include the following:

---

[139] See Part XV: Caps on Political Donations.
[140] Submission of NSW Electoral Commissioner, above n11, 22.

- System of registers for candidates, third-party campaigners, party agents and official agents;[142]
- Management of donations and expenditure;[143]
- Audit requirements;[144] and
- Requirements as to forms, documentation and vouching.

This would mean the repeal of various provisions in these areas[145] with the guidelines of the NSWEC determining specific requirements.

To avoid doubt, the report recommends principles-based legislation in relation to *securing* compliance but not to compliance more generally. A compliance regime – as the report later discusses – comprises a range of key elements including audit powers, investigative powers, civil penalty provisions, criminal offences and administrative penalties.[146] This report does *not* recommend that principles-based legislation govern this entire area, with the NSWEC, for instance, having the power to determine what investigative powers it enjoys or what criminal offences should be available. These are matters that should be determined by Parliament through legislation. What the report recommends is that principles-based legislation should govern how these elements are *operationalised.*

> *Recommendation 10*: NSW election funding and spending laws should adopt principles-based legislation in relation to the areas of administration and securing compliance.

B *Goal of Ensuring that Legislation is Flexible and Adaptable*

Two types of flexibility and adaptability should be distinguished here: that of administering election funding and spending laws, and that which requires significant changes to such laws. The first type of flexibility and adaptability is enabled through having principles-based

---

[141] Similar sentiments are reflected in the NSW Electoral Commissioner's recommendation that 'the legislative machinery (is) to be implemented by the NSW Electoral Commission as a trusted integrity agency of the State': Submission of NSW Electoral Commissioner, above n11, 7.
[142] EFED Act pt 4.
[143] Ibid pt 6 div 3.
[144] See EFED Act s 96K.
[145] See Part XII: Registration; Part XIII: Management of Donations and Expenditure; Part XIX: Compliance, Section D.
[146] See Part XIX: Compliance.

legislation in the areas of administration and the area of securing compliance (as recommended above).

As to the second type of flexibility and adaptability, significant changes to these laws should be made by the New South Wales Parliament, not the NSWEC. With such changes, the principle of institutional expertise has limited purchase and, in any event, yields to the principle of democratic accountability.

At the same time, structures should be put into place that regularly brings to the attention of the New South Wales Parliament the need – if any – for significant changes to the these laws. An effective way to secure this would be to require JSCEM to conduct periodic review of the operations of these laws informed by the annual reports of the NSWEC.

> *Recommendation 11*: The NSW Joint Standing Committee on Electoral Matters shall conduct periodic reviews of the NSW election funding and spending laws informed by the annual reports of the NSWEC.

C *Enhanced Mechanisms of Accountability*

The increased legislative power that results from adopting principles-based legislation in the areas of administration and compliance should be accompanied by enhanced accountability measures. These measures should be underpinned by two key elements: a public process in developing the NSWEC's guidelines and specific mechanisms of parliamentary accountability.

The need for a public process in the exercise of legislative power by electoral commissions was emphasised by several electoral commissioners, including the NSW Electoral Commissioner.[147] In this respect, both the NSW and Queensland Electoral Commissioners referred to the detailed processes set out in relation to the redistribution of electoral districts as a possible model.

---

[147] Interview with Ed Killesteyn, Australian Electoral Commissioner (Melbourne, 4 September 2012); Interview with Colin Barry, New South Wales Electoral Commissioner (Sydney, 22 August 2012); Interview with David Kerslake, Queensland Electoral Commissioner (Telephone Interview, 6 September 2012).

Key elements of the public process governing the development of the NSWEC's guidelines could include the following:

- Draft guidelines together with a statement of reasons (analogous to explanatory memoranda to Bills) to be made public prior to the guidelines being issued;
- Submissions on these draft guidelines to be invited from the public – especially from stake-holders – with the NSWEC obliged to consider these submissions prior to issuing the final guidelines;
- JSCEM to review these guidelines with its comments to be considered by NSWEC prior to issuing the final guidelines.[148]

Besides putting in place a public process, these elements also strengthen parliamentary accountability through the review by JSCEM of the draft guidelines. Two other measures should be adopted for the purposes of parliamentary accountability: the guidelines should be tabled before both Houses of the New South Wales Parliament and should be disallowable by either House of the New South Wales Parliament (like regulations).[149]

Recommendation 12: NSW election funding and spending laws should detail a public process to govern the issuing of guidelines by the NSWEC.

Recommendation 13: The guidelines of the NSWEC shall be tabled before each House of the New South Wales Parliament.

Recommendation 14: The guidelines of the NSWEC shall be disallowable by either House of the New South Wales Parliament (like regulations).

[148] For an example of a public process prescribed by statute, see section 64 of the *Health Records and Information Privacy Act 2002* (NSW).
[149] Interview with Warwick Gately, Western Australian Electoral Commissioner (Telephone Interview, 5 September 2012).

VII DISTINGUISHING PROVISIONS APPLYING TO STATE ELECTIONS AND LOCAL GOVERNMENT ELECTIONS

Most of the provisions of the EFED Act apply to both State and local government elections, including the provisions relating to registration[150] and Part 6 (Political donations and electoral expenditure).[151]

This report recommends separating out the provisions applying to State elections from those applicable to local government elections. The current situation is confusing especially in terms of Part 6. While the opening section of this Part, section 83, states that this Part applies to local government elections, only certain areas apply to these elections, namely, disclosure of political donations and electoral expenditure, [152] management of donations and expenditure, [153] prohibition of certain political donations [154] and prohibition of property developer etc donations.[155] The provisions in relation to the caps on political donations[156] and caps on electoral communication expenditure[157] are limited to State elections in terms of their scope; they do *not* apply to local government elections.

More fundamentally, local government elections in New South Wales have features that distinguish it from State elections.[158] In the author's report, *Regulating the Funding of New South Wales Local Government Election Campaigns,* the following was said:

> This level of government has a distinctive structure of government and electoral system. There are also distinctive patterns of election funding and expenditure at this level of government. Such distinctiveness needs to be fully appreciated as it implies significant differences from the structure of government, electoral system and patterns of election funding and expenditure at the State level.[159]

---

[150] EFED Act s 26.
[151] Ibid s 83.
[152] Ibid pt 6 div 2.
[153] Ibid pt 6 div 3.
[154] Ibid pt 6 div 4.
[155] Ibid pt 6 div 4A.
[156] Ibid s 95AA.
[157] Ibid s 95E.
[158] See also Submission of NSW Electoral Commissioner, above n11, 75-76.
[159] Tham, above n10, 10.

Pages 20-22 of the report fully elaborated on these distinctive features. For ease of reference, they have been reproduced in the following pages.

Pages 20-22 of Joo-Cheong Tham, *Regulating the Funding of New South Wales Local Government Election Campaigns* (2010)

In his foreword to the NSW Electoral Commission's report on the 2008 Local Government Elections, the Commissioner observed:

> The 2008 NSW Local Government Elections were held on 13 September 2008. The NSWEC conducted 332 contested elections across NSW, including mayoral elections, referenda and polls. Nearly 4 million votes were counted for 4,620 candidates. The variations across the 148 Local Government authorities in terms of geographic size, population and population density were significant. Different logistical arrangements were required to meet the operational challenges of providing efficient electoral services across 148 councils where resident numbers ranged from 1,400 residents (Urana) to 283,000 residents (Blacktown), where the smallest geographical Local Government area was 5.8 square kilometres (Hunters Hill)) to the largest 53,510 square kilometres (Central Darling), where the density of population varied from 0.045person/ square kilometres (Central Darling) to the most densely populated 6,624.8 person/ square kilometres (Waverley).[160]

These remarks make clear the diversity and complexity of NSW local government elections. As the Commissioner has noted:

> Local Government elections in NSW are the most complex in Australia. The legislative and regulatory provisions impose different rules and processes for the voting and counting systems applicable to the different elections required for each council.[161]

Such diversity and complexity stems, firstly, from the significant differences in the size of council areas and the number of electors in each area. The *Local Government Act*, while mandating rough equality in number of electors for wards (there must not be variation of

---

[160] NSW Electoral Commission, *Report on the 2008 Local Government Elections* (2009) 8 (citations omitted).
[161] Ibid (citations omitted).

more than 10 per cent between number of electors in each ward of an area),[162] does not apply a similar requirement to council areas (see Appendix One). Second, as explained earlier, different voting systems can apply according to:

- whether council is divided or not into wards (see Table 1 and Appendix One);
- whether there was a constitutional referendum adopting a mixed-system of electing councillors;
- number of councillors; and
- whether the mayor is directly elected.

Table 1: Councils Divided / Not Divided into Wards

		as % Total
Total Councils	152	100%
Total Undivided Councils	88	57.89%
Total Councils with Wards	64	42.11%

Source: Data provided by NSW Electoral Commission (copy on file with author)

Differences also *potentially* arise due to the rules governing the eligibility of electors. With NSW local government elections, a kind of property vote is allowed because property rights through ownership, occupational and rental confer an entitlement to vote. Individuals in this category can be enrolled in the non-residential rolls *if* they apply for inclusion of their names on these rolls (see above). This system of optional enrolment, however, has resulted in a low level of electors on the non-residential roll – the highest proportion of the total rolls of a council comprising the non-residential roll stood only at 1.57% (see Table 2; see also Appendix Two).

[162] *Local Government Act 1993* (NSW) s 210(7).

Table 2: Top Three Councils with Highest Proportion of Voters on Non-Residential Roll (2008 NSW Local Government Elections)

Council	Residential Roll	Non-Residential Roll	Total Roll	% of Roll Non-Resident
Eurobodalla Shire Council	26,456	421	26,877	1.57%
Central Darling Shire Council	1,199	16	1,215	1.32%
Tenterfield Shire Council	4,649	22	4,671	0.47%

Source: Data provided by NSW Electoral Commission (copy on file with author)

The diversity in NSW local government elections distinguishes such elections from NSW State elections and makes it quite distinctive. There is far greater uniformity with State elections – there are 93 members for the NSW Legislative Assembly with electoral districts of approximately equal number of electors[163] and 42 members of the NSW Legislative Council who are voted by the electors of the entire State.[164]

There is another feature of NSW local government elections which distinguishes them from NSW State elections. In NSW State elections, political parties - especially the major parties (Australian Labor Party, Liberal Party, National Party and the Greens) -dominate with candidates predominantly running on a party ticket. The position is quite different with NSW local government elections. With a high level of independent candidates and micro-parties, there is a much lower level of party-affiliated candidates and even lower proportion of candidates endorsed by the major parties. Of the 4620 councillor and mayoral candidates that ran in the 2008 NSW local government elections, only 1537, around a third, were endorsed by a political party (see Appendix Three). A similar situation pertains in relation to current councillors (who were elected in the 2008 NSW local government elections) where out of the 1474 current councillors, there are only 424, less than a third, with party affiliation (see Appendix Four). These figures testify to 'the peculiar nature of Local Government elections (where candidates do not necessarily run on a party platform'.[165]

---

[163] *Constitution Act 1902* (NSW) s 28.
[164] Ibid s 22A(1), sch 6 cl 1.
[165] Criminal Justice Commission (Qld), *Report on a Public Inquiry into Payments made by Land Developers to Aldermen and Candidates for Election to the Council of the City of Gold Coast* (1991) 10.

The distinctiveness of local government elections in New South Wales means that the provisions applying to them will (should?) differ from those applying to State elections. Grouping these provisions together is, therefore, not just confusing but fails to recognise these differences. This 'disconnect', in turn, has given rise to difficulties in administering the provisions to candidates in New South Wales local government elections.[166]

> *Recommendation 15*: The provisions relating to local government elections should be separated from those applying to State elections.

[166] Interview with staff of New South Wales Election Funding Authority (Sydney, 16 August 2012).

VIII A SEPARATE PART FOR THIRD PARTIES AND DONORS

The EFED Act currently has provisions applicable to political parties, candidates, groups of candidates and elected members placed together with those applicable to third-party campaigners and donors. The submission of Unions NSW to the JSCEM inquiry[167] has recommended a separate part of the Act dealing with third-party campaigners. This recommendation should be adopted.

As will be discussed later, third-party campaigners are qualitatively different from political parties, candidates, groups of candidates and elected members: they do not stand for election and, in most cases, their organisational purposes are not solely political.[168] As such, the provisions applying to these organisations will be – and should be – different; a matter that should be fully recognised by the NSW laws regulating election funding and spending by having a separate part for these organisations. Grouping the obligations applying to these organisations with those of political parties, candidates, groups of candidates and elected members produces a 'confusing range of provisions'.[169] Having a separate part would, on the other hand, provide ease of reference for these organisations, thereby facilitating better compliance. This separate part should also include the provisions applying to donors as they are also different from political parties, candidates, groups of candidates and elected members in that they do not stand for election.

> *Recommendation 16*: NSW laws regulating election funding and spending should provide for a separate part dealing with provisions applicable to third-party campaigners and donors.

---

[167] Unions NSW, Submission No 19 to the Joint Standing Committee on Electoral Matters, *Review of the Parliamentary Electorates and Elections Act 1912 and the Election Funding, Expenditure and Disclosures Act 1981*, 13 June 2012, 2**.**

[168] See Part XI: Differences Between Political Parties and Third-Party Campaigners.

[169] Interview with staff of New South Wales Electoral Commission (Sydney, 8 June 2012).

IX PROPOSED STRUCTURE OF NSW LAWS REGULATING ELECTION FUNDING AND SPENDING

Incorporating the above recommendations in relation to distinguishing provisions applying to State and local government elections as well as a separate part for third-party campaigners and donors, the report recommends the following structure for NSW laws regulating election funding and spending:

Part 1: Preliminary

- Purposes of the Act
- Definitions

Part 2: The New South Wales Electoral Commission

- Constitution, tenure, termination etc
- Functions
- Guiding principles

Part 3: State Elections

Division 1: Political parties, candidates, groups of candidates and elected members

- Registration
- Management of donations and expenditure
- Disclosure of political donations and electoral expenditure
- Caps on political donations
- Prohibition of certain political donations
- Caps on electoral expenditure
- Public funding (Election Campaigns Fund, Administration Fund, Policy Development Fund)

Division 2: Third party campaigners and donors

- Registration
- Management of donations and expenditure
- Disclosure of political donations and electoral expenditure
- Caps on political donations

- Prohibition of certain political donations
- Caps on electoral expenditure

Part 4: Local Government Elections

Division 1: Political parties, candidates, groups of candidates and elected members

- Registration
- Management of donations and expenditure
- Disclosure of political donations and electoral expenditure
- Prohibition of certain political donations

Division 2: Third party campaigners and donors

- Registration
- Management of donations and expenditure
- Disclosure of political donations and electoral expenditure
- Prohibition of certain political donations

Part 5: Compliance

- Party Compliance Policies
- Compliance Agreements
- Audit requirements
- Investigative powers
- Penalty regime comprising criminal offences, civil penalties and administrative penalties

While the report recommends a separate part for third parties and donors, it will, however, discuss them together with political parties, candidates, groups of candidates and elected members according to the various topics (Registration; Management of donations and expenditure; Disclosure of political donations and electoral expenditure; Caps on political donations; Prohibition of certain political donations; Caps on electoral communication expenditure). This approach provides for greater clarity of analysis of the current provisions as the Act is currently structured in this way; it also provides for greater economy of analysis (avoiding unnecessary repetition) as some of the considerations that apply to political parties,

candidates, groups of candidates and elected members also apply to third-party campaigners and donors.

X DIVERSITY OF PARTY ORGANIZATIONS AND STRUCTURES

Key to designing effective laws regulating election funding and spending is appreciation of the diversity of party organisations and structures. The main New South Wales political parties vary in terms of their:

- legal status;
- intra-party units;
- reliance on paid staff and volunteers;
- membership structures; and
- centralisation of fund-raising and spending.

In terms of its legal status, a political party can choose to incorporate or be an unincorporated body.[170] As Table 3 indicates, the major political parties in New South Wales – the ALP, Liberal Party and the National Party – are unincorporated bodies while the other parties have chosen to incorporate.

Incorporation brings about regulation as a corporate entity; it also confers important benefits including the political party being able to independently own property and enter into contracts as well as limited liability for its members.[171] There are two main ways here for a party to incorporate: it could register as a company under the *Corporations Act 2001* (Cth) like Family First [172] or it could register as an incorporated association under the *Associations Incorporation Act 2009* (NSW)[173] like the Christian Democratic Party,[174] NSW Greens[175] and the Shooters and Fishers Party.[176]

---

[170] See generally Anika Gauja, 'State Regulation and Internal Organisation of Political Parties: The Impact of Party Law in Australia, Canada, New Zealand and the United Kingdom' (2008) 46(2) *Commonwealth & Comparative Politics* 244, 253; Teresa Somes, 'The legal status of political parties' in Marian Simms (ed), *The Paradox of Parties: Australian Political Parties in the 1990s* (Allen & Unwin, 1996) 173, 173.

[171] Phillip Lipton, Abe Herzberg and Michelle Welsh, *Understanding Company Law* (Lawbook, 15th ed, 2010) 22-23.

[172] Email from Jason Cornelius to Joo-Cheong Tham, 3 November 2012. Family First Pty Ltd is registered under the Australian Securities and Investments Commission's register (ACN: 090 759 005; ABN: 80 090 759 005).

[173] See generally Paul Redmond, *Companies and Securities Law: Commentary and Materials* (Lawbook, 5th ed, 2009) 98-102; John Gooley, David Russell, Matthew Dicker and Michael Zammit, *Corporations and Associations Law: Principles and Issues* (LexisNexis Butterworths, 5th ed, 2011) 103-124.

[174] The Christian Democratic Party (Fred Nile Group) Incorporated is registered under the Australian Securities and Investments Commission's register (Registration number: INC9893210).

If a political party chooses not to incorporate, like the ALP, the Liberal Party and the National Party, it is classified under the common law as an unincorporated or voluntary association. This was established by the High Court in *Cameron v Hogan* in 1934.[177] In this decision, the High Court included political parties in the category of voluntary associations, which were:

> for the most part bodies of persons who have combined to further some common end or interest, which is social, sporting, political, scientific, religious, artistic or humanitarian in character, or otherwise stands apart from private gain and material advantage.[178]

As an unincorporated association, a political party is not separate from its members and so is not a legal entity in its own right.[179] Various consequences follow from this including the inability of the party to hire or lease property,[180] enter into contracts; and receive gifts unless they are immediate gifts to the present members of the party (as in *Bacon v Pianta*).[181]

---

[175] Email from Chris Maltby to Joo-Cheong Tham, 24 October 2012. The Greens NSW Incorporated is registered under the Australian Securities and Investments Commission's register (Registration number: INC9876260).
[176] Email from Margie McInerney, Assistant to the Honourable Robert Borsak, to Joo-Cheong Tham, 26 October 2012. Shooters and Fishers Party Incorporated is registered under the Australian Securities and Investments Commission's register (Registration number: Y2896627).
[177] *Cameron v Hogan* (1934) 51 CLR 358.
[178] Ibid 370.
[179] Teresa Somes, above n170, 175.
[180] Ibid 175-176.
[181] Ibid.

Table 3: Legal Status and Number of Intra-Party Units of NSW Political Parties

Party	ALP	Christian Democratic Party	Family First	Greens	Liberal Party	National Party	Shooters and Fishers Party
Incorporated?	No	Yes	Yes	Yes	No	No	Yes
Number of intra-party units	800	33	12	56	Around 550	Around 100	30

Source: Interviews with NSW party officials

Besides different legal statuses, NSW political parties also have different organisational structures. All have State offices together with other intra-party units. Some like the ALP, Christian Democratic Party, Family First, Greens, and Shooters and Fishers Party have one other type of intra-party units. In the case of the NSW Greens, these units are referred to as local groups; with the other parties, these units are described as branches.[182]

In addition to their State offices, the NSW Liberal Party and NSW National Party have various other types of intra-party units: the NSW Liberal Party has electoral conferences (federal, State and local government) together with branches[183] while the NSW National Party has 20 electoral councils and over a hundred branches.[184]

As Table 3 shows, these parties also have different numbers of intra-party units largely reflecting their size. NSW ALP has the largest number of intra-party units with 800 branches while at the lower end Family First has 12 branches.

---

[182] Interview with Sam Dastyari, General Secretary, NSW Labor (Sydney, 21 August 2012); Interview with the Honourable Reverend Fred Nile, Member of the Legislative Council, Parliament of New South Wales, State President and National President of the Christian Democratic Party (Sydney, 17 August 2012); Interview with Jason Cornelius, State President, Family First NSW (Sydney, 17 August 2012); Interview with Chris Maltby, Registered Officer, and Geoff Ash, Deputy Registered Officer, Greens NSW (Sydney, 16 August 2012); Interview with the Honourable Robert Borsak, Member of the Legislative Council, Parliament of New South Wales and Party Agent, Shooters & Fishers Party NSW (Sydney, 21 August 2012).

[183] Interview with Simon McInnes, Finance Operations Director, Liberal Party of Australia (NSW Division) (Sydney, 17 August 2012).

[184] Interview with Greg Dezman, Deputy Director, NSW National Party (Sydney, 20 August 2012).

NSW political parties also vary in terms of their reliance on paid staff and volunteers. All heavily rely upon volunteer labour – especially in terms of branches (and local groups). The key difference concerns the extent to which there are employees staffing the State offices. The larger parties – the ALP, Liberal Party, National Party and the Greens – have paid employees staffing their State offices while the Christian Democratic Party and the Shooters and Fishers Party have only in recent times begun employing workers to staff their State office, often in response to the changes in NSW election funding and spending laws.[185]

NSW political parties also have different types of membership structures. The Christian Democratic Party,[186] the Greens,[187] the Liberal Party[188] and the National Party[189] restrict themselves to individual memberships and are, in this way, *direct parties.* The NSW ALP,[190] on the other hand, allows both individual membership and membership by groups and is therefore a *mixed party*. The Shooters and Fishers Party falls somewhere in the middle: membership is formally restricted to individuals,[191] while close links are maintained with various groups.[192] In these situations such groups, while not members of the party, act as *ancillary organisations*.[193]

---

[185] Interview with the Honourable Reverend Fred Nile, Member of the Legislative Council, Parliament of New South Wales, State President and National President of the Christian Democratic Party (Sydney, 17 August 2012); Interview with the Honourable Robert Borsak, Member of the Legislative Council, Parliament of New South Wales and Party Agent, Shooters & Fishers Party NSW (Sydney, 21 August 2012).

[186] See Christian Democratic Party (New South Wales State Branch), 'New South Wales State Branch Constitution and Rules' (Constitution, Christian Democratic Party (New South Wales State Branch), 14 November 2009) cl 11.1.

[187] The Greens NSW, 'Constitution of the Greens NSW' (Constitution, The Greens NSW, August 2009) cl 2.1.

[188] See Liberal Party of Australia (New South Wales Division), 'Constitution of the Liberal Party of Australia (New South Wales Division)' (Constitution, Liberal Party of Australia (New South Wales Division), 12 September 2009) cl 2.

[189] National Party of Australia – NSW, 'Constitution and Rules' (Constitution, National Party of Australia – NSW, September 2011) cl 2.1.1.

[190] NSW Labor, 'Rules 2012: Rebuilding Together' (Constitution, NSW Labor, 2011) cl A.3.

[191] The Shooters and Fishers Party (NSW) Inc, 'Constitution' (Constitution, The Shooters and Fishers Party, 13 October 2012) cl 3.

[192] In the case of the Shooters Party, this is made clear by the previous version of its Constitution, which states that one of its aims is '*[t]o exert a discipline through shooting organizations and clubs and within the non-affiliated shooting community*, to curb the lawless and dangerous element; and to help shooters understand that they hold the future of their sport in their own hands by their standards of conduct': Constitution of The Shooters Party (NSW), cl 2(g) (emphasis added) (cf The Shooters and Fishers Party (NSW) Inc, 'Constitution' (Constitution, The Shooters and Fishers Party, 13 October 2012) cl 3).

[193] For fuller explanations of direct and indirect party structures, see Maurice Duverger, *Political Parties: Their Organization and Activity in the Modern State* (Barbara and Robert North trans, Meuthen, 2nd ed, 1959) 6–17 [trans of: *Les Partis Politiques* (first published 1954)].

The final dimension of difference is the centralisation of election fund-raising and spending. As will be elaborated in the part of the report examining the management of accounts, the parties have put in place different decision-making processes of fund-raising and spending in order to comply with the current NSW election funding and spending laws; some have highly centralised their decision-making while others have maintained decentralised structures.[194]

All four objects of the NSW election funding and spending laws imply respect for such diversity of party structures and organisation, albeit in different ways. First, the aim of protecting the integrity of representative government is advanced through competitive elections. Diversity and pluralism in politics often sustains such competition with parties tailoring their organizational structures to their strategic priorities and objectives. Second, the goal of promoting fairness in politics, in particular, fair elections, requires open access to the electoral arena – it mandates the opportunity for newer (and smaller) parties to break in. This, in turn, requires sensitivity to the distinctive ways in which these parties organise themselves. Third, the aim of supporting political parties to perform their democratic functions applies to *all* NSW political parties in their diversity and complexity.

Last but not least, the principle of respect for political freedoms suggests that volunteer participation in political parties should be encouraged – or at the very least not hindered – by election funding and spending laws. Such volunteering constitutes a crucial way in which political freedoms are exercised. Respect for political freedoms also entails respect for freedom of party association and the different ways in which parties determine their membership structures and decision-making processes. As a general rule, election funding and spending laws should leave the parties free to determine their membership structures and the extent to which their decision-making processes are de/centralised.

As will be seen later, respect for diversity of party structures and organisation has profound implications for the design of NSW election funding and spending laws[195] *and* how the NSWEC performs its functions.[196]

---

[194] See Part XIII: Management of Donations and Expenditure, Section B.
[195] See, for example, Part XVI: Prohibition of Certain Political Donations.
[196] See, for example, Part XIII: Management of Donations and Expenditure.

XI DIFFERENCES BETWEEN POLITICAL PARTIES AND THIRD-PARTY CAMPAIGNERS

There are important differences in principle between political parties and third-party campaigners when it comes to the regulation of election funding and spending laws. Pages 19-20 of the author's report for the NSWEC, *Towards a More Democratic Political Finance Regime in New South Wales*, explained why (reproduced below).

Extracts from Joo-Cheong Tham*, Towards a More Democratic Political Finance Regime in New South Wales* (2010) 19-20

In his major study of Australian political parties, Dean Jaensch observed:

> There can be no argument about the ubiquity, pervasiveness and centrality of party in Australia. The forms, processes and content of politics – executive, parliament, pressure groups, bureaucracy, issues and policy making – are imbued with the influence of party, party rhetoric, party policy and party doctrine. Government is party government. Elections are essentially party contests, and the mechanics of electoral systems are determined by party policies and party advantages. Legislatures are party chambers. Legislators are overwhelmingly party members. The majority of electors follow party identification. Politics in Australia, almost entirely, is party politics.[197]

Parties are central to Australia's democracy and, indeed, 'modern democracy is unthinkable save in terms of parties'.[198] As Neville Wran, then NSW Premier, observed in his 2nd Reading Speech to the Election Funding Bill 1981 (NSW):

> The strength and stability of the Westminster system lies in the strength of the party system. The political parties are the unacknowledged pillars of parliamentary democracy … No one suggests that political parties are perfect institutions – far from

---

[197] Dean Jaensch, *Power Politics: Australia's Party System* (Allen & Unwin, 1994) 1–2.
[198] Elmer E Schattschneider, *Party Government: American Government in Action* (Transaction Publishers, 1942) 1. See Gerald Pomper, 'Concept of Political Parties' (1992) 4(2) *Journal of Theoretical Politics* 143 on the connection between different types of parties and democracy.

> it – but it is unrealistic to deny the importance of political parties in our system of government. They are the very foundation of parliamentary democracy.[199]

There is little doubt then that the New South Wales political finance regime should be rooted in the centrality of political parties. This means that such a regime should ensure that parties are adequately funded. Adequacy, though, does not mean what the parties want (or think they need for campaigning purposes) and must be strictly judged against the functions that parties ought to perform.

It may be said, however, that the only functions that parties perform are as vehicles to gain political power. This is true but only in part. What it obscures are the various democratic functions that parties perform. Foremost, political parties have *representative functions*, that is, functions aimed at reflecting public opinion. They perform an *electoral function* whereby political parties, in their efforts to secure voter support, respond to the wishes of the citizenry. They also have a *participatory function* as they offer a vehicle for political participation through membership, meetings and engagement in the development of party policy. The relationship between political parties and the citizenry is not, however, one way. As Sartori has noted, '[p]arties do not only *express;* they also *channel*'.[200] Alongside their representative functions, political parties also perform an *agenda-setting function* in shaping the terms and content of political debates. For example, the platform of a major party influences, and is influenced by, public opinion. Political parties further perform a *governance function.* This function largely relates to parties who succeed in having elected representatives. These parties determine the pool of people who govern through their recruitment and preselection processes. They also participate in the act of governing. This is clearly the case with the party elected to government and also equally true of other parliamentary parties as they are involved in the lawmaking process and scrutinise the actions of the executive government.

There are, of course, many other intermediary organisations, many of which perform one or more of these functions that have been ascribed to political parties. The media, for example, clearly performs an agenda-setting function and, to a lesser and controversial extent, a responsive function. Non-government organisations like interest groups also perform

---

[199] New South Wales, *Parliamentary Debates*, Legislative Assembly, 15 April 1981, 5938–9 (Neville Wran, Premier and Treasurer).
[200] Giovanni Sartori, *Parties and Party Systems: A Framework for Analysis: Volume 1* (Cambridge University Press, 1976) 28 (emphasis in original).

responsive and agenda-setting functions while the public service obviously has a governance function. But no other institution or group *combines* these various functions. That is why Sartori was correct to argue that '[p]arties are *the* central intermediate and intermediary structure between society and government'.[201]

* * *

The difference in functions in the extracted paragraphs explains why one of the central purposes of election funding and spending laws is to support political parties to discharge their democratic functions. In some cases, this purpose justifies the preferential treatment of political parties over third-party campaigners: it justifies the provision of public funding to political parties (not available to third-party campaigners)[202] and higher caps on political donations[203] and electoral communication expenditure[204] for political parties.

The difference in functions of political parties and third-party campaigners is not the only difference to be taken into account in the design of election funding and spending laws. There are also crucial points of difference between political parties and third-party campaigners in their organizational purposes, and in the ways they engage in election funding and spending.

Political parties are *wholly* political organisations – all of their activities are driven by political objectives, in particular the aim of influencing electoral outcomes. Most third-party campaigners, on the other hand, have purposes other than their political objectives – they tend *not* to be wholly political organisations. For instance, all but one of the eight third-party campaigners interviewed fell into this general category: five are trade unions which engage in industrial campaigns as well as political campaigns;[205] two are peak organisations which

---

[201] Ibid ix.
[202] See EFED Act pt 5 (Public funding of State election campaigns) and pt 6A (Administrative and policy development funding).
[203] See EFED Act s 95A.
[204] See EFED Act s 95F.
[205] Interview with Mark Lennon, Secretary, Unions NSW (Sydney, 20 August 2012); Interview with officials of a third-party campaigner (Sydney, 17 August 2012); Interview with Anthony D'Adam, Senior Industrial Officer, Public Service Association (Sydney, 20 August 2012); Interview with Rita Mallia, President, Construction, Forestry, Mining and Energy Union, NSW Branch, Construction and General Division (Sydney, 21 August 2012); Interview with Tim Ayres, New South Wales Secretary, Australian Manufacturing Workers' Union (Sydney, 21 August 2012).

engage in service delivery as well as political advocacy.[206] The only third-party campaigner interviewed with wholly political objectives is the Australian Chinese Friends of Labor.[207]

Related to the multiple objectives of third-party campaigners are their varied sources of income. The key point of distinction here is that – unlike political parties - third-party campaigners tend not to rely upon political donations to fund their political campaigns. As an illustration, all of the third-party campaigners interviewed relied either upon membership subscription fees[208] or income from investments and service delivery[209] to fund their political campaigns except for the Australian Chinese Friends of Labour.

The manner in which third-party campaigners engage in political campaigns also differs significantly from that of political parties. As Unions NSW Secretary Mark Lennon put it, '(p)olitical parties are trying to win elections; third parties are trying to win on issues'.[210] This difference explains why campaigns of political parties are invariably *electoral campaigns* - campaigns aimed at influencing voters and electoral outcomes. Third-party campaigners do engage in such campaigns but also engage in *non-electoral campaigns* where the primary aim is not so much to influence voters and electoral outcomes but the government and its policy.

Moreover, the way in which third-party campaigners engage in electoral campaigns also differs from that of political parties. The campaign of a political party would inevitably be directed at advocating a vote for their party and its candidates (*express party and candidate advocacy*). Some third-party campaigners do engage in express party and candidate advocacy.[211] However, this is not always – even generally - the case. For instance, some

---

[206] Interview with official of a third-party campaigner (Sydney, 22 August 2012); Interview with official of a third-party campaigner (Sydney, 21 August 2012).
[207] This organisation has two key objectives: it seeks to address electoral issues of concern to the Chinese community by liaising with the ALP and seeking to influence its policy; it also seeks to communicate ALP policies to the Chinese community and seek their support for ALP: Interview with Ernest Wong, Asian Friends of Labor (Telephone Interview, 21 September 2012).
[208] Interview with Mark Lennon, Secretary, Unions NSW (Sydney, 20 August 2012); Interview with officials of a third-party campaigner (Sydney, 17 August 2012); Interview with Anthony D'Adam, Senior Industrial Officer, Public Service Association (Sydney, 20 August 2012); Interview with Rita Mallia, President, Construction, Forestry, Mining and Energy Union, NSW Branch, Construction and General Division (Sydney, 21 August 2012); Interview with Tim Ayres, New South Wales Secretary, Australian Manufacturing Workers' Union (Sydney, 21 August 2012).
[209] Interview with official of a third-party campaigner (Sydney, 22 August 2012); Interview with official of a third-party campaigner (Sydney, 21 August 2012).
[210] Interview with Mark Lennon, Secretary, Unions NSW (Sydney, 20 August 2012).
[211] Interview with Rita Mallia, President, Construction, Forestry, Mining and Energy Union, NSW Branch, Construction and General Division (Sydney, 21 August 2012); Interview with Tim Ayres, New

third-party campaigners do *not* engage in such advocacy as a matter of organisational policy; for these organisations, it was imperative not to be 'party-political'.[212]

Importantly, third-party campaigners engage in other forms of electoral campaign:

- *Provision of electoral information*

  For instance, several of the organisations interviewed submitted their policy positions to the competing parties in the lead-up to elections, asking them to respond. The responses of parties were then publicised through their websites and communicated to their members. Both forms of communication would not advocate a vote for a particular candidate or party.[213]
- *Strict issue advocacy*

  This type of electoral campaign is aimed at advocating the importance of particular issues without advocating a particular vote. For example, in the last State election, two of the third-party campaigners interviewed engaged in electoral campaigns seeking to highlight the importance of particular issues to voters, political parties and candidates.[214]
- *Issue advocacy with party and candidate advocacy*

  This type of campaign combines the elements of provision of electoral information, issue advocacy, and party and candidate advocacy. Unions NSW, for example, has conducted electoral campaigns with the key message that 'if you support rights at work, these are the candidates to vote for'.[215] While such party and candidate advocacy is not as explicit as express party and candidate advocacy, it is still advocacy for a particular party and candidate.

While useful in understanding the different ways in which third-party campaigners engage in electoral campaigns, these conceptual differences should not be overplayed. They are not watertight distinctions: one mode of electoral campaign can easily morph into - or be hard to

---

South Wales Secretary, Australian Manufacturing Workers' Union (Sydney, 21 August 2012); Interview with Mark Lennon, Secretary, Unions NSW (Sydney, 20 August 2012).

[212] Interview with official of a third-party campaigner (Sydney, 22 August 2012); Interview with official of a third-party campaigner (Sydney, 21 August 2012); Interview with officials of a third-party campaigner (Sydney, 17 August 2012); Interview with Anthony D'Adam, Senior Industrial Officer, Public Service Association (Sydney, 20 August 2012).

[213] Interview with official of a third-party campaigner (Sydney, 22 August 2012); Interview with official of a third-party campaigner (Sydney, 21 August 2012); Interview with officials of a third-party campaigner (Sydney, 17 August 2012).

[214] Interview with official of a third-party campaigner (Sydney, 22 August 2012); Interview with official of a third-party campaigner (Sydney, 21 August 2012).

[215] Interview with Mark Lennon, Secretary, Unions NSW (Sydney, 20 August 2012).

distinguish from – another. Significantly, the electoral campaigns of most third-party campaigners would involve one or more of these different ways of engaging in electoral campaigns with also *shifts and changes* in terms of strategies. In other words, the electoral campaigns of third-party campaigners are often *fluid and multi-dimensional.*

Indeed, the broader point can be made that the *political campaigns* of third-party campaigners are fluid and multi-dimensional. In particular, these campaigns often combine electoral and non-electoral campaigns with the nature of the campaign changing over time. One example is the current campaign by Union NSW concerning changes to workers' compensation laws. Such a campaign is currently a non-electoral campaign but as the next State election comes closer, it will increasingly take on elements of an electoral campaign.[216]

Another important difference between political parties and third-party campaigners concerns the period when their political campaigns are undertaken. The campaigns of political parties tend to be concentrated in the lead-up to elections. By comparison, campaigning is continuous for many third-party campaigners. For instance, Unions NSW conducts political campaigns 'throughout the year, throughout any particular year' – it is engaged in 'a constant campaign'.[217] In a similar vein, the campaigns of the NSW Public Service Association did not strongly distinguish between election and non-election time.[218]

The differences discussed in the preceding analysis mean that third-party campaigners generally face a more difficult task of identifying which funds and spending are regulated by NSW election funding and spending laws. For both political parties and third-party campaigners, this *challenge of identification* arises in terms of money used for elections other than NSW State elections.[219] Third-party campaigners also experience this challenge due to their *multiple organisational purposes* and the *fluid and multi-dimensional character of their political campaigns.* This challenge is also more acute in the case of the third-party campaigners that engage in continuous political campaigns.

---

[216] Interview with Mark Lennon, Secretary, Unions NSW (Sydney, 20 August 2012).
[217] Interview with Mark Lennon, Secretary, Unions NSW (Sydney, 20 August 2012).
[218] Interview with Anthony D'Adam, Senior Industrial Officer, Public Service Association (Sydney, 20 August 2012).
[219] See Part XIII: Management of Donations and Expenditure, Section C.

The EFED Act is not adequately meeting this challenge of identification for third-party campaigners. Many of the third-party campaigners interviewed described the provisions relating to them as 'complex' and 'confusing' and have particular difficulty in determining 'what's in, what's out';[220] the result for these organisations is a high degree of uncertainty.[221] As the report will later demonstrate, such confusion can be traced to poorly drafted statutory provisions, in particular, the definitions of 'political donation', 'electoral expenditure' and 'electoral communication expenditure'.[222]

This failure in the design of the EFED Act places an unjustified compliance burden on third-party campaigners. This burden occurs in a context where these organisations are not publicly funded to meet their compliance obligations;[223] it also occurs in a context where many third-party campaigners are unlikely to have the established capacity to comply with these laws because their interaction with the NSW election funding and spending laws is intermittent. As one of the interviewees explained in relation to the compliance burden experienced by her organisation:

> we are a relatively small NGO . . . we don't have those skills and understanding in house. So that causes stress and impact on staff, they got to respond to these things, it's out of everyone's comfort zone, we are not really sure what we are doing, there's not really a lot of guidance in it. So you then have that impact on your organization as well.[224]

There is a risk that such an unjustified compliance burden results in a lessening of political participation through third-party campaigners. If so, this would raise concern under three of the central objects of NSW election funding and spending laws. First, the goal of protecting the integrity of representative government would be adversely affected as the lessening of political participation through third-party campaigners is likely to diminish public accountability. Second, there is challenge to fairness in politics as the unjustified compliance burden unduly tilts the political arena in favour of political parties. Third, respect for political

---

[220] Interview with officials of a third-party campaigner (Sydney, 17 August 2012).
[221] Interview with Anthony D'Adam, Senior Industrial Officer, Public Service Association (Sydney, 20 August 2012); Interview with Tim Ayres, New South Wales Secretary, Australian Manufacturing Workers' Union (Sydney, 21 August 2012).
[222] See Part XIV: Disclosure of Political Donations and Electoral Expenditure, Section B(1); Part XV: Caps on Political Donations, Section B.
[223] Interview with Anthony D'Adam, Senior Industrial Officer, Public Service Association (Sydney, 20 August 2012).
[224] Interview with official of a third-party campaigner (Sydney, 21 August 2012).

freedoms is undermined as there is an undue impact on freedom of association, namely, freedom to associate through third-party campaigners.

XII REGISTRATION

The registration provisions of the EFED Act deal with two quite different registration schemes:

- registration of political parties, candidates, groups of candidates and third-party campaigners; and
- registration of agents for these entities and persons and elected members.

A *Registration of Political Parties, Candidates, Groups of Candidates and Third-Party Campaigners*

The EFED Act provides for registers of candidates, groups of candidates and third-party campaigners.[225] As noted earlier, the registration scheme in relation to political parties is found in Part 4A of the PE & E Act.

These registration schemes have two purposes. First, they enable the NSWEC to more effectively administer the legislation as they identify the entities and individuals that would be subject to such laws. Secondly, by being made public,[226] the register provides information to the general public, in particular voters, as to who are the main participants in New South Wales elections. This may lead to more informed voting decisions, a consequence that protects the integrity of representative government through more effective electoral accountability.

Given these purposes, registration should be mandatory for political parties, candidates, groups of candidates and third-party campaigners. Indeed, making registration compulsory would simply be formalising the current position. While the provisions relating to these registers may give an impression that registration by political parties, candidates, groups of candidates and third-party campaigners is *optional*, this is far from the truth. While neither the EFED Act nor the PE & E Act expressly requires registration, it is a de facto requirement.

For political parties, registration provides the important benefit of party endorsement on ballot papers.[227] Being a registered party on polling day of a State election is also a condition

---

[225] EFED Act pt 4 div 2 (Register of Candidates); div 2A (Register of Third-party Campaigners).
[226] Ibid s 52.
[227] PE & E Act pt 5 div 6B.

of eligibility for receiving payments from the Election Campaigns Fund[228] for that election. Continued registration after such time is a condition of eligibility for payments from the Administration Fund[229] for a particular State election. Similarly, being registered for at least 12 months when a claim is being determined is a condition of eligibility for receiving payments from the Policy Development Fund.[230] The various provisions mean that it is very unlikely that a political party seriously contesting elections in New South Wales would opt *not* to register.

The position is even clearer in relation to candidates, groups of candidates and third-party campaigners. For candidates and groups of candidates, being registered for a particular State election is a condition of eligibility for receiving payments from the Election Campaign Fund for that election.[231] More importantly, it is unlawful for such persons and groups to receive 'political donations' unless they are registered[232] – this prohibition would clearly prompt candidates and groups of candidates to register.

For third-party campaigners, section 96AA(1)(a) is the key provision that makes registration of these groups quasi-mandatory. It states that '(i)t is unlawful for a third-party campaigner to make payments for electoral communication expenditure incurred during a capped expenditure period, or to accept political donations for the purposes of incurring that expenditure, unless . . . the third-party campaigner is registered under this Act'. In addition, registration of third-party campaigners prior to the 'capped expenditure period'[233] provides the benefit of a higher cap on 'electoral communication expenditure'.[234]

> *Recommendation 17*: Registration should be compulsory for political parties, candidates, groups of candidates and third-party campaigners.

Two other changes should be made to these registration schemes. The first relates to the period for maintaining registers for particular State elections. The Act is currently unclear about this. While it states that the registers are to be kept from the polling day of the previous

---

[228] EFED Act s 57(2)(a).
[229] Ibid s 97E(2)(a).
[230] Ibid s 97I(2)(a).
[231] Ibid s 59(2)(a).
[232] Ibid s 96A(2).
[233] Ibid s 95H.
[234] Ibid s 95F(10).

election,[235] it does not expressly provide when these registers need not be kept (thereby, not being subject to the requirement of public access). It would make for a clearer situation if the Act explicitly stated the duration for which the registers are to kept and open to public access. A period lasting three electoral cycles would seem to be adequate.

> *Recommendation 18*: Registers should be kept for a period lasting three electoral cycles and should be open to public access during that time.

The other change concerns the information that is provided in applications for registration, and information that is made public through the registers. The EFED Act currently requires certain information to be provided in an application for registration (including that which is prescribed by regulations) while leaving it to the EFA to keep the various registers in a form and manner it thinks fit. Both areas should be governed by principles-based legislation with the guidelines of the NSWEC determining specific requirements.[236]

> *Recommendation 19*: The requirements as to what information is provided in applications for registration and what information should made public through the registers should be determined by the NSWEC through its guidelines.

---

[235] See EFED Act ss 31(2), 38A(3).
[236] See Part VI: Principles-based Legislation in Administration and Securing Compliance.

B *Registration of Agents for Political Parties, Elected Members, Candidates, Groups of Candidates and Third-Party Campaigners*

1 *Role and Purposes of Agents under EFED Act*

For all intents and purposes, it is compulsory for political parties, elected members, candidates, groups of candidates and third-party campaigners to have an agent under the EFED Act. The Act currently requires political parties to appoint party agents[237] while obliging candidates and groups of candidates to appoint official agents.[238] For elected members, their official agent is the party agent unless another agent has been appointed.[239] While the Act does not expressly require third-party campaigners to appoint an official agent, it is unlawful for a third-party campaigner to make payments for electoral communication expenditure incurred during a capped expenditure period, or to accept political donations for the purposes of incurring that expenditure, unless it has an official agent.[240] The latter prohibition would make appointment of an official agent a de facto requirement.

These agents play a significant role under the EFED Act. They are responsible for complying with the disclosure obligations imposed on political parties, elected members, candidates, groups of candidates and third-party campaigners.[241] Such an obligation, in turn, triggers a range of criminal offences.[242] In addition, amounts equivalent to unlawfully made political donations can be recovered from a party agent when the political party is not an incorporated body[243] and from official agents in cases involving elected members, candidates, groups of candidates and third-party campaigners.[244]

The election funding and spending laws in the Australian Capital Territory (ACT) and Queensland also rely upon agents. Under the ACT scheme, reporting agents[245] are responsible for complying with disclosure obligations in relation to annual returns[246] and election

---

[237] EFED Act s 41(1).
[238] Ibid s 46(1).
[239] See EFED Act ss 4(1), 46A.
[240] Ibid s 96A(1)(b). A similar prohibition applies to elected members, candidates and groups of candidates: ibid s 96A.
[241] Ibid s 90.
[242] See EFED Act s 96H.
[243] Ibid s 96J(1)(b).
[244] Ibid s 96J(1)(c).
[245] See *Electoral Act 1992* (ACT) pt 14 div 14.2.
[246] Ibid s 230.

expenditure returns,[247] a responsibility that implicates several criminal offences.[248] The Queensland laws place various responsibilities upon agents including compliance with provisions relating to State campaign accounts,[249] disclosure obligations[250] and caps on election expenditure.[251] It also renders these agents liable for amounts equal to gifts of foreign property that are unlawfully received when a political party is not incorporated, and when the receipt is by a candidate.[252]

What then are the purposes underlying this scheme of agents? Two purposes can be discerned from the 2nd Reading Speech to Election Funding Amendment (Political Donations and Expenditure) Bill 2008 (NSW), the Bill that introduced this scheme. The first is to 'provide for a segregation of duties and . . . ensure that the financial records of groups, candidates, members of Parliament and councillors are overseen by a properly trained person'.[253] And the second is to facilitate compliance with legislative requirements. According to the then Attorney-General, John Hatzistergos, '(t)he new rules will also help ensure reporting is done in accordance with the new legislation'.[254]

It should be emphasised here that the scheme of agents is not aimed at obtaining a point of contact for political parties, elected members, candidates, groups of candidates and third-party campaigners; such information can be obtained when these entities and individuals register by requiring that they nominate a contact person. Neither is the scheme aimed at obtaining information as to who are the responsible officers of political parties and third-party campaigners. Again this can be obtained when these organisations register (in any event, there is no assurance that the nominated agents are the responsible officers). In other words, identifying a point of contact or the responsible officers does not require the *imposition of liability* on these individuals which is what the scheme of agents under the EFED Act does.

---

[247] Ibid s 224(1).
[248] Ibid s 236.
[249] *Electoral Act 1992* (Qld) ss 218-221.
[250] Ibid ss 260-262, 290.
[251] Ibid ss 275-280.
[252] Ibid s 270.
[253] New South Wales, *Parliamentary Debates*, Legislative Council, 18 June 2008, 8578 (John Hatzistergos, Attorney-General).
[254] Ibid.

2 *Inappropriate Purpose of Segregation as Integrity Measure for Elected Members, Candidates and Groups of Candidates*

One way that the scheme of agents purports to be 'an important integrity measure'[255] is by preventing elected members, candidates and groups of candidates from managing their campaign funds. This is an inappropriate purpose as it carries the assumption that those who seek public office and those hold public office - in some cases, Ministers – are not sufficiently responsible to handle their own campaign funds. This is a rather bizarre assumption given that such persons are treated as being sufficiently responsible to exercise public power and, in the case of Ministers, are responsible for budgets running into millions of dollars. It is also an assumption that perversely leads to the *shifting* of responsibility from elected members, candidates and groups of candidates to agents (who are held liable). An assumed lack of ability to be responsible has led to an absence of (legal) responsibility.

The assumption that justifies the purpose of preventing elected members, candidates and groups of candidates from managing their campaign funds irremediably taints it. The purpose of the scheme of agents that should be focused upon is facilitating compliance with the requirements under the EFED Act.

3 *Unjustified Reliance on Agents to Secure Compliance*

(a) Principles for the Imposition of Liability

In considering the relevant principles, it is crucial to distinguish the two possible ways of securing compliance through the imposition of liability.[256] The first – and obvious – way is to directly impose liability on those who are to comply - the political parties, elected members, candidates, groups of candidates and third-party campaigners themselves. For instance, under the ACT scheme, civil penalties in relation to breaches of limits applying to electoral expenditure and gifts are directly recovered from the political party, candidate or third-party campaigner which has breached the limit.[257] This approach imposes liability on the *duty-holders.*

---

[255] Ibid.
[256] For discussion as to who should be liable for an offence, see Joint Standing Committee on Electoral Matters, above n2, 265-266.
[257] *Electoral Act 1992* (ACT) ss 205F-205I.

The other way is to impose liability on individuals other than the duty-holders as a means of securing the ultimate goal of compliance by duty-holders. This is what the scheme of agents under the EFED Act seeks to do: liability is imposed on the agents *as a means* to secure compliance by political parties, elected members, candidates, groups of candidates and third-party campaigners. Other schemes also adopt this broad approach. For instance, liability is imposed on the financial controllers of 'associated entities' under the ACT and Queensland schemes.[258]

The first principle in terms of the imposition of liability is that such liability should generally be imposed on the duty-holders. This is dictated by considerations of fairness: the burden of liability (and compliance) should be borne by those who are subject to obligations under the EFED Act. It is also dictated by considerations of effectiveness: the duty-holders are obviously able to control conduct necessary to comply with the EFED Act given that it is their conduct that is in question.

The second principle is that liability should be imposed on individuals other than the duty-holders in exceptional situations. It should only be imposed when the following conditions are met:

- Imposition of liability on the duty-holders is not feasible;
- The individual/s subject to liability is in a position to control the conduct relevant for compliance; and
- Imposition of liability on these individuals will promote compliance.

These principles are consistent with the six principles endorsed by the Council of Australian Governments in relation to the imposition of personal liability for corporate fault (reproduced below). The first principle articulated above is couched in similar terms to Principles 1-3 endorsed by COAG while the second principle has elements similar to Principle 4 endorsed by COAG.

> Principle 1: Where a corporation contravenes a statutory requirement, the corporation should be held liable in the first instance.

---

[258] See *Electoral Act 1992* (ACT) s 231B; *Electoral Act 1992* (Qld) s 294.

Principle 2: Directors should not be liable for corporate fault as a matter of course or by blanket imposition of liability across an entire Act.

Principle 3: A 'designated officer' approach to liability is not suitable for general application.

Principle 4: The imposition of personal criminal liability on a director for the misconduct of a corporation should be confined to situations where:

- there are compelling public policy reasons for doing so (for example, in terms of the potential for significant public harm that might be caused by the particular corporate offending);
- liability of the corporation is not likely on its own to sufficiently promote compliance; and
- it is reasonable in all the circumstances for the director to be liable having regard to factors including:
    - that the obligation on the corporation, and in turn the director, is clear;
    - that the director has the capacity to influence the conduct of the corporation in relation to the offending; and
    - that there are steps that a reasonable director might take to ensure a corporation's compliance with the legislative obligation.

Principle 5: Where Principle 4 is satisfied and directors' liability is appropriate, directors could be liable where they:

- have encouraged or assisted in the commission of the offence; or
- have been negligent or reckless in relation to the corporation's offending.

Principle 6: In addition, in some instances, it may be appropriate to put directors to proof that they have taken reasonable steps to prevent the corporation's offending if they are not to be personally liable.[259]

[259] Cited in Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into the Personal Liability for Corporate Fault Reform Bill 2012* (2012) 14.

The scheme of agents under EFED Act fares poorly when evaluated against the two principles articulated in this report. A central recommendation of this report is that it be abolished. The following analysis explains why and recommends alternatives.

> *Recommendation 20*: The scheme of agents under the EFED Act should be abolished.

(b) Elected Members, Candidates and Groups of Candidates

With elected members, candidates and groups of candidates, imposition of liability on the duty-holders is feasible, rendering unnecessary - and undesirable - the imposition of liability on the agents. There is clearly no need to impose liability on agents in relation to elected members and candidates as these individuals can be directly held liable as natural persons. Matters are less straightforward in relation to groups of candidates (which are not single legal entities or persons). The approach here should be to treat these groups *as groups* with the members of these groups *jointly and severally liable* for the obligations of the groups.

There are other difficulties with the scheme of agents under the EFED Act as it relates to elected members, candidates and groups of candidates. It seems to breach the principle that liability be imposed on individuals only when these individuals are in a position to control the conduct relevant for compliance as it appears that many agents for elected members, candidates and groups of candidates are *not* in this position. For instance, many elected members and candidates are nominating their spouses or close family members as their official agents, sometimes as an afterthought to comply with the EFED Act.[260] Because of familial ties, these agents are not likely to be in a position to control or direct the election funding and spending of their respective members or candidates. This lack of control makes not only the imposition of liability on agents unfair but also ineffective.

> *Recommendation 21*: Members of groups of candidates should be jointly and severally liable for the obligations of these groups.

[260] Interview with staff of New South Wales Election Funding Authority (Sydney, 8 June 2012).

(c) Political Parties and Third-Party Campaigners

(i) Incorporated Entities

Several of the main parties in New South Wales are incorporated entities. Family First is a company registered under *Corporations Act 2001* (Cth) while the Christian Democratic Party, NSW Greens and the Shooters and Fishers Party are incorporated associations under *Associations Incorporation Act 2009* (NSW).[261] Many third-party campaigners will also be incorporated. In such situations, liability can be directly imposed on the duty-holders as they are separate legal entities. By imposing liability on agents, the EFED Act breaches the principles that liability should generally be imposed on duty-holders, and that other individuals be held liable only when such liability is not feasible.[262]

It also appears that the scheme of agents under the EFED Act is also breaching the principle that liability be imposed on individuals other than duty-holders only when such individuals are in a position to control the conduct relevant to compliance in many situations. In the case of political parties, those nominated as party agents are sometimes employees who are taking on the role of the agent in the course of their employment. Their choice whether or not to take on the role of the agent might not be significant. As one EFA staff member commented, for some of these agents 'it's part of their job, they have no choice'.[263]

Moreover, depending on the seniority of their positions, the employee agents might not be able to control or direct the election funding and spending of their political parties.[264] Even when occupying senior positions within a political party, these employee agents might also face challenges in controlling or directing the election funding and spending of the many intra-party units.[265] Further, there is the challenge of controlling or influencing the conduct of volunteers who run these units. As one EFA staff put it, these volunteers can just 'pack up and leave'.[266]

These difficulties necessarily arise from using a scheme of agents to secure the compliance of political parties. A recent submission of the Australian Electoral Commission captured this

---

[261] See Part X: Diversity of Party Organizations and Structures.
[262] See text above accompanying nn 256-259.
[263] Interview with staff of New South Wales Election Funding Authority (Sydney, 8 June 2012).
[264] Ibid.
[265] See Part X: Diversity of Party Organizations and Structures.
[266] Interview with staff of New South Wales Election Funding Authority (Sydney, 8 June 2012).

well. Referring to provisions of the *Commonwealth Electoral Act 1918* (Cth) that render party agents liable for any penalties or recovery of monies in relation to political parties, the Commission said that '(t)his approach has inherent problems in attempting to make an individual liable personally for matters that the individual may have no knowledge of or which may be a wider responsibility within the political party'.[267]

These situations - where the agent is not in a real position to control or direct the election funding and spending of their respective organisations – gives rise not only to unfairness but ineffectiveness (like the situations involving agents of elected members, candidates and groups of candidates). Another risk of ineffectiveness results from the possibility that the imposition of responsibility and liability on agents allows political parties and third-party campaigners to wash their hands of their responsibilities; for one, the political party that has committed the offence has no obligation to support the party agent who is liable to repay unlawful amounts.[268] In the context of political parties and third-party campaigners, organisational responsibility requires organisational leadership, not the imposition of responsibility on a single person.

(ii) Unincorporated Entities

The unfairness and ineffectiveness of the scheme of agents in relation to incorporated entities similarly applies to political parties and third-party campaigners which are not incorporated. These vices alone are enough to condemn the scheme of agents.

What does make the position is more complicated in relation to unincorporated bodies is they are not legal entities as such - and generally cannot be held liable in their own right. It was noted in the Commonwealth Government's *Electoral Reform Green Paper: Donations, Funding and Expenditure* that:

> Although political parties are the primary participants in Australia's electoral system, the offence provisions do not apply to political parties, in recognition of the fact that many political parties are not legal entities. Political parties in Australia are generally

---

[267] Australian Electoral Commission, Submission No 1 to the Joint Standing Committee on Electoral Matters, Parliament of Australia, *Inquiry into the AEC analysis of the FWA report on the HSU*, 21 June 2012, 15 <http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=em/fundingdisclosure/subs.htm>.

[268] Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure* (2008) 71.

> categorised as voluntary associations made up of members who have agreed to the internal rules of that association.[269]

The common law rule in relation to such groups is that their committee members are liable in contract and torts law.[270] This rule does not however, necessarily apply to liabilities arising under statutes. The question then arises: should this rule be extended to liabilities under the EFED Act?

This report argues against such an extension. Adopting the common law rule in relation to liabilities under the EFED is likely to give rise to considerable difficulties in ascertaining which committee members are liable especially when breaches of the Act has taken place over a period of time (during which the composition of the committee has changed).

It also argues against such an extension because there is a more effective alternative. The alternative is to treat unincorporated associations as legal entities for particular purposes. This is an approach evident in relation to workers' compensation laws.[271] It is also an approach taken in various court decisions that have held that the constitution and internal rules of registered political parties - even when unincorporated - can be interpreted and enforced by courts.[272] This was the conclusion of Justice Dowsett in *Baldwin v Everingham,*[273] a conclusion that has been followed in subsequent cases.[274]

In line with this approach, the report recommends deeming unincorporated political parties and third-party campaigners as bodies corporate for the purposes of the EFED Act. This has been recommended by the Australian Electoral Commission in relation to the challenge of

---

[269] Ibid 70.
[270] See *Peckham v Moore* [1975] 1 NSWLR 353; *Bradley Egg Farm v Clifford* [1943] 2 All ER 378; *Smith v Yarnold* [1969] 2 NSWR 410; *Rochfort v Associated Steamships Pty Ltd* (1981) 53 FLR 364. See generally John Gooley, David Russell, Matthew Dicker and Michael Zammit, above n173, 83-89; Robert Baxt, Keith Fletcher and Saul Fridman, *Afterman and Baxt's Cases and Materials on Corporations and Associations* (Butterworths, 8th ed, 1999) 109-131.
[271] See *Bailey v Victorian Soccer Federation* [1976] VR 13.
[272] Anika Gauja, above n173, 257. See also Anika Gauja, *Political Parties and Elections: Legislating for Representative Democracy* (Ashgate, 2010) 43-47.
[273] *Baldwin v Everingham* [1993] 1 Qd R 10.
[274] See for example *Greene v McIver* [2012] QSC 181 (26 June 2012) [36]; *Carberry v Drice as rep of Brisbane Junior Rugby Union (An unincorporated Body)* [2011] QSC 016 (11 January 2011) [34]; *Tudehope v Liberal Party of Australia (NSW Division)* [2010] NSWSC 1210 (16 September 2010) [10]; *Coleman v Liberal Party of Australia, New South Wales Division (No 2)* [2007] NSWSC 736 (27 June 2007) [34]-[36].

prosecuting unincorporated political parties under the *Commonwealth Electoral Act 1981* (Cth). According to the Commission:

> The most effective solution to this anomaly is for political parties to be recognised as legal entities for the purposes of the Electoral Act as part of the registration process under Part XI of the Electoral Act. This would allow the AEC to take prosecution or recovery action against the registered political party as a legal entity rather than against an individual office holder within the party.[275]

In comments that warrant reproduction, the Commission also said:

> The argument for having parties treated as bodies corporate is to allow the parties, rather than individuals within the party, to be held accountable under the (funding and) disclosure provisions of the Electoral Act. This is particularly the case where financial penalties are to be imposed for convictions of offences against the disclosure provisions and where monies are to be recovered. *It is both more feasible and appropriate to seek these outcomes from the political party as an entity with collective responsibility rather than from an individual officer holder within that party*
>
> . . . .
>
> The concept of having registered political parties deemed to be bodies corporate for the purposes of the Electoral Act is not new. The idea was raised both in the Harders Report in 1981 and the First Report of the JSCER in 1983. It is also not a unique proposal, having parallel precedents in other legislation.[276]

The Commonwealth Joint Standing Committee on Electoral Matters has recently adopted the Commission's recommendation. Referring to its recommendation to deem registered political parties as bodies corporate, it said:

> It will shift the focus of prosecution and financial responsibility from the individual to the political party. Ultimately, political parties must be responsible for meeting their reporting obligations. It is intended that this will encourage political parties to ensure that the person tasked with lodging its returns is suitably qualified to perform

---

[275] Australian Electoral Commission, above n267, 15.
[276] Ibid 15 (emphasis added).

> the role, and that effective systems are in place to ensure a complete and accurate return is lodged.[277]
>
> *Recommendation 22*: Unincorporated political parties and third-party campaigners should be deemed as bodies corporate for the purposes of NSW election funding and spending laws.

For the sake of comprehensiveness, it should also be pointed out that the report recommends securing compliance by candidates and political parties (whether incorporated or not) through means other than the imposition of liability; it recommends conditions imposed on public funding aimed at promoting compliance. Reliance on this method avoids difficulties that might arise as to whether a political party is incorporated or not – or whether it is a legal entity. The point is that whether it is or not, it will be treated under the public funding scheme as an organisation; and it is up to the party to meet the conditions imposed on public funding in order to receive such money (not for the NSWEC to demonstrate that it has *not* met the conditions). It is partly for these reasons that this report recommends a range of compliance measures that impose conditions on public funding. Of note is its recommendation that Candidate and Party Compliance Policies be introduced as a condition of receipt of public funding payment.[278]

---

[277] Joint Standing Committee on Electoral Matters, Parliament of Australia, *Review of the AEC analysis of the FWA report on the HSU* (2012) iv.
[278] See Part XIX: Compliance, Section B.

XIII MANAGEMENT OF DONATIONS AND EXPENDITURE

A *Principles-Based Legislation for the Management of Donations and Expenditure*

The EFED Act currently lays downs various requirements as to how political donations and electoral expenditure are to be managed through a system of campaign accounts. Table 4 details the requirements that apply to political parties, elected members, candidates, groups of candidates and third-party campaigners.

A proper system of campaign accounts is essential to the effectiveness of laws regulating election funding and spending. It is necessary so that the responsible statutory agency can fully determine through these accounts what election funding and spending has been made. It is only with the assurance of such assessments that compliance with disclosure obligations, caps and restrictions on political donations and caps on electoral expenditure can be properly determined.

Unfortunately, the system of campaign accounts under EFED Act poorly serves these purposes – it is unclear, inconsistent and unnecessarily prescriptive. It is unclear in a most fundamental way with poor drafting resulting in confusion as to whether there is a requirement for a single campaign account in relation to elected members, candidates, groups of candidates and third-party campaigners (but not so in relation to political parties).

With elected members, section 96A(3) of the EFED Act suggests that there can be multiple campaign accounts as it refers to 'a campaign account', but references to 'their campaign account (sic)' in s 96A(5) and 'the campaign account' in s 96B(1) suggests there should be only one campaign account. It is similarly unclear with candidates and groups of candidates with reference to 'a campaign account' in section 96A(3) but reference to 'their campaign account (sic)' in section 96A(5A) and 'the campaign account' in section 96B. Third-party campaigners are also faced with confusing references to 'a campaign account'[279] as well as 'the campaign account'.[280]

The rules governing campaign accounts are also inconsistent, with different rules applying to political parties, elected members, candidates, groups of candidates and third-party

[279] EFED Act ss 96AA(2)(a), 96AA(3).
[280] Ibid ss 96AA(2)(b), 96AA(4), 96AA(5), 96AA(6).

campaigners in terms of what money can be put into these accounts and what money can be spent from these accounts (see Table 4). No clear rationale can be discerned for these differences.

The EFED Act is also unnecessarily prescriptive in the detail that it stipulates in relation to campaign accounts. The approach of having principles-based legislation should be adopted in this area with the NSWEC empowered to determine the specific requirements of the system of campaign accounts through its guidelines.[281] In doing so, it can tailor requirements according to the differences in the financial affairs of political parties and third-party campaigners;[282] as well as differences between these organisations on the one hand, and elected members, candidates and groups of candidates, on the other.

In adopting this approach, unnecessary requirements like that requiring a single campaign account for political parties should be repealed.[283] This is a requirement that has been met by NSW political parties with some difficulty given their various intra-party organisational units, often by local branches/groups having sub-accounts of the State office's main account. Yet, its necessity is moot. In terms of the NSWEC being able to fully determine what election funding and spending has been made by a political party, there needs to be designated campaign accounts but not necessarily a single campaign account.[284]

> *Recommendation 23:* The management of donations and expenditure should be governed by principles-based legislation with the guidelines of the NSWEC prescribing specific requirements.

---

[281] See Part VI: Principles-based Legislation in Administration and Securing Compliance.
[282] See Part XI: Differences between Political Parties and Third-party Campaigners. Differences also emphasised by Anthony D'Adam: Interview with Anthony D'Adam, Senior Industrial Officer, Public Service Association (Sydney, 20 August 2012).
[283] EFED Act ss 96(3), 96(4).
[284] Interview with staff of New South Wales Election Funding Authority (Sydney, 16 August 2012).

Table 4: Management of Donations and Expenditure under *EFED Act* in relation to Campaign Accounts

Incoming payments permitted	Incoming payments not permitted	Incoming payments required	Outgoing payments permitted	Outgoing payments not permitted	Outgoing payments required
Political parties					
• Political donations after 1 January 2011; • Payments to the party under Part 5 (Public Funding of State election campaigns); • Money borrowed by the party; • Bequests to the party; • Money belonging to the party on 1 January 2011; • Other money of a kind prescribed by regulations.[285]	• Party subscriptions other than those exceeding maximum in section 95D; • Political donations that exceed applicable caps on political donations to the party; • Money paid to the party under Part 6A (Administration Fund and Policy Development Fund); • Other money of a kind prescribed by regulations.[286]	None – this means political donations *need not* be paid into party campaign accounts.	All[287] - this means that State campaign accounts of parties can be used for electoral expenditure in relation to elections other than NSW State elections, e.g: • NSW local government elections; • Federal elections; • Elections in other States and Territories.	None.	'(P)ayments for electoral expenditure for a State election campaign'[288]
Elected Members					
All permitted	None	Political donations 'used to incur electoral expenditure or reimburse	Section 96B(5): (5) Payments out of a campaign account may only be		'(P)ayments for electoral expenditure for their own election or re-election'[291]

[285] EFED Act s 96(5).
[286] Ibid s 96(6).
[287] Ibid s 96(7).
[288] Ibid s 96(3).

Incoming payments permitted	Incoming payments not permitted	Incoming payments required	Outgoing payments permitted	Outgoing payments not permitted	Outgoing payments required
		a person for incurring electoral expenditure'[289] Note: political donations to elected members to be used only for incurring electoral expenditure etc[290] HENCE, above de facto requirement that all political donations to be paid into campaign account	made: (a) for the purposes of electoral expenditure incurred by or on behalf of the elected member, group or candidate to whom the account belongs, or (b) with the approval of the elected member, group or candidate to whom the account belongs, for the purposes of lawful expenditure referred to in section 96 incurred by or on behalf of the party of which they are a member, or (c) to reimburse the elected member, group or candidate for money paid into the account by the member, group or candidate, or (d) for the purpose of the elected member, group or candidate to whom the account belongs to make political donations to elected members, groups or candidates who are members of the same party, or (e) for the purposes of expenditure incurred in connection with parliamentary or council duties of the person to whom the account belongs or in connection with community activities.		

[291] Ibid s 96A(5).
[289] Ibid s 96A(3).
[290] Ibid s 96A(6).

Incoming payments permitted	Incoming payments not permitted	Incoming payments required	Outgoing payments permitted	Outgoing payments not permitted	Outgoing payments required
Candidates and groups of candidates					
All permitted	None[292]	Political donations 'used to incur electoral expenditure or reimburse a person for incurring electoral expenditure'[293] Note: political donations to candidates and groups of candidates to be used only for incurring electoral expenditure etc[294] HENCE, above de facto requirement that all political donations to be paid into campaign account	Section 96B(5): (5) Payments out of a campaign account may only be made: (a) for the purposes of electoral expenditure incurred by or on behalf of the elected member, group or candidate to whom the account belongs, or (b) with the approval of the elected member, group or candidate to whom the account belongs, for the purposes of lawful expenditure referred to in section 96 incurred by or on behalf of the party of which they are a member, or (c) to reimburse the elected member, group or candidate for money paid into the account by the member, group or candidate, or (d) for the purpose of the elected member, group or candidate to whom the account belongs to make political donations to elected members, groups or candidates who are members of the same party, or (e) for the purposes of expenditure incurred in connection with parliamentary or council duties of the		'(P)ayments for electoral expenditure for their own election or re-election'[295]

[292] Ibid s 96B(4).
[293] Ibid s 96A(3).
[294] Ibid s 96A(6).
[295] Ibid s 96A(5A).

Incoming payments permitted	Incoming payments not permitted	Incoming payments required	Outgoing payments permitted	Outgoing payments not permitted	Outgoing payments required
			person to whom the account belongs or in connection with community activities.		
Third-party campaigners					
All	• Political donations that exceed applicable cap; • Any other amount of kind prescribed by regulations.[296]	Political donations used for electoral communication expenditure during regulated period[297]	All[298] - this means that campaign accounts of third-party campaigners can be used for electoral expenditure in relation to elections other than NSW State elections, e.g: • NSW local government elections; • Federal elections; • Elections in other States and Territories.	None	Payments for electoral communication expenditure during regulated period[299]

[296] Ibid s 96AA(5).
[297] Ibid s 96AA(2)(b).
[298] Ibid s 96AA(6).
[299] Ibid s 96AA(2)(a).

B *The Centralisation of Fund-Raising and Electoral Expenditure*

An important issue to consider is the impact of the EFED Act on the centralisation of election fund-raising and spending. If the Act requires highly centralised election fund-raising and spending, it is arguable that this may inflict damage on the health of democracy in New South Wales. The varying extent to which political parties centralise their decision-making processes in this area is a source of diversity that should be respected.[300] Such diversity reflects different ideologies, a connection which was put clearly by Simon McInnes, Financial Director of the NSW Liberal Party:

> one of the things that we pride ourselves on in the Liberal Party is that we are... decentralised and we are autonomous.[301]

It also reflects the different views taken by parties on how best to achieve their electoral objectives; shoehorning parties into centralised decision-making might limit the competitiveness of certain political parties. Highly centralised decision-making processes also have another significant impact. They potentially sap the vigour of local branches; this may discourage individuals from participating in political parties through their volunteer efforts.

A key question then is this: *do election funding and spending laws require centralisation of election fund-raising and spending?* This question should be answered in the context of the varied ways in which NSW political parties have de/centralised their fund-raising and spending processes.

With the ALP, fund-raising is conducted by the State office as well as the local branches with the branches organising fund-raising events in accordance to guides issued by the State office. On the spending side, expenditure is incurred by the State office and the candidates. All ALP candidates, however, have the same agent, the party agent for the ALP. Campaign budgets of candidates have to be approved by the State office. Once approved, candidates are free to spend within the terms of their budget. Expenditure outside the terms of the budget, however, requires approval of their agent (the party agent).[302]

---

[300] See Part X: Diversity of Party Organizations and Structures.
[301] Interview with Simon McInnes, Finance Operations Director, Liberal Party of Australia (NSW Division) (Sydney, 17 August 2012).
[302] Interview with Sam Dastyari, General Secretary, NSW Labor (Sydney, 21 August 2012).

With the NSW Liberal Party, fund-raising is conducted through the State office, the electoral conferences and the branches. Fund-raising targets are also set for strong Liberal Party seats, so-called 'blue chip' seats. How election spending is incurred depends on whether the seat is a strong Liberal Party seat, a strong ALP seat (hard luck seat) or a marginal seat (target seat). With 'blue chip' and 'hard luck' seats, campaigning is predominantly conducted at the local level by branches and conferences while campaigns for target seats are primarily run from the State office.[303]

With the NSW National Party, fund-raising is conducted by the State office as well as electoral councils and branches. Funds raised by State office are primarily directed to marginal seats. In terms of election spending, the State office runs the campaigns in marginal seats while the electoral councils run the campaigns in safe National Party seats and safe ALP seats.[304]

Fund-raising by the NSW Greens is undertaken by the State office and local groups. Election campaign spending is conducted under 'a very decentralized structure for campaigning' in relation to Legislative Assembly seats with local groups making 'big decisions on expenditure'. The State office, however, has a more significant role in relation to Legislative Council campaigns.[305]

The other parties adopt different practices. With the Christian Democratic Party, the main fundraising is by State office. Its local branches fund-raise but the money goes to State office.[306] With the Shooters and Fishers Party, fund-raising is solely undertaken by the State office.[307] Family First, on the other hand, fund-raises both through its State office and local branches.[308]

---

[303] Interview with Simon McInnes, Finance Operations Director, Liberal Party of Australia (NSW Division) (Sydney, 17 August 2012).
[304] Interview with Greg Dezman, Deputy Director, NSW National Party (Sydney, 20 August 2012).
[305] Interview with Chris Maltby, Registered Officer, and Geoff Ash, Deputy Registered Officer, Greens NSW (Sydney, 16 August 2012).
[306] Interview with the Honourable Reverend Fred Nile, Member of the Legislative Council, Parliament of New South Wales, State President and National President of the Christian Democratic Party (Sydney, 17 August 2012).
[307] Interview with the Honourable Robert Borsak, Member of the Legislative Council, Parliament of New South Wales and Party Agent, Shooters & Fishers Party NSW (Sydney, 21 August 2012).
[308] Interview with Jason Cornelius, State President, Family First NSW (Sydney, 17 August 2012).

If the practices of the parties are any guide, it would be strongly appear that the EFED Act does *not* require a highly centralised system of election fund-raising and spending; it does not in particular require all election fund-raising and spending decisions be made centrally by the party's State office. All parties except the Shooters and Fishers Party allow their local branches (groups, conferences) to fund-raise; and all parties allow these intra-party units some degree of autonomy in terms of election spending.

Indeed, closer consideration of the terms of the EFED Act results in the same conclusion. The EFED Act requires parties to comply with disclosure obligations, caps and prohibitions on political donations and caps on electoral communication expenditure. Under the Act, a party with various intra-party units is treated as one. In doing so, the Act emphasises the organisational responsibility of the party.

Meeting this organisational responsibility, however, does not require highly centralised processes. What it does require is the *centralisation of record-keeping* and *co-ordination* of other aspects of election fund-raising and spending.

Centralisation of record-keeping is necessary for the party as a whole to keep track of money going in and out of the various intra-party units – this is an essential condition for the party to fully comply with its obligations under the EFED Act. All the main parties in New South Wales have, in fact, adopted centralised record-keeping systems in order to meet their obligations under the Act.

It is true, of course, that such centralisation of record-keeping *can* bring about increased centralisation of other fund-raising and spending functions[309] but that is not a necessary consequence. A metaphor used by Greg Dezman, Deputy Director of the NSW National Party, is particularly illuminating in understanding the *limited* role of centralised record-keeping. In his words, the State office of the NSW National Party through its centralised recording-keeping system became 'the banker' for the electoral councils and local branches: '(t)hey (electoral councils and local branches) just send the money to us, send the bills to us rather than banking the money themselves and writing the cheques'.[310] In this scenario, the

[309] See interview with Sam Dastyari, General Secretary, NSW Labor (Sydney, 21 August 2012).
[310] Interview with Greg Dezman, Deputy Director, NSW National Party (Sydney, 20 August 2012).

local intra-party units can still enjoy autonomy in their fund-raising and spending activities provided that funds are channelled through the State office.

Putting aside record-keeping, what is otherwise required is *co-ordination* – a process where the State office and intra-party units agree upon the processes of fund-raising and electoral expenditure and share information to ensure these processes adhered to. Such co-ordination can, of course, take the form of a highly centralised system (e.g. fund-raising by the Shooter and Fishers Party) but it need not. For instance, co-ordination can effectively occur through highly *decentralised* systems like the NSW Greens provided there is an agreed framework of decision-making and proper exchange of information. Indeed, co-ordination can also effectively occur under systems that are centralised in some ways and decentralised in others (e.g. election campaign spending by NSW Liberal Party and NSW National Party).

This report has elaborated upon these issues for two reasons. First, it seeks to correct what is perhaps a mistaken perception of what the EFED Act requires – highly centralised systems of election funding and spending. Second, these issues are important considerations for the NSWEC in the performance of its functions, in particular, in determining its guidelines regarding the management of accounts. Given that there should be respect for the diversity of party structures and organisation – including the varying extent to which they centralise their decision-making processes – the NSWEC should only require centralisation of election fund-raising and spending processes to the extent necessary. Otherwise, the nature of thee processes should be determined by the parties themselves.

C *The Mixing of Federal, State and Local Government Election Money*

The EFED Act generally does not apply to money for federal elections.[311] Money dedicated to local government elections is also subject to rules different from those applying to State election money.[312] The different rules in relation to federal, State and local government elections has consequences for the main NSW political parties as all of them campaign in elections other than State elections, notably, federal elections and local government elections. In fact, all parties except for the National Party and the Shooters and Fishers Party campaign

[311] See, for example, EFED Act ss 83, 95AA, 95E.
[312] See Part XIII: Management of Donations and Expenditure, Section C.

at all three levels; these two parties do not engage in local government election campaigns in New South Wales.[313]

In response to these different rules, the ALP, Christian Democratic Party, National Party and Shooter and Fishers Party have separate accounts for federal, State and local government elections.[314] The NSW Greens does not separate out the various types of money but ensures that all money received by the party is compliant with rules applying to State elections.[315]

The NSW Liberal Party adopts more complex arrangements. There is no differentiation of money for the various elections in relation to funds received by branches, State and local government electoral conferences with all such funds being subjected (internally) to the provisions of the EFED Act that apply to State elections. There are, however, separate accounts for these different elections when money is received by the State office and federal electoral conferences.[316]

The practices of the main parties – while not expressly required by the EFED Act – facilitate compliance with the rules that apply to political donations and electoral expenditure for State elections. The legislative context, nevertheless, gives rise to the risk of non-compliance when such money is mixed with political donations and electoral expenditure for federal and local government elections. For instance, breaches of caps on political donations cannot be easily identified because this mixing allows a party, candidate or third-party campaigners to claim

---

[313] Interview with the Honourable Reverend Fred Nile, Member of the Legislative Council, Parliament of New South Wales, State President and National President of the Christian Democratic Party (Sydney, 17 August 2012); Interview with the Honourable Robert Borsak, Member of the Legislative Council, Parliament of New South Wales and Party Agent, Shooters & Fishers Party NSW (Sydney, 21 August 2012); Interview with Sam Dastyari, General Secretary, NSW Labor (Sydney, 21 August 2012); Interview with Greg Dezman, Deputy Director, NSW National Party (Sydney, 20 August 2012); Interview with Simon McInnes, Finance Operations Director, Liberal Party of Australia (NSW Division) (Sydney, 17 August 2012); Interview with Jason Cornelius, State President, Family First NSW (Sydney, 17 August 2012); Interview with Chris Maltby, Registered Officer, and Geoff Ash, Deputy Registered Officer, Greens NSW (Sydney, 16 August 2012).

[314] Interview with the Honourable Reverend Fred Nile, Member of the Legislative Council, Parliament of New South Wales, State President and National President of the Christian Democratic Party (Sydney, 17 August 2012); Interview with the Honourable Robert Borsak, Member of the Legislative Council, Parliament of New South Wales and Party Agent, Shooters & Fishers Party NSW (Sydney, 21 August 2012); Interview with Sam Dastyari, General Secretary, NSW Labor (Sydney, 21 August 2012); Interview with Greg Dezman, Deputy Director, NSW National Party (Sydney, 20 August 2012).

[315] Interview with Chris Maltby, Registered Officer, and Geoff Ash, Deputy Registered Officer, Greens NSW (Sydney, 16 August 2012).

[316] Interview with Simon McInnes, Finance Operations Director, Liberal Party of Australia (NSW Division) (Sydney, 17 August 2012).

that certain amounts of money were dedicated to federal elections and/or local government elections with no real way for the NSWEC to determine the veracity of the claim.[317]

One way to avoid these situations is to prohibit campaigns accounts from having money relating to federal elections and local government elections. Having principles-based legislation in relation to management of accounts, however, means that the NSWEC should determine through its guidelines whether or not such a method should be adopted. The Act should nevertheless make clear that these guidelines *can* prohibit campaign accounts from having money other than those relating to NSW State elections. It should be added that such a provision would most likely to be within the constitutional power of the New South Wales Parliament as it is incidental to effectively enforcing the provisions relating to State elections.[318]

> *Recommendation 24*: NSW election funding and spending laws should expressly state that the guidelines of the NSWEC can prohibit campaign accounts from having money other than that relating to NSW State elections.

[317] Interview with staff of New South Wales Election Funding Authority (Sydney, 16 August 2012).
[318] This is similar to the view taken by Phil Green, the ACT Electoral Commissioner in relation to the ability to require the disclosure of federal election money under ACT laws: Interview with Phil Green, ACT Electoral Commissioner (Telephone Interview, 5 September 2012).

XIV DISCLOSURE OF POLITICAL DONATIONS AND ELECTORAL EXPENDITURE

The disclosure obligations under the EFED Act have two broad objectives. They firstly have a compliance function: they enable the administration and enforcement of other regulatory measures, specifically caps on political donations and electoral expenditure. Second, they seek to protect the integrity of representative government. They do so by preventing corruption and the perception of corruption, a rationale that applies most strongly to those seeking public office - parties, candidates and groups of candidates - and those hold public office, elected members. These obligations also protect the integrity of representative government by facilitating informed voting through the provision of information on how the election campaigns of those standing for office and those seeking to influence the elections, notably, third-party campaigners, are being funded.

These purposes can be used to evaluate the disclosure scheme under the EFED Act in the following respects:

- Who is required to disclose?
- What is required to be disclosed?
- How is the information disclosed?
- How frequent should disclosure be?

A *Who is Required to Disclose?*

The disclosure scheme of the EFED Act fares well on this count in that it subjects political parties, candidates, groups of candidates, elected members, third-party campaigners and major political donors to disclosure obligations.[319]

The scheme does, however, have a significant weakness: it does not provide for specific provisions dealing with 'associated entities', entities which are either controlled by one or more political parties or that operate wholly or to a significant extent for the benefit of one or more political parties.[320] Provisions relating to 'associated entities' are directed at capturing

---

[319] EFED Act ss 88(1)-(2).

[320] *Electoral Act 1992* (Qld) s 197; *Electoral Act 1907* (WA) s 175; *Electoral Act 1992* (ACT) s 198; *Electoral Act 2004* (NT) s 176. The *Commonwealth Electoral Act 1918* (Cth) has a broader definition of 'associated entities'. With the enactment of the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth), the definition of 'associated entity' under the federal scheme has been extended to include organisations that are financial members or have voting rights in a political party, see *Commonwealth Electoral Act 1918* (Cth) s 287.

entities that are – for all intents – appendages of political parties. It is the close relationship between 'associated entities' and their respective political parties that justifies the approach taken in other Australian disclosure schemes to subject 'associated entities' to the *same obligations* as political parties.

This unfortunately is not an approach adopted by the EFED Act.[321] With no specific provisions dealing with 'associated entities', groups that fall within the definitions found in other disclosure schemes are treated as third-party campaigners[322] and/or major political donors.[323] The result is that they are subject to disclosure obligations less exacting than those that apply to political parties.

The author's 2010 report, *Towards a More Democratic Political Funding Regime in New South Wales*, recommended that 'associated entities' be subject to disclosure obligations identical to those that apply political parties[324]. This recommendation should be adopted.

Recommendation 25:

- The EFED should provide for specific provisions dealing with 'associated entities' (entities which are either controlled by one or more political parties; or that operates wholly or to a significant extent for the benefit of one or more political parties); and
- The disclosure obligations of 'associated entities' should be identical to those of political parties.

---

[321] See Joo-Cheong Tham, *Money and Politics: The Democracy We Can't Afford* (University of New South Wales Press, 2010) 33.
[322] EFED Act s 88(1A).
[323] Ibid s 88(2).
[324] Joo-Cheong Tham, *Towards a More Democratic Political Funding Regime in New South Wales: A Report Prepared for the New South Wales Electoral Commission* (2010) 50-51 <http://efa nsw.gov.au/__data/assets/pdf_file/0009/66465/Towards_a_More_Democratic_Political_Finance_Regime_in_NSW_Report_for_NSW_EC.pdf>.

B *What is Disclosed?*

1 *The Concepts of 'Political Donation', 'Electoral Expenditure' and 'Electoral Communication Expenditure'*

Three statutory concepts govern the disclosure obligations of political parties, elected members, candidates, groups of candidates, major political donors and third-party campaigners: 'political donation', 'electoral expenditure' and 'electoral communication expenditure'. As detailed understanding of these definitions is crucial for appreciating how the disclosure scheme of the EFED Act operates, the key provisions defining these concepts have been reproduced below.

Section 85 provides the definition of 'political donation'. The general definition is provided by section 85(1):

85 Meaning of "political donation"

(1) For the purposes of this Act, a "political donation" is:

(a) a gift made to or for the benefit of a party, or
(b) a gift made to or for the benefit of an elected member, or
(c) a gift made to or for the benefit of a candidate or a group of candidates, or
(d) a gift made to or for the benefit of an entity or other person (not being a party, elected member, group or candidate), the whole or part of which was used or is intended to be used by the entity or person:
(i) to enable the entity or person to make, directly or indirectly, a political donation or to incur electoral expenditure, or
(ii) to reimburse the entity or person for making, directly or indirectly, a political donation or incurring electoral expenditure.

Section 87 of the EFED Act defines 'electoral expenditure' and 'electoral communication expenditure' (which is a sub-category of 'electoral expenditure'):

87 Meaning of "electoral expenditure" and "electoral communication expenditure"

(1) For the purposes of this Act, ***electoral expenditure*** is expenditure for or in connection with promoting or opposing, directly or indirectly, a party or the election

of a candidate or candidates or for the purpose of influencing, directly or indirectly, the voting at an election.

(2) For the purposes of this Act, ***electoral communication expenditure*** is electoral expenditure of any of the following kinds:

(a) expenditure on advertisements in radio, television, the Internet, cinemas, newspapers, billboards, posters, brochures, how-to-vote cards and other election material,

(b) expenditure on the production and distribution of election material,

(c) expenditure on the Internet, telecommunications, stationery and postage,

(d) expenditure incurred in employing staff engaged in election campaigns,

(e) expenditure incurred for office accommodation for any such staff and candidates (other than for the campaign headquarters of a party or for the electorate office of an elected member),

(f) such other expenditure as may be prescribed by the regulations as electoral communication expenditure,

but is not electoral expenditure of the following kinds:

(g) expenditure on travel and travel accommodation,

(h) expenditure on research associated with election campaigns,

(i) expenditure incurred in raising funds for an election or in auditing campaign accounts,

(j) such other expenditure as may be prescribed by the regulations as not being electoral communication expenditure.

(3) Electoral expenditure (and electoral communication expenditure) does not include:

(a) expenditure incurred substantially in respect of an election of members to a Parliament other than the New South Wales Parliament, or

(b) expenditure on factual advertising of:

(i) meetings to be held for the purpose of selecting persons for nomination as candidates for election, or

(ii) meetings for organisational purposes of parties, branches of parties or conferences, committees or other bodies of parties or branches of parties, or

(iii) any other matter involving predominantly the administration of parties or conferences, committees or other bodies of parties or branches of parties.

> (4) Electoral expenditure (and electoral communication expenditure) does not include expenditure incurred by an entity or other person (not being a registered party, elected member, group or candidate) if the expenditure is not incurred for the dominant purpose of promoting or opposing a party or the election of a candidate or candidates or influencing the voting at an election.

These definitions have a very different application to political parties, elected members, candidates, groups of candidates and major political donors, on one hand, and third-party campaigners on the other. The following analysis will discuss them separately.

2 *Political Parties, Elected Members, Candidates, Groups of Candidates and Major Political Donors*

The scope of disclosure obligations of political parties, elected members, candidates, groups of candidates and major political donors under the EFED Act are demarcated by the definitions of 'political donations' and 'electoral expenditure'.

Political parties,[325] elected members, candidates and groups of candidates are required to disclose details of 'political donations' received.[326] 'Political donations', in these circumstances, equates to all gifts made to or for the benefit of these groups or individuals (see section 85(1)(a)-(c) reproduced above). This focus on 'gifts' is correct as it is 'gifts' that carry the risk of corruption. That is one reason why other disclosure schemes also adopt this focus (see Appendix Six). The requirement that 'major political donors'[327] disclose 'reportable political donations' (donations exceeding $1 000 made to or for the benefit of political parties, elected members, candidates, groups of candidate and third-party campaigners)[328] is also appropriate[329] – such disclosure provides an important check on the veracity of the information provided by the recipient groups and individuals (and vice-versa).

---

[325] Political parties are also required to provide annual financial statements: EFED Act s 96N.
[326] Ibid s 88(1).
[327] Defined in EFED Act s 84(1).
[328] Ibid s 86(1)(b).
[329] Ibid s 88(2).

Political parties, elected members, candidates and groups of candidates are also required to disclose details of 'electoral expenditure' incurred.[330] Such requirements are essential as they provide details of spending made by these groups and individuals in advancing their electoral prospects.

3 *Third-Party Campaigners*

Section 88(1A) of the EFED Act stipulates the disclosure obligations of third-party campaigners. It provides the following:

> (1A) **Third-party campaigners**
>
> Disclosure is required under this Part of:
>
> (a) electoral communication expenditure incurred by a third-party campaigner in a capped expenditure period during the relevant disclosure period, and
>
> (b) political donations received by the third-party campaigner during the relevant disclosure period for the purposes of incurring that expenditure.

The purpose of requiring disclosure of third-party campaigners is to determine how much (and in what way) they are spending on electoral campaigns, and how such campaigns are being funded by donations. Given this purpose, restricting their disclosure obligations to the capped expenditure period is appropriate: the 'capped expenditure period' is generally the six months prior to the polling day of NSW State Elections,[331] the period during which electoral campaigns by third-party campaigners will be conducted. Extending the obligation beyond this period is arguably unjustifiable as it would capture non-electoral campaigns, campaigns that are not squarely within the scope of *election* funding and spending laws.

By the same token, limiting disclosure obligations to spending associated with electoral campaigns is also appropriate as there is no strong justification for election funding and spending laws to capture other types of spending of third-party campaigners.[332] However, the way in which the current disclosure obligations of these organisations are restricted to 'electoral communication expenditure' is problematic. Such a restricted scope is not

---

[330] EFED Act s 88(1).
[331] See EFED Act s 95H.
[332] See Part XI: Differences between Political Parties and Third-party Campaigners.

defensible in terms of the purpose requiring the disclosure of third-party campaigners as it leaves out certain items of electoral campaign spending, for instance, spending on research associated with election campaigns.[333] It also is a source of confusion with third-party campaigners having to determine – at times, with great difficulty – what election campaign spending is caught by the definition of 'electoral communication expenditure'.[334]

This report recommends that the disclosure obligations of third-party campaigners be extended to cover all 'electoral expenditure' (like the obligations of political parties). This more effectively serves the purpose of these obligations to reveal how the electoral campaigns of these organisations are being funded. It is also likely to provide greater ease of compliance. Adopting this recommendation will mean that third-party campaigners will have to disclose details of all 'electoral expenditure' made within the capped expenditure period. This is a simpler approach than the current one as these organisations will not have to engage in the line-drawing exercise of determining which items of 'electoral expenditure' are caught by the complicated concept of 'electoral communication expenditure'.

One objection, however, to extending disclosure obligations to all 'electoral expenditure' is that such obligations are integrated to the caps on 'electoral communication expenditure'; the current disclosure obligations in section 88(1A)(a) mirror the scope of these caps in that they apply to 'electoral communication expenditure' in the 'capped expenditure period'.[335] The answer to this objection is that there is no necessity for so closely integrating these two regulatory measures as their purposes are different. In any event, this report recommends that the caps on election spending extend more broadly to 'electoral expenditure', providing for symmetry in terms of the disclosure obligations and these caps. Indeed, it recommends that the concept of 'electoral communication expenditure' be removed entirely from NSW election funding and spending laws.

Another aspect of the disclosure obligations of third-party campaigners concerns the exception to 'electoral expenditure' when such expenditure is not incurred for the dominant purpose of promoting or opposing a party or the election of a candidate or candidates or influencing the voting at an election (see section 87(4) reproduced above). Again, this is not

---

[333] EFED Act s 87(2)(h).
[334] See Part XI: Differences between Political Parties and Third-party Campaigners; Part XVII: Prohibition of Property Developer etc Donations.
[335] EFED Act s 95I(1).

defensible in terms of the purposes of the requirement of third-party campaigners to disclose- all 'electoral expenditure' of these groups should be disclosed. Moreover, this statutory caveat is a source of confusion for third-party campaigners given the fluid and multi-dimensional character of their political campaigns.[336]

While this exception was inserted into the EFED Act in 2012 with the intention of ameliorating the restriction of political donations to those on electoral rolls, the view taken by this report is that this restriction should be repealed.[337] There is no justification for this exception on this count.

Recommendation 26: Third-party campaigners should be required to disclose:

- electoral expenditure incurred in a capped expenditure period; and
- political donations received for the purposes of incurring that expenditure.

Recommendation 27: The concept of 'electoral communication expenditure' should be removed from NSW election funding and spending laws.

Recommendation 28: The exception to 'electoral expenditure', when such expenditure is not incurred for the dominant purpose of promoting or opposing a party or the election of a candidate or candidates or influencing the voting at an election, should be repealed.

4 *Principles-Based Legislation to Govern Specific Requirements of Disclosure*

The EFED Act currently prescribes that disclosure of 'political donations' include certain detail relating to 'reportable political donations', small donations, annual party membership or affiliation subscriptions, fund-raising ventures and loans.[338] It does not, however, prescribe any specific requirements in relation to 'electoral expenditure'.[339]

These areas should be governed by principles-based legislation with the guidelines of the NSWEC prescribing specific requirements rather than being stipulated by statutory

[336] See Part XI: Differences between Political Parties and Third-party Campaigners.
[337] See Part XVI: Prohibition of Certain Political Donations.
[338] EFED Act s 92.
[339] Ibid s 93.

provisions.[340] The exercise of power by the NSWEC in this instance should be directed towards promoting transparency of election funding and spending - a key objective of agencies administering election funding and spending laws[341] - while having regard to other concerns, particularly privacy considerations.[342]

Recommendation 29:

- Statutory provisions stipulating the specific details of disclosure should be repealed; and
- The detail of such requirements should be determined by the guidelines of the NSWEC.

C *How Disclosed?*

Under the EFED Act, the information provided by disclosures is published by the EFA on a website it maintains.[343] The responsibility of maintaining the website which publicises disclosure information is highly significant. The website is the gateway to the disclosure information; how accessible it is and what information it provides will have a significant impact upon the transparency achieved by NSW election funding and spending laws.

Two points are worth considering here in better effecting the function of the NSWEC in maintaining a website that achieves transparency. The first concerns the provision of analysis of the disclosure information. Currently, the website provides analytical tools through its website for users.[344] There is considerable value in going beyond such an approach - for the NSWEC to provide annual reports providing analysis of the trends in political donations received and electoral expenditure incurred by political parties, elected members, candidates, groups of candidates, elected members and third-party campaigners. This report could, for instance, identify changes in the amount of political donations received and electoral expenditure incurred by the political parties and who their top donors were. It could also do the same in relation to the other individuals and third-party campaigners.

---

[340] See Part VI: Principles-based Legislation in Administration and Securing Compliance.
[341] Interview with David Kerslake, Queensland Electoral Commissioner (Telephone Interview, 6 September 2012); Interview with Warwick Gately, Western Australian Electoral Commissioner (Telephone Interview, 5 September 2012).
[342] The tension between privacy considerations and the aim of transparency was raised by NSWEC staff: Interview with staff of New South Wales Electoral Commission (Sydney, 22 October 2012).
[343] EFED Act s 95.
[344] NSW Election Funding Authority, *Disclosures Website* (2012) <http://searchdecs.efa.nsw.gov.au/>.

The second is regular reviews of the website by the NSWEC incorporating consultation with relevant stakeholders. The Australian Electoral Commission, for instance, held a workshop in September this year inviting journalists and academics to identify ways that its website could be improved to assist with analysis and transparency of financial disclosure. It will be useful for the NSWEC to hold similar events.

> *Recommendation 30*: The NSWEC should compile annual reports that provide analysis of the trends in political donations received and electoral expenditure incurred by political parties, elected members, candidates, groups of candidates, elected members and third-party campaigners.

> *Recommendation 31*: The NSWEC should engage in regular reviews of its disclosure website incorporating consultation with relevant stakeholders.

D *How Frequent Should Disclosure Be?*

In examining this issue, it is important to distinguish between the role of disclosure schemes under election funding and spending laws that do not provide for caps on political donations and their role when there are caps on political donations (as in New South Wales). In the former situation, the disclosure scheme is *the* central measure to address the risk of corruption – there is a strong argument here for disclosure that is more frequent than annual disclosure (and possibly continuous disclosure).[345]

Disclosure obligations, however, play a lesser role when there are caps on political donations. If complied with, these caps provide an assurance to the public that political parties, elected members, candidates, groups of candidates, elected members and third-party campaigners are not receiving political donations above them. In this context, annual disclosure obligations are *generally* appropriate; having more frequent (regular) disclosure is not necessary given the caps on political donations.

---

[345] Joint Standing Committee on Electoral Matters, Parliament of Australia, *Report on the funding of political parties and election campaigns* (2011) 61-67.

More frequent disclosure is, however, called for in the lead up to polling day in the interest of promoting informed voting. There is a good argument here for continuous disclosure, say three months from polling day. In order to augment the effectiveness of such disclosure, the NSWEC could provide an election report at that time providing up-to-date analysis of the trends in political donations received and electoral expenditure incurred by political parties, elected members, candidates, groups of candidates, elected members and third-party campaigners.

> *Recommendation 32*: In the three months prior to polling day, there should be continuous disclosure of political donations.

> *Recommendation 33*: The NSWEC should publish an election report providing up-to-date analysis of the trends in political donations received and electoral expenditure incurred by political parties, elected members, candidates, groups of candidates, elected members and third-party campaigners three months prior to polling day.

For the sake of completeness, the position under the EFED Act should be distinguished from the position under the *Electoral Act 1992* (Qld). Section 266 of the *Electoral Act 1992* (Qld) requires reporting within 14-days of 'gifts' received by a political party (or its associated entity) in a six-month period that exceed $100 000. This obligation is intelligible in the context of the Queensland Act because its caps apply only to 'political donations', a particular type of 'gift'.[346] Put differently, the scope of the Queensland caps on 'political donations' is narrower than the disclosure obligations under section 266. A similar situation does not, however, apply to the EFED Act with both disclosure obligations and caps applying to the same subject matter of 'political donations'.

[346] See *Electoral Act 1992* (Qld) s 250.

XV CAPS ON POLITICAL DONATIONS

Caps on political donations serve three purposes. The first is that they protect the integrity of representative government by addressing the problem of corruption and undue influence associated with large political donations. They also promote fairness in politics as they prevent the wealthy from using their money to secure a disproportionate influence on the political process, thereby promoting the fair value of political freedoms (despite limiting the formal freedom to contribute). Further, by requiring political parties to secure the support of a large base of small contributors, such limits are likely to enhance their participatory function.[347]

These purposes can be applied to evaluate the key dimensions of the current caps on political donations, namely:

- The political actors they cover;
- The funds they apply to; and
- The level at which they are set.

A *Political Actors Covered by the Caps on Political Donations*

The caps on political donations under the EFED Act currently apply to political parties (whether registered or not), elected members, candidates, groups of candidates and third-party campaigners.[348] The Act also applies an aggregation rule in relation to donations to elected members, candidates and groups of candidates of the same political party. The effect of this rule is that a single cap applies to all of these individuals.[349]

The coverage of these caps is adequate except in one respect: they fail to specifically cover 'associated entities'. This is a lacuna that generally pervades the Act and was previously discussed in relation to the disclosure obligations under the Act.[350]

Under the current caps on political donations, 'associated entities' of political parties are now treated as third-party campaigners. This is wrong as a matter of principle given the close

---

[347] See Tham, above n324, 50-51.
[348] EFED Act s 95A(1).
[349] Ibid s 95A(3).
[350] See Part XIV: Disclosure of Political Donations and Electoral Expenditure, Section A.

relationship between these groups and their respective political parties. It also gives rise to a risk of evasion with parties currently able to establish (or use) various 'associated entities' in order to receive separate caps. In order to address these issues, this report recommends that the aggregation rule that applies to candidates, groups of candidates and elected members of the same political party *also* apply to parties and their 'associated entities'. The result is that a single cap (that which applies to the political party) will apply to amounts received by a political party and its 'associated entities'.

> *Recommendation 34*: NSW election funding and spending laws should aggregate the donations received by a political party and its 'associated entities' so that the total amount of these donations are subject to the cap applying to the political party.

B *Funds to Which the Caps on Political Donations Apply*

The funds to which these caps apply are governed by the definition of 'political donation'. As noted earlier in the analysis of the disclosure scheme, this definition applies in different ways to political parties, elected members, candidates and groups of candidates, on one hand, and third-party campaigners, on the other, warranting separate discussion.[351]

1 *Political Parties, Elected Members, Candidates and Groups of Candidates*

As with the disclosure obligations, there is an appropriate focus here on gifts made to these various groups and individuals.[352]

While not quarrelling with this general approach, the NSW Greens have argued that gifts made by NSW political parties to their candidates should be exempted from these caps.[353] This concern is rightly raised. At first glance, it is odd that gifts from the State branch to its candidates are currently caught by caps as there does not seem to be a risk of corruption – how can a party corrupt itself through political donations? A concern with unfairness does not exist for similar reasons.

---

[351] See Part XIV: Disclosure of Political Donations and Electoral Expenditure, Section B.
[352] See ibid.
[353] Interview with Chris Maltby, Registered Officer, and Geoff Ash, Deputy Registered Officer, Greens NSW (Sydney, 16 August 2012).

The risk, however, is not of a party corrupting itself (or treating itself unfairly) but of a party being used as an intermediary for donors seeking to contribute to the candidates unencumbered by the caps under NSW election funding and spending laws. In this, a blanket exemption for *all* transfers from the State party to its candidates will allow political donations initially raised by the State party for federal elections (which are not subject to NSW election spending and funding laws) to be funneled to its candidates.

But this risk can be dealt with by restricting the exemption to political donations raised by the State party in relation to State elections, such money being subject to NSW election funding and spending laws already (A distinction should be made here in relation to transfers between NSW branches of political parties subject to NSW election funding and spending laws in relation to State elections and *other branches* of the party (e.g. federal) which are not. Transfers of money from these other branches to NSW branches are properly subject to the caps on political donations (as currently provided by the EFED Act)).[354]

Another risk of having the transfer of political donations from the State branch to candidates being *totally* exempt from the caps is that it allows candidates to benefit from the higher caps that apply to the party. Again this is not a conclusive argument against an exemption but points more to restricting the scope of the exemption – it should only apply to transfers that comprise of political donations that are equal or lower than the candidate caps.

> *Recommendation 35*: The caps on political donations should not apply to transfers of political donations from NSW political parties to their candidates if the transfers comprise of political donations raised for State elections which are equal or lower than the candidate caps.

2 *Third-Party Campaigners*

Section 85(1)(d) of the EFED Act provides the definition of 'political donation' in relation to third-party campaigners. It is:

> (d) a gift made to or for the benefit of an entity or other person (not being a party, elected member, group or candidate), the whole or part of which was used or is intended to be used by the entity or person:

[354] See EFED Act s 85(3A).

> (i) to enable the entity or person to make, directly or indirectly, a political donation or to incur electoral expenditure, or
> (ii) to reimburse the entity or person for making, directly or indirectly, a political donation or incurring electoral expenditure.

The caps on 'political donations' (as defined above) in relation to third-party campaigners apply in relation to all 'electoral expenditure' *whether or not* undertaken in the 'capped expenditure period'. Their scope can be contrasted with the disclosure obligations that apply to third-party campaigners, obligations that only apply in relation to expenditure made in the 'capped expenditure period'.[355] It is due to the lack of the temporal limitation and the breadth of the definition of 'electoral expenditure' that these caps extend beyond the electoral campaigns of third-party campaigners to their non-electoral campaigns that are seen to have 'the purpose of influencing . . . *indirectly* the voting at an election'.[356]

Here, the EFED Act follows the approach to defining 'electoral expenditure' (and cognate concepts) found in Tasmania, Canada and the United States where there are broad definitions of these concepts capturing all items of election campaign spending. The other main approach, found in Australian and comparable jurisdictions, is to restrict such concepts to *particular* items of election campaign spending, predominantly broadcasting and advertising expenditure. This is the approach taken by the Commonwealth, Australian Capital Territory, Northern Territory, Queensland, Victorian, Western Australian, New Zealand and United Kingdom election funding and spending laws (see Appendices Seven and Eight).

This report recommends *against* restricting the scope of 'electoral expenditure' under the EFED Act by adopting the latter approach. Such an approach is problematic as it would involve complex line drawing as to what is in and what is out.

If the broad approach to 'electoral expenditure' currently taken by the EFED Act is maintained, one way to deal with its excessive breadth as it applies to third-party campaigners would be to narrow the definition of 'electoral expenditure'. This is what the current caveat that spending is not 'electoral expenditure' if 'not incurred for the dominant purpose of promoting or opposing a party or the election of a candidate or candidates or influencing the

---

[355] See Part XIV: Disclosure of Political Donations and Electoral Expenditure, Section B(3).
[356] EFED Act s 87(1) (emphasis added).

voting at an election'[357] seeks to do. Narrowing the definition of 'electoral expenditure' in this way, however, give rises to considerable difficulties in its application.

This can be illustrated by reference to two examples mentioned in the interviews conducted with third-party campaigners. Mark Lennon, Secretary of Unions NSW, expressed his view that an advertisement that did the following fell within the scope of the 'dominant purpose' caveat: 'If we say X party says this, Y party says that. X party says that they'll defend workers' rights, and Y party says they won't. You make up your mind'.[358] Anthony D'Adam of the NSW Public Service Association went further by saying most political campaigns of third-party campaigners (even during election time) came within the scope of the caveat because they had the 'the dominant purpose . . .to shift the public policy debate . . . (or) to change government policy'.[359]

While these views are not implausible, contrary arguments can easily be put that the 'dominant purpose' caveat does *not* apply and that in both situations, the 'dominant purpose' is to influence voting at NSW State elections. With the example given by Lennon, it can be asked: why else put forth such advertisement providing information regarding the policies of parties and candidates unless the principal aim is to influence voting? While the view put forth by D'Adam is not incorrect, it does not preclude the political campaigns of third-party campaigners being animated by the dominant purpose of influencing voting – these campaigns can be seeking to shift public policy debate (or to change government policy) *by* influencing voting.

The point of this discussion is not to suggest that these interpretations of the 'dominant purpose' caveat are wrong (or right); rather, it is to highlight the uncertainty and instability of this caveat. The difficulties that arise due to such uncertainty will be even more acute in the context of the fluid and multi-dimensional nature of the political campaigns of third-party campaigners.[360]

---

[357] Ibid s 87(4).
[358] Interview with Mark Lennon, Secretary, Unions NSW (Sydney, 20 August 2012).
[359] Interview with Anthony D'Adam, Senior Industrial Officer, Public Service Association (Sydney, 20 August 2012).
[360] See Part XI: Differences between Political Parties and Third-party Campaigners.

Such uncertainty clearly imposes unjustified compliance costs on these organisations. There are also other costs to the health of democracy in New South Wales. There is a risk here that third-party campaigners alter the content of their messages in an attempt to fall within the 'dominant purpose' caveat.[361] If so, this clearly results in a distortion of electoral communication with messages being crafted not in order to effectively advocate particular views but rather to comply with laws.

The challenge then is to devise a definition of 'political donation' targeted at the electoral campaigns of third-party campaigners that is simple to administer and comply with. The report recommends the following:

- retention of the broad definition of 'electoral expenditure' found in the definition of 'political donation' as it applies to third-party campaigners;
- repeal of 'dominant purpose' caveat;
- restricting the definition of 'political donation' as it applies to third-party campaigners to 'electoral expenditure' incurred in the 'capped expenditure period'.

The broad definition of 'electoral expenditure' working in conjunction with the 'capped expenditure period' (six-month) temporal limitation will have the effect of the definition of 'political donation' capturing all funds used for political campaigns of third-party campaigners in 'capped expenditure period'. This has the distinct advantages of providing 'bright-line' rules that are simpler to apply; it will not involve difficult judgments as to the purpose of the political campaigns. Moreover, the scope of this revised definition is properly directed at the electoral campaigns of third-party campaigners as their political campaigns during the 'capped expenditure period' can be reasonably presumed to have this character.

> *Recommendation 36*: The caps on political donations in relation to third-party campaigners shall apply only to political donations used for incurring electoral expenditure in the capped expenditure period.

* * *

[361] Interview with Mark Lennon, Secretary, Unions NSW (Sydney, 20 August 2012).

Many third-party campaigners use their membership fees to fund political campaigns. Some also treat them as not being 'political donations'.[362] This report agrees with this approach.

According to the Act, a 'gift' means:

> any disposition of property made by a person to another, otherwise than by will, being a disposition made *without consideration in money or money's worth or with inadequate consideration*, and includes the provision of a service (other than volunteer labour) for no or inadequate consideration (emphasis added).

Membership fees are typically paid for services provided by the organisation (e.g. union membership fees are paid so that the union engages in bargaining and campaigning activities). So-called levies also fall within this category (e.g. a special levy imposed by Unions NSW);[363] they can be seen as hypothecated membership fees. Given the quid pro quo involved with the payment of these fees, it is difficult then to characterise such fees as being made with no or inadequate consideration (It should also be noted that these fees are not caught by section 85(3) which only deems membership subscriptions paid to political parties to be 'gifts'. Indeed, this deeming provision itself suggests that membership subscriptions are not otherwise 'gifts').

C *The Level at Which the Caps on Political Donations are Set*

The current (indexed) levels of the caps are as follows:

- $5,300 for political donations to or for the benefit of a registered political party;
- $5,300 for political donations to or for the benefit of a group;
- $2,200 for political donations to or for the benefit of an unregistered party;
- $2,200 for political donations to or for the benefit of a candidate; and
- $2,200 for political donations to or for the benefit of a third-party campaigner.[364]

The main considerations in determining whether these levels are appropriate are as follows:

---

[362] Interview with Mark Lennon, Secretary, Unions NSW (Sydney, 20 August 2012); Interview with Anthony D'Adam, Senior Industrial Officer, Public Service Association (Sydney, 20 August 2012).
[363] Interview with Mark Lennon, Secretary, Unions NSW (Sydney, 20 August 2012).
[364] See NSW Election Funding Authority, *Political Donations and Electoral Expenditure* (31 August 2012) <http://efa nsw.gov.au/registered_political_parties/political_donations_and_electoral_expenditure2>.

1) Whether the caps are set at a level to effectively deal with political donations that carry the risk of corruption and undue influence;

2) Whether the caps are set at a level so that it can be reasonably said that donors are not securing unfair influence in politics through their donations;

3) The impact of the caps on political parties, elected members, candidates, groups of candidates and third-party campaigners.

Consideration 1) largely depends on a matter of judgment and it can at least be said the current levels are not unreasonable in light of the aim of addressing corruption and undue influence. There might, however, be a case for lowering the levels of the caps because of Consideration 2). Yet this should not be done until the impact of the caps on political donations on political parties, elected members, candidates, groups of candidates and third-party campaigners is more fully known (as discussed below).

These caps clearly have had a profound impact on the amount of political donations available to political parties (arguably less so in relation to third-party campaigners because of reliance on membership fees which are not 'political donations' – see above). It has also changed the nature of party fund-raising. While fund-raising was previously concentrated in lead up to elections, it was now more spread out over the electoral cycle.[365] As the General Secretary of the NSW ALP commented in relation to the 2011 State Election, 'the campaign period wasn't a constant fundraising period as well'.[366]

Yet the full impact of the caps on political donations - particularly for political parties - cannot be fully assessed for two reasons. First, there is a limited availability of data. Appendix Nine details the amounts and types of donations received by the main parties from 2007/2008 to 2010/2011. At the time of completing the report, the data for 2011/2012 is not yet available. This means that the figures only speak to the impact of the first six months of the caps taking effect (from 1 January 2011).

[365] Interview with Sam Dastyari, General Secretary, NSW Labor (Sydney, 21 August 2012); Interview with Greg Dezman, Deputy Director, NSW National Party (Sydney, 20 August 2012).
[366] Interview with Sam Dastyari, General Secretary, NSW Labor (Sydney, 21 August 2012).

Second, there was a transition period between the enactment of the *Election Funding and Disclosures Amendment Act 2010* (NSW) which put in place the caps on political donations, and the caps taking effect. This period would have allowed organisations and candidates – particularly political parties – to raise funds without being subject to the caps.[367] As such, even the figures relating to the first six months of the operation of the caps on political donations should be treated with caution (see Appendices Nine and Ten).

A fuller assessment can only be made after the next State election in 2015. This report recommends is that there be a review by JSCEM of the level of the caps on political donations together with level of caps on electoral expenditure and the period to which they apply, and the rate of public funding after every State election starting from the 2015 State election. This review should be aided by a report on the topic by the NSWEC and should aim to develop a methodology for determining the appropriate levels for the caps and for public funding (see Recommendation 48 below).[368]

[367] This was expressly mentioned by Robert Borsak in Interview with the Honourable Robert Borsak, Member of the Legislative Council, Parliament of New South Wales and Party Agent, Shooters & Fishers Party NSW (Sydney, 21 August 2012).
[368] See Part V: A Single Electoral Commission: Key Functions and Guiding Principles, Section A.

XVI PROHIBITION OF CERTAIN POLITICAL DONATIONS

Division 4, Part 6 of the Act which is entitled 'Prohibition of certain political donations etc' lays down five separate prohibitions. Four of these are aimed at enhancing the efficacy of compliance and enforcement; they do not occasion great controversy and can be briefly discussed.

Sections 96F and 96G respectively prohibit receiving gifts from unknown sources and receiving loans unless details of such loans are recorded. These provisions are essential to ensuring that recipients engage in proper record-keeping. In essence, section 96E prohibits in-kind gifts and deals with the difficulty of monitoring the provision of such gifts. Section 96EA, on the other hand, prohibits political donations from political parties to independent candidates. This section presumably was inserted to deal with the problem of 'dummy' candidates.

The section of most concern is section 96D (reproduced below).

> **96D Prohibition on political donations other than by individuals on the electoral roll**
>
> (1) It is unlawful for a political donation to a party, elected member, group, candidate or third-party campaigner to be accepted unless the donor is an individual who is enrolled on the roll of electors for State elections, the roll of electors for federal elections or the roll of electors for local government elections.
>
> (2) It is unlawful for an individual to make a political donation to a party, elected member, group, candidate or third-party campaigner on behalf of a corporation or other entity.
>
> (3) It is unlawful for a corporation or other entity to make a gift to an individual for the purpose of the individual making a political donation to a party, elected member, group, candidate or third-party campaigner.
>
> (4) Annual or other subscriptions paid to a party by a person or entity (including an industrial organisation) for affiliation with the party that are, by the operation of section 85 (3), taken to be gifts (and political donations to the party) are subject to this section. Accordingly, payment of any such subscription by an industrial organisation or other entity is unlawful under this section.

> (5) Dispositions of property between branches of parties or between associated parties that are, by the operation of section 85 (3A), taken to be gifts (and political donations to the parties) are not subject to this section.

A central recommendation of this report is that this section be repealed. The following analysis explains why through the two main effects of this section:

- Its restriction of political donations to individuals on the electoral rolls; and
- Its prohibition of affiliation fees from corporations and other entities.[369]

Recommendation 37: Section 96D of the EFED Act should be repealed.

A *Restriction of Political Donations to Individuals on the Electoral Rolls*

Prior to inclusion of section 96D, caps on political donations in section 95A of the EFED Act and the prohibition on breaching such caps in section 95B(1) did not differentiate between:

- individuals on the roll of electors for the federal, State or local government elections and those not so registered;
- individuals on the one hand and corporations and other entities on the other.

Section 96D of the Act does so differentiate by banning political donations from all except individuals on the roll of electors for the federal elections, State elections and local government elections ('electoral rolls'). Section 96D(4) is specifically directed towards party membership subscriptions and will be discussed separately in the following section.

---

[369] These sections of the report heavily draw upon the author's submission to the New South Wales Legislative Council Select Committee's inquiry into the Election Funding, Expenditure and Disclosures Amendment Bill 2011 (NSW): see Joo-Cheong Tham, Submission No 27 to the Legislative Council Select Committee on the provisions of the Election Funding, Expenditure and Disclosures Amendment Bill 2011, *Provisions of the Election Funding, Expenditure and Disclosures Amendment Bill 2011*, 13 January 2012.

1 *Questionable Aim*

The New South Wales Premier, Barry O'Farrell, has explained section 96D as implementing the Coalition's commitment 'to restrict political donations to individuals – citizens on the electoral roll, the people who decide elections'.[370] In the words of the Premier, '(i)t will invest power to donate solely in those who have the power to vote, those with the greatest stake in the system'.[371]

The Premier further stated in the 2nd Reading Speech to the Election Funding, Expenditure and Disclosures Amendment Bill 2011*:*

> the only way that you can ensure that the public is going to have confidence about our electoral system is to limit [donations] to the individuals who are on the electoral roll. It must be limited to those Australian citizens who are enrolled, not overseas citizens and non-residents, because of course those people do not get the vote. They do not have a stake in the system and they should not be able to influence the system – nor should unions, third party interest groups and corporations . . . [372]

These statements suggest that two arguments underlie the ban on political donations from those not on the electoral rolls:

- Argument 1): Only those on the electoral rolls should be able to influence the political process;
- Argument 2): Because of Argument 1), non-citizens and organisations should not be able to influence the political process.

  Therefore, non-citizens and organisations should not be able to make political donations.

Each argument - and consequently the ban - is flawed. Argument 1) wrongly excludes citizens not on electoral rolls. Outside its scope are some citizens who are residing overseas.[373] Also falling outside its scope are resident citizens not registered under the

---

[370] New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 September 2011, 5432 (Barry O'Farrell, Premier).
[371] Ibid.
[372] Ibid.
[373] Peter Mares and Brian Costar, 'The Voting Rights of Non-Resident Citizens and Non-Citizen Residents' in Joo-Cheong Tham, Brian Costar and Graeme Orr (eds), *Electoral Democracy: Australian Prospects* (Melbourne University Press, 2011) ch 1.

electoral rolls – the Australian Electoral Commission, for one, has estimated that 1.4 million Australian citizens who are entitled (and obliged) to vote in federal elections are 'missing' from the federal electoral roll.[374]

Argument 1) seems intuitively appealing because it invokes the notion of citizenship. It implies a *citizenship-centred* understanding of the right to vote and political freedoms more generally – citizenship is a necessary condition for these rights. Such a narrow understanding, however, fails to appreciate that citizenship is not the only basis for the right to vote or for political freedoms. There is a persuasive argument that long-term residence and attachment to the country should also result to an entitlement to vote, for example, for permanent residents (as occurs in New Zealand).[375]

More significantly, citizenship is not the sole basis for being able to influence the political process in Australia - or put differently, to exercise political freedoms in this country. Key political freedoms, in particular, those of political expression and association, are human rights – individuals possess these rights by virtue of their status as human beings, not because they are citizens of a country. This is made abundantly clear by the key international conventions on human rights.[376] Those regularly subject to the laws of a country, while not necessarily entitled to a right to vote,[377] should also be able to participate in the political process:[378] permanent residents and temporary residents who are here on a long-term basis (e.g. migrant workers on the 457 (Business (Long Stay) visas) should be able to express and organise themselves politically, especially in relation to the laws to which they are subject.

The difficulties with Argument 1) weaken the force of Argument 2). Argument 2) is also wrong for another set of reasons: even if Argument 1) is accepted, this does not mean that organisations should not be able to influence the political process. Citizens in Australia

---

[374] Peter Brent and Rob Hoffman, 'Electoral Enrolment in Australia: Freedom, Equality and Integrity' in Joo-Cheong Tham, Brian Costar and Graeme Orr (eds), *Electoral Democracy: Australian Prospects* (Melbourne University Press, 2011) ch 2.
[375] See Mares and Costar, above n373.
[376] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) arts 19, 20; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 19, 22.
[377] See *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 21(1).
[378] See Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books, 1984) ch 2.

typically influence the political process through organisations and groups (political parties, companies, trade unions or non-government organisations). Institutions like the media and independent statutory agencies also play an indispensable role in Australian politics. There is little doubt: Australian politics is heavily collectivised and institutionalised. Yet, Argument 2) neglects this reality and advances a problematic *individualised* understanding of political freedoms and the political process.[379]

Indeed, it strikes at the heart of democratic party-politics – what are political parties if not collective entities? Section 96D(5) recognises this by *exempting* political donations between branches of political parties from the general prohibition of section 96D. Such an exemption would not be necessary if political parties were not collectives.

It should also be noted that overseas comparisons are equivocal in providing support for a ban on political donations from entities and individuals not on the electoral rolls. Closest to proposed section 96D of the Act is the position in Canada where political donations are restricted to citizens *and* permanent residents.[380] In the United Kingdom, political donations are restricted to individuals registered on the electoral registers *as well as* companies registered in the UK and other EU countries and UK trade unions.[381] New Zealand, on the

---

[379] This was a point also made in the interviews with several trade unions: Interview with Tim Ayres, New South Wales Secretary, Australian Manufacturing Workers' Union (Sydney, 21 August 2012); Interview with Anthony D'Adam, Senior Industrial Officer, Public Service Association (Sydney, 20 August 2012).

[380] Section 404(1) of the *Canada Elections Act*, SC 2000, c 9 (Canada) provides that:

> No person or entity other than an individual who is a citizen or permanent resident as defined in subsection 2(1) of the *Immigration and Refugee Protection Act* shall make a contribution to a registered party, a registered association, a candidate, a leadership contestant or a nomination contestant.

[381] Section 54 of the *Political Parties, Elections and Referendum Act 2000* (UK) ch 41 provides that:

> (1) A donation received by a registered party must not be accepted by the party if—
>
> (a) the person by whom the donation would be made is not, at the time of its receipt by the party, a permissible donor; or
>
> (b) the party is (whether because the donation is given anonymously or by reason of any deception or concealment or otherwise) unable to ascertain the identity of that person.
>
> (2) For the purposes of this Part the following are permissible donors—
>
> (a) an individual registered in an electoral register;
>
> (b) a company—
>
> i) registered under the Companies Act 2006, and
>
> ii) incorporated within the United Kingdom or another member State, which carries on business in the United Kingdom;
>
> (c) a registered party**,** other than a Gibraltar party whose entry in the register includes a statement that it intends to contest one or more elections to the European Parliament in the combined region;
>
> (d) a trade union entered in the list kept under the *Trade Union and Labour Relations (Consolidation) Act 1992* or the *Industrial Relations (Northern Ireland) Order 1992*;

other hand, generally does not ban political donations from organisations or those not on electoral rolls[382] (A NZ$1 500 donation limit, however, applies to 'overseas persons', those who reside outside New Zealand but are not New Zealand citizens or registered on the electoral rolls, or companies who are registered or have their principal place of business outside of New Zealand).[383]

2 *Unjustified Limitation of Political Freedoms*

(a) Impact on Political Freedoms Exercised Through Political Parties

The ban to be imposed by section 96D of the Act has profound effects on the exercise of political freedoms through political parties: it is accompanied by significant compliance costs which disproportionately affect smaller political parties; it impacts upon the internal workings of political parties; and it curbs the participation of non-citizens and citizens in political parties especially through collectives.

The compliance costs associated with this ban results from political parties having to institute mechanisms to ensure that their donors are on the roll of electors. These mechanisms will involve more time and resources than those put in place in relation to the caps on political donations. The latter is easier to comply with as recipient can determine whether the cap is breached or not from amount received. On the other hand, the prohibition here turns on the *status* of the donor which needs to be checked against electoral rolls.

This in turn is likely to have a disproportionate impact upon smaller parties, a point mentioned by Jason Cornelius, State President of Family First[384] as well as Simon McInnes, Finance Director of the NSW Liberal Party. [385] If so, this prohibition not only hinders the

---

(e) a building society (within the meaning of the *Building Societies Act 1986*);
(f) a limited liability partnership registered under the *Limited Liability Partnerships Act 2000*... which carries on business in the United Kingdom;
(g) a friendly society registered under the *Friendly Societies Act 1974* or a society registered (or deemed to be registered) under the *Industrial and Provident Societies Act 1965* or the *Industrial and Provident Societies Act (Northern Ireland) 1969*; and
(h) any unincorporated association of two or more persons which does not fall within any of the preceding paragraphs but which carries on business or other activities wholly or mainly in the United Kingdom and whose main office is there.

[382] See *Electoral Act 1993* (NZ) pt 6A sub-pt 3.
[383] *Electoral Act 1993* (NZ) s 207K.
[384] Interview with Jason Cornelius, State President, Family First NSW (Sydney, 17 August 2012).
[385] Interview with Simon McInnes, Finance Operations Director, Liberal Party of Australia (NSW Division) (Sydney, 17 August 2012).

exercise of political freedoms through these parties but also contributes to barriers to entry, lessening the competitiveness of elections.

These additional compliance costs will also affect the internal workings of *all* political parties. It will have particular impact on small fund-raisers like film nights[386] and raffles.[387] Given that such fund-raisers are a key way in which local branches fund-raise, this impact may lead to local branches lessening – even ceasing - their fund-raising activities. Greg Dezman of the NSW National Party, for instance, observed that:

> we do have branches, electorate councils all over the place who have just thrown up their hands and said 'what's the point? It's all too difficult and we're not going to bother.[388]

Such a consequence would mean that NSW election funding and spending laws are contributing to an undesirable centralization of fund-raising activity.[389]

There are other consequences on the internal workings of political parties. The prohibition bans political donations from political parties to its endorsed candidates because the latter can no longer receive such money from groups. Political donations from 'associated entities' of a party to the party and its endorsed candidates would also seem to be caught by this prohibition.

This prohibition, which restricts political donations to those on the electoral rolls, clearly bars political donations from non-citizens, individuals who are not entitled to be enrolled.[390] This has a particular impact on political parties whose supporters include non-citizens. The Christian Democratic Party, for instance, has supporters who are Koreans, Syrians and

---

[386] Interview with Chris Maltby, Registered Officer, and Geoff Ash, Deputy Registered Officer, Greens NSW (Sydney, 16 August 2012).
[387] Interview with Jason Cornelius, State President, Family First NSW (Sydney, 17 August 2012).
[388] Interview with Greg Dezman, Deputy Director, NSW National Party (Sydney, 20 August 2012).
[389] See Part XIII: Management of Donations and Expenditure, Section B.
[390] PE & E Act s 22(1)(a)(ii).

Armenians who are permanent residents (but not citizens);[391] the Shooters and Fishers Party has an estimated 20% of members not on the electoral rolls.[392]

The prohibition also has other impacts on the exercise of political freedoms by *citizens.* Citizens who have not reached the age of 18 and therefore are not entitled to be enrolled[393] are prohibited from paying membership fees, payments deemed to be 'political donations' under the EFED Act.[394] This was an impact of the prohibition specifically mentioned by the Greens,[395] Liberal Party[396] and the National Party.[397]

The prohibition also bans political donations from groups and corporations. It has a profound impact on the ALP given its party structure is based on trade union affiliation, an issue that is discussed in the following section. However the point should be made that it is not only the ALP that is adversely impacted by this restriction on collectives financially contributing to political parties. The Christian Democratic Party has traditionally received financial support from churches,[398] a practice that is now illegal as a result of the prohibition. The Shooters and Fishers Party also relies upon an established network of group funding through financial support from shooting and fishing associations.[399]

The two examples demonstrate how the method of exercising political freedoms through collectives financially contributing to political parties is not unique to the ALP. The Honourable Robert Borsak of the Shooters and Fishers Party captured this nicely in relation to his party:

---

[391] Interview with the Honourable Reverend Fred Nile, Member of the Legislative Council, Parliament of New South Wales, State President and National President of the Christian Democratic Party (Sydney, 17 August 2012).
[392] Interview with the Honourable Robert Borsak, Member of the Legislative Council, Parliament of New South Wales and Party Agent, Shooters & Fishers Party NSW (Sydney, 21 August 2012).
[393] PE & E Act s 22(1)(a)(i).
[394] EFED Act s 85(3).
[395] Interview with Chris Maltby, Registered Officer, and Geoff Ash, Deputy Registered Officer, Greens NSW (Sydney, 16 August 2012).
[396] Interview with Simon McInnes, Finance Operations Director, Liberal Party of Australia (NSW Division) (Sydney, 17 August 2012).
[397] Interview with Greg Dezman, Deputy Director, NSW National Party (Sydney, 20 August 2012).
[398] Interview with the Honourable Reverend Fred Nile, Member of the Legislative Council, Parliament of New South Wales, State President and National President of the Christian Democratic Party (Sydney, 17 August 2012).
[399] Interview with the Honourable Robert Borsak, Member of the Legislative Council, Parliament of New South Wales and Party Agent, Shooters & Fishers Party NSW (Sydney, 21 August 2012).

> why were unions formed in the first place? For political purposes, so ordinary people could band together to form a force, an organization that would give them a chance to stand against capital. All shooting associations and fishing associations are doing is imitating what the union movement has done.

(b) Impact on Political Freedoms Exercised Through Third-Party Campaigners

A more complex situation attends third-party campaigners with the impact of section 96D depending on the type of income that an organisation relies on. Essential to understanding this varied impact is appreciating that concept of 'political donation' upon which the ban imposed on section 96D turns. 'Political donations' are a type of 'gift'.[400] If there is no 'gift' - no disposition of property with no or inadequate consideration[401] - then there is no 'political donation' and restrictions on 'political donations' (including section 96D) have no application.

Two situations should also be distinguished and separately discussed: political campaigns by third-party campaigners that are not peak organisations; and political campaigns by and through peak organisations.

The impact on third-party campaigners that are not peak organizations can be illustrated according to the following list:

- *non-government organisations that are predominantly political organisations* (e.g. GetUp![402] and Australian Chinese Friends of Labor)

  We can assume that the income of these organisations mostly comes from donations – 'gifts' under the Act – and because such donations are given to enable the organisations to engage in political spending, they are most likely to be 'political donations' under the Act.[403] If so, these organisations will have to institute mechanisms to ensure all of its donors are on the electoral rolls. For organisations like the Australian Chinese Friends of Labor which seeks to represent both citizens and permanent residents, restricting their donors to those on the electoral rolls will have a significant impact on their income. The

---

[400] See EFED Act, s 85.
[401] See EFED Act, s 84(1) for definition of 'gift'.
[402] See Getup, *Getup! Action for Australia* (2012) <http://www.getup.org.au/>.
[403] See, in particular, EFED Act s 85(1)(d).

Australian Chinese Friends of Labor, for instance, has experienced 30-40% reduction in its donation income as a result of this restriction.[404]

- *non-government organisations with charitable and political purposes* (e.g. the Brotherhood of St Laurence[405] and RSPCA[406])

  We can assume that the income of these organisations originates mostly from donations which are 'gifts' under the Act. If so, these organisations will have to do one of the following:

  - restrict donations to those on the electoral rolls;
  - have an 'open' donation system while setting up a separate fund for political campaigning with incoming funds restricted to those on the electoral rolls.

- *Trade unions*

  Restrictions on 'political donations' most likely do not apply to trade union membership fees – the principal source of trade union income - as such payments are not 'gifts' under the Act.[407] If trade union membership fees are, however, 'gifts', compliance with restrictions on 'political donations' proposed by section 96D is likely to require trade unions to do one of the following:

  - restrict membership to those on the electoral rolls: this would mean closing membership to workers who are permanent and temporary residents;
  - have an 'open' membership system while setting up a separate fund for political campaigning with incoming funds restricted to those on electoral rolls.

  Some unions like the CFMEU also receive political donations from their members.[408] Arrangements will have to be put in place to ensure that donations are only received from those on the electoral rolls.

- *Businesses*

  If the restriction of political donations to those on the electoral rolls is enacted, the flow of money used by businesses for political campaigns is not likely to be significantly affected. This is because such money is often drawn from share-

---

[404] Interview with Ernest Wong, Asian Friends of Labor (Telephone Interview, 21 September 2012).
[405] See Brotherhood of St Lawrence, *Brotherhood of St Lawrence: Working for an Australia free of poverty* (2 November 2012) <http://www.bsl.org.au/>.
[406] RSPCA, *Home* <http://www.rspca.org.au/>.
[407] See Part XV: Caps on Political Donations, Section B(2).
[408] Interview with Rita Mallia, President, Construction, Forestry, Mining and Energy Union, NSW Branch, Construction and General Division (Sydney, 21 August 2012).

holder funds, funds which are not 'gifts' under the Act as the purchase of shares is clearly for good consideration.

When a third-party campaigner has to institute mechanisms to ensure that their donors are on the electoral rolls, it will have to deal with a difficulty not experienced by political parties – lack of access to the electoral rolls.[409]

What about campaigns run by peak organisations like Unions NSW, Minerals Council of Australia, ACOSS or Clubs NSW?[410] Section 96D has no impact on campaigns funded by commercial revenue as such income does not come within the definition of 'gift' under the Act (and therefore, is not a 'political donation'). Whether funds provided by constituent organisations are legally permitted depends upon the manner in which such funds are provided. If they are provided largely free of conditions, they are likely to be 'gifts', being funds provided for inadequate consideration. If, however, they are provided in the form of membership fees then they are most likely not 'gifts' (see above). Other conditional payments (for instance, as payment under a contract for the peak organisation to conduct a campaign) are also unlikely to be 'gifts' and therefore, will be lawful under section 96D.

(c) Why Unjustified

There is nothing inherently wrong with limitations on political freedoms, including the freedom to make political donations – the crucial question is whether such limitations are justified.[411] This question can be examined by asking whether there is a legitimate aim and, if so, whether the limitations are reasonably adapted to this aim (these are conveniently also the issues to be analysed when determining whether these limitations breach the implied freedom of political communication).[412]

---

[409] Interview with Anthony D'Adam, Senior Industrial Officer, Public Service Association (Sydney, 20 August 2012). Political parties in New South Wales have access to the electoral roll of NSW by virtue of the PE & E Act s 40.

[410] See Suzanne Smith, 'Clubs plot campaign against pokies reform', *ABC News* (online), 3 December 2010 < http://www.abc net.au/news/2010-12-03/clubs-plot-campaign-against-pokies-reform/2361180>; Sean Nicholls, 'Xenophon accuses clubs of pokie fear tactics', *Sydney Morning Herald* (Sydney), 28 December 2010, 2; Ben Langford, 'Clubs' pokie cry a 'scare campaign'', *Illawarra Mercury* (New South Wales), 15 February 2011, 3.

[411] There is a compelling argument for limiting the freedom to make political donations through caps on such donations in the interest of preventing corruption and undue influence and promoting fairness in politics, see Joo-Cheong Tham, above n 321,108-110.

[412] See Part XVI: Prohibition of Certain Political Donations, Section A(3).

The answer to both issues point to a lack of proper justification for proposed section 96D. As outlined above, its aim is questionable not least because of its citizenship-centred and individualised understanding of political freedoms.[413]

The citizenship-centred understanding will also have an (unjustified) impact on the political representation of permanent residents through political parties (e.g. the Christian Democratic Party) and third-party campaigners (e.g. Australian Chinese Friends of Labor and the CFMEU[414]). The individualised understanding, on the other hand, also results in problematic curbs on freedom of political association whether it be through political parties, companies, trade unions, other non-government organisations and peak organisations. This section also has a discriminatory impact: it particularly affects organisations that primarily rely upon 'gifts' (e.g. organisations that are predominantly political entities; organisations with charitable and political purposes) and smaller parties. These impacts set up effective barriers to entry for small organizations that do not have the resources or the capacity to comply with the prohibition in section 96D.[415]

3 *The Implied Freedom of Political Communication*

The reasons why the impact imposed by the proposed section 96D (if enacted) is unjustified similarly suggests that this amendment is likely to be in breach of the implied freedom of political communication.

The current test for determining whether this freedom has been breached (often referred to as the *Lange* test) has two limbs:

- Does the law (of a state or federal parliament or a territory legislature) effectively burden freedom of communication about government or political matters either in its terms, operation or effect?

---

[413] See Part XVI: Prohibition of Certain Political Donations, Section A(1).
[414] According to Rita Mallia, the membership of the NSW CFMEU includes 'a lot of new immigrants' who are not citizens but permanent residents: Interview with Rita Mallia, President, Construction, Forestry, Mining and Energy Union, NSW Branch, Construction and General Division (Sydney, 21 August 2012).
[415] Interview with Mark Lennon, Secretary, Unions NSW (Sydney, 20 August 2012).

- If the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end (in a manner) which is compatible with the prescribed system of representative and responsible government?[416]

Applying this test to this provision, it is likely to be concluded that this restriction burdens political communication in that it restricts the money that is used for election campaigns. Significantly, there is a good chance that this burden will be found unconstitutional for breaching the implied freedom of political communication because it is informed by a questionable aim, and because it is not reasonably appropriate and adapted to this aim given its impact on freedom of political association, particularly for organisations that rely upon donations for their income.

[416] The test was stated in *Lange* (1997) 189 CLR 520, 571–72 as modified by a majority in *Coleman v Power* (2004) 220 CLR 1, 50 (McHugh J), 78 (Gummow and Hayne JJ), 82 (Kirby J).

B *Prohibition of Affiliation Fees from Corporations and Other Entities*

Prior to the insertion of section 96D, the Act deemed subscriptions paid to a party by an individual or an entity to be 'gifts' to a party.[417] This results in such payments being 'political donations'[418] and, therefore, being subject to the caps on political donations under the Act.[419] Importantly, the Act provided an exemption from these caps for party subscriptions and party levies. Section 95D states the following:

> (1) A party subscription paid to a party is to be disregarded for the purposes of this Division, except so much of the amount of the subscription as exceeds the relevant maximum subscription under subsection (3).
>
> (2) A **"party subscription"** is:
>
> > (a) an annual or other subscription paid to the party by a member of the party, or
> >
> > (b) an annual or other subscription paid to the party by an entity or other person (including an industrial organisation) for affiliation with the party.
>
> (3) For the purposes of this section:
>
> > (a) the maximum subscription in respect of membership of a party is $2,000, and
> >
> > (b) the maximum subscription in respect of affiliation with a party is:
> >
> > > (i) if the amount of the subscription is not calculated by reference to the number of members of the affiliate--$2,000, or
> > >
> > > (ii) if the amount of the subscription is calculated by reference to the number of members of the affiliate--$2,000 multiplied by the number of those members of the affiliate.
>
> (4) A party levy paid to a party by an elected member endorsed by the party is to be disregarded for the purposes of this Division.

---

[417] EFED Act s 85(3).
[418] This results from EFED Act s 85(1)(a).
[419] Ibid s 95A(1).

Under these provisions, an individual who is a member of a political party could pay an annual membership subscription of up to $2 000 *as well as* make donations to the same political party up to its cap. Entities, for instance trade unions, could also be affiliated to a political party and pay affiliation fees up to the maximum provided by section 95D(3).

By contrast, the prohibition in section 96D directly targets organisational membership fees through section 96D(4). This sub-section provides that:

> Annual or other subscriptions paid to a party by a person or entity (including an industrial organisation) for affiliation with the party that are, by operation of section 85(3), taken to be gifts (and political donations) are subject to this section. *Accordingly, payment of any such subscription by an industrial organisation or other entity is unlawful under this section* (emphasis added).

(Very oddly, section 95D of the Act which currently provides for an exemption for party subscriptions and party levies has not been amended or repealed. This will need to be rectified for the purpose of clarity).

Section 96D(4) clearly bans affiliation fees, in particular, fees paid by trade unions affiliated to the ALP. Is such a ban justified? The report argues 'no'.[420]

1 *A Ban on Organisational Membership Fees: Misdirected at 'Trade Union Bosses'*

A ban on organisational membership fees (including trade union affiliation fees) will have a severe impact upon the trade union-ALP link by either prohibiting or severely limiting the amount of money that trade unions can contribute to the ALP. By banning or at least reducing significantly the flow of trade union affiliation fees to the ALP, such measures will most likely weaken the relationship that the trade union movement has with the ALP.

Indeed, this is one of key aims of some advocates of limits on political donations. For example, former NSW Premier Bob Carr has endorsed his successor Morris Iemma's call for banning organisational contributions on the basis that unions will not be able to affiliate to the

[420] The following sections heavily draw from Joo-Cheong Tham, above n321, ch 4.

ALP on a collective basis.[421] Discontented with the power wielded by 'trade union bosses' within the ALP, some would prefer that the ALP-union link be made illegal.

There are, in fact, three main complaints bundled up in the epithet 'trade union bosses' and it is crucial to consider them separately. The first is the claim that the presence within the party of 'trade union bosses', or more kindly, the influence of trade union officials within the ALP, is making the ALP unelectable or at least preventing it from becoming 'the natural party of Federal government'.[422] The concern here is that the influence of trade unions has the effect of the ALP not being properly representative of the Australian community, thereby impairing – perhaps even severely damaging – its electoral prospects.

Such views may or may not be correct. The issue here, however, does not turn on the veracity of these views; the question here is whether a ban on organisational membership fees is a legitimate way of dealing with concerns regarding the electability of the ALP (or for that matter, the electability of any party). The answer is "surely not": these are matters for the ALP and its members to decide, not one for regulation, let alone contribution limits involving a ban on organisational membership fees. Should these concerns not be dealt with properly then the discipline of the ballot box will operate with voters choosing not to support the ALP.

There are two other complaints implied by criticisms of 'trade union bosses': one relating to internal party democracy and the other to trade union democracy. Mark Aarons, a former union official who was also an adviser to Bob Carr when he was New South Wales Premier, has argued that the ALP is organised in 'a most undemocratic way'[423] because affiliated trade unions exercise 'a grossly out-of-proportion, even extraordinary, influence over policy formulation'.[424] This lack of proportion is said to arise because the level of power trade union delegates exercise within the ALP is not justified by the level of union density: how can it be

---

[421] Editorial 'Limit political donations: Carr', *The Australian* (online), 4 May 2008 <http://www.theaustralian news.com.au/story/0,25197,23643124-2702,00.html>.
[422] Mark Aarons, 'The Unions and Labor' in Robert Manne (ed), *Dear Mr Rudd: Ideas for A Better Australia* (Black Inc, 2008) 86, 91.
[423] Ibid 88.
[424] Ibid.

right that trade unions have 50 per cent of delegates in ALP conferences when less than one-fifth of the workforce is unionised?[425]

This argument, however, turns on a fallacious use of the term 'undemocratic'. It is true that parties have a representative function in that *parties or the party system as a whole* should represent the diversity of opinion within a society. This is, however, not the same as saying that *a single party* should seek to represent the entire spectrum of this opinion. Not only is this practically impossible but paradoxically, parties discharge their representative function by representing different sections of society. It is the cumulative effect of such sectional representation that stamps a party system as representative in overall terms. In this context, characterising the manner in which the ALP is organised as being undemocratic simply because its membership base is not wholly representative of the Australian public is somewhat perverse.

To say this is to emphasise that there is nothing self-evidently 'undemocratic' about such influence. It is not to imply that the extent of union influence over the ALP is justifiable or desirable. Some, for example, might argue that such influence results in a rather partial notion of the 'public interest'. Just as the relationships between the Liberal Party and business supporters, the National Party and agricultural producers, and the Greens and the environmental groups are relevant considerations for the voters in deciding whether a political party adequately represents the 'public' or 'national' interest, such matters are clearly legitimate considerations for citizens deciding whether or not to vote for the ALP.

There is another difficulty with characterising the manner in which the ALP is organised as being undemocratic: reducing trade union influence will not necessarily revitalise the internal democracy of the ALP.[426] So much can be seen through a rough depiction of the power relations within the ALP as given in Table 5. The party elite comprises the parliamentary leadership, the members of parliament and their staff,[427] the union leadership (including union

---

[425] In 2007, union density stood at 19 per cent of the Australian workforce: Australian Bureau of Statistics, 'Employee Earnings, Benefits and Trade Union Membership, Australia, August 2007' (Issue No 6310.0, Australian Bureau of Statistics, 2007).

[426] This point is made well by Bolton: John R Bolton, 'Constitutional Limitations on Restricting Corporate and Union Political Speech' (1980) 22 *Arizona Law Review* 383, 417.

[427] This would include political advisers, some of which have been criticised as exercising 'power without responsibility': see Anne Tiernan, *Power Without Responsibility: Ministerial Staffers in Australian Governments from Whitlam to Howard* (University of New South Wales Press, 2007). Tiernan's study was focussed on ministerial advisers.

delegates), and the party officials and bureaucrats. The rank and file, on the other hand, consists of the party members.

Table 5: Power Relations within the ALP

Party elite	Union leadership	Parliamentary leadership	Party officials and bureaucracy
Rank and file	Party members		

These relations can be analysed according to horizontal and vertical dimensions. Reducing the influence of the union leadership does not mean that power will flow vertically to the rank and file. In the context of shrinking party membership within the ALP,[428] it is far more likely that power will be redistributed horizontally to others remaining within the party elite. Where the 'party in public office', the parliamentary leadership, is already ascendant over the 'party on the ground' as well as the 'party central office',[429] it is a fair bet that the parliamentary leadership will be a key beneficiary of this redistribution of power. A similar conclusion results when one casts an eye to power relations beyond the party. Looking at the 'material constitution'[430] of the ALP, that is, its relationship with class forces, diminishing the influence of trade unions within the ALP is likely to mean a corresponding empowerment of business interests but not of the rank and file. Moreover, the power of the government bureaucracy also needs to be factored in, especially when the ALP is in government: its influence is likely to increase as sources of countervailing power like trade unions weaken in strength.

---

[428] For figures, see Gary Johns, 'Party Organisation and Resources: Membership, Funding and Staffing' in Ian Marsh (ed), *Political Parties in Transition?* (Federation Press, 2006) 46, 47; Ian Ward, 'Cartel Parties and Election Campaigns' in Ian Marsh (ed), *Political Parties in Transition?* (Federation Press, 2006) 70, 73–75.

[429] Ian Ward, 'Cartel Parties and Election Campaigns' in Ian Marsh (ed), *Political Parties in Transition?* (Federation Press, 2006) 70, 72, 85–88. On the power of trade unions within the ALP, see Kathryn Cole, 'Unions and the Labor Party' in Kathryn Cole (ed), *Power, Conflict and Control in Australian Trade Unions* (Pelican Books, 1982) where it was concluded that 'the power of unions within the ALP is far more circumscribed than is commonly believed and the process which each of the party's two sections (i.e. industrial and political wings) accommodates to the demands and needs of the other is complex and tortuous': at 100.

[430] Tom Bramble and Rick Kuhn 'The Transformation of the Australian Labor Party' (Speech delivered at the Joint Social Sciences Public Lecture, Australian National University, 8 June 2008) <http://dspace.anu.edu.au/handle/1885/45410>.

Underlying all this is a risk of throwing the baby out with the bath water. While it is true that the internal democracy of the ALP is undermined in some cases by trade unions because of their oligarchical tendencies, the answer is not to excise trade unions from the party. Collective organisations like trade unions play a necessary, though at times problematic, role in empowering citizens. The ambivalent character of such organisations is well captured by sociologist Robert Michels. Michels is famous for his iron law of oligarchy: '[w]ho says organization, says oligarchy'.[431] He is perhaps less well known for his observation that '[o]rganization … is the weapon of the weak in their struggle with the strong'.[432] Within the ALP, collective organisations like trade unions allow individual members to band together to secure a voice that they would not have otherwise. While they do give rise to the risk of oligarchy within the organisations themselves, when functioning well they provide 'effective internal polyarchal controls'[433] that counter the oligarchical tendencies of the party. By severely diminishing the role of trade unions within the ALP, the ban on organisational affiliation fees will likely increase the oligarchical tendencies within the party.

The other complaint in relation to 'trade union bosses' concerns trade union democracy. Aarons has argued that because 'individual unionists have no practical say in whether they are affiliated to the ALP and whether a proportion of their membership fees pay for this [and] … in how their union's votes will be cast', there is 'not a democratic expression of the union membership's wishes'.[434] This criticism, however, is doubly misconceived. First, under any system of representative governance, most decisions are made by representatives without the direct say of their constituencies. It is this feature that contrasts representative systems from those based on direct democracy and, indeed, this is how the Australian system of parliamentary representation is supposed to work. The key question in such contexts is not whether members have a direct say but whether the representatives are effectively accountable to their constituencies, in this case, trade union delegates to their members. The real problem here is one of 'union oligarchies'[435] that are insulated from effective

---

[431] Robert Michels, *Political Parties: A Sociological Study of the Oligarchical Tendencies of Modern Democracy* (Collier Books, 1962) 365. Michels' iron law is better understood as pointing to the 'oligarchical tendencies' of organisations. The title of the last part of Michels' book is, in fact, 'Synthesis: The Oligarchical Tendencies of Organizations': Robert Michels, *Political Parties: A Sociological Study of the Oligarchical Tendencies of Modern Democracy* (Collier Books, 1962).
[432] Ibid 61. Schattscheider has similarly observed that '[p]eople do not usually become formidable to governments until they are organised': Schattscheider, above n198, 28.
[433] Charles E Lindblom, *Politics and Markets: the World's Political Economic Systems*, (Basic Books, 1977) 141.
[434] Mark Aarons, above n422, 89.
[435] Andrew Parkin, 'Party Organisation and Machine Politics: the ALP in Perspective' in Andrew Parkin and John Warhurst (eds), *Machine Politics in the Australian Labor Party* (George Allen & Unwin, 1983) 15, 22.

membership control. Yet, and this brings us to the second misconception, a ban on organisational membership (including trade union affiliation fees) will do little to meaningfully address this problem.[436] At best, what they would do is carve out certain decisions from the remit of trade union oligarchies while still leaving the oligarchies intact.

2 *Unjustified Limitation of Freedom of Political Association*

It is essential that NSW election funding and spending laws respect freedom of political association because such freedom is crucial to the proper workings of Australian democracy.[437] Specifically, it is necessary in order to ensure pluralism in Australian politics, pluralism that is required to protect both the integrity of representative government and fairness in politics. This does not, however, mean that state regulation of political associations is impermissible. There can be public interest grounds for limiting freedom of political association. Whether particular measures are justified will depend upon the weight of such rationales, the extent to which the limitation is adapted to advancing such rationale/s and the severity of the limitation.

In evaluating a ban on organisational membership fees, it is convenient to begin with the last factor, the severity of the ban. Freedom of political association possesses several key aspects, notably:

- the individual's right to form political associations, act through such associations and to participate in the activities of these associations; and
- the association's ability to determine its membership, the rules and manner of its governance and the methods it will use to promote its common objectives.[438]

Here we focus on freedom of party association and, in particular, the ability of political parties to determine their membership. As noted earlier, there is a diversity of party structures

---

[436] Aarons has argued that problems with 'trade union bosses' requires review of the funding provided by trade unions to the ALP: Mark Aarons, 'Rein in union strongmen's ALP power', *The Australian* (online), 18 March 2008 <http://www.theaustralian news.com.au/story/0,25197,23391595-7583,00 html>.
[437] See Part IV: The Central Objects of Election Funding and Spending Laws in New South Wales.
[438] Affidavit of Keith Ewing to IDSA litigation. See also Howard Davis, *Political Freedom: Associations, Political Purpose and the Law* (Continuum, 2000) 46.

in Australian politics with direct and mixed parties. Such diversity, it was pointed out, should be respected as it contributes to the pluralism of Australia's democracy.[439]

When viewed from this perspective, the impact of a ban on organisational membership fees on the freedom of party association is quite severe: it will mandate the particular party structure of direct parties and, while not directly banning parties that allow for organisational membership, generally make them unviable unless such parties are able to secure sufficient public funding.[440]

The specific impact on the trade union-ALP relationship can be illustrated through the typology developed by industrial relations experts Matthew Bodah, Steve Coates and David Ludlam. According to these authors, there are two dimensions to union-party linkages, formal organisational integration and a level of policy-making influence, which give rise to four types of linkages:

- external lobbying type – that is, no formal organisational integration between unions and parties, with unions having no or little influence in party policy-making;
- internal lobbying type – that is, no formal organisational integration between unions and parties, but unions are regularly consulted in policy-making;
- union/party bonding type – that is, unions occupy important party positions but do not enjoy domination of party policy-making; and
- union dominance model – that is, unions occupy important party positions and dominate party policy-making.[441]

According to this typology, the trade union-ALP link fits either the union/party bonding type or the union dominance model because of the organisational integration of trade union

---

[439] See Part X: Diversity of Party Organizations and Structures.
[440] This seems to be the position in relation to the Canadian New Democratic Party that still allows trade unions to affiliate on a collective basis: see Harold Jansen & Lisa Young, 'Solidarity Forever? The NDP, Organised Labour, and the Changing Face of Party Finance in Canada' (Paper presented at the Annual Meeting of the Canadian Political Science Association, London, Ontario, 2–4 June). See also the discussion in Keith Ewing, *The Cost of Democracy*: *Party Funding in Modern British Politics* (Hart, 2007) 220–21.
[441] Matthew Bodah, Steve Ludlam and David Coates, 'The Development of an Anglo-American Model of Trade Union and Political Party Relations' (2003) 28(2) *Labor Studies Journal* 45, 46; see also Steve Ludlam, Matthew Bodah and David Coates 'Trajectories of Solidarity: Changing Union-Party Linkages in the UK and the USA' (2002) 4(2) *British Journal of Politics and International Relations* 222, 233–41. For an application of the typology to the Australian context, see Gerard Griffin, Chris Nyland and Anne O'Rourke, 'Trade Unions, the Australian Labor Party and the Trade-Labour Rights Debate' (2004) 39(1) *Australian Journal of Political Science* 89.

affiliates into the ALP. As members of state and territory branches of the ALP, affiliated trade unions are guaranteed 50 per cent representation at state and territory conferences.[442] These conferences determine state and territory branch policies and elect state party officials and delegates to National Conference.[443] The latter functions as 'the supreme governing authority of the Party'[444] and elects members of the National Executive, 'the chief administrative authority' of the party.[445] A ban on organisational membership fees will, however, make organisational integration between the ALP and unions much less viable; the menu of options is effectively restricted to the external/internal lobbying types. There is much truth then in the comments by Sam Dastyari, the Secretary of NSW ALP and Mark Lennon, the Secretary of Unions NSW, that this ban attacks 'the structure of the Labor Party' and seeks to 'outlaw the structure of the Labor Party'.[446]

Is there a compelling justification for such a severe incursion into the freedom of the ALP to organise itself as it sees fit? It is exceedingly difficult to see one. There is, firstly, the prima facie legitimacy of membership fees – they are payments made as a condition for participating within political parties. Further, as the previous discussion has argued, the 'trade union bosses' objections are misdirected: amongst others, a ban on organisational membership fees will neither enhance internal party democracy nor invigorate trade union democracy. Absent an adequate rationale for limiting freedom of party association, it is hard to escape the conclusion that such a ban represents an unjustified limitation on freedom of party association.

It was such a concern with freedom of party association that led the New South Wales Select Committee to include trade union affiliation fees in their exemption for membership fees.[447] The key reasons given by the six-member committee, which had only two ALP members, are worth reproducing:

---

[442] See, for example, NSW Labor, above n190, cl B.25(a), B.26; Victorian Labor, 'Australian Labor Party Victorian Branch Rules' (Constitution, Victorian Labor, May 2012) cl 6.3.2.
[443] See, for example, NSW Labor, above n190, cl B.2; Victorian Labor, above n442, cl 6.2.
[444] Australian Labor Party, 'National Platform' (Constitution, Australian Labor Party, 1 August 2009) cl 5(b).
[445] Ibid cl 5(c).
[446] Interview with Mark Lennon, Secretary, Unions NSW (Sydney, 20 August 2012).
[447] Legislative Council Select Committee on Electoral and Political Party Funding, above n2, 107–8, 113 (Recommendation 9).

> The Committee considers that membership fees should not be encompassed by the Committee's proposed ban on all but small individual donations … *Similarly, the Committee believes that trade union affiliation fees should be permissible, despite the proposed ban on union donations. To ban union affiliation fees would be to place unreasonable restrictions on party structures.*[448]

3 *The Implied Freedom of Political Communication*

Applying the *Lange* test, the ban on organisational affiliation fees will place a significant burden on the ability of the ALP to engage in political communication as such fees constitute an important revenue stream.[449] There is a reasonable likelihood that this burden will be found to be in breach of the implied freedom of political communication: its aim is, firstly, dubious given the lack of proper justification and the severity of the burden is likely to mean it is not reasonably appropriate and adapted.[450]

4 *Re-Emphasising the Scope of the Argument*

There are many critics of the trade union-ALP relationship: a considerable number of voters believe that this relationship casts doubt on the ability of the ALP to govern for all; within the union movement there are union members – even union leaders[451] - who strongly take the view that this relationship fails to serve their best interests; and even within the ALP this relationship does not enjoy unqualified support, with some rank-and-file members feeling disenfranchised by the influence enjoyed by union affiliates and more than a few key party officials expressing concern that the relationship undermines the party's ability to win public office.

For the most part, this report says very little, often nothing, on these questions. It has focussed on whether there should be a ban on organisational membership fees (including trade union affiliation fees). In concluding against such a ban, the report does not amount to a general defence of the trade union-ALP relationship. The central point is that this relationship should not be prohibited as a matter of law. The broader question as to whether this relationship is

---

[448] Ibid 113 (emphasis added).
[449] See Tham, above n321, 67-71.
[450] See Part XVI: Prohibition of Certain Political Donations, Section A(3).
[451] See, for example, Dean Mighell, 'Unions must leave Labor', *The Age* (online), 11 February 2010, <http://www.theage.com.au/opinion/politics/unions-must-leave-labor-20100210-nsat.html>.

desirable or justified raises a complex range of issues, most of which fall outside the scope of this report.

XVI PROHIBITION OF PROPERTY DEVELOPER ETC DONATIONS

Division 4A, Part 6 of the EFED Act is entitled 'Prohibition of property developer donations'. The prohibitions in this Division were the result of two pieces of legislation: the *Election Funding and Disclosures Amendment (Property Developers Prohibition) 2009* (NSW) placed a ban on political donations from property developers and close associates while the *Election Funding and Disclosures Amendment Act 2010* (NSW) extended the ban on political donations from property developers and their close associates' to gambling, liquor and tobacco companies (and their close associates).

A central recommendation of this report is that these prohibitions be repealed.

They are unnecessary. The key justification for these prohibitions is that they address the problem of corruption and undue influence in relation to property developers, gambling, liquor and tobacco companies. The caps on political donations, however, effectively do so, rendering these prohibitions redundant. In a way, these prohibitions are an anachronism. When the property developer ban was introduced, the then Premier, Nathan Rees said the following:

> the ban on developer donations is a first step. A ban on donations from one sector of the business community inevitably raises the issue of corporate donations more generally.[452]

Given that there are now caps on political donations (including corporate political donations) there is no strong case for the prohibitions applying specifically to property developers, gambling, liquor and tobacco companies.

The flaws of these prohibitions go beyond their lack of necessity. There are also difficulties with their scope, difficulties which can be illustrated by reference to the ban on political donations from 'property developer[s]'. This ban operates on the definition of 'property developer' found in section 96GB of the EFED Act:

> a "property developer" for the purposes of this Division:

---

[452] New South Wales, *Parliamentary Debates*, Legislative Assembly, 25 November 2009, 19918 (Nathan Rees, Premier).

> (a) a corporation engaged in a business that regularly involves the making of relevant planning applications by or on behalf of the corporation in connection with the residential or commercial development of land, with the ultimate purpose of the sale or lease of the land for profit,
> (b) a person who is a close associate of a corporation referred to in paragraph (a).

This definition does not cover the range of individuals and companies that have an interest in planning applications and which may wish to make political donations (thereby, posing a risk of corruption and undue influence). For instance, a large company - which is not in the business of property development - that makes a planning application and donates thousands of dollars to local government councilors will not be caught by this ban as it is not a 'property developer'. The ban is also over-inclusive as it bans political donations even when no conflict of interest with planning decisions exists, for instance, a 'property developer' donating to a party or candidate where it does not intend to make a planning application.

There are also acute difficulties in complying with these prohibitions, with the ALP,[453] Liberal Party[454] and the National Party[455] expressly mentioning these concerns. Staff of the NSW EFA similarly mentioned considerable difficulty in administering these prohibitions.[456] These difficulties largely stem from the structural features of these prohibitions. These prohibitions apply according to the *activities* of the donor, in particular the business activities of the donor (e.g. 'in a business that regularly involves the making of relevant planning applications';[457] 'engaged in a business undertaking that is mainly concerned with the manufacture or sale of tobacco products';[458] 'engaged in a business undertaking that is mainly concerned with either or a combination of the following . . . the manufacture or sale of liquor products (and/or) wagering, betting or other gambling'[459]).

These activities are not readily apparent to the recipient party, candidate or third-party campaigner. As Greg Dezman of the NSW National Party pointed out in relation to the 'property developer' prohibition, it is 'not clear where the boundaries . . . are' and unless

---

[453] Interview with Sam Dastyari, General Secretary, NSW Labor (Sydney, 21 August 2012).
[454] Interview with Simon McInnes, Finance Operations Director, Liberal Party of Australia (NSW Division) (Sydney, 17 August 2012).
[455] Interview with Greg Dezman, Deputy Director, NSW National Party (Sydney, 20 August 2012).
[456] Interview with staff of New South Wales Election Funding Authority (Sydney, 16 August 2012).
[457] EFED Act s 96GB(1)(a).
[458] Ibid s 96GB(2A)(a).
[459] Ibid s 96GB(2B)(a).

there is knowledge of the businesses of the donor, there is no sure way of ascertaining whether s/he is a prohibited donor.[460] The nature of these prohibitions can be contrasted with the caps on political donations which apply to the *amount* of donations, a sum which is readily apparent to the recipient party, candidate or third-party campaigner.

Another structural feature of these prohibitions that creates difficulties in administration and compliance is that they apply to 'close associates'. Section 96GB(3) defines 'close associate' in this way:

> ***close associate*** of a corporation means each of the following:
>
> (a) a director or officer of the corporation or the spouse of such a director or officer,
> (b) a related body corporate of the corporation,
> (c) a person whose voting power in the corporation or a related body corporate of the corporation is greater than 20% or the spouse of such a person,
> (d) if the corporation or a related body corporate of the corporation is a stapled entity in relation to a stapled security—the other stapled entity in relation to that stapled security,
> (e) if the corporation is a trustee, manager or responsible entity in relation to a trust—a person who holds more than 20% of the units in the trust (in the case of a unit trust) or is a beneficiary of the trust (in the case of a discretionary trust).

There are two determinations that need to be made in order to comply with these prohibitions regarding 'close associates': an assessment of the activities engaged in by relevant corporations; and consideration of the relationship between a donor and these corporations. Neither is readily apparent to recipient party, candidate and third-party campaigner.

Laws that by their design are exceedingly difficult to administer and comply with should not be enacted. They not only impose unjustified costs but also bring disrepute to the legal regime.

> *Recommendation 38*: The prohibitions found in Division 4A, Part 6 of the EFED Act (Prohibition of property developer donations etc) should be repealed.

---

[460] Interview with Greg Dezman, Deputy Director, NSW National Party (Sydney, 20 August 2012).

XVII CAPS ON ELECTORAL COMMUNICATION EXPENDITURE

A *Purposes of Caps on Election Spending*

Caps on election spending have two central purposes. They promote fairness in elections by preventing excessive election spending – they 'level down' the playing field. They also contribute to preventing corruption and undue influence by lessening the pressure for fund-raising.

These purposes – it should be emphasised – are served by limiting the *level* of spending. Caps on election spending do not seek to alter the composition of such spending (e.g. radio, television or newspaper advertisements) or the campaign messages of such spending.

The following sections will outline the current caps on election spending under the EFED Act and then evaluate the following dimensions of caps against their purposes:

- the type of spending they cover;
- the period to which the limits apply;
- the political actors they cover (e.g. political parties, candidates, third parties);
- the levels at which the caps apply (e.g. State-wide; constituency); and
- the amounts at which they are set.[461]

B *Caps on Election Spending under EFED Act*

Spending limits do not tend to apply to all types of political spending (e.g. all spending made by a political party). The spending limits in Canada, New Zealand and the United Kingdom, for instance, only restrict expenditure that has some connection with influencing election outcomes (although they capture this connection in different ways).[462]

The same applies to the NSW spending limits, and here there are two central concepts that determine the scope of NSW spending limits: 'electoral expenditure' and 'electoral communication expenditure'. Both concepts have complicated meanings with the EFED Act providing general definitions together with various exclusions.

---

[461] For discussion, see Tham, above n 321, 208-213.
[462] See Tham, above n321, 210-211.

'Electoral expenditure' is the broader concept and is defined under the EFED Act as 'expenditure for or in connection with promoting or opposing, directly or indirectly, a party or the election of a candidate or candidates *or* for the purpose of influencing, directly or indirectly, the voting at an election'.[463] Section 87(3) of the EFED Act, however, excludes the following from 'electoral expenditure':

> (a) expenditure incurred substantially in respect of an election of members to a Parliament other than the New South Wales Parliament, or
>
> (b) expenditure on factual advertising of:
>
> > (i) meetings to be held for the purpose of selecting persons for nomination as candidates for election, or
> >
> > (ii) meetings for organisational purposes of parties, branches of parties or conferences, committees or other bodies of parties or branches of parties, or
> >
> > (iii) any other matter involving predominantly the administration of parties or conferences, committees or other bodies of parties or branches of parties.

Section 87(4) further provides the following exemption:

> Electoral expenditure (and electoral communication expenditure) does not include expenditure incurred by an entity or other person (not being a registered party, elected member, group or candidate) if the expenditure is not incurred for the dominant purpose of promoting or opposing a party or the election of a candidate or candidates or influencing the voting at an election.

'Electoral communication expenditure' is a sub-category of 'electoral expenditure'. Section 87(2) of the EFED Act defines 'electoral communication expenditure' as 'electoral expenditure' of the following kinds:

> (a) expenditure on advertisements in radio, television, the Internet, cinemas, newspapers, billboards, posters, brochures, how-to-vote cards and other election material,

---

[463] EFED Act s 87(1) (emphasis added).

> (b) expenditure on the production and distribution of election material,[464]
>
> (c) expenditure on the Internet, telecommunications, stationery and postage,
>
> (d) expenditure incurred in employing staff engaged in election campaigns,
>
> (e) expenditure incurred for office accommodation for any such staff and candidates (other than for the campaign headquarters of a party or for the electorate office of an elected member),
>
> (f) such other expenditure as may be prescribed by the regulations as electoral communication expenditure,

The same sub-section excludes the following from the notion of 'electoral communication expenditure':

> (g) expenditure on travel and travel accommodation,
>
> (h) expenditure on research associated with election campaigns,
>
> (i) expenditure incurred in raising funds for an election or in auditing campaign accounts,
>
> (j) such other expenditure as may be prescribed by the regulations as not being electoral communication expenditure.

The New South Wales spending limits apply only to 'electoral communication expenditure'. The complex definitional scheme under the EFED Act means that four questions need to be asked in order to determine whether a particular kind of political spending is covered by the spending limits. Table 6 captures the sequence of reasoning.

[464] 'Election material' is not defined by the EFED Act. The PE & E Act does, however, use the term 'electoral material' in sections 151F-151G.

Table 6: Ascertaining Whether Political Spending Covered by New South Wales Spending Limits

Question	Yes	No
1) Does the spending come within the general definition of 'electoral expenditure'?	Proceed to Question 2).	Spending is not covered by the limits.
2) Does the spending fall within the exclusions to 'electoral expenditure'?	Spending is not covered by the limits.	Proceed to Question 3).
3) Does spending come within the general definition of 'electoral communication expenditure'?	Proceed to Question 4)	Spending is not covered by the limits.
4) Does the spending fall within the exclusions to 'electoral communication expenditure'?	Spending is not covered by the limits.	*Spending is covered by the limits*[465]

Turning to the period to which the limits apply, 'capped expenditure period' is the key statutory concept. The New South Wales spending limits apply in the context of four-year fixed-term State elections.[466] Unless dissolved, the term of the New South Wales Parliament is four years[467] with State elections taking place in the fourth Saturday of March of the year in which the term expired.[468] In such circumstances, the 'capped expenditure period' runs from 1 October of the preceding year to the polling day, a period of close to six months.[469]

---

[465] Additional requirements apply to the additional caps for individual Assembly seats and caps on spending by candidates: see discussion below accompanying nn 474-475.
[466] The absence of fixed-term elections (as in Canada, New Zealand and the United Kingdom) is, however, not fatal to the workability of election spending limits: see Tham, above n321, 208-209.
[467] *Constitution Act 1902* (NSW) s 24(1).
[468] Ibid ss 22A(3), 24A(1).
[469] EFED Act s 95H(b). As a transitional measure, a shorter period applied to the recent 2011 New South Wales elections with the limits applying from 1 January 2011 to the end of polling day, 26 March 2011: Ibid s 95H(a).

If the New South Wales Parliament, however, is dissolved (prior to its expiry date), the 'capped expenditure period' runs from the day on which the writs for the election were issued to the end of polling day.[470] Under the *Constitution Act 1902* (NSW), this is a period that can be no shorter than 40 days.[471]

Two other dimensions of the NSW spending limits, the political participants they cover and the various levels/amounts at which they are set, can be discussed together. Table 7 summarises these aspects. It should be noted that the amounts given are for the 2011 NSW State elections. These amounts will be higher for the next State election as they are indexed.[472]

[470] EFED Act s 95H(c).
[471] *Constitution Act 1902* (NSW) s 24A(b).
[472] EFED Act s 95F(14).

Table 7: Spending Limits under *Election Funding, Expenditure and Disclosures Act 1981* (NSW) in relation to 2011 NSW State Elections

Political actor	Applicable cap
Political parties with Legislative Assembly candidates	• $100,000 x number of electoral districts in which a candidate is endorsed; • Additional cap of $50,000 for each electorate.
Political parties that have 10 or fewer Legislative Assembly candidates	$1, 050, 000
Group of Legislative Council candidates not endorsed by any party	$1,050,000
Party-endorsed Legislative Assembly candidates	$100,000
Legislative Assembly candidates not endorsed by any party	$150,000
Third-party campaigners	• $1,050,000 if registered prior to commencement of capped expenditure period; • $525,000 in any other case; • Additional cap of $20,000 for each electorate.

Source: EFED Act s 95F

The overall caps on political parties and third parties apply to any 'electoral communication expenditure' incurred for a State election campaign during the 'capped expenditure period'.[473] The additional caps for individual Assembly seats (which sit within the overall caps), however, apply only when 'electoral communication expenditure' is:

> for advertising or other material that:
>
> (a) explicitly mentions the name of a candidate in that election in that electorate or the name of the electorate, and
>
> (b) is communicated to the electors in that electorate, and

[473] Ibid s 95I(1).

(c) is not mainly communicated to electors outside that electorate.[474]

The caps on spending by candidates or groups of candidates also have a further requirement beyond the spending being 'electoral communication expenditure': such expenditure must be 'directed at the election of the candidate or group'.[475]

Finally, the provisions aggregating expenditure for the purposes of the NSW spending limits should be noted.[476] Notably, there are provisions relating to 'associated parties'. Section 95G(1) of the EFED Act provides that registered parties are 'associated' if:

(a) they endorse the same candidate for a State election, or

(b) they endorse candidates included in the same group in a periodic Council election, or

(c) they form a recognised coalition and endorse different candidates for a State election or endorse candidates in different groups in a periodic Council election.

Section 95G(2) further provides that:

(2) Aggregation of expenditure of associated parties

If 2 or more registered parties are associated:

(a) the amount of $100,000 of electoral communication expenditure in respect of any electoral district in which there are candidates endorsed by the associated parties is, for the purpose of calculating the applicable cap on electoral communication expenditure by those parties under section 95F (2), to be shared by those parties (and is not a separate amount for each of those parties), and

(b) the amount of $1,050,000 of electoral communication expenditure in respect of any group of candidates endorsed by those parties is, for the purpose of calculating the applicable cap on electoral communication expenditure by those parties under section 95F (4), to be shared by those parties (and is not a separate amount for each of those parties).

---

[474] Ibid s 95F(13).
[475] Ibid s 95I(3).
[476] See EFED Act s 95G.

The *Election Funding, Expenditure and Disclosures Amendment Act 2012* (NSW) inserted section 95G(6)-(7) which aggregates the spending of 'affiliated organisations' to their respective political parties. These sections provide as follows:

> (6) **Aggregation of expenditure of parties and affiliated organisations**
>
> Electoral communication expenditure incurred by a party that is of or less than the amount specified in section 95F for the party (as modified by subsection (2) in the case of associated parties) is to be treated as expenditure that exceeds the applicable cap if that expenditure and any other electoral communication expenditure by an affiliated organisation of that party exceed the applicable cap so specified for the party.
>
> (7) In subsection (6), an ***affiliated organisation*** of a party means a body or other organisation, whether incorporated or unincorporated, that is authorised under the rules of that party to appoint delegates to the governing body of that party or to participate in pre-selection of candidates for that party (or both).

C *Types of Spending Covered*

Table 8 details the electoral expenditure incurred by the main parties in the 2011 NSW State Election with break-down for electoral expenditure that was electoral communication expenditure (spent during and outside the capped expenditure period). The available data, however, does not allow for disaggregation of electoral expenditure, other than electoral communication expenditure according to whether it was spent during or outside the capped expenditure period.

Table 8: Electoral Expenditure and Electoral Communication Expenditure of the Main NSW Parties in 2011 NSW State Election

Party Name	Expenditure cap	Electoral Expenditure other than electoral communication expenditure	Total Electoral Communication Expenditure [L+M]	Total Electoral Communication Expenditure outside Capped Period	Total Electoral Communication Expenditure during Capped Period	Actual Electoral Communication Expenditure as % of Max
Australian Labor Party (NSW Branch)	$8,800,000	$1,971,653.35	$9,376,755.91	$578,917.30	$8,797,838.61	99.975%
Country Labor Party	$1,050,000	$-	$499,759.54	$-	$499,759.54	47.596%
Christian Democratic Party (Fred Nile Group)	$8,600,000	$13,449.00	$287,416.79	$-	$287,416.79	3.342%
Liberal Party of Australia New South Wales Division	$7,300,000	$3,287,176.75	$8,117,286.44	$872,699.27	$7,244,587.17	99.241%
National Party of Australia – NSW	$2,000,000	$456,103.65	$2,538,722.79	$577,654.74	$1,961,068.05	98.053%
Shooters and Fishers Party	$1,050,000	$100,753.00	$821,715.38	$-	$821,715.38	78.259%
The Greens	$9,300,000	$69,772.00	$1,405,873.52	$-	$1,405,873.52	15.117%
Family First	$1,500,000	$23,554.00	$14,411.38	$-	$14,411.38	0.961%
		$5,922,461.75	$23,061,941.75	$2,029,271.31	$21,032,670.44	

This report recommends that the caps on election spending under the EFED Act apply to all 'electoral expenditure' during the 'capped expenditure period' rather than just 'electoral communication expenditure'. This would more effectively advance the purposes of these caps as it would capture all election spending. Potentially up to nearly $6 million of 'electoral expenditure' during this period was not caught by the current caps – more than a quarter of the $21 million caught by the caps.

This broader approach also avoids the risks of caps distorting the spending of political parties. Under current provisions, a party coming close to its maximum might shift its election spending to items not caught by the caps - 'electoral expenditure' that is not 'electoral communication expenditure'. This is not only a regulatory loophole but one that involves the party determining the *composition* of its election spending according to election funding and spending laws rather than its campaign priorities. As noted earlier, caps on election spending should only seek to regulate the level of spending, not the composition of spending.

This broader approach also avoids the line-drawing exercises involved in determining whether an item of 'electoral expenditure' is 'electoral communication expenditure'. This, in turn, would avert all the compliance efforts that go into such exercises as well as disputes that invariably accompany such complex line-drawing.[477]

D *Period to Which the Caps Apply*

It is unclear whether the 'capped expenditure period' is an adequate period – in particular whether it is too short (or too long). Table 8 indicates that the major parties – the ALP, Liberal Party and National Party – engaged in substantial spending on 'electoral communication expenditure' prior to three-month period that was capped in the 2011 State election. Some of the 'other' electoral expenditure might also have taken place outside the 'capped regulated period'. Yet the data does not allow us to determine whether such spending occurred before the six months prior to the 2011 State election, a period that would normally be capped. As such, this report recommends that a review of the length of 'capped regulated period' should take place when the level of the caps is reviewed (see below).

---

[477] The issue of difference in opinions between the ALP and the Liberal Party as to what is caught by 'electoral communication expenditure' was noted by Sam Dastyari: see Interview with Sam Dastyari, General Secretary, NSW Labor (Sydney, 21 August 2012).

E *Political Actors the Caps Cover*

As with the third dimension, the spending limits do apply to all key political participants: not only are political parties, candidates and groups of candidates subject to the limits but so are third-party campaigners.[478]

The general rule under the EFED Act is that these limits apply separately to each candidate and political party.[479] This general rule is informed by the understanding that these limits seek to promote fairness in *electoral contests* and *amongst electoral contestants* and that for such purpose, contestants, whether as candidates or political parties, should be treated as separate entities as they should be presumed to be competing with each other.

This rule does not apply when there is clearly a co-ordinated electoral campaign between the candidate/s and the party or between parties. Hence, sections 95G(1) and 95G(2) of the Act aggregate the 'electoral communication expenditure' of 'associated parties' (parties that endorse the same candidates or form a 'recognised coalition'[480]); sections 95G(4) and 95G(5) do the same in relation to a party and the candidate/s it has endorsed for the election to the Legislative Council. When there is a co-ordinated electoral campaign, the candidate/s and the party or the parties can legitimately be treated as one for the purposes of the 'electoral communication expenditure' limits.

These provisions of the Act can be said to give rise to the following principle:

> Caps on election spending should apply separately to each political party (with no aggregation of spending from other parties, candidates or third-party campaigners) unless there is a co-ordinated electoral campaign for the purpose of New South Wales elections.

When evaluated against this principle, we find significant difficulties with how the caps on election spending under the EFED Act aggregate the spending of various political actors.

---

[478] See text above accompanying Table 2.
[479] EFED Act s 95F.
[480] This phrase is not defined by the EFED Act.

1 *Absence of Provisions relating to 'Associated Entities'*

As has been noted before, the EFED Act does not have specific provisions relating to 'associated entities'.[481] This means that an 'associated entity' of a political party is treated as a third-party campaigner with a separate cap applying to it with *no* aggregation of its spending to the political party.

This gap allows a political party to set up various associated entities – with which it engages in a co-ordinated campaign - in order to increase its maximum allowable spend. Such situations, however, are clearly ones where spending should be aggregated for the purpose of the caps on electoral expenditure; the relationship between a political party and its 'associated entities' is close enough for there to be an assumption of a co-ordinated campaign.

> *Recommendation 39*: The electoral expenditure of associated entities during the capped expenditure period should be aggregated towards the cap on electoral expenditure of the respective political party.

2 *Sections 95G(6) and 95G(7): Aggregation of Spending by Affiliated Organisations*

(a) Flawed Assumption of Co-ordinated Electoral Campaigns Between the ALP and its Affiliated Trade Unions

Sections 95G(6) and 95G(7) of the EFED Act are directed at dealing with co-ordinated election campaigns between the ALP and its affiliated trade unions. In his 2nd Reading Speech to the Bill that inserted these provisions, Premier, Barry O'Farrell said that these amendments dealt with the 'unfair loophole' where 'organisations intimately involved in the governance of a political party, even with office bearers in common, [are] campaigning on behalf of a party with no corresponding offset to the party's own ability to spend'.[482] More specifically, Deputy Premier, Andrew Stoner, identified the target of the provisions being trade unions running 'proxy campaigns' for the Australian Labor Party.[483]

---

[481] See Part XIV: Disclosure of Political Donations and Electoral Expenditure, Section A.
[482] New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 September 2011, 5432 (Barry O'Farrell, Premier).
[483] New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 October 2011, 6045 (Andrew Stoner, Deputy Premier).

While these sections are informed by a legitimate aim, they remain seriously flawed. By aggregating the expenditure of 'affiliated organisations' to the relevant party, sections 95G(6) and 95G(7) assume in the case of the Australian Labor Party ('ALP') and its affiliated trade unions that they are *always* engaged in co-ordinated electoral campaigns. This is a deeply problematic assumption – it does not hold simply because the policy views and agenda of the ALP and its affiliated trade unions do not always coincide. There are many reasons for this including divisions between the affiliated trade unions and the parliamentary wing of the ALP (due in part to their different constituencies: for the trade unions, it is their members; for the ALP, it is the voters); and the diversity of trade union movement.

Indeed, striking examples can be given of the political conflict between the ALP and its affiliated trade unions. Take, for instance, the campaign by New South Wales unions (including those affiliated to the New South Wales ALP) against then ALP Premier Morris Iemma's plan to privatise the electricity industry.[484] Consider further the campaign in the most recent State election by the New South Wales branch of the Electrical Trades Union - a union affiliated to the New South Wales ALP - to support non-ALP candidates who opposed the privatisation of the State's electricity industry.[485]

(b) Unfair Impact: Over and Under-Inclusive Scope

Sections 95G(6) and 95G(7) are also unfair in their operation. They are *over-inclusive*: 'electoral communication expenditure' spent on campaigns by trade unions affiliated to the ALP *against* the ALP would perversely count towards the ALP's spending limits. These provisions will cut deep into the political campaigns of affiliated trade unions. The spending limits under the Act apply to 'electoral communication expenditure', in essence, 'electoral expenditure' directed at electoral communication.[486] 'Electoral expenditure', in turn, is broadly defined by section 87(1) to mean:

> Expenditure for or *in connection* with promoting or opposing, directly *or indirectly*, a party or the election of a candidate or candidates *or* for the purpose of influencing, directly *or indirectly*, the voting at an election (emphasis added).

---

[484] See Michael Easson, 'How the machine ate the Labor Party', *The Australian Financial Review* (Sydney), 11 June 2010, 66.
[485] See Editorial, 'Labor leader electrocutes the Premier', *Sunday Telegraph* (Sydney), 28 November 2010, 49; Steven Scott, 'Power play reveals high ALP tension', *The Australian Financial Review* (Sydney), 30 November 2010, 16; Sean Nicholls, 'Forcing out Riordan will upset unions, retiring MP warns', *Sydney Morning Herald* (Sydney), 30 November 2010, 4.
[486] EFED Act, s 87(2).

This broad definition - in particular the italicised parts - has the effect that 'electoral communication expenditure' will capture spending on communication undertaken as part of issue-based campaigns aimed at influencing the policies of parties and candidates during the 'capped expenditure period',[487] even though such campaigns may not explicitly advocate a vote for or against a particular party or candidate.[488]

Sections 95G(6) and 95G(7) are also *under-inclusive*. They clearly fail to capture all co-ordinated electoral campaigns: they do *not* cover electoral campaigns co-ordinated between:

- a political party and its candidates, and other individuals (including those who are office-bearers in the party);
- a political party and its associated entities (see above);
- a political party and its candidates, and groups other than affiliated organisations; and
- third-party campaigners.

The false assumption upon which these sections are based together with their discriminatory scope give credence to the criticism that they unfairly target the ALP and its affiliated trade unions.

(c) Undermining Freedom of Party Association and Vitality of Party System

As discussed earlier, NSW political parties organise themselves in various ways. Such diversity of party structures should be respected because it is one of the main ways in which the pluralism of Australian politics is sustained. The freedom of political parties to choose the organisation of their party structures is also a crucial aspect of freedom of party association.[489]

These principles reveal another vice of proposed sections 95G(6) and 95G(7): by targeting 'affiliated organisations', their impact is restricted to parties with indirect structures – parties which allow membership by groups – and do not extend to direct parties. This not only

[487] This period will typically run from 1 October of the year before State elections up to the polling day: see EFED Act, s 95H.
[488] Cf New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 October 2011, 6053 (Barry O'Farrell, Premier).
[489] See Part X: Diversity of Party Organizations and Structures.

undermines freedom of party association by discriminating against a particular type of party structure but may also have the effect of undermining the vitality of Australia's party system by reducing its diversity.

(d) An Alternative Approach

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

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

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

> (6) Where—
>
> (a) during a regulated period any controlled expenditure is incurred in a particular part of the United Kingdom by or on behalf of a third party, and
>
> (b) the expenditure is so incurred in pursuance of a plan or other arrangement whereby controlled expenditure is to be incurred by or on behalf of—
>
> (i) that third party, and
>
> (ii) one or more other third parties, respectively in connection with the production or publication of election material which can reasonably be regarded as intended to achieve a common purpose falling within section 85(3), the expenditure mentioned in paragraph (a) shall be treated for the purposes of this section and Schedule 10 as having also been incurred, during the period and in the part of the United Kingdom concerned, by or on behalf of the other third party (or, as the case may be, each of the other third parties) mentioned in paragraph (b)(ii).

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

Recommendation 40: Sections 95G(6) and 95G(7) of the EFED Act should be repealed.

Recommendation 41:

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

F *The Levels at which the Caps Apply*

By applying to various political actors, the caps under the EFED Act seek not only to regulate the overall amount of spending of these particular actors but also the amount they spend in State-wide election campaigns and campaigns in particular electorates. This approach is correct as fairness in NSW elections concerns fairness in the State-wide contests as well as fairness in the contests in specific electorates – especially marginal seats.

The EFED Act seeks to regulate spending in particular electorates in two ways. The first is through the caps applying to the political parties and third-party campaigners: these groups

are subject to an overall cap on 'electoral communication expenditure' with a sub-cap for 'electoral communication expenditure incurred substantially for the purposes of the election in a particular electorate'.[490] Section 95F(13) stipulates when this sub-cap applies:

> (13) For the purposes of subsection (12), electoral communication expenditure is only incurred for the purposes of the election in a particular electorate if the expenditure is for advertising or other material that:
>
> (a) explicitly mentions the name of a candidate in the election in that electorate or the name of the electorate, and
>
> (b) is communicated to electors in that electorate, and
>
> (c) is not mainly communicated to electors outside that electorate.

The other way in which the EFED Act seeks to regulate spending in particular electorates is through caps on 'electoral communication expenditure' by candidates. Section 95I(3) prescribes when these caps are operative:

> (3) The applicable cap for a candidate or group of candidates is for electoral communication expenditure directed at the election of the candidate or group.

Concerns have been raised regarding the effectiveness of these methods of regulating electoral expenditure in particular electorates. Greg Dezman of the NSW National Party commented that the restricted scope of the sub-caps on political parties and third-party campaigners allowed these organisations to spend large amounts in particular electorates 'so long as the message is appropriately crafted'. Consequentially, according to Dezman, 'those provisions do open a huge window that can be exploited for parties to throw enormous resources into a particular seat'.[491] The NSW Greens, who support the caps, further questioned whether these was full compliance with the sub-caps and the caps applying to candidates in the last State election.[492] NSW EFA staff have observed in this respect evidence that political parties were shifting spending between these various caps in order to comply with them.[493] In addition, Sam Dastyari, General-Secretary of the NSW ALP, noted the additional compliance costs associated with complying with these different caps.[494]

---

[490] EFED Act s 95F(12).
[491] Interview with Greg Dezman, Deputy Director, NSW National Party (Sydney, 20 August 2012).
[492] Interview with Chris Maltby, Registered Officer, and Geoff Ash, Deputy Registered Officer, Greens NSW (Sydney, 16 August 2012).
[493] Interview with staff of New South Wales Election Funding Authority (Sydney, 16 August 2012).
[494] Interview with Sam Dastyari, General Secretary, NSW Labor (Sydney, 21 August 2012).

These concerns raise two issues of regulatory design. The first is whether there should be a sub-cap on political parties sitting alongside caps on spending by its endorsed candidates. This report says 'no'. There is no reason to distinguish in this context between spending by parties and their endorsed candidates in a particular electorate – they are for all intents and purposes directed at the same goal, the election of the endorsed candidate.

The report proposes abolishing the sub-cap on political parties *and* aggregating party spending for a particular electorate to the caps applying to its endorsed candidates. The advantages of this proposal are that it achieves a virtual sub-cap through its aggregation rule and avoids the opportunities for evasion and compliance costs associated with separate caps (If this recommendation is adopted, the level of the caps on party-endorsed candidates should be identical to those applying to independent candidates; the latter is currently higher as it takes into account the amount that can be spent by a party through its sub-cap).

The second issue the concerns raise is more challenging: what electoral expenditure should come within the scope of the limits applying to candidates? At one level, the answer is simple: for candidates, all of their electoral expenditure should come within limits, hence section 95I(3) should be repealed.

The difficulty arises when considering party spending; such spending may be specifically directed at the election of an endorsed candidate or more generally aimed at promoting the electoral prospects of the party. What is clear though is that the approach taken by section 95F(13) (reproduced below) is under-inclusive - it leaves out electoral expenditure that could be reasonably regarded as being specifically directed at the election of an endorsed candidate. For instance, a focused campaign by a political party in a particular electorate using advertisements that did not mention the name of candidate or name of electorate would not trigger the sub-cap applying to the political party.

In place of section 95F(13), the report recommends adopting an approach based on section 3(1) of *Electoral Act 1993* (NZ). This section defines 'candidate advertisement' as the following:

> an advertisement in any medium that may reasonably be regarded as encouraging or persuading voters to do either or both of the following:

(a) to vote or a constituency candidate (whether or not the name of the candidate is named)

(b) not to vote for a constituency candidate (whether or not the name of the candidate is stated).

This report recommends adapting the core elements of this definition for the purpose of stipulating what electoral expenditure of political parties should be treated as being incurred in a particular electorate. It also recommends that deeming the circumstances currently enumerated in section 95F(13) as falling within this definition.

Recommendation 42:

- The sub-cap applying to political parties in relation to electoral expenditure in particular electorates should be abolished; and
- The electoral expenditure of a political party for a particular electorate shall be aggregated towards the caps applying to its endorsed candidates.

Recommendation 43: Section 95I(3) of the EFED Act should be repealed.

Recommendation 44:

- Electoral expenditure of a political party and third-party campaigner shall be treated as being incurred in a particular electorate if it may reasonably be regarded as encouraging or persuading voters to do either or both of the following:
  (a) to vote for a candidate in that electorate (whether or not the name of the candidate is stated);
  (b) The disclosure obligations of ‘associated entities’ should be identical to those of political parties. The disclosure obligations of ‘associated entities’ should be identical to those of political parties.not to vote for a candidate in that electorate (whether or not the name of the candidate is stated).
- Electoral expenditure of a political party and third-party campaigner shall be treated as being incurred in a particular electorate if it:
  (a) explicitly mentions the name of a candidate in the election in that electorate or the name of the electorate; or

(b) is communicated to electors in that electorate and is not mainly communicated to electors outside that electorate.

G *The Amounts at Which the Caps are Set*

It strongly appears that that amounts at which the caps are set did not constrain the election campaigns of political parties and third-party campaigners in the last State election. A number of the third-party campaigners interviewed gave responses to this effect.[495] Their views are further substantiated by the electoral communication expenditure disclosed by third-party campaigners. Table 9 details the amount of such expenditure incurred by the top ten third-party campaigners (in terms of spending). A cap of $1.05 million applied to registered third-party campaigners; none of these groups spent even half of that amount.

[495] Interview with official of a third-party campaigner (Sydney, 22 August 2012); Interview with official of a third-party campaigner (Sydney, 21 August 2012); Interview with Rita Mallia, President, Construction, Forestry, Mining and Energy Union, NSW Branch, Construction and General Division (Sydney, 21 August 2012); Interview with Anthony D'Adam, Senior Industrial Officer, Public Service Association (Sydney, 20 August 2012); Interview with Tim Ayres, New South Wales Secretary, Australian Manufacturing Workers' Union (Sydney, 21 August 2012); Interview with Ernest Wong, Asian Friends of Labor (Telephone Interview, 21 September 2012).

Table 9: Top Ten Third-Party Campaigners in Terms of Electoral Communication Expenditure, 2011 NSW State Elections

TPC Name	**Total Electoral Communication Expenditure per Disclosure**
National Roads and Motorists Association Ltd	$387,773.09
NSW Business Chamber	$354,094.76
Unions NSW	$197,490.82
NSW Teachers Federation	$137,799.30
The Newcastle Alliance Incorporated	$61,056.29
Australian Chinese Friends of Labor	$36,700.00
Police Association of NSW	$33,967.89
Construction Forestry Mining & Energy Union C&G Northern District	$33,893.60
Carers NSW Inc	$30,937.43
Public Service Association of NSW	$29,817.22
	$1,303,530.40

Similarly, none of the main political parties found the amount at which the caps set to have hindered them in engaging in their election campaigns in the last State election.[496] Interestingly, the major parties – the ALP, Liberal Party and the National Party – seem to treat the caps not only as ceilings but also as 'targets' for the amount of spending.[497] Such an approach is consistent with the disclosed figures with these parties coming close to spending up to the maximums permitted under their party caps (see Table 8).

[496] Interview with the Honourable Reverend Fred Nile, Member of the Legislative Council, Parliament of New South Wales, State President and National President of the Christian Democratic Party (Sydney, 17 August 2012); Interview with the Honourable Robert Borsak, Member of the Legislative Council, Parliament of New South Wales and Party Agent, Shooters & Fishers Party NSW (Sydney, 21 August 2012); Interview with Sam Dastyari, General Secretary, NSW Labor (Sydney, 21 August 2012); Interview with Greg Dezman, Deputy Director, NSW National Party (Sydney, 20 August 2012); Interview with Simon McInnes, Finance Operations Director, Liberal Party of Australia (NSW Division) (Sydney, 17 August 2012); Interview with Jason Cornelius, State President, Family First NSW (Sydney, 17 August 2012); Interview with Chris Maltby, Registered Officer, and Geoff Ash, Deputy Registered Officer, Greens NSW (Sydney, 16 August 2012).

[497] Interview with Sam Dastyari, General Secretary, NSW Labor (Sydney, 21 August 2012); Interview with Simon McInnes, Finance Operations Director, Liberal Party of Australia (NSW Division) (Sydney, 17 August 2012); Interview with Greg Dezman, Deputy Director, NSW National Party (Sydney, 20 August 2012).

Does this all mean that the caps are being set at appropriate amounts? Not necessarily so. The evidence above suggests that the caps were not so low as to impact upon election campaigns in the last State election but they say nothing as to whether they were too high. Even the evidence that the caps were not too low in the last State election should be treated carefully. Under the EFED Act, the 'capped expenditure period' generally runs for six months but it only ran for half that amount of time for the last State election, the first one for which the caps applied.[498] As Greg Dezman of the NSW National Party pointed out, this means it is difficult to ascertain the ordinary impact of the caps from the last State election.[499]

As with level of the caps on political donations and the rate of public funding, this report recommends a review by JSCEM of the amounts at which the caps on election spending are set and the period to which they apply after every State election starting with the 2015 State Election. As with the other areas, this review should seek to develop a methodology for determining these aspects of the caps on election spending and be informed by a report by the NSWEC (see Recommendation 48 below).

[498] EFED Act s 95H.
[499] Interview with Greg Dezman, Deputy Director, NSW National Party (Sydney, 20 August 2012).

XVIII PUBLIC FUNDING (ELECTION CAMPAIGNS FUND, ADMINISTRATION FUND, POLICY DEVELOPMENT FUND)

A *Purposes of Public Funding Schemes*

Three purposes of the EFED Act inform its public funding schemes, purposes that these schemes advance in conjunction with other measures. Operating together with caps on political donations, public funding schemes under the EFED Act firstly seek to protect the integrity of representative government by reducing reliance on private funding and in doing so lessen the risk of corruption and undue influence. Second, the schemes seek to promote fairness in politics, in particular fair elections, by 'leveling up' the playing field: they aim to ensure that serious parties and candidates can mount meaningful election campaigns, and that there is open access to contesting elections with the dominant parties not enjoying undue advantages (Caps on electoral expenditure, on the other hand, seek to promote the goal of fairness by 'leveling down' – that is by lessening the unfairness that comes from disproportionate spending). Thirdly, public funding schemes support political parties in discharging their democratic functions; a goal – it should be stressed – that is not restricted to the electoral function of political parties.

The following sections will outline the three public funding schemes under the EFED Act: the Election Campaigns Fund;[500] the Administration Fund[501] and the Policy Development Fund. It will then evaluate these schemes according to the purposes of public funding schemes. Such evaluation will assess the three key dimensions of these schemes:

- eligibility for public funding;
- criteria for calculating amount of public funding; and
- level of maximum amounts of public funding.

[500] EFED Act s 56.
[501] Ibid s 97D.

B *Public Funding Schemes under EFED Act*

1 *Election Campaigns Fund*

(a) Political Parties

A registered party is eligible for payments from this Fund when at least one of its endorsed candidates is elected in the relevant State election or when its endorsed candidates receive at least 4% of the total number of first preference votes in that election.[502]

Payments from this Fund are made after each election with the amount of funding provided to eligible parties reimbursing these parties for the money they spent on 'actual expenditure', that is the total amount of 'electoral communication expenditure' incurred.[503] This reimbursement system operates according to a sliding scale that ties the amount of reimbursement to the expenditure caps that applies to the party. Different scales apply according whether the party is an eligible Assembly party or an eligible Council party[504] (see Tables 10-11).

Table 10: Election Campaigns Fund: Reimbursement Scale for Eligible Assembly Parties

Actual expenditure as % of the applicable cap	Funds from Elections Campaigns Fund - Eligible Assembly Party
0-10%	100% of actual expenditure
10-90%	75% of actual expenditure
90-100%	50% of actual expenditure

Source: EFED Act s 58(2)

[502] Ibid s 56.
[503] Ibid s 58(1).
[504] An 'eligible Council party' is a party eligible for payment from the Election Campaigns Fund that did not endorse any candidates for election in the New South Wales Assembly or endorsed candidates in not more than 10 electorates: EFED Act s 58(1). An 'eligible Assembly party' is a party eligible for payment from the Election Campaigns Fund that is not an 'eligible Council party': ibid.

Table 11: Election Campaigns Fund: Reimbursement Scale for Eligible Council Parties

Actual expenditure as % of the applicable cap	Funds from Elections Campaigns Fund – Eligible Council Party
0-33.3%	100% of actual expenditure
33.3-66.7%	75% of actual expenditure
33.3-100%	50% of actual expenditure

Source: EFED Act s 58(2)[505]

Table 12 details the payments made from the Election Campaigns Fund to the main parties made in relation to the 2011 State election.

Table 12: Payments from Election Campaigns Fund to Main Parties for 2011 NSW State Election

	Amount	**% of all ECF payments**
ALP	$6,492,928.31	31.11%
Liberal Party	$4,737,567.12	22.70%
National Party	$1,420,162.74	6.80%
Greens	$1,025,327.70	4.91%
Christian Democratic Party	$286,374.04	1.37%
Shooters & Fishers Party	$654,232.99	3.13%
Family First	Nil – not eligible	Nil
TOTAL	**$14,616,592.90**	**70.02%**

Source: Figures supplied by NSWEC

[505] There is a drafting error in the percentages of the caps on electoral communication specified in relation to actual expenditure that is reimbursed to the amount of 50% of the actual expenditure.

(b) Candidates

In essence, a candidate who has secured at least 4% of the total first preference votes in the election s/he contested is eligible for payments from the Election Campaigns Fund.[506] As with the amount of funding provided to eligible parties from the Election Campaigns Fund, eligible candidates are reimbursed for the money they spent on 'actual expenditure' – the total amount of 'electoral communication expenditure' incurred.[507] Sliding scales tied to the applicable cap on 'electoral communication expenditure' determine the amount of payment with the scales varying according to whether the eligible candidate is an eligible Assembly party candidate, eligible Assembly independent candidate or an eligible Council candidate[508] (see Tables 13-15).

Table 13: Election Campaigns Fund: Reimbursement Scale for Eligible Assembly Party Candidates

Actual expenditure as % of the applicable cap	Funds from Elections Campaigns Fund - Eligible Assembly party candidate
0-10%	100% of actual expenditure
10-50%	50% of actual expenditure

Source: EFED Act s 60(2)

Table 14: Election Campaigns Fund: Reimbursement Scale for Eligible Assembly Independent Candidates

Actual expenditure as % of the applicable cap	Funds from Elections Campaigns Fund - Eligible Assembly independent candidate
0-10%	100% of actual expenditure
10-80%	50% of actual expenditure

Source: EFED Act s 60(2)

[506] EFED Act s 58(1).
[507] Ibid s 58(1).
[508] An 'eligible Assembly party candidate' is an eligible candidate who was endorsed by a party whereas an 'eligible Assembly independent candidate' is an eligible candidate who was not endorsed by a party: EFED Act s 60(1). An 'eligible Council candidate' is an eligible candidate at a periodic Council election: ibid.

Table 15: Election Campaigns Fund: Reimbursement Scale for Eligible Council Candidates

Actual expenditure as % of the applicable cap	Funds from Elections Campaigns Fund - Eligible Council candidate
0-33.3%	100% of actual expenditure
33.3-66.7%	75% of actual expenditure
33.3-100%	50% of actual expenditure

Source: EFED Act s 60(2)[509]

2 *Administration Fund*

Payments from this Fund are made annually to eligible parties and independent members of the New South Wales Parliament. Political parties are eligible if they have elected members in the New South Wales Parliament[510] with these payments reimbursing these parties for 'administrative expenditure'[511] incurred by or on behalf of the parties in that calendar year with a maximum of $83 000 (indexed) per elected member of the party or $2 073 100 (indexed) per party (whichever is the lesser).[512] Independent members of the New South Wales Parliament, that is elected members not endorsed by any party, are entitled to have an amount to reimburse the 'administrative expenditure'[513] incurred by or on behalf of the member in that calendar year with a cap of $83 000 (indexed).[514]

Section 97B of the EFED Act defines 'administrative expenditure':

> **97B Administrative expenditure—payments from Administration Fund**
>
> (1) For the purposes of Division 2, a reference to administrative expenditure is a reference to expenditure for administrative and operating expenses and:
>
> (a) includes a reference to the following:

[509] There is a drafting error in the percentages of the caps on electoral communication specified in relation to actual expenditure that is reimbursed to the amount of 50% of the actual expenditure.
[510] EFED Act s 97E(2).
[511] 'Administrative expenditure' is defined by section 97B(1) of the EFED Act.
[512] EFED Act ss 97E(3), 97E(5). For current amounts, see Election Funding Authority of New South Wales, *Fact Sheet: Administration Fund and Policy Development Fund* <http://efa nsw.gov.au/__data/assets/pdf_file/0004/93271/Fact_Sheet_Administration_and_Policy_Dev_funds_V3.pdf>.
[513] 'Administrative expenditure' is defined by section 97B(1) of the EFED Act.
[514] EFED Act ss 97F(3)-(4).

(i) expenditure for the administration or management of the activities of the eligible party or elected member,

(ii) expenditure for conferences, seminars, meetings or similar functions at which the policies of the eligible party or elected member are discussed or formulated,

(iii) expenditure on providing information to the public or a section of the public about the eligible party or elected member,

(iv) expenditure on providing information to members and supporters of the eligible party or elected member,

(v) expenditure in respect of the audit of the financial accounts of, or claims for payment or disclosures under this Act of, the eligible party or elected member,

(vi) expenditure on the remuneration of staff engaged in the above activities for the eligible party or elected member (being the proportion of that remuneration that relates to the time spent on those activities),

(vii) expenditure on equipment or vehicles used for the purposes of the above activities (being the proportion of the cost of their acquisition and operation that relates to the use of the equipment or vehicles for those activities),

(viii) expenditure on office accommodation for the above staff and equipment,

(ix) expenditure on interest payments on loans, but

(b) does not include a reference to the following:

(i) electoral expenditure,

(ii) expenditure for which a member may claim a parliamentary allowance as a member,

(iii) expenditure incurred substantially in respect of operations or activities that relate to the election of members to a Parliament other than the New South Wales Parliament,

(iv) expenditure prescribed by the regulations.

(2) The decision of the Authority as to whether any expenditure is or is not administrative expenditure in accordance with this Act, the regulations and the guidelines determined under section 24 is final. The Auditor-General or an auditor is, for the purposes of this Act, entitled to rely on any such decision of the Authority.

Table 16 details the payments made from the Administration Fund to the main parties for the period 2010/2011 to 2011/2012.

Table 16: Payments Made from the Administration Fund to the Main Parties for the Period 2010/2011 to 2011/2012

Party	Amount
ALP	$3 311 486
Liberal Party	$3 489 407
National Party	$2 882 671
Greens	$483 872
CDP	$166 000
Shooters & Fishers Party	$166 000
Family First	Nil – not eligible
TOTAL	**$10 499 436**

Source: Figures supplied by NSWEC

3 *Policy Development Fund*

This fund provides annual payments to political parties that are not eligible for payments from the Administration Fund.[515] These parties are eligible for payments from the Policy Development Fund if they are registered and have been so for at least 12 months on the date on which the entitlement to payments from this Fund is determined, and have satisfied the Authority that they are genuine political parties.[516]

Eligible parties are entitled to annual payments to reimburse the 'policy development expenditure' incurred by or on their behalf in the relevant calendar year. These payments, however, cannot exceed the maximum for the party[517] which is the amount of $0.26 (indexed) for each first preference vote received by candidates endorsed by the party at the previous State election.[518] For parties registered when the Fund commenced operation in 1 January 2011, their maximum amount is also subject to a floor of $5 200 (indexed) until 1 January 2019.[519]

Section 97C of the Act defines 'policy development expenditure':

> **97C Policy development expenditure—payments from Policy Development Fund**
>
> (1) For the purposes of Division 3, a reference to policy development expenditure:
>
> (a) includes a reference to the following:
>
> (i) expenditure for providing information to the public or a section of the public about the eligible party,
>
> (ii) expenditure for conferences, seminars, meetings or similar functions at which the policies of the eligible party are discussed or formulated,
>
> (iii) expenditure on providing information to members and supporters of the eligible party,
>
> (iv) expenditure in respect of the audit of the financial accounts of, or claims for payment or disclosures under this Act of, the eligible

[515] Ibid s 97I(1).
[516] Ibid s 97I(2).
[517] Ibid s 97I(3).
[518] Ibid ss 97I(4), 97I(6). For current rates of payment, see Election Funding Authority of New South Wales, above n512.
[519] EFED Act s 97I(5)(a).

party,

(v) expenditure on the remuneration of staff engaged in the above activities for the eligible party (being the proportion of that remuneration that relates to the time spent on those activities),

(vi) expenditure on equipment or vehicles used for the purposes of the above activities (being the proportion of the cost of their acquisition and operation that relates to the use of the equipment or vehicles for those activities),

(vii) expenditure on office accommodation for the above staff and equipment,

(viii) expenditure on interest payments on loans, but

(b) does not include a reference to the following:

(i) electoral expenditure,

(ii) expenditure incurred substantially in respect of activities that relate to the election of members to a Parliament other than the New South Wales Parliament,

(iii) expenditure prescribed by the regulations.

(2) The decision of the Authority as to whether any expenditure is or is not policy development expenditure in accordance with this Act, the regulations and the guidelines determined under section 24 is final. The Auditor-General or an auditor is, for the purposes of this Act, entitled to rely on any such decision of the Authority.

Table 17 details the top five parties eligible for payments from the Policy Development Fund in terms of their maximum entitlement and the amounts they claimed and were paid in 2011/2012.

Table 17: Top Five Parties Eligible for Payments from the Policy Development Fund, 2011/2012

Eligible party	Maximum entitlement	Amount claimed in reporting period	Amount paid in reporting period
Family First	$20,336.16	$0	$0
Fishing Party	$15,492.88	$0	$0
No Parking Metres Party	$12,851.54	$0	$0
Outdoor Recreation Party	$9,369.88	$3,029.14	$0
Save Our State	$5,200.00	$5,200.00	$5,200.00

Source: Figures supplied by NSWEC

C *Eligibility for Public Funding*

Two purposes of public funding schemes are crucial here: supporting political parties to discharge their democratic functions, and promoting fairness in politics, in particular fair elections (by 'leveling up' the playing field by ensuring that serious parties and candidates can mount meaningful election campaigns, and that there is open access to contesting elections with the dominant parties not enjoying undue advantages).

Three different eligibility criteria currently exist under the EFED Act. Under the Election Campaigns Fund, the criterion is 4% of first preference votes (or the election of a candidate). Under the Administration Fund, the criterion is a member of Parliament. Political parties are eligible for payments from the Policy Development Fund if they are not eligible for payments from the Administration [Fund] *and* are genuine parties and have been registered for at least 12 months (with no requirement as to the number votes received).

These various ways are not unreasonable in light of the purposes of public funding schemes. First preference votes and the number of parliamentarians are based - in different ways - on voter support, a reliable criterion for determining whether a party or candidate is 'serious' (therefore, deserving of public funding). The eligibility criteria in relation to the Policy Development Fund are not based on voter support but that is appropriate as this scheme

functions as a type of 'start up' fund for newer political parties (in order to promote open contest in elections).

While appropriate for candidates, the threshold of 4% of first preference votes is too high for political parties as it might exclude parties that enjoy considerable voter support. A party (or group of candidates) should be eligible for the payments from the Election Campaigns Fund if it secures at least 2% of first preference votes cast as a whole for Legislative Assembly elections; or at least 2% of first preference votes cast in Legislative Council elections.

The criticism of an excessive threshold also applies to the requirement of having a member of Parliament for entitlement to payments from the Administration Fund. This criterion of eligibility should be replaced with the eligibility criteria based on first preference votes, as recommended above. It might, however, be argued that this is inappropriate as the Administration Fund is clearly designed to only support parliamentary parties, that is political parties that have parliamentary representation. These parties, as the argument goes, are deserving of public funding superior to that provided to non-parliamentary parties because of the greater role they play in New South Wales politics.

It is true that parliamentary parties perform a greater role than non-parliamentary parties; in particular, they perform a governance function through their involvement in the legislative process and the process of holding the executive accountable. This greater role is, however, recognised through the provision to parliamentarians of a range of benefits under the *Parliamentary Remuneration Act 1989* (NSW). That is, parliamentary parties are *already* provided greater public support through parliamentary entitlements. There is then no compelling case for preferential funding arrangements through the EFED Act.

D *Criteria for Calculating Amount of Public Funding*

There are two structural features of the public funding schemes under the EFED Act that determine the amount of funding provided to a party or candidate. These schemes are, firstly, reimbursement schemes: 'electoral communication expenditure' is reimbursed through payments from the Election Campaigns Fund; 'administrative expenditure is reimbursed through payments from the Administration Fund; 'policy development expenditure' is reimbursed through payments from the Policy Development Fund. The purpose of this feature

is to ensure that public funding is used for particular purposes and, in the case of political parties, devoted to the discharge of their democratic functions.

Second, the schemes stipulate various maximums as to the amount of reimbursement. Under the Election Campaigns Fund, the maximums are set by sliding scales tied to caps on 'electoral communication expenditure'. With the Administration Fund, the maximums are determined according to the number of parliamentarians while the maximums under the Policy Development Fund are determined according to the first preference votes received by the eligible party.

Both these structural features have deficiencies. A system of public funding based on reimbursement imposes significant compliance costs (including lengthier processing times) as eligible parties and candidates have to provide proof of spending, proof necessitate by a reimbursement system. Such a system can be contrasted with a public funding scheme that is based on entitlement determined by the number of 1st preference votes received (as exists under Commonwealth and various State and Territory election funding and spending laws).

This report recommends that such an entitlement scheme be enacted in relation to the Election Campaigns Fund. In the overwhelming majority of situations, there is no need here for mechanisms to ensure that parties and candidates in receipt of payments from this Fund spend this money on 'electoral communication expenditure' (or 'electoral expenditure') as they can be confidently presumed to do so - their primary goal is to influence elections by engaging in election campaigns.

Such an entitlement scheme raises concerns about 'profiteering', situations where a party receives public funding in excess of its campaign spending in relation to a particular election.[520] This is a risk that invariably arises under an entitlement scheme that is not tied to reimbursement. It is, however, a risk that should be kept in perspective. Parties and candidates will generally spend *more* than what they receive in election campaign funding so the cases of 'profiteering' tend to be exceptional; moreover, the 'profits' made by a party is likely to be

[520] See, for example, Commonwealth Joint Standing Committee on Electoral Matters, *Advisory Report on the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008* (2008) 14.

channeled into the party's activities; and lastly, the costs of such limited 'profiteering' is outweighed by the compliance costs of a reimbursement system.

A different situation applies to spending on 'administrative expenditure' and 'policy development expenditure'; here mechanisms are needed to ensure that public funding is spent on these items. These mechanisms, however, do not have to take the form of a reimbursement scheme. This report recommends that these mechanisms be put in place through internal systems to ensure that payments from the Administration Fund and Policy Development are properly spent. As will be discussed below, having such internal systems will be a condition of receiving such funding due to the requirement of Candidate and Party Compliance Policies.[521] The benefits of this method are that it ensures that parties and candidates put in place such systems (which they should have in any event) and avoids the compliance costs of the reimbursement system.

There are also deficiencies in relation to how the public funding schemes under the EFED Act sets the maximums for reimbursement. The maximums under the Election Campaigns Fund are most problematic: being based on the amount of spending, they are clearly not based on any criteria of fairness; moreover, they seem to be encouraging spending dictated more by the availability of public funding rather than by campaign objectives.[522] As to the maximums under the Administration Fund which are based on the number of parliamentarians, they are not as precise a reflection of voter support as the number of first preference votes received.

This report recommends that the maximums for all three schemes be based on the number of first preference votes received (as with the Policy Development Fund). In addition, the number of party members should also be a factor in determining the maximums under the Administration Fund and the Policy Development Fund. This is for two reasons: the administrative costs of a party increases with the number of members; and having this as a factor may also encourage parties to recruit more party members (thereby more fully discharging their participatory function).

---

[521] See Part XIX: Compliance, Section B.
[522] Interview with Chris Maltby, Registered Officer, and Geoff Ash, Deputy Registered Officer, Greens NSW (Sydney, 16 August 2012); Interview with Simon McInnes, Finance Operations Director, Liberal Party of Australia (NSW Division) (Sydney, 17 August 2012).

One objection to replacing maximums under the Election Campaigns Fund with ones based on number of 1st preference votes is that it lessens the certainty of the amount of public funding.[523] Two responses can be given to this. Maximums based on first preference votes still provide some degree of certainty as the main parties have some degree of stability in terms of their voter support. Further, the value of certainty under the current arrangements is outweighed by the current arrangements' costs: its lack of fairness and contribution to (unnecessary) campaign spending.

E *Level of Maximum Amounts of Public Funding*

The levels of the maximums are set in different ways under the three public funding schemes. Under the Election Campaigns Funding, the level varies according to whether an eligible party or an eligible candidate is being considered. With the Administration Fund, the current maximums are $83 000 per parliamentarian with a ceiling of $2 073 100 for a party; the maximum level under the Policy Development Fund is $0.26 per first preference vote received by an eligible party.

The different methods of setting maximums have significant limitations. Basing the maximums on number of parliamentarians (under the Administration Fund) is not as fair as relying upon the number of first preference votes. Further, there is no justification for different maximums applying to candidates and parties under the Election Campaigns Fund (or more generally). These differential ceilings have given rise to efforts on to classify spending as particular kind in order to maximise the amount of public funding[524] - such 'game-playing' is undesirable.

This report recommends the level of the maximums being based on the number of first preference votes received with a tapered scale. As argued in the author's 2010 report, *Towards a More Democratic Political Finance Regime in New South Wales:*

> The amount of payments should be subject to a tapered scheme with the payment rate per vote decreasing according to the number of first preference votes received. For instance,

---

[523] This aspect of the payments from the Election Campaigns Fund was expressly mentioned by Chris Maltby and Geoff Ash (Interview with Chris Maltby, Registered Officer, and Geoff Ash, Deputy Registered Officer, Greens NSW (Sydney, 16 August 2012)) and Greg Dezman (Interview with Greg Dezman, Deputy Director, NSW National Party (Sydney, 20 August 2012)).

[524] This was noted by Simon McInnes: Interview with Simon McInnes, Finance Operations Director, Liberal Party of Australia (NSW Division) (Sydney, 17 August 2012).

> the first 5% of first preference votes received by a party could entitle it to a payment of $2.00 per vote, while a payment rate of $1.50 per vote could be applied to the next 20% of first preference votes and a payment rate of $1.00 per vote attached to votes received beyond the 25% mark.[525]

The virtue of this recommended system is that it promotes open contests in elections by providing proportionately more funding per vote to smaller parties. It also deals with the disproportionate compliance burden that falls on these parties. For these parties, their limited resources and personnel is likely to give rise to greater difficulty in compliance when compared to the larger, more established parties.

It is important for this disproportionate impact to be addressed so as to ensure that NSW election funding and spending laws do not contribute to barriers to participating in politics and elections. This report recommends several measures in this respect. The first being the repeal of provisions that tend to have a more significant impact on smaller parties – like the restriction of political donations to those on the electoral rolls. It also recommends (below) that the NSWEC engage in efforts specifically targeted at smaller parties.[526] A system of public funding that provides a higher rate of payments to smaller parties, as recommended here, will also deal with this disproportionate compliance burden.

It remains to ask: are the levels of these maximums adequate? This question has heightened significance given JSCEM's current inquiry into Administration Funding for minor parties.[527] Both the Christian Democratic Party and Shooters and Fishers Party have in their submissions to this inquiry argued for an increased rate of payment for minor parties.[528]

The view taken by this report that a review of the level of public funding payments should take place in comprehensive manner: it should include all political parties and candidates (not

---

[525] Tham, above n 324, 74.
[526] See Part XIX: Compliance, Section A.
[527] See Joint Standing Committee on Electoral Matters, *Administrative funding for minor parties (inquiry)* NSW Parliament <http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/A0350004FFD18042CA257A1D00015F2B?open&refnavid=CO3_1>.
[528] See Shooters and Fishers Party, Submission No 1 to Joint Standing Committee on Electoral Matters, *Administrative Funding for Minor Parties*, 31 July 2012; Christian Democratic Party, Submission No 2 to Joint Standing Committee on Electoral Matters, *Administrative Funding for Minor Parties*, 6 August 2012.

just minor parties) and should take into account the impact of restrictions on political donations and electoral expenditure. As the level of the caps on political donations and electoral expenditure, this report recommends that a review be conducted by JSCEM of the level of public funding payments after every State election beginning from the 2014 State Elections with a view of developing a methodology for determining the appropriate level of public funding. This review should be aided by a report from the NSWEC.

F *Reforming The Public Funding Schemes under the EFED Act*

Drawing upon the preceding analysis, this report makes the following recommendations.

Recommendation 45: Payments under the Election Campaigns Fund should have:

- The following eligibility criteria:
    - for candidates, at least 4% of first preference votes received;
    - for political parties, at least 2% of first preference votes cast as a whole for Legislative Assembly elections; or at least 2% of first preference votes cast in Legislative Council elections;
- The amount of payments should be based on the number of first preference votes received under a tapered scheme – these amounts should be provided by way of an entitlement.

Recommendation 46: Payments under the Administration Fund should have:

- The following eligibility criteria:
    - for candidates, at least 4% of first preference votes received;
    - for political parties, at least 2% of first preference votes cast as a whole for Legislative Assembly elections; or at least 2% of first preference votes cast in Legislative Council elections;
- A condition of receipt of payments are internal systems to ensure that these payments are directed at 'administration expenditure' – this condition should be effected through Candidate and Party Compliance Policies;
- The maximum amounts of payments should be based on the number of first preference votes received under a tapered scheme and the number of party members.

Recommendation 47: Payments under the Policy Development Fund should have:

- the current eligibility criteria;

- A condition of receipt of payments is internal systems that ensure these payments are directed at 'policy development expenditure' – this condition should be effected through Candidate and Party Compliance Policies;
- The maximum amounts based on first preference votes (no need for a tapered scheme as payments are only available to parties not eligible for the Administration Fund).

Recommendation 48:

- The NSW Joint Standing Committee on Electoral Matters shall conduct a review of the level of public funding, the level of the caps on political donations, and the level of the caps on election spending and the period to which they apply, after every State election beginning with the 2014 State election;
- This review shall seek to develop a methodology for determining the appropriate levels of public funding and caps;
- It shall be informed by a report by the NSW Electoral Commission.

XIX COMPLIANCE

There is no doubting the following observation made by the Commonwealth Joint Standing Committee on Electoral Matters:

> Compliance and enforcement of political financing arrangements is central to the effectiveness of the overall scheme.[529]

The goal of securing compliance with NSW election funding and spending laws is also central to the functions of the NSWEC. Most importantly, it is a vital aspect of its function in administering these laws – effective administration of these laws clearly requires compliance by political parties, elected members, candidates, groups of candidates and third-party campaigners. The goal of securing compliance with these laws is also an aim of other functions of the NSWEC: the provision of education and information regarding these laws to stake-holders has this aim; the exercise of law-making functions as specified by such laws is also strongly animated by such an aim. It follows from all this that NSW election funding and spending laws should be, in the words of the NSW Electoral Commissioner, 'compliance-oriented'[530] and should secure 'high levels of compliance'.[531]

This report proposes an integrated suite of compliance measures comprising the following elements:

- Measures to promote voluntary compliance;
- Candidate and Party Compliance Policies;
- Compliance Agreements;
- Audit requirements;
- Investigative powers; and
- Penalty regime comprising of criminal, civil and administrative penalties.

---

[529] Joint Standing Committee on Electoral Matters, above n345, 177.
[530] Submission of NSW Electoral Commissioner, above n11, 73.
[531] Interview with Colin Barry, New South Wales Electoral Commissioner (Sydney, 22 August 2012).Other Commissioner expressed similar views. The Western Australian Electoral Commissioner considered 'effective enforcement' to be a key goal of election funding and spending laws: Interview with Warwick Gately, Western Australian Electoral Commissioner (Telephone Interview, 5 September 2012), while the Queensland Electoral Commissioner emphasised the need for 'strong compliance': Interview with David Kerslake, Queensland Electoral Commissioner (Telephone Interview, 6 September 2012).

Four significant features of this suite warrant emphasis. First, the suite provides a flexible range of compliance tools with 'soft' measures (e.g. efforts to promote voluntary compliance), 'moderate' measures (e.g. administrative penalties) and 'hard' (e.g. civil penalties and criminal offences);[532] as well as measures directed at pro-active compliance (securing compliance prior to breaches occurring)[533] and measures that apply when a (suspected) breach has occurred, so-called ex post facto or retrospective measures. This range allows for a judicious selection of compliance strategies.

Second, there is an increased emphasis on pro-active compliance. There is much truth in the sentiments expressed by the NSW Electoral Commissioner when he said: '(t)he stick often doesn't work because it's looking backwards, what we should be using is more of the carrot'.[534]

Third, this increased emphasis on pro-active compliance involves tying public funding to compliance with NSW election funding and spending laws. This is deeply congruent with the purposes of public funding in New South Wales. As Professor George Williams put it:

> (w)here a political party receives public funding, extra compliance mechanisms (should be) introduced in terms of democratic accountability as part of the role of political parties and the transparency that goes with their accounts . . .if the public is really going to be forking out the money in any significant way, then political parties need to bear higher responsibilities that go with that.[535]

A key recommendation here is that Candidate and Party Compliance Policies should be introduced as part of the system of public funding. If used effectively, this regulatory device would more effectively provide for internal party systems aimed at compliance with laws regulating election funding and spending.

Fourth, with ex post facto / retrospective compliance measures, the report recommends increased reliance on civil penalty provisions with the accompanying powers to recover being conferred on the NSWEC.

---

[532] Correspondence with staff of Queensland Electoral Commission, 7 September 2012.
[533] For discussion, see Joint Standing Committee on Electoral Matters, above n345, 192-193.
[534] Interview with Colin Barry, New South Wales Electoral Commissioner (Sydney, 22 August 2012).
[535] Professor George Williams cited in Joint Standing Committee on Electoral Matters, above n2, 258.

The area of compliance is one where the NSWEC – rightly – enjoys significant discretion.[536] If the recommendations of the report are adopted, it will have legislative powers with its guidelines being able to determine a range of matters including audit requirements and the rules governing the approval of Party Compliance Policies. It will also have discretion in determining whether or not to rely on a particular compliance measure as well as discretion *amongst* the range of compliance tools.

In the exercise of such power, the NSWEC should scrupulously adhere to its guiding principles of independence, accountability, impartiality and fairness. In all likelihood, meeting these principles becomes more challenging with increased power and discretion.[537]

Structural mechanisms are vital in meeting this challenge. The recommendations made by the report to buttress the independence of the NSWEC are important in providing an assurance that the NSWEC is an agency that can be trusted to exercise these powers impartially and fairly.[538] The enhanced accountability mechanisms applying to the guidelines of the Commission also aid in this respect.[539]

The principle of impartiality and fairness is also of importance. In this context, it means according procedural fairness and natural justice to those subject to the compliance powers of the Commission.[540] It also involves the respect of fundamental principles of the criminal justice system including the presumption of innocence. The compliance powers of the NSWEC should also be accompanied by adequate review mechanisms. As seen below, the report recommends the establishment of a system of internal review in relation to the Commission's investigative powers[541] and the availability of judicial review in relation to its powers to recover.[542]

These measures to ensure the impartiality and fairness will, of course, limit the effectiveness of the enforcement efforts of Commission in some situations; any system of checks and balances invariably has this effect. But this is rightly so. A compliance regime should be

---

[536] See Part IV: The Central Objects of Election Funding and Spending Laws in New South Wales.
[537] Interview with Phil Green, ACT Electoral Commissioner (Telephone Interview, 5 September 2012).
[538] See Part V: A Single Electoral Commission: Key Functions and Guiding Principles, Section B(2).
[539] See Part VI: Principles-based Legislation in Administration and Securing Compliance, Section C.
[540] See Part V: A Single Electoral Commission: Key Functions and Guiding Principles, Section B(2).
[541] See Part XIX: Compliance, Section E.
[542] See Part XIX: Compliance, Section F.

devised not only with regard to the aim of securing effective enforcement but also other principles, particularly that of fairness. Effective enforcement is not the sole logic that operates in this area.

In any event, the tension between effective enforcement and the principle of impartiality and fairness should not be over-played. In many cases, measures to ensure fairness *enhance* the effectiveness of enforcement. Appropriate review mechanisms, for instance, should ideally produce better decision-making on the part of the Commission in the long run by ensuring that its compliance powers are properly exercised.

As with all its functions, the NSWEC should undertake its compliance activity in pursuit of the four central objectives of the legislation.[543] Of note is the objective of respecting political freedoms. An important way in which such freedoms are exercised is through individuals volunteering to support political parties, candidates and third-party campaigners. This implies that the NSWEC should perform its compliance functions in a way that does not unreasonably impact upon such efforts. This requires sensitivity to the compliance costs it imposes and efforts to ensure that such costs are fully justified and do not unduly affect political activity.[544]

Another aspect of this objective worth noting is respect for freedom of party association. As discussed earlier, respect for such freedom implies respect for diverse party structures,[545] a matter that should be taken into account by the NSWEC especially in relation to its approval of Party Compliance Policies.

A *Measures to Promote Voluntary Compliance*

Voluntary compliance is essential to ensuring effective laws regulating election funding and spending. In a society that respects freedom, it is to be preferred over coerced conduct. Resource constraints also mean that coercive measures cannot be generally – or even mostly – utilised. Widespread voluntary compliance, moreover, signals that there is a culture of complying with election funding and spending laws. This arguably is the ultimate test of the success of these laws. In his foreword to the NSW JSCEM's report, *Public Funding of*

---

[543] See Part VI: Principles-based Legislation in Administration and Securing Compliance.
[544] See discussion in Joint Standing Committee on Electoral Matters, above n2, 255-256.
[545] See Part X: Diversity of Party Organizations and Structures.

Election Campaigns, Robert Furolo MP, then chair of the committee, noted that: (w)hatever changes to the system of donations and funding that occurs in NSW arising from this report, [if] it results in a change of culture . . . it will have been a success'.[546]

For these reasons, there is much truth to the NSW Electoral Commissioner's observation that 'when we have to prosecute people it's almost we are putting the flag up to say we failed - we failed to convince those people to do the right thing'.[547] As such, the NSWEC – like any other agency administering election funding and spending laws - should have 'a very strong focus on promoting voluntary compliance'.[548]

There are three sets of measures that can used to promote voluntary compliance. The first are those aimed at promoting public scrutiny. Public scrutiny is a powerful incentive for voluntary compliance, with non-compliance attracting the prospect of adverse publicity. The NSWEC has an important role here through enhancing the transparency and accessibility of the disclosure scheme.[549]

The second element is the provision of education and information. This can be effective in building the compliance-capabilities of political parties, elected members, candidates, groups of candidates and third-party campaigners. There is a distinction here between providing information and education. As explained by the NSW Electoral Commissioner, information is currently provided by the EFA through its website, information sheets and advertisements. Education, on the other hand, involves providing structured training to those responsible for complying with the legislation and assessing their level of knowledge and capability.[550] Such a process is currently undertaken to a limited extent by the EFA through the requirement that a person complete training prescribed by regulations as a condition of eligibility for being an agent.[551] It was the view of the NSW Electoral Commissioner that more by way of education could be undertaken by the EFA.

The final element in promoting voluntary compliance comprises measures facilitating compliance (or improving the ease of compliance). These measures include the use of

---

[546] Joint Standing Committee on Electoral Matters, above n2, viii.
[547] Interview with Colin Barry, New South Wales Electoral Commissioner (Sydney, 22 August 2012).
[548] Interview with Ed Killesteyn, Australian Electoral Commissioner (Melbourne, 4 September 2012).
[549] See Part XIV: Disclosure of Political Donations and Electoral Expenditure Section B(4).
[550] Interview with Colin Barry, New South Wales Electoral Commissioner (Sydney, 22 August 2012).
[551] EFED Act s 27(1)(e).

information technology to allow easier lodgment of declarations (e.g. the use of electronic returns) and faster completion of declarations (e.g. electronic forms allowing auto-population).[552]

With the last two types of measures, there is much to be said here for dedicated measures to particular groups: third-party campaigners, volunteers of political parties and smaller parties. Unlike political parties, third-party campaigners are not wholly political (or electoral) organisations.[553] Some third-party campaigners – especially smaller organisations – will not have the established capacity to comply with NSW election funding and spending laws. This in turn may result in these laws discouraging political participation by some of these groups. One important way to avoid this effect is to ensure that the provisions applying to third-party campaigners are easy to comply with, for instance, by having simpler definitions of 'political donations' and 'electoral expenditure'.[554] Another effective way is to have the NSWEC engage in efforts to facilitate compliance by these organisations.

Finally, volunteering in political parties is an important exercise of political freedoms, specifically freedom of association. While not paid, volunteers perform a central role in Australian political parties, including being involved in ensuring these parties comply with laws. It is fair to say, however, that most volunteers participate in political parties in order to advance the policies and platform of these parties with compliance activity being incidental to such participation. It is important then that what is incidental not overshadow the 'core' business of their party participation. One effective way to do this is for the NSWEC to adopt measures that facilitate compliance by volunteers.

As with smaller parties, their limited resources and personnel is likely to give rise to greater difficulty in compliance when compared to the larger, more established parties. It is important for this disproportionate impact to be addressed so as to ensure that NSW election funding and spending laws do not contribute to barriers to participating in politics and elections. As noted earlier, this report recommends several measures in this respect. The first is the repeal of provisions that invariably have a more significant impact on smaller parties. The second is

---

[552] Interview with Ed Killesteyn, Australian Electoral Commissioner (Melbourne, 4 September 2012).
[553] See Part XI: Differences between Political Parties and Third-party Campaigners.
[554] See Part XIV: Disclosure of Political Donations and Electoral Expenditure, Section B; Part XV: Caps on Political Donations, Section B.

a system of public funding that provides a higher rate of payments to smaller parties.[555] Efforts by the NSWEC specifically targeted to smaller parties should also complement these measures.

B *Candidate and Party Compliance Policies*

The EFED Act currently provides for an extremely limited nexus between eligibility conditions for public funding and obligations imposed under the Act: parties and candidates that have not lodged the requisite declaration and/or annual financial statement are not eligible for payments from the Election Campaigns Fund,[556] the Administration Fund or the Policy Development Fund.[557]

The report proposes more significant set of conditions being imposed on public funding of political parties through a scheme of Candidate and Party Compliance Policies. The key elements of this scheme are as follows:

- A condition of eligibility for payments from the Election Campaigns Fund, the Administration Fund and the Policy Development Fund is the provision by the party or candidate of a Compliance Policy;
- For parties seeking to receive payments from the Administration Fund, these policies should be submitted on an annual basis;
- These policies should deal with matters required under guidelines issued by the NSWEC – examples of these matters include:
  - Record-keeping by central office and other organisational units;
  - Mechanisms to ensure that disclosure obligations are complied with;
  - Mechanisms to ensure caps and prohibitions relating to political donations are complied with;
  - Mechanisms to ensure that caps on 'electoral communication expenditure' are complied with; and
  - Mechanisms to ensure that public funding received are spent for their legitimate purposes.
- Approval of these policies by the NSWEC is a condition of eligibility for payments from the various Funds;

---

[555] See Part XVIII: Public Funding (Election Campaigns Fund, Administration Fund, Policy Development Fund).
[556] EFED Act s 70(1).
[557] EFED Act s 97L.

- The NSWEC is to approve a Compliance Policy only if it is satisfied that the policy is likely to result in compliance with election funding and spending laws; and
- Once a Compliance Policy is approved by the NSWEC, breaches of this policy will result in deductions of public funding with amounts specified in the legislation.

The proposed scheme involves additional obligations being placed on candidates and political parties in receipt of public funding. It is, however, fair. Substantial public funding is provided to NSW candidates and political parties not only to support the discharge of their democratic functions but also to enable them to comply with the limitations on political donations and electoral expenditure.[558] Requiring mechanisms to ensure that the public funding received is spent upon legitimate purposes also directly advances the purposes of public funding and does so in a way that is more efficient than a reimbursement scheme.[559]

The scheme also has distinct advantages in terms of effective compliance. It directly promotes pro-active compliance. Moreover, it does so by focusing on the systems required for broader compliance rather than measures dealing with specific breaches; in doing so, it requires parties receiving public funding to deal internally with issues relating to compliance. Further, it provides the NSWEC with a regulatory tool that can implement a flexible range of measures tailored to different kinds of candidates and particular party structures. Lastly, because the scheme is tied to the system of public funding, it avoids the legal complexity of prosecuting political parties as entities.[560]

> *Recommendation 49*: A scheme of Candidate and Party Compliance Policies should be introduced.

C *Compliance Agreements*

Section 110B of the EFED Act provides as follows:

> (1) The Authority may enter into a written agreement (a "compliance agreement") with any person affected by this Act for the purpose of ensuring that the person complies with this Act or remedies an apparent contravention of this Act.

---

[558] See text above accompanying n535.
[559] See Part XVIII: Public Funding (Election Campaigns Fund, Administration Fund, Policy Development Fund), Section F.
[560] See Part XII: Registration, Section B(3).

> (2) A person affected by this Act includes a party, a group, an elected member, a candidate and a third-party campaigner.
>
> (3) A compliance agreement may specify the measures to be taken by the person affected by this Act to ensure that the person complies with this Act or remedies an apparent contravention of this Act.

Section 110B(5) of the Act provides that such agreements may be enforced through an application by the EFA to the NSW Supreme Court for a declaration that a person has contravened a compliance agreement and for ancillary orders to enforce the agreement. Compliance agreements are also available under Queensland election funding and spending laws.[561]

In a way, Compliance Agreements are akin to Candidate and Party Compliance Policies except that they are used in the event of breach (or suspected breach). These agreements can provide for measures not available through legal action in relation to civil penalties and criminal offences. For instance, it could require a political party to institute training to avoid the breach occurring or to publicly apologise for the breach.

But unlike Candidate and Party Compliance Policies, they are not administered through conditions imposed in relation to public funding; rather, they need to be *agreed to* by a party, candidate or third-party campaigner. This does not, however, mean that this mechanism is meaningless. A party, candidate or third-party campaigner may agree to a Compliance Agreement in order to avoid legal action seeking to impose civil and/or criminal liability. As such, this regulatory tool should be retained.

> *Recommendation 50*: Section 110B of the EFED Act that provides for Compliance Agreements should be retained.

[561] *Electoral Act 1992* (Qld) s 319.

D *Audit Requirements*

The EFED Act currently requires audit certificates in relation to claims for payments from Election Campaigns Funds[562] as well as in relation to declarations of disclosures under Part 6 (Political donations and electoral expenditure).[563] The latter requirement does not, however, apply if there is an exemption under the regulations or where the EFA waives the requirement.[564] Section 96K(3) of the EFED Act identifies the situations in which the EFA can waive this requirement:

> (3) The Authority may waive compliance with the audit requirement in any of the following cases:
>
> > (a) where the declaration contains a statement to the effect that no political donations were received and no electoral expenditure was incurred,
> >
> > (b) where the group, candidate or third-party campaigner to whom the declaration relates is not eligible to receive a payment under Part 5,
> >
> > (c) where the Authority considers the cost of compliance would be unreasonable.

The EFA may also require an audit certificate in relation to claims for payments from the Administration Fund and the Policy Development Fund.[565] Clause 33 of the *Election Funding, Expenditure and Disclosures Regulations 2009* (NSW) confers power on the EFA to conduct compliance audits. The EFA has issued an audit policy setting out how it will exercise this power.[566]

The requirements of audit certificates in relation to claims for payments from the Election Campaign Fund and declaration of disclosures are unnecessarily prescriptive and should be repealed. This area should be governed by principles-based legislation - the requirements of audit certificates should be determined by the NSWEC through its guidelines.[567]

---

[562] EFED Act s 65.
[563] Ibid s 96K(1).
[564] Ibid s 96K(2). A similar provision exists under the Qld scheme: see *Electoral Act 1992* (Qld) s 310.
[565] EFED Act s 97K.
[566] NSW Election Funding Authority, *Policy Document: Audit Policy* <http://efa nsw.gov.au/__data/assets/pdf_file/0007/93418/Audit_Policy_Final.pdf>
[567] See Part VI: Principles-based Legislation in Administration and Securing Compliance.

This would allow for a more nuanced approach towards requiring audit certificates; a risk management approach[568] could be more fully adopted in the absence of these requirements. It would also allow the NSWEC to tailor the audit requirements to the diversity of party organisations and third-party campaigners. In particular, the NSWEC could impose audit requirements in relation to Candidate and Party Compliance Policies, policies that are adapted to the specific circumstances of candidates and political parties eligible for public funding.

In this, empowering the NSWEC to determine whether or not to require an audit certificate also allows for greater sensitivity to the compliance costs of requiring an audit certificate,[569] a consideration that is expressly noted in section 96K(3)(c) of the EFED Act. As with other areas where the NSWEC has law-making power, the NSWEC should be required to promulgate (disallowable) guidelines which detail how it would generally exercise its power to impose audit requirements[570]

This approach of vesting discretion in the NSWEC in relation of audit requirements does not, in fact, signal a significant departure from the current legislation. At present, the EFED Act vests such discretion in the EFA in relation to claims for payments from the Administration Fund and the Policy Development Fund. It also empowers the EFA to waive the requirement for an audit certificate in relation to declaration of disclosures.

> *Recommendation 51*: The audit requirements under NSW laws regulating election funding and spending should be determined by the NSWEC through its guidelines.

---

[568] Interview with David Kerslake, Queensland Electoral Commissioner (Telephone Interview, 6 September 2012); Joint Standing Committee on Electoral Matters, above n2, 273.
[569] The costs of obtaining an audit certificate is one area of concern for the Christian Democratic Party: Interview with the Honourable Reverend Fred Nile, Member of the Legislative Council, Parliament of New South Wales, State President and National President of the Christian Democratic Party (Sydney, 17 August 2012).
[570] See Part VI: Principles-based Legislation in Administration and Securing Compliance.

E *Investigative Powers*

Two key provisions of the EFED Act currently confer upon the EFA investigative powers: section 110 of the Act confers inspection powers in relation to records and bankers' books of parties, elected members, groups or candidates (or their agents), including powers to compel the production of such documents and to examine them as well as the power to enter premises in certain circumstances, while section 110A provides for the power to require provision of documents and information including the power to compel the production of information and documents, the answering of questions and attendance in order to answer such questions. The EFA has issued a compliance policy that sets out how the EFA will exercise these powers.[571]

Different arrangements exist under the ACT and Queensland election funding and spending laws. There is a system of investigation notices under the ACT laws; these notices can require the production of information as well as compel an appearance before the Commissioner to give evidence or produce information.[572] Decisions to issue these notice are internally reviewable decisions.[573] Under the Queensland laws, authorised officers have a range of powers including powers to enter places, to seize property and other information-obtaining powers.[574]

There are key deficiencies with the provisions relating to investigative powers under the EFED Act. There is an overlap between sections 110 and 110A; both these sections should be integrated as suggested by NSW Electoral Commissioner.[575]

Further, there is no statutory system of internal review of these significant powers as exists in the ACT. Such a system should be instituted to provide an adequate check on these powers to *compel* the production of information.

Moreover, section 110 does not apply to a key group subject to obligations under the Act - third-party campaigners. It also does not apply to major political donors. This is a significant lacuna. As the NSW Electoral Commissioner observes, '(i)n the modern political climate, the

---

[571] NSW Election Funding Authority, *Policy Document: Compliance Policy* <http://efa nsw.gov.au/__data/assets/pdf_file/0004/93424/EF11_38_Compliance_Policy_V3.pdf>.
[572] *Electoral Act 1992* (ACT) s 237.
[573] Ibid pt 15 sch 5.
[574] *Electoral Act 1992* (Qld) pt 11 divs 17-18.
[575] Submission of NSW Electoral Commissioner, above n11, 92.

EFA is more likely to require such information from donors during the course of the investigation'.[576] The answer to these limitations is to have provisions that are not limited to particular individuals or entities but instead extend to all suspected breaches of the Act.

Recommendation 52:

- There should be an integrated provision providing for the powers currently available in sections 110 and 110A of the EFED Act that applies to all suspected breaches of Act;
- The exercise of these powers should be subject to a statutory internal review process.

F *Penalty Regime Comprising of Criminal, Civil and Administrative Penalties*

There are three kinds of conduct currently subject to penalties under the EFED Act, that relating to:

- Breaches of obligations relating to the disclosure scheme;
- Breaches of caps and limitations on political donations;
- Breaches of caps on electoral expenditure.

Three different types of penalties apply to such conduct: criminal penalties, civil penalties and administrative penalties.[577] Criminal penalties are penalties imposed by a court in criminal proceedings (including imprisonment) with the standard of proof of 'beyond reasonable doubt'. Civil penalties are also penalties imposed by courts but are typically pecuniary penalties and do not include imprisonment; these penalties are also imposed through civil proceedings with a less stringent standard of proof (and also less strict rules of evidence).[578] Administrative penalties are penalties that can be imposed by an administrative agency like

---

[576] Ibid 91.
[577] For discussion of administrative penalties in relation to the Commonwealth disclosure scheme, see Joint Standing Committee on Electoral Matters, above n345, 179-182.
[578] The *Evidence Act 1995* (NSW) defines 'civil penalties' in the following way: 'For the purposes of this Act, a person is taken to be liable to a civil penalty if, in an Australian or overseas proceeding (other than a criminal proceeding), the person would be liable to a penalty arising under an Australian law or a law of a foreign country': ibid Dictionary Pt 2 cl 3. Civil penalties are found in range of New South Wales legislation including the *Industrial Relations Act 1996* (NSW); *Industrial Relations (Child Employment) Act 2006* (NSW) and *Motor Accidents Compensation Act 1999* (NSW) and also in various Commonwealth legislation including the *Corporations Act 2001* (Cth).

the NSWEC with the availability of review by a court.[579] Under the EFED Act, these penalties are referred to as penalty notices.[580]

With breaches of obligations relating to the disclosure scheme, it is a criminal offence to fail to lodge a required declaration,[581] and to fail to keep required records.[582] Both these offences are also subject to the powers of the EFA to impose penalty notices.[583] It is also a criminal offence to knowingly make a false statement in a declaration relating to the disclosure scheme.[584]

The breaches of the caps and limitations on political donations are treated in two ways. There are de facto civil penalty provisions, with an amount equal to the amount of the political donations unlawfully received being payable by that person to the State ('double that amount if that person knew it was unlawful').[585] These amounts 'may be recovered by the Authority as a debt due to the State'[586] and may be recovered through deduction from payments made from the Election Campaigns Fund,[587] the Administration Fund and the Policy Development Fund.[588]

Breaches of caps and limitations on political donations are also dealt through the criminal offences in sections 96HA and 96I. Section 96HA deal with acts unlawful under Division 2A (Caps on political donations for State elections) while section 96I deals with acts that are unlawful under Division 3 (Management of donations and expenditure), Division 4 (Prohibition of certain political donations etc) and Division 4A (Prohibition of property developer donations). These offences either require awareness of the facts that result in unlawful act/s or an intention to commit the unlawful act/s. They provide as follows:

---

[579] See generally Joint Standing Committee on Electoral Matters, above n277, 46-49.
[580] EFED Act s 111A.
[581] Ibid s 96H(1).
[582] Ibid s 96I(2).
[583] Ibid s 111A; *Election Funding, Expenditure and Disclosures Regulations 2009* (NSW) cl 48, sch 2.
[584] EFED Act s 96H(2).
[585] Ibid s 96J(1).
[586] Ibid.
[587] Ibid s 70(2).
[588] Ibid s 97L.

96HA Offences relating to caps on donations and expenditure

(1) A person who does any act that is unlawful under Division 2A or 2B is guilty of an offence if the person was, at the time of the act, aware of the facts that result in the act being unlawful.

(2) A person who makes a donation with the intention of causing the donation to be accepted in contravention of Division 2A is guilty of an offence.

Maximum penalty: In the case of a party, 200 penalty units or in any other case, 100 penalty units.

96I Other offences

(1) A person who does any act that is unlawful under Division 3, 4 or 4A is guilty of an offence if the person was, at the time of the act, aware of the facts that result in the act being unlawful.

Maximum penalty: In the case of a party, 200 penalty units or in any other case, 100 penalty units.

Breaches of the caps on electoral communication expenditure are dealt with solely through the criminal offence in section 96HA(1) (see above). An offence is only committed under this provision if the alleged offender was 'aware of the facts that result[ed] in the act being unlawful'.

This report recommends the following changes to the penalty regime under the EFED Act. In particular, it recommends that:

1) Criminal offences apply when there is:
    - a breach of the laws regulating election funding and spending committed with knowledge or intention;
    - failure to lodge a required declaration and to maintain required records; and
    - lodgment of incomplete returns.

2) Civil penalties should be available for all breaches of the laws (with no requirement as to knowledge or intention); and
3) Administrative penalties should be available in relation to failure to lodge a required declaration and to maintain required records.

The recommendations in relation to 1) and 3), in fact, will largely mean maintenance of the status quo.

The recommendation in 1) is made on the basis that knowing of breaches of the laws regulating election funding and spending is sufficiently grave to warrant criminalisation. It will mean retention of the criminal offences in sections 96HA and 96I and also the criminal offence of knowingly making a false statement in a declaration relating to the disclosure scheme in section 96H(2).

It should be noted here that the submission of the NSW Electoral Commissioner has opposed retaining the requirement of knowledge (or intention) in sections 96HA and 96I. In a section of his submission entitled 'Difficulties in prosecuting certain offences', the Commissioner observed in relation to the knowledge requirement in section 96I:

> This remains a barrier to the successful operation of the EFA's enforcement powers and renders ineffectual the power to commence prosecutions for certain offences.[589]

In a separate part of his submission, the Commissioner said that:

> The current general offence provision requires the prosecution to prove that the defendant had actual knowledge of the unlawfulness of his/her actions which effectively prevents the successful prosecution of all but those offences where an admission has been made. [590]

[589] Submission of NSW Electoral Commissioner, above n11, 79.
[590] Ibid 90.

Rather than having the current offences in section 96HA and 96I, the Commissioner recommended replacing them with 'specified strict liability offences.' [591] As the Commissioner puts it:

> Strict liability offences displace the common law presumption that the prosecutor must prove that the defendant *intended* to commit the offence. The prosecutor is required to prove that the alleged act took place (known as *actus reas*) but is not required to prove that the defendant intended to commit the act (known as *mens rea*).[592]

In recommending the retention of the requirement of knowledge (or intention) in sections 96HA and 96I, this report strongly takes issue with these views. Pointing to difficulties in obtaining successful prosecutions of sections 96HA and 96I says nothing about what conduct should be criminalised. Put differently, it does not provide any argument that breaches of the Act committed without knowledge (or intention) should be criminalised.

It would appear that the difficulties in obtaining successful prosecutions of sections 96HA and 96I because of the requirement of knowledge (or intention) broadly fall into two situations. First, they may result from the non-existence of such knowledge (or intention); it might very well be that most breaches of the Act are not knowingly or intentionally committed but done so negligently or inadvertently. In these situations, difficulties in obtaining successful prosecutions do not occasion any concern as the conduct being criminalised does not exist.

The second type of situations involves those where the Commission strongly suspects such knowledge (or intention) but cannot secure sufficient evidence. These situations also do not provide a compelling justification for abolishing the requirement of knowledge (or intention). If the Commission cannot secure sufficient evidence, it might very be because such evidence does not exist – especially given the significant powers the Commission has to compel the production of information under sections 110 and 110A of the Act. Here we see how there is a blurred line between the first and second types of situations.

---

[591] Ibid.
[592] Ibid (emphasis original).

Moreover, the difficulties in obtaining successful prosecutions in these situations largely result from the application of the presumption of innocence that places the burden of proof on the prosecuting agency. Re-crafting criminal offences (by not requiring knowledge or intention) in order to sidestep these consequences undermines this principle.

Failures to lodge a required declaration and to maintain required records should also be criminal offences even when there is no requisite knowledge or intent; they should be strict liability offences. This is because these actions gravely undermine the integrity of the laws regulating election funding and spending: without proper disclosures and records, it will be impossible to determine whether these laws are being complied with. This is arguably why the ACT[593] and Queensland laws provide for strict liability offences in relation to failure to lodge required returns and to maintain required records.[594] Under these laws, lodgment of incomplete returns is also a strict liability offence,[595] a position that should also be adopted in New South Wales.

> *Recommendation 53*: The criminal offences in sections 96H(1), 96HA, 96H(2) and 96I of the EFED Act should be maintained.

> *Recommendation 54*: It should be a strict liability criminal offence to lodge incomplete declarations.

The recommendation in 3) is already reflected in current law. The availability of administrative penalties (called penalty notices under the EFED Act) is appropriate in the current context: these are 'low-level' offences that are suitable for administrative penalties and the penalties currently available are relatively modest ($1100 and $2750).[596] Importantly, there is access to judicial review, with an individual or group subject to a penalty notice able to elect to have the matter determined by a court.[597]

---

[593] *Electoral Act 1992* (ACT) ss 236(1)-(5).
[594] *Electoral Act 1992* (Qld) ss 307(1)-(2).
[595] *Electoral Act 1992* (ACT) ss 236(1)-(5); *Electoral Act 1992* (Qld) s 307(2).
[596] *Election Funding, Expenditure and Disclosures Regulations 2009* (NSW) sch 2.
[597] See EFED Act, s 111.

Through 2), the report recommends that civil penalties be available for all breaches of the laws and that such penalties will be available even when there is no requisite knowledge or intention – these should be strict liability provisions (as recommended by NSW Electoral Commissioner).[598] Of the various recommendations, this would require the most significant changes.

The rationales for these proposed changes rest upon considerations of fairness and effectiveness. First, conduct involved in breaches of NSW election funding and spending laws do not always warrant criminal sanctions:[599] they are not necessarily accompanied by requisite knowledge or intention; they could have involved limited amounts of money; they could have been inadvertently committed by volunteers.

Second, civil penalties might be more effective than criminal sanctions: they are easier to invoke with a lower standard of proof; the financial penalties can be tailored to gravity of the breach and the amounts of money involved; provisions providing for civil penalties can be accompanied by powers on the part of the NSWEC to recover these penalties, in particular, from public funding payments (see below). All these aspects of civil penalties might also result in a greater willingness to rely on these penalties.

By introducing a comprehensive range of civil penalty provisions, NSW election funding and spending laws will taking a leaf from the ACT and Queensland laws, both of which heavily rely upon civil penalties in relation to breaches of limits on political donations and electoral expenditure.

Under the ACT laws, a breach of the statutory limits on gifts received results in twice the amount that the gift exceeded the limit being payable to the Territory.[600] The ACT Electoral Commissioner may recover this amount.[601] Breaches of the limits on electoral expenditure result in a penalty twice the amount by which the electoral expenditure exceeded the limit,[602]

---

[598] Submission of NSW Electoral Commissioner, above n11, 90.
[599] This consideration is one favouring the introduction of civil penalties: see Australian Law Reform Commission, 'Securing Compliance: Civil and Administrative Penalties in Federal Jurisdiction' (Discussion Paper No 65, May 2002) 565.
[600] *Electoral Act 1992* (ACT) s 205I(5).
[601] Ibid s 205I(9).
[602] Ibid ss 205F(3) (party groupings); 205G(3) (MLAs, candidates and third-party campaigners).

a penalty that may be recovered by the ACT Electoral Commissioner.[603] The decisions by the Commissioner to recover are not internally reviewable decisions[604] but can be subject to a judicial review application under *Administrative Decisions (Judicial Review) Act 1989* (ACT).[605]

Under the Queensland laws, breaches of limits on political donations are subject to a maximum penalty of twice the amount of the political donations that exceeded the limits or 200 penalty units (whichever is greater).[606] The Queensland Electoral Commissioner may recover this penalty.[607] Breaches of the caps on electoral expenditure are treated in a similar way with the maximum penalty being 200 penalty units or twice the amount the cap on electoral expenditure that was exceeded (whichever is greater).[608] The Queensland Electoral Commissioner does not, however, have the power to recover these penalties.

These provisions are excellent models for a system of civil penalties under NSW election funding and spending laws. They deal with the lack of civil penalties for breaches of caps on electoral communication expenditure.[609] Further, they deal with the inadequate level of civil penalties. Under section 96J of the EFED Act, only the amount equal to the unlawful political donations received is recoverable (unless knowledge can be demonstrated), hence successful recovery of these amounts merely puts the offender back in the original position. The level of penalty should include an additional amount that punishes the breach – an amount equal to twice the unlawful amount (as provided under ACT and Queensland laws) does not seem unreasonable.

One further change should, however, be made. A shortcoming of the ACT and Queensland civil penalty regimes is that they do not provide for the penalties to be recovered from public funding payments. This is a current feature of section 96J that should be maintained and extended to all civil penalty provisions.

---

[603] Ibid ss 205F(4) (party groupings); 205G(4) (MLAs, candidates and third-party campaigners).
[604] See *Electoral Act 1992* (ACT) sch 5.
[605] Correspondence with Phil Green, ACT Electoral Commissioner, 17 September 2012.
[606] *Electoral Act 1992* (Qld) s 281.
[607] Ibid s 318(3).
[608] Ibid s 281.
[609] Submission of NSW Electoral Commissioner, above n11, 85-86.

Recommendation 55:

- A civil penalty regime similar to that provided under ACT and Queensland laws regulating election funding and spending should be adopted in NSW together; and
- This regime should be accompanied with powers to recover penalties, including recovery from public funding.

* * *

It is an odd thing that the criminal offences relating to the disclosure scheme under the EFED Act very much fall at two ends of the spectrum: there are strict liability offences for failure to lodge declarations and maintain records, and offences requiring knowledge for false statements knowingly made. There are no intermediate offences dealing with false or inaccurate disclosures (whether made inadvertently or deliberately). Given that accurate disclosures are vital to the integrity of the Act's measures, this is a glaring omission.

This report proposes civil penalties apply to the lodgement of a declaration of disclosures that is false or misleading in a material particular. These penalties do not, however, apply if the organisation or person has taken reasonable steps to ensure that the return is not false or misleading in material particulars.[610] Crafted in this away, a civil penalty will apply when there is negligence resulting in returns that are false or misleading in a material particular but not so when reasonable care has been taken to ensure the accuracy of the disclosure.

While this proposal has some similarities with the view of NSW Electoral Commissioner that there should be strict liability criminal offences (which would have the defence of 'honest and reasonable mistake of fact'),[611] there are key differences. The report proposes a civil penalty provision not a criminal offence. Further, it suggests that the defence be one of 'reasonable steps'. Such a defence is preferable because it would expressly prompt those regulated to take reasonable steps to ensure the accuracy of their disclosure returns (including putting in place appropriate systems) and in this way, promote compliance more effectively than the narrower defence of honest and reasonable mistake.

---

[610] This defence is akin to that found in section 307(13)(b) of the *Electoral Act 1992* (Qld).
[611] Submission of NSW Electoral Commissioner, above n11, 90-91.

Recommendation 56:

- Lodgement of a declaration of disclosure that is false or misleading in a material particular should be subject to a civil penalty.
- This penalty will not apply if the organisation or person can demonstrate that reasonable steps have been taken to ensure that the declaration is not false or misleading in a material particular.

APPENDIX ONE

RELEVANT TERMS OF REFERENCE OF NSW JOINT STANDING COMMITTEE ON ELECTORAL MATTERS' REVIEW OF THE PARLIAMENTARY ELECTORATES AND ELECTIONS ACT 1912 AND THE ELECTION FUNDING, EXPENDITURE AND DISCLOSURES ACT 1981

Research Question 1: Are the terms and structure of the EFE&D Act appropriate having regard to changes in electoral practices and the nature of modern political campaigning?

Questions to be addressed include:

- What are the relevant changes in electoral practices and the nature of modern political campaigning?
- What should be the general principles in drafting NSW funding and disclosure legislation?
- What purposes and principles should be stated in the legislation?
- What level of detail should be prescribed in the legislation?
- What parts of the legislation should left to the discretion or determination of the Commission?
- What should be the key definitions of the legislation (e.g. 'gift'; 'political donations'; 'electoral expenditure'; 'electoral communication expenditure')?
- Are the provisions of the legislation in the following areas appropriate having regard to changes in electoral practices and the nature of modern political campaigning?
    - Disclosure obligations;
    - Limits on 'political donations';
    - Ban on 'political donations' from property developers etc;
    - Limits on 'electoral communication expenditure';
    - Public funding;
- What should the powers of enforcement of the Election Funding Authority?

Research Question 2: What should be the role and functions of the Election Funding Authority of New South Wales?

Questions to be addressed include:

- Should there be a separate authority for funding and disclosure?

- What should the composition of the Election Funding Authority? Should the current composition be retained?
- What should the role and functions of the Election Funding Authority?

Research Question 3: What has been the operation and effectiveness of recent campaign finance reforms including the Election Funding Amendment (Political Donations and Expenditure) Act 2008, the Election Funding and Disclosures Amendment (Property Developers Prohibition) Act 2009, and the Election Funding and Disclosures Amendment Act 2010?

Issues to be addressed include the operation and effectiveness of:

- Disclosure obligations;
- Limits on 'political donations';
- Ban on 'political donations' from property developers etc;
- Limits on 'electoral communication expenditure';
- Public funding.

APPENDIX TWO

STATUTORY FUNCTIONS OF AUSTRALIAN ELECTORAL COMMISSIONS

Commission/Commissioner	Functions
1A. Australian Electoral Commission	• The functions of the Commission are: a) to perform functions that are permitted or required to be performed by or under this Act, not being functions that: ▪ a specified person or body, or the holder of a specified office, is expressly permitted or required to perform; or ▪ consist of the appointment of a person to an office; and b) To consider, and report to the Minister on, electoral matters referred to it by the Minister and such other electoral matters as it thinks fit. c) To promote public awareness of electoral and Parliamentary matters by means of the conduct of education and information programs and by other means. d) To provide information and advice on electoral matters to the Parliament, the Government, Departments and authorities of the Commonwealth. e) To conduct and promote research into electoral matters and other matters that relate to its functions. f) To publish material on matters that relate to its functions. fa) To provide, in cases approved by the Foreign Affairs Minister, assistance in matters relating to elections and referendums (including the secondment of personnel and the supply or loan of materiel) to authorities of foreign countries or to foreign organizations. g) To perform such other functions as are conferred on it by or under any law of the Commonwealth.[612]

[612] *Commonwealth Electoral Act 1918* (Cth) s 7(1).

Commission/Commissioner	Functions
1B. Australian Electoral Commissioner	• The Electoral Commissioner shall have such other functions, and such powers, as are conferred upon him or her by or under any law of the Commonwealth.[613] • The Electoral Commissioner may give written directions to officers with respect to the performance of their functions, and the exercise of their powers, under this Act.[614]
2A. ACT Electoral Commission	• The Electoral Commission has the following functions: a) To advise the Minister on matters relating to elections. b) To consider, and report to the Minister on, matters relating to elections referred to it by the Minister. c) To promote public awareness of matters relating to elections and the Assembly by conducting education and information programs and by any other means it chooses. d) To provide information and advice on matters relating to elections to the Assembly, the Executive, the head of any administrative unit of the public service, Territory authorities, political parties, MLAs and candidates at elections. e) To conduct and promote research into matters relating to elections or other matters relating to its functions. f) To publish material on matters relating to its functions. g) To provide, on payment of the determined fee (if any), goods and services to persons or organisations, to the extent that it is able to do so by using information or material in its possession or expertise acquired in the exercise of its functions. h) To conduct ballots for prescribed persons and organizations. i) To exercise any other function given to it under this Act or another Territory law.[615]
2B. ACT Electoral	• The Commissioner has the functions given to the commissioner under this Act or another Territory law.[616]

[613] Ibid s 18(2).
[614] Ibid s 18(3).
[615] *Electoral Act 1992* (ACT) s 7(1).
[616] Ibid s 23(2).

Commission/Commissioner	Functions
Commissioner	• The Commissioner may give written directions to officers and members of the staff of the Electoral Commission in relation to the exercise of their functions under this Act or another Territory law.[617]
3A. NSW Electoral Commission	• The Commission has the functions conferred or imposed on it by or under this or any other Act.[618]
3B. NSW Electoral Commissioner	• The functions of the Commission are exercisable by the Electoral Commissioner, and any act, matter or thing done in the name of, or on behalf of, the Commission by the Electoral Commissioner, or with the authority of the Electoral Commissioner, is taken to have been done by the Commission.[619] • Any functions conferred or imposed on the Electoral Commissioner by or under this or any other Act may be exercised by the Electoral Commissioner in his or her official name as Electoral Commissioner or in the name of the Commission.[620] • The Electoral Commissioner has the responsibility of administering this Act and any provisions of any other Act, so far as this Act and those provisions relate to the enrolment of electors, the preparation of rolls of electors, and the conduct of elections.[621] • In addition to the functions conferred or imposed by this Act, the Electoral Commissioner has the functions conferred or imposed on the Commissioner by or under any other Act.[622]
4A. NT Electoral Commission	• The Commission's functions are as follows: a) To maintain rolls and conduct elections under this Act. b) To advise the Minister on matters relating to elections.

[617] Ibid s 23(3).
[618] PE & E Act s 21A(2).
[619] Ibid s 21A(3).
[620] Ibid s 21A(4).
[621] Ibid s 21AA(2).
[622] Ibid s 21AA(3).

Commission/Commissioner	Functions
	c) To consider, and report to the Minister on, matters relating to elections referred to it by the Minister. d) To promote public awareness of matters relating to elections and the Legislative Assembly by conducting education and information programs and in any other way it chooses. e) To provide information and advice on matters relating to elections to the Legislative Assembly, an Executive body, the head of an Agency, Territory authorities, political parties, MLAs and candidates at elections. f) To conduct and promote research into matters relating to elections or other matters relating to its functions. g) To publish material on matters relating to its functions. h) To provide, on payment of the fee decided by it, goods and services to persons or organisations, to the extent that it is able to do so by using information or material in its possession or expertise acquired in the exercise of its functions. i) To conduct ballots for persons and organizations. j) To perform any other function given to it under this or another Act.[623]
4B. NT Electoral Commissioner	• The Commissioner has the functions given to the Commissioner under this or another Act.[624]
5A. Electoral Commission of Queensland	• The functions of the Commission are to – a) To perform functions that are permitted or required to be performed by or under this Act, other than functions that a specified person or body, or the holder of a specified office, is expressly permitted or required to perform. b) To conduct a review of the appropriateness of the number of electoral districts whenever the Minister requests it, in writing, to conduct such a review, and report to the Minister the results of the review. c) To consider and report to the Minister on: i. electoral matters referred to it by the Minister; and

[623] *Electoral Act 2004* (NT) s 309(1).
[624] Ibid s 316.

Commission/Commissioner	Functions
	ii. other appropriate electoral matters. d) To promote public awareness of electoral matters by conducting education and information programs and in other ways. e) To implement strategies to encourage persons, particularly those belonging to groups with traditionally low enrolment rates, to enrol as electors. f) To implement strategies to maintain the integrity of the electoral rolls. g) To provide information and advice on electoral matters to the Legislative Assembly, the government, departments and government authorities. h) To conduct and promote research into electoral matters and other matters that relate to its functions. i) To publish material on matters that relate to its functions. j) To perform any other functions that are conferred on it by or under another Act.[625]
5B. Queensland Electoral Commissioner	None listed.
6A. SA Electoral Commission	Not mentioned in Act.
6B. SA Electoral Commissioner	• The Electoral Commissioner - a) is responsible to the Minister for the administration of this Act. b) is responsible for the proper conduct of elections in accordance with this Act. c) is responsible for the carrying out of appropriate programmes of publicity and public education in order to ensure that the public is adequately informed of their democratic rights and obligations under this Act. d) is empowered - i. to conduct and promote research into electoral matters. ii. to publish the results of such research and other material on electoral Matters. [626]

[625] *Electoral Act 1992* (Qld) s 7(1).
[626] *Electoral Act 1985* (SA) s 8(1).

Commission/Commissioner	Functions
	• The Electoral Commissioner - a) has the powers and functions conferred on or assigned to him or her under this Act or any other Act; and b) may, with the permission of the Minister, carry out any other statutory or non-statutory functions on terms and conditions approved by the Minister.[627]
7A. Tasmanian Electoral Commission	• In addition to the functions conferred on it by any other provisions of this Act or any other Act, the Commission has the following functions: a) To advise the Minister on matters relating to elections. b) To consider and report to the Minister on matters referred to it by the Minister. c) To promote public awareness of electoral and parliamentary topics by means of educational and information programs and by other means. d) To provide information and advice on electoral issues to the Parliament, the Government, Government departments and State authorities, within the meaning of the *State Service Act 2000*. e) To publish material on matters relating to its functions. f) To investigate and prosecute illegal practices under this Act.[628] g) Without limiting subsection (2) and in addition to any power conferred on the Commission by any other provision of this Act or any other Act, the Commission, in addition to conducting Assembly elections or Council elections, may conduct ballots or elections for a person or organisation and may charge fees for that service.[629]
7B. Tasmanian Electoral Commissioner	• In addition to the functions and powers imposed or conferred under this Act, the Commissioner has such other functions and powers as are imposed or conferred on the Commissioner by or under any other Act.[630]

[627] Ibid s 8(2).
[628] *Electoral Act 2004* (Tas) s 9(1).
[629] Ibid s 9(3).
[630] Ibid s 15(2).

Commission/Commissioner	Functions
	• The Commissioner may give written direction to election officials and members of the staff of the Commission with respect to the performance of their functions and the exercise of their powers under this Act.[631]
8A. Victorian Electoral Commission	• **[Responsibility:** The Commission is responsible for the administration of the enrolment process and the conduct of parliamentary elections and referendums in Victoria.][632] • The functions of the Commission are: a) To perform such functions as are conferred on the Commission by this or any other Act, other than functions which are expressly conferred on a specified person or body or the holder of a specified office. b) To report to each House of Parliament within 12 months of the conduct of each election on the administration of that election. c) To conduct an election under the **Local Government Act 1989** if appointed to do so by a Council under clause 1(2)(c) of Schedule 2 of that Act. **d)** To provide goods and services to persons or organisations on payment of any relevant fees, to the extent that the Commission is able to do so by using information or material in its possession or expertise acquired in the performance of its functions. e) To provide administrative and technical support to the Electoral Boundaries Commission established under section 3 of the **Electoral Boundaries Commission Act 1982.** f) To promote public awareness of electoral matters that are in the general public interest by means of the conduct of education and information programs. g) To conduct and promote research into electoral matters that are in the general public interest. h) To consider, and report to the Minister on, electoral matters that are in the general public interest referred to the Commission by the Minister.

[631] Ibid s 15(3).
[632] *Electoral Act 2002* (Vic) s 8 (1).

Commission/Commissioner	Functions
	i) To administer this Act.[633]
8B. Victorian Electoral Commissioner	• The Electoral Commissioner: a) constitutes the Commission under section 7. b) has the functions, powers and duties delegated to the Electoral Commissioner by the Commission.[634]
9A. West Australian Electoral Commission	None listed.
9B. West Australian Electoral Commissioner	• The Electoral Commissioner - b) Is responsible for the proper maintenance of electoral rolls and the proper conduct of elections under this Act. c) Shall consider, and report to the Minister on, electoral matters referred to him by the Minister and such other electoral matters as the Electoral Commissioner thinks fit. d) Shall promote public awareness of electoral and Parliamentary matters by means of the conduct of education and information programmes and by other means. e) Shall provide information and advice on electoral matters to the Parliament, Members of Parliament, the Government, departments and authorities of the State. f) May conduct other elections, referendums or polls if authorised to do so under another written law or if they are provided for under another written law and the regulations authorise the Electoral Commissioner to conduct them. g) May make arrangements with any person for the conduct by the Electoral Commissioner of elections or polls not provided for under a written law on such terms and conditions as are agreed between the Electoral Commissioner and that person. f) May conduct and promote research into electoral matters and other matters that relate to his functions.

[633] Ibid s 8(2).
[634] Ibid s 16(1).

Commission/Commissioner	Functions
	g) May publish material on matters that relate to his functions. h) Shall perform such other functions as are conferred on him by or under this Act or any other written law.[635]

[635] *Electoral Act 1907* (WA) s 5F(1).

APPENDIX THREE

STATUTORY FUNCTIONS OF INTERNATIONAL ELECTORAL COMMISSIONS

Commission	Functions
1. Canada	• The Chief Electoral Officer shall: a) exercise general direction and supervision over the conduct of elections; b) ensure that all election officers act with fairness and impartiality and in compliance with this Act; c) issue to election officers the instructions that the Chief Electoral Officer considers necessary for the administration of this Act; and d) exercise the powers and perform the duties and functions that are necessary for the administration of this Act.[636]
2. New Zealand	• The functions of the Electoral Commission are to— a) carry the provisions of this Act into effect: b) carry out duties in relation to parliamentary election programmes that are prescribed by Part 6 of the Broadcasting Act 1989: c) promote public awareness of electoral matters by means of the conduct of education and information programmes or by other means: d) consider and report to the Minister or to the House of Representatives on electoral matters referred to the Electoral Commission by the Minister or the House of Representatives: e) make available information to assist parties, candidates, and others to meet their statutory obligations in respect of electoral matters administered by the Electoral Commission: f) carry out any other functions or duties conferred on the Electoral Commission by or under any other enactment.[637]

[636] *Canada Elections Act*, SC 2000, c 9, s 16.

Commission	Functions
3. United Kingdom	• The Commission shall after every election or referendum prepare a report on the administration of the election.[638] • The Commission shall keep under review, and from time to time submit reports on, issues relating to the following matters: elections, referendums, redistribution of seats, registration of political parties and regulation of their income and expenditure, political advertising, and the laws relating to the issues above. (Exceptions for Northern Ireland and Scotland).[639] • The Commission shall write a report on any issue requested by the Secretary of State.[640] • The Commission must be consulted before various authorities make regulations/changes to the electoral law (relevant Acts listed in section). [641] • Some powers with respect to elections are only exercisable in accordance with a recommendation of Commission (relevant Acts listed in section).[642] • The Commission may participate with any relevant local authority in submission of proposals in relation to pilot schemes for changes in electoral procedure.[643] • The Commission may, at the request of any relevant body, provide the body with advice and assistance as respects any matter in which the Commission have skill and experience.[644] • Broadcasters must have regard to the views of the Commission before making any rules on party political broadcasts.[645] • The Commission shall submit to the Secretary of State recommendations for a Commission Scheme of 'policy

[637] *Electoral Act 1993* (NZ) s 5.
[638] *Political Parties, Elections and Referendums Act 2000* (UK) c 41, s 5.
[639] Ibid s 6(1).
[640] Ibid s 6(2).
[641] Ibid s 7.
[642] Ibid s 8.
[643] Ibid s 9.
[644] Ibid s 10.
[645] Ibid s 11.

Commission	Functions
	development grants' – grants to ensure smaller parties in the House of Commons have the funds to develop policy.[646] • The Commission shall promote public awareness of current electoral systems in the UK, current systems of local government, and the institutions of the United Kingdom.[647]
4. United States	**Powers of Commission:** a) *Specific authorities*. The Commission has the power— 1. to require a person to submit reports or submissions; 2. to administer oaths or affirmations; 3. to subpoena witnesses and evidence; 4. in any proceeding or investigation, to order or compel testimony; 5. to pay witnesses the same fees as are paid in courts; 6. to initiate (through civil actions for injunctive, declaratory, or other appropriate relief), defend (in the case of any civil action brought under section 437g(a)(8) of this title) or appeal any civil action in the name of the Commission to enforce the provisions of this Act and chapter 95 and chapter 96 of title 26, through its general counsel; 7. to render advisory opinions under section 437f of this title; 8. to develop prescribed forms and to make, amend, and repeal such rules; 9. to conduct investigations and hearings expeditiously, to encourage voluntary compliance, and to report apparent violations to the appropriate law enforcement authorities.[648] b) *Judicial orders for compliance with subpoenas and orders of Commission; contempt of court*. Upon petition by the Commission, any United States district court within the jurisdiction of which any inquiry is being carried on may, in case of refusal to obey a subpoena or order of the Commission issued under subsection (a) of this section, issue an

[646] Ibid s 12.
[647] Ibid s 13.
[648] *Federal Election Campaign Act of 1971*, 14 USC § 437d (2008).

Commission	Functions
	order requiring compliance. Any failure to obey the order of the court may be punished by the court as a contempt thereof.[649] c) *Civil liability for disclosure of information.* No person shall be subject to civil liability to any person (other than the Commission or the United States) for disclosing information at the request of the Commission.[650] d) *Concurrent transmissions to Congress or member of budget estimates, etc.; prior submission of legislative recommendations, testimony, or comments on legislation* 1. Whenever the Commission submits any budget estimate or request to the President or the Office of Management and Budget, it shall concurrently transmit a copy of such estimate or request to the Congress. 2. Whenever the Commission submits any legislative recommendation, or testimony, or comments on legislation, requested by the Congress or by any Member of the Congress, to the President or the Office of Management and Budget, it shall concurrently transmit a copy thereof to the Congress or to the Member requesting the same.[651] e) *Exclusive civil remedy for enforcement*. Except as provided in section 437g(a)(8) of this title, the power of the Commission to initiate civil actions under subsection (a)(6) of this section shall be the exclusive civil remedy for the enforcement of the provisions of this Act.[652] **Duties of Commission** a) The Commission shall— 1. prescribe forms necessary to implement this Act; 2. prepare, publish, and furnish to all persons required to file reports and statements under this Act a manual recommending uniform methods of bookkeeping and reporting; 3. develop a filing, coding, and cross-indexing system;

[649] Ibid.
[650] Ibid.
[651] Ibid.
[652] Ibid.

Commission	Functions
	4. make any reports received by the commission public within 48 hours of receiving them; 5. keep such designations, reports, and statements for a period of 10 years from the date of receipt; 6. A. compile and maintain a cumulative index of designations, reports, and statements filed under this Act; B. compile, maintain, and revise a separate cumulative index of reports and statements filed by multicandidate committees; C. compile and maintain a list of multicandidate committees, which shall be revised and made available monthly; 7. prepare and publish periodically lists of authorized committees which fail to file reports as required by this Act; 8. prescribe rules, regulations, and forms to carry out the provisions of this Act, in accordance with the provisions of subsection (d) of this section; and 9. transmit to the President and to each House of the Congress no later than June 1 of each year, a report which states in detail the activities of the Commission in carrying out its duties under this Act, and any recommendations for any legislative or other action the Commission considers appropriate.[653]

[653] Ibid § 438A.

APPENDIX FOUR

ACCOUNTABILITY MECHANISMS OF AUSTRALIAN ELECTORAL COMMISSIONS

Commission	Appointment	Rules on Advice and Reporting	Termination of Appointment
1A. Australian Electoral Commission	• The Commission consists of a Chairperson, an Electoral Commissioner, and one other member.[654] • Chairperson must be one of three nominated judges submitted by the Chief Justice of the Federal Court of Australia.[655] • A non-judicial appointee must hold the office of either an Agency head under the *Public Service Act 1999* (Cth) or an office established under an Act with equivalent status.[656] • Commissioners are appointed for a term no longer than 7 years and are eligible for reappointment.[657]	• The Electoral Commission must consider, and report to the Minister on, electoral matters referred to it by the Minister and such other electoral matters.[658] • The Electoral Commission must provide information and advice on electoral matters to the Parliament, the Government, Departments and authorities of the Commonwealth.[659] • The Electoral Commission must conduct and promote research into electoral matters and other matters that relate to its	• An appointed Commissioner may resign by giving the Governor General notice.[669] • If the non-judicial appointee is absent from 3 consecutive meetings of the Commission without approved leave, or fails to comply with his/her obligations under s 11, their appointment will be terminated.[670] • If non-judicial appointee ceases to hold the office referred to in s 6(5) (see Appointment), they will cease to be a Commissioner.[671]

[654] *Commonwealth Electoral Act 1918* (Cth) s 6(2).
[655] Ibid s 6(4).
[656] Ibid s 6(5).
[657] Ibid s 8(1).
[658] Ibid s 7(1)(b).
[659] Ibid s 7(1)(d).

Commission	Appointment	Rules on Advice and Reporting	Termination of Appointment
		functions.[660] • The Electoral Commission must publish material on matters that relate to its functions.[661] • The Commission must prepare an annual report for the year ending 30 June.[662] This report must include all those who have received a copy of the roll under sub-s 90B(1), (4).[663] • The Commission must prepare a report after each general election and Senate election.[664] This must include all the names of those whom the Commission believes must file a return.[665] • The Commission must prepare	

[669] Ibid s 10.
[670] Ibid s 12.
[671] Ibid s 8(3), (4).
[660] Ibid s 7(1)(e).
[661] Ibid s 7(1)(f).
[662] Ibid s 17(1).
[663] Ibid s 17(1A).
[664] Ibid s 17(2).
[665] Ibid s 17(2A).

Commission	Appointment	Rules on Advice and Reporting	Termination of Appointment
		reports on the operation of Part XX (Election Funding and Financial Disclosure) when appropriate.[666] • Note that these reports cannot include any evidence/information in relation to an investigation into an electoral offence.[667] • Reports must be presented to each House of Parliament within 15 sitting days of receipt.[668]	
1B. Australian Electoral Commissioner	• Electoral Commissioner is appointed by the Governor-General.[672] • Electoral Commissioner is appointed for a term no longer than 7 years and is eligible for reappointment.[673]	-	If the Electoral Commissioner… fails, without reasonable excuse, to comply with his or her obligations under section 11, the Governor-General shall terminate his or her appointment as Electoral Commissioner. [674]

[666] Ibid s 17(2B).
[667] Ibid s 17A.
[668] Ibid s 17(4).
[672] Ibid s 21(1).
[673] Ibid s 21(2).
[674] Ibid s 25(3).

Commission	Appointment	Rules on Advice and Reporting	Termination of Appointment
2A. ACT Electoral Commission ***Member***: member of the Electoral Commission other than the Commissioner.	• The Electoral Commission consists of the chairperson, the commissioner, and one other person.[675] • The Executive may appoint the members (see the Legislation Act, pt 19.3).[676] • Before a person is appointed as a member, the Minister must consult the leaders of each political party and all independents in the Legislative Assembly about the proposed appointment.[677] • The Executive must not appoint a person as a member if they have been an MP in the Act, Commonwealth or any State or Territory in the last 10 years, or have been a member of a political party in the last 5 years.[678] • The executive may appoint a person as Chairperson only if the person is/has been:	• The Electoral Commission must advise the Minister on matters relating to elections.[681] • The Electoral Commission must consider, and report to the Minister on, matters relating to elections referred to it by the Minister.[682] • The Electoral Commission must provide information and advice on matters relating to elections to the Assembly, the Executive, and the head of any administrative unit of the public service, Territory authorities, political parties, MLAs and candidates at elections.[683] • The Electoral Commission must conduct and promote research	• The Executive may suspend a member for misbehavior or physical or mental incapacity.[688] • On the first sitting day after a member has been suspended, a Minister will give reasons why the member was suspended to the Legislative Assembly.[689] If the LA passes a resolution within seven days of this to end the appointment of the member, the Executive shall do so.[690] • If the above two requirements are not fulfilled a suspended member shall resume his/her duties.[691] • During suspension the member will be paid in full.[692] • The executive shall end the appointment of a member if the member is absent from 3 consecutive meetings without granted leave.[693]

[675] *Electoral Act 1992* (ACT) s 6.
[676] Ibid s 12(1).
[677] Ibid s 12(3).
[678] Ibid s 12A.
[681] Ibid s 7(1)(a).
[682] Ibid s 7(1)(b).
[683] Ibid s 7(1)(d).

Commission	Appointment	Rules on Advice and Reporting	Termination of Appointment
	o a Supreme Court/Federal Court judge; o A Justice of the High Court; o a Director-General of an administrative unit; o a CEO of a territory instrumentality; o a statutory office-holder; o a Commonwealth agency head; o a member of the Electoral Commission, AEC, or a state/territory electoral commission; o a senior lawyer; or o someone who has held a senior position in academia, business, or a profession, and has appropriate knowledge and skills.[679]	into matters relating to elections or other matters relating to its functions.[684] • The Electoral Commission must publish material on matters relating to its functions.[685] • (Heading: Electoral Commission's Annual Report): The electoral commission is a public authority for the *Annual Reports (Government Agencies) Act 2004*.[686] • The Electoral Commission may give to the Minister a report on anything relating to elections, referendums or other ballots. This must be presented to the	• The executive shall end the appointment of a member if the member contravenes s 21 without reasonable excuse.[694] • The executive shall end the appointment of a member if the member is convicted of an offence with 12 months imprisonment or longer.[695]

[688] Ibid s 17(1).
[689] Ibid s 17(2).
[690] Ibid s 17(3).
[691] Ibid s 17(4).
[692] Ibid s 17(5).
[693] Ibid s 17(6)(a).
[679] Ibid s 12B.

Commission	Appointment	Rules on Advice and Reporting	Termination of Appointment
	• A member is appointed for renewable term of no longer than 5 years.[680]	Legislative Assembly within 6 sitting days of receipt.[687]	
2B. ACT Electoral Commissioner	• The Executive may appoint the Electoral Commissioner (see the Legislation Act, pt 19.3).[696] • Before a person is appointed as the Electoral Commissioner, the Minister must consult the leaders of each political party in the Legislative Assembly and all independents in the Legislative Assembly about the proposed appointment.[697] • The Commissioner is appointed for term of no longer than 5 years.[698]	-	• The executive may suspend the Commissioner for misbehavior or physical or mental incapacity.[699] • On the first sitting day after the Commissioner has been suspended, a Minister will give reasons why the Commissioner was suspended to the Legislative Assembly.[700] If the LA passes a resolution within seven days of this to end the appointment of the Commissioner, the Executive shall do so.[701]

[684] Ibid s 7(1)(e).
[685] Ibid s 7(1)(f).
[686] Ibid s 10.
[694] Ibid s 17(6)(b).
[695] Ibid s 17(6)(c).
[680] Ibid s 13.
[687] Ibid s 10A.
[696] Ibid s 22(1).
[697] Ibid s 22(2).
[698] Ibid s 25.
[699] Ibid s 29(1).
[700] Ibid s 29(2).
[701] Ibid s 29(3).

Commission	Appointment	Rules on Advice and Reporting	Termination of Appointment
			• If the above two duties are not fulfilled the Commissioner shall resume his/her duties.[702] • During suspension the Commissioner will be paid in full.[703] • The executive shall end the appointment of the Commissioner if the Commissioner is absent from 3 consecutive meetings without granted leave.[704] • The executive shall end the appointment of the Commissioner if the Commissioner contravenes s 21 without reasonable excuse.[705] • The executive shall end the appointment of the Commissioner if the Commissioner is convicted of an offence with 12 months imprisonment or longer.[706]
3A. New South Wales Electoral	The NSW Electoral Commission is a corporation constituted by the *Parliamentary*	None specified, but mention of an annual report prepared by the	-

[702] Ibid s 29(4).
[703] Ibid s 29(5).
[704] Ibid s 29(6)(a).
[705] Ibid s 29(6)(b).
[706] Ibid s 29(6)(c).

Commission	Appointment	Rules on Advice and Reporting	Termination of Appointment
Commission	*Electorates and Elections Act 1912* (NSW).[707]	Commission is seen in *Parliamentary Electorates and Elections Act 1912* (NSW) ss 41(6), 48(7).	
3B. Electoral Commissioner for New South Wales	• The Electoral Commissioner is appointed for a term of no longer than 10 years, and can be reappointed for one further consecutive term.[708] • A person who is a member of a party/was a member of a party in the last 5 years cannot be Electoral Commissioner.[709] • The provisions of the *Public Sector Employment and Management Act 2002* do not apply to the appointment of the Electoral Commissioner.[710]	-	• The office of the Electoral Commissioner becomes vacant if the holder dies, is not reappointed, resigns, is absent from duty without approval for a period of 14 consecutive days, engages in paid employment outside the duties of his office, becomes bankrupt, becomes mentally incapacitated, is convicted of an offence with a prison sentence of 12 months or more/is imprisoned, or becomes a member of a party.[711] • The Electoral Commissioner may be suspended from office for misbehavior or incompetence, but may only be removed if the Minister lays a statement for the grounds of suspension before each House of Parliament and the Houses vote to

[707] PE & E Act s 21A(1).
[708] Ibid s 21AB(1).
[709] Ibid s 21AB(4).
[710] Ibid s 21AC(1).
[711] Ibid s 21AB(2).

Commission	Appointment	Rules on Advice and Reporting	Termination of Appointment
			remove him within 21 days. If not, he/she is reinstated as Commissioner.[712]
4A. NT Electoral Commission	• The Commission consists solely of the Commissioner.[713] • According to the *Public Sector Employment and Management Act*, the Commission is an Agency.[714]	• The Commission must advise the Minister on matters relating to elections.[715] • The Commission must consider, and report to the Minister on, matters relating to elections referred to it by the Minister.[716] • The Commission must provide information and advice on matters relating to elections to the Legislative Assembly, an Executive body, the head of an Agency, Territory authorities, political parties, MLAs and candidates at elections.[717]	-

[712] Ibid s 21AB(3).
[713] *Electoral Act 2004* (NT) s 308.
[714] Ibid s 312(1).
[715] Ibid s 309(1)(b).
[716] Ibid s 309(1)(c).
[717] Ibid s 309(1)(e).

Commission	Appointment	Rules on Advice and Reporting	Termination of Appointment
		• The Commission must conduct and promote research into matters relating to elections or other matters relating to its functions.[718] • The Commission must publish material on matters relating to its functions.[719] • Not more than 4 months after the end of each financial year, the Commission must give the Speaker a report of the Commission's operations during the year.[720] • In addition, the Commission may give the Speaker a report on any matter relating to its functions.[721] • This must be presented to the Legislative Assembly within 3 sitting days of receipt.[722]	

[718] Ibid s 309(1)(f).
[719] Ibid s 309(1)(g).
[720] Ibid s 313(1).
[721] Ibid s 313(2).
[722] Ibid s 313(3).

Commission	Appointment	Rules on Advice and Reporting	Termination of Appointment
4B. NT Electoral Commissioner	• The Administrator must appoint an Electoral Commissioner by Gazette notice.[723] • Before a person is appointed as the Electoral Commissioner, the Minister must consult the leaders of each political party and all independents in Parliament about the proposed appointment.[724] • The Commissioner holds office for a period not exceeding 5 years and is eligible for re-appointment.[725] • An MLA is not eligible to be appointed as the Commissioner.[726]	-	• The Administrator may suspend the Commissioner from duty for misbehaviour or physical or mental incapacity.[727] • Within 3 sitting days after the day the Commissioner has been suspended, a Minister must give reasons why the Commissioner was suspended to the Legislative Assembly.[728] If the LA passes a resolution within 7 days of this statement to end the appointment of the Commissioner, the Executive shall do so.[729] • If the above two requirements are not fulfilled the Commissioner shall resume his/her duties.[730] • During suspension the Commissioner will be paid in full.[731] • The Administrator must terminate the

[723] Ibid s 314(1).
[724] Ibid s 314(2).
[725] Ibid s 320.
[726] Ibid s 327.
[727] Ibid s 323(1).
[728] Ibid s 323(2).
[729] Ibid s 323(3).
[730] Ibid s 323(4).
[731] Ibid s 323(5).

Commission	Appointment	Rules on Advice and Reporting	Termination of Appointment
			appointment of the Commissioner if the Commissioner becomes bankrupt.[732] • The Commissioner may resign with notice.[733]
5A. Electoral Commission of Queensland	• The Commission consists of a Chairperson, Electoral Commissioner, and one other member when performing its functions under Part III.[734] • The Commission consists of the Electoral Commissioner when performing its functions other than those under Part III.[735] • The chairperson and non-judicial appointee are appointed by the Governor in Council and hold office part time.[736] • The chairperson must be a judge or former judge of a court of the Commonwealth or a state/territory for a period of at least 3 years.[737]	• The Commission must conduct a review of the appropriateness of the number of electoral districts whenever the Minister requests it, in writing, to conduct such a review, and report to the Minister the results of the review.[741] • The Commission must report to the Minister on electoral matters referred to it by the Minister; and such other electoral matters as it considers appropriate.[742] • The Commission must provide information and advice on electoral matters to the	• If the non-judicial appointee ceases to be the CEO of a department or equivalent office (under 6(6)(b)), the person ceases to hold office as a non-judicial appointee.[749] • A Commissioner may resign by notice to Governor.[750] • The Governor-in-Council must terminate the appointment of an appointed Commissioner if the appointed Commissioner: o Accepts nomination for election; o Becomes a member of a political party; o Becomes bankrupt; o Is absent without leave for 3

[732] Ibid s 323(6).
[733] Ibid s 324.
[734] *Electoral Act 1992* (Qld) s 6(2).
[735] Ibid s 6(3).
[736] Ibid s 6(4).
[737] Ibid s 6(5).

Commission	Appointment	Rules on Advice and Reporting	Termination of Appointment
	• The non-judicial appointee must be the CEO of a department or an equivalent statutory position.[738] • A person can only be appointed as a chairperson or non-judicial appointee if the Minister has consulted with each Parliamentary leader of a political party about the appointment, and with the parliamentary committee about the appointment and process for appointment.[739] • An appointed Commissioner holds office for not longer than 7 years.[740]	Legislative Assembly, the government, departments and government authorities.[743] • The Commission must conduct and promote research into electoral matters and other matters that relate to its functions.[744] • The Commission must publish material on matters that relate to its functions.[745] • No more than 4 months after the end of each financial year, the Commission must give to the Minister a report on the	consecutive meetings; or o Does not disclose interests without reasonable excuse.[751]

[741] Ibid s 7(1)(b).
[742] Ibid s 7(1)(c).
[749] Ibid s 9(2).
[750] Ibid s 11.
[738] Ibid s 6(6).
[739] Ibid s 6(7).
[740] Ibid s 9(1).
[743] Ibid s 7(1)(g).
[744] Ibid s 7(1)(h).
[745] Ibid s 7(1)(i).

Commission	Appointment	Rules on Advice and Reporting	Termination of Appointment
		Commission's operations during that year.[746] • The Commission must give a report on the operation of Part 7 (elections) in relation to the election as soon as practicable after the return of the writ for an election.[747] • This must be presented to the Legislative Assembly within 6 sitting days of receipt.[748]	
5B. Queensland Electoral Commissioner	• The Electoral Commissioner is to be appointed by the Governor in Council.[752] • A person may be appointed as Electoral Commissioner only if advertisements	-	• An Electoral Commissioner may resign by notice to the Governor-General.[757] • The Governor-in-Council may terminate the appointment of the electoral

[751] Ibid s 13.
[746] Ibid s 18(1).
[747] Ibid s 18(2).
[748] Ibid s 18(3).
[752] Ibid s 22(1).
[757] Ibid s 24.

Commission	Appointment	Rules on Advice and Reporting	Termination of Appointment
	have been circulated nationally calling for applications, the Minister has consulted with Parliamentary political party leaders and independents, and the Minister has consulted with the Parliamentary Committee about the appointment and its process of selection.[753] This is not required for the reappointment of an Electoral Commissioner.[754] • A member of a political party cannot be appointed as an Electoral Commissioner.[755] • The Electoral Commissioner holds office for a term no longer than 7 years.[756]		commissioner for misbehavior or physical or mental incapacity.[758] • The Governor-in-Council must terminate the electoral commissioner's appointment if the electoral commissioner: o Accepts nomination for election to Parliament; o Becomes a member of a political party; o Becomes bankrupt; o Is absent without leave for 14 consecutive days or 28 days in each year; o Does not disclose interests without reasonable excuse; or o Engages in paid employment outside the duties of office without the Minister's approval.[759] • Notice of an Electoral Commissioner's appointment must be published in the

[753] Ibid s 22(2).
[754] Ibid s 22(3).
[755] Ibid s 22(4).
[756] Ibid s 22(5).
[758] Ibid s 25(1).
[759] Ibid s 25(2).

Commission	Appointment	Rules on Advice and Reporting	Termination of Appointment
			Gazette.[760]
6A. SA Electoral Commission	Not included in Act.	Not included in Act.	Not included in Act.
6B. SA Electoral Commission	• The Governor may appoint an Electoral Commissioner on recommendation made by a resolution of both houses of Parliament.[761] • The duty of inquiring into and finding a suitable candidate for Electoral Commissioner is given to the Statutory Officers Committee established under the *Parliamentary Committees Act 1991*.[762] • The Electoral Commissioner must not engage in any remunerative employment outside the functions and duties of their respective offices.[763]	-	• The Governor may remove the Electoral Commissioner from office on presentation of a resolution from both Houses of Parliament.[765] • The Governor may suspend the Electoral Commissioner from duty for misbehaviour or incompetence.[766] • Within 3 sitting days after the day the Commissioner has been suspended, a Minister must give reasons why the Commissioner was suspended to Parliament.[767] If Parliament passes a resolution within 12 days of this statement

[760] Ibid s 28.
[761] *Electoral Act 1985*(SA) s 5(1).
[762] Ibid s 5(2).
[763] Ibid s 5(3).

Commission	Appointment	Rules on Advice and Reporting	Termination of Appointment
	• The Electoral Commissioner is appointed for a term expiring on the day they reach the age of 65 years.[764]		to end the appointment of the Commissioner, the Governor shall do so.[768] • If the above resolution is not passed the Commissioner shall resume his/her duties.[769] • The office of the Commissioner becomes vacant if he/she dies, resigns, retires (after 55), is convicted of an indictable offence or sentenced to imprisonment for an offence, he/she becomes a member or candidate for election as a member of Parliament, or he/she becomes physically or mentally incapable of satisfactorily carrying out his/her functions and duties.[770]
7A. Tasmanian Electoral Commission	• The Tasmanian Electoral Commission consists of the Commissioner and two other members.[771]	• The Electoral Commission must advise the Minister on matters relating to elections.[778]	• A person may resign office by notice to the Governor.[783] • A person may be removed from office by

[765] Ibid s 7(7).
[766] Ibid s 7(8).
[767] Ibid s 8(2)(a).
[764] Ibid s 7(6).
[768] Ibid s 7(8)(b).
[769] Ibid s 7(8)(b).
[770] Ibid s 7(9).
[771] *Electoral Act 2004* (Tas) s 7.

Commission	Appointment	Rules on Advice and Reporting	Termination of Appointment
	• The two other members are appointed by the Governor.[772] • A person can only be appointed as a member if the Minister has consulted with each Parliamentary leader of a political party and the President of the Council about the appointment.[773] • A person is not eligible to be appointed as a member of the Commission if the person is or in the last 5 years has been a Member of Parliament or a member of a political party.[774] • The Governor may appoint a member of the Commission, other than the Commissioner, to be chairperson.[775] • A member is appointed for a term no longer than 7 years and may be reappointed.[776]	• The Electoral Commission must consider and report to the Minister on matters referred to it by the Minister.[779] • The Electoral Commission must provide information and advice on electoral issues to the Parliament, the Government, Government departments and State authorities, within the meaning of the *State Service Act 2000*.[780] • The Electoral Commission must publish material on matters relating to its functions.[781] • The Commission, as soon as practicable after 30 June in each year, is to lay before each House	the Governor on addresses from both Houses of Parliament.[784] • A Governor may suspend a person from office if the person: o Is incapable of performing the functions of a member; o has shown himself/herself incompetent or has neglected to perform those functions; o has been absent without leave from 3 consecutive meetings of the Commission; o has become bankrupt; o has been convicted of a crime with an imprisonment term of 12 months or more; o Does not disclose a financial interest as soon as they become

[778] Ibid s 9(1)(a).
[783] Ibid sch 1 cl 7.
[772] Ibid s 8(1).
[773] Ibid s 8(2).
[774] Ibid s 8(3).
[775] Ibid s 8(4).
[776] Ibid sch 1 cl 2.
[779] Ibid s 9(1)(b).

Commission	Appointment	Rules on Advice and Reporting	Termination of Appointment
	• A member who holds an office which by the terms of his/her employment is required to devote the whole of his/her time to the functions of that office is not disqualified from holding the office of a member.[777]	of Parliament a report on the performance of its functions and the exercise of its powers during the period of 12 months ending on that date and may, at any time, lay before each House of Parliament a report on any matter arising in connection with the performance of its functions or exercise of its powers.[782]	aware of an interest; or o has been guilty of misconduct.[785] • If a member has been suspended, he/she is to be restored to office[786] unless: o A statement of the grounds for the member's suspension is laid before Parliament during the first 7 sitting days.[787] o Within 30 days of the statement being so laid, each House of Parliament passes an address requesting the removal of the member from office.[788]
7B. Tasmanian Electoral	• The Governor may appoint a person to be Electoral Commissioner.[789] • A person can only be appointed as	-	• The Commissioner may resign by notice to the Governor.[795] • A Governor may suspend the

[780] Ibid s 9(1)(d).
[781] Ibid s 9(1)(e).
[784] Ibid s 8(2).
[777] Ibid sch 1 cl 3.
[782] Ibid s 13.
[785] Ibid sch 1 cl 8.
[786] Ibid sch 1 cl 8(3).
[787] Ibid sch 1 cl 8(3)(a).
[788] Ibid sch 1 cl 8(3)(b).
[789] Ibid s 14(1).

Commission	Appointment	Rules on Advice and Reporting	Termination of Appointment
Commissioner	Commissioner if the Minister has consulted with each Parliamentary leader of a political party and the President of the Council about the appointment.[790] • A person is not eligible to be appointed as Commissioner if the person is or in the last 5 years has been a Member of Parliament or a member of a political party.[791] • The Commissioner holds office for a term of no longer than 7 years.[792] • The Commissioner is eligible for reappointment.[793] • The Commissioner may hold any other office compatible with the performance of his functions as Commissioner.[794]		Commissioner from office if the Commissioner: o Is incapable of performing the functions of Commissioner; o has shown himself/herself incompetent or has neglected to perform those functions; o has been absent without leave from 3 consecutive meetings of the Commission; o has become bankrupt; o has been convicted of a crime with an imprisonment term of 12 months or more; o Does not disclose a financial interest as soon as they become aware of an interest; or o has been guilty of misconduct.[796] • If the Commissioner has been suspended,

[795] Ibid s 20.
[790] Ibid s 14(2).
[791] Ibid s 14(3).
[792] Ibid s 17(1).
[793] Ibid s 17(3).
[794] Ibid s 17(4).
[796] Ibid s 21(2).

Commission	Appointment	Rules on Advice and Reporting	Termination of Appointment
			he/she is to be restored to office[797] unless: o A statement of the grounds for the Commissioner's suspension is laid before Parliament during the first 7 sitting days.[798] • Within 30 days of the statement being so laid, each House of Parliament passes an address requesting the removal of the Commissioner from office.[799]
8A. Victorian Electoral Commission	• The Commission consists of one member who is appointed as the Electoral Commissioner.[800]	• The Commission must report to each House of Parliament within 12 months of the conduct of each election on the administration of that election.[801] • The Commission must conduct and promote research into electoral matters that are in the general public interest.[802] • The Commission must consider,	-

[797] Ibid s 21(3).
[798] Ibid s 21(3)(a).
[799] Ibid s 21(3)(b).
[800] *Electoral Act 2002* (Vic) s 7.
[801] Ibid s 8(2)(b).
[802] Ibid s 8(2)(g).

Commission	Appointment	Rules on Advice and Reporting	Termination of Appointment
		and report to the Minister on electoral matters that are in the general public interest referred to the Commission by the Minister.[803] • The Commission must report to each House of Parliament on all elections and polls referred to in subsection (3) within the first sitting week of each House of the Parliament immediately after 1 January and 1 July each year.[804] • The Commission must publish an election manual for the purposes of this Act, with any directions issued by the Commission.[805] • The Commission may publish guidelines relating to the performance of its responsibilities and functions and the exercise of its powers.[806]	

[803] Ibid s 8(2)(h).
[804] Ibid s 8(4).
[805] Ibid s 11(1), (2).
[806] Ibid s 11(3).

Commission	Appointment	Rules on Advice and Reporting	Termination of Appointment
8B. Victorian Electoral Commissioner	• The Governor in Council may appoint an Electoral Commissioner.[807] • The Electoral Commissioner holds office for a period of 10 years and may be reappointed.[808] • An Electoral Commissioner cannot be/have been for 5 years a member of a registered political party.[809] • Nothing in the *Public Administration Act 2004 (Vic)* applies in relation to the office of Electoral Commissioner.[810] • The Electoral Commissioner must not engage in any paid employment outside the role of Commissioner. If he does so, he must immediately inform the minister, who within 7 sitting days must inform the Parliament.[811]	-	• The office of the Electoral Commissioner becomes vacant if the Commissioner: o Resigns; o Becomes bankrupt; o Nominates for election for Parliament; o Is convicted of an indictable offence or sentenced to imprisonment; o If the Governor in Council determine that the Electoral Commissioner is physically incapable of carrying out his duties; or o If a resolution passes both Houses requesting the Electoral Commissioner's removal from office.[812] • The Governor in Council may suspend the Commissioner on the basis of neglect of

[807] Ibid s 12(1).
[808] Ibid s 12(2).
[809] Ibid s 12(3).
[810] Ibid s 12(5).
[811] Ibid s 15(2), (3).
[812] Ibid s 12(4).

Commission	Appointment	Rules on Advice and Reporting	Termination of Appointment
			duty, misconduct, or any other ground that makes the Commissioner unfit for office.[813] • The Minister must notify the President, Speaker and Leader of each political party in each house of Parliament 2 hours after the suspension of the Commissioner.[814] • If Parliament is not sitting, and a petition of at least 20 LA members or 30 Parliamentary members is signed objecting to the suspension and requesting Parliament sit, the Parliament must be summoned to meet ASAP.[815] • A Commissioner must be restored to office unless a statement setting out the reasons for suspension is set before both Houses during the first 7 sitting days, and each house passes a resolution requesting the removal of the Commissioner from office.[816]
9A. WA	• The department of the Public Service of	-	-

[813] Ibid s 14(1).
[814] Ibid s 14(2).
[815] Ibid s 14(3).
[816] Ibid s 14(4).

Commission	Appointment	Rules on Advice and Reporting	Termination of Appointment
Electoral Commission	the State through which this Act is administered shall be known as the Western Australian Electoral Commission.[817]		
9B. WA Electoral Commissioner	• There shall be an Electoral Commissioner.[818] • The Electoral Commissioner shall be appointed by the Governor on the recommendation of the Premier.[819] • Before making a recommendation, the Premier must consult the Parliamentary leader of each party in Parliament.[820] • The Electoral Commissioner shall hold office for a term not exceeding 9 years and is eligible for reappointment.[821] • No person who is or has been a Member of Parliament shall be appointed as Electoral Commissioner.[822] • Section 52 of the *Interpretation Act 1984*	• The Electoral Commissioner must consider, and report to the Minister on, electoral matters referred to him by the Minister and such other electoral matters as the Electoral Commissioner thinks fit.[824] • The Electoral Commissioner must provide information and advice on electoral matters to the Parliament, Members of Parliament, the Government, departments and authorities of the State.[825] • The Electoral Commissioner must	• The Electoral Commissioner may resign.[830] • If an Electoral Commissioner is nominated for election he/she shall vacate office.[831] • The Electoral Commissioner shall not hold any position of profit or trust or engage in any occupation or reward outside the duties of his office and if he does, he shall be guilty of misconduct.[832] • The Electoral Commissioner may be suspended or removed from office by the Governor on addresses from both Houses of Parliament.[833] • The Governor may suspend the Electoral Commissioner from office where the Commissioner:

[817] *Electoral Act 1907* (WA) s 4A.
[818] Ibid s 5.
[819] Ibid s 5B(2).
[820] Ibid s 5B(3).
[821] Ibid s 5B(4).
[822] Ibid s 5B(10).

Commission	Appointment	Rules on Advice and Reporting	Termination of Appointment
	does not apply to the Electoral Commissioner.[823]	conduct and promote research into electoral matters and other matters that relate to his functions.[826] • The Electoral Commissioner must publish material on matters that relate to his functions.[827] • As soon as practicable after the end of the period within which returns under sections 175N and 175NA have to be lodged in relation to a financial year, the Electoral Commissioner shall prepare and submit to the Minister a report on the operation of this Part in relation to that financial year.[828]	o Is incapable of properly performing the duties of office; o Has shown himself incompetent to perform, or has neglected those duties; o Is bankrupt; or o Has been guilty of misconduct.[834] • A Commissioner must be restored to office unless a statement setting out the reasons for suspension is set before both Houses during the first 7 sitting days, and within 30 days of that statement each house passes a resolution requesting the removal of the Commissioner from office.[835]

[824] Ibid s 5F(1)(c).
[825] Ibid s 5F(1)(e).
[830] Ibid s 5B(5).
[831] Ibid s 5B(10).
[832] Ibid s 5B(11).
[833] Ibid s 5C(1).
[823] Ibid s 5B(12).
[826] Ibid s 5F(1)(f).
[827] Ibid s 5F(1)(f).
[828] Ibid s 175ZG(1).

Commission	Appointment	Rules on Advice and Reporting	Termination of Appointment
		• The Minister shall cause a copy of each report submitted under subsection (1) to be laid before each House of Parliament as soon as practicable after receiving the report.[829]	

[834] Ibid s 5C(2).
[835] Ibid s 5C(3).
[829] Ibid s 175ZG(2).

APPENDIX FIVE

ACCOUNTABILITY MECHANISMS OF INTERNATIONAL ELECTORAL COMMISSIONS

Commission	Appointment	Rules on Advice and Reporting	Termination of Appointment
1. Canadian Chief Electoral Officer [Note that there is also a Commissioner of Canada Elections, whose duty it is to ensure that the Act is complied with and enforced.[836] He investigates upon direction by the Chief Electoral Officer.[837]	• There shall be a Chief Electoral Officer who shall be appointed by resolution of the House of Commons to hold office during good behaviour.[838]	• After a general election, the Chief Electoral Officer within 90 days must publish a report that sets out the number of votes for each candidate, and any other relevant information.[839] • After a general election, the Chief Electoral Officer must within 90 days provide to the Speaker a report that sets out any matter that has arisen, and any measures taken under s 17(1), (3) [emergency provisions] or ss 509-513 [investigation of offences] that needs to be brought to the attention of the House of Commons.[840] • If there is one or more by-elections, a Chief Electoral Officer must within 90 days of the end of the year provide to the Speaker a report that sets out any matter that has arisen, and any measures taken under s 17(1), (3) or ss 509-513	• [The Chief Electoral Officer] may be removed for cause by the Governor General on address of the Senate and House of Commons.[845] • The Chief Electoral Officer ceases to hold office on reaching 65 years of age.[846] • In the case of death, incapacity, or negligence of the Chief Electoral Officer while the Parliament is not sitting, a substitute Chief Electoral Officer shall be chosen by the Chief Justice of the Supreme Court of Canada.[847]

[836] *Canada Elections Act*, SC 2000, c 9, s 509.
[837] Ibid s 510.
[838] Ibid s 13(1).
[839] Ibid s 533.
[840] Ibid s 534(1).

Commission	Appointment	Rules on Advice and Reporting	Termination of Appointment
		[see above] that needs to be brought to the attention of the House of Commons.[841] • If the Chief Executive Order prescribes qualifications for appointment or termination of Returning Officers, he must report this to the House of Commons without delay.[842] • After a general election, the Chief Electoral Officer will make a report to the Speaker that sets out any proposed amendments to the Electoral Act.[843] • The Speaker will submit any report to the House of Commons without delay.[844]	
2. New Zealand Electoral Commission	• The Governor General, on the recommendation of the House of Representatives, must appoint three members of the electoral commission: one Chief Executive Officer, one	• The functions of the Commission are to: o Consider and report to the Minister or to the House of Representatives on electoral matters referred to the Electoral Commission by the Minister or	• A member of the Electoral Commission may resign by written notice to the Governor-General. This is effective from the date specified in the notice or

[845] Ibid s 13(1).
[846] Ibid s 13(2).
[847] Ibid s 14(1).
[841] Ibid s 534(2).
[842] Ibid 535(2).
[843] Ibid s 535.
[844] Ibid 536.

Commission	Appointment	Rules on Advice and Reporting	Termination of Appointment
	chairperson, and one deputy chairperson.[848] • The members of the Commission are considered the board for the purposes of the Crown Entities Act 2004 (see **Termination**).[849] The appointment of a judge as a member does not affect his/her tenure or rank/title/salary etc.[850]	the House of Representatives.[851] o Make information available to parties, candidates, etc to assist them with their statutory requirements relating to the Electoral Commission.[852] • The Electoral Commission may, if it considers it is necessary for the proper discharge of its functions: o Provide any information and advice on any matter to the Minister, either for the Minister's consideration or for presentation to the House of Representatives.[853] • If the Electoral Commission provides any advice under s 6(e) for presentation to the House of Representatives, the Minister must present it within 5 working days, or as soon as possible after Parliament recommences if it is not sitting.[854]	when the Governor-General receives it.[861] • The power to suspend a judge is regulated by s 42 of the Crown Entities Act.[862] o A judge may be removed as a member in accordance with Crown Entities Act for a breach of a board's collective duties, but only if all members are being removed, and this does not affect his tenure as a judge.[863] • Any member may be removed for just cause by the Governor-General acting on address by House of Representatives.[864]

[848] *Electoral Act 1993* (NZ) s 4D(1).
[849] Ibid s 4D(3).
[850] Ibid s 4E.
[851] Ibid s 5(d).
[852] Ibid s 5(e).
[853] Ibid s 6(1)(e).
[854] Ibid s 6(3).

Commission	Appointment	Rules on Advice and Reporting	Termination of Appointment
		• Within 6 months of an election, the Electoral Commission must report to the Minister on the administration of that election (issues to be covered are listed).[855] The Minister must present this report to the House of Representatives within 5 working days of receiving it, or as soon as possible after Parliament commences if it is not sitting.[856] The Electoral Commission must publish this report as soon as practicable (no later than 10 working days) after it has been received by the Minister.[857] • The Commission must also report on a change of electoral boundaries.[858] This report must be laid before Parliament within 3 sitting days (of receiving report or Parliament recommencing if it is not sitting).[859]	• Just cause is defined in the Crown Entities Act.[865] o Just cause includes misconduct, inability to perform the functions of office, neglect of duty, and breach of the collective duties of the board or individual duties of members.[866]

[861] Ibid s 4F(1), (2).
[862] Ibid s 4G(1).
[863] *Crown Entities Act 2004* (NZ) s 42.
[864] *Electoral Act 1993* (NZ) s 4G(3).
[855] Ibid s 8(1).
[856] Ibid s 8(2).
[857] Ibid s 8(3).
[858] Ibid s 40.
[859] Ibid s 41.
[865] Ibid s 4G(4).
[866] *Crown Entities Act 2004* (NZ) s 40.

Commission	Appointment	Rules on Advice and Reporting	Termination of Appointment
		• The Electoral Commission must report on the total amounts of donations received, the amounts paid to a party secretary, and the amount returned to donors. They must report this every three months on their website and every year in their annual report.[860]	
3A. UK Electoral Commission	• The Commission shall consist of members to be known as Electoral Commissioners[867], appointed by the Queen.[868] There shall be not less than five, but not more than nine.[869] • The Queen shall only act upon an Address from the House of Commons.[870] No motion shall be made for such an address unless the there has been consultation with the leader of each political party of the House of Commons, and with the Speaker's agreement.[871]	• The Commission shall, as soon after the end of each financial year as may be practicable, prepare and lay before each House of Parliament a report about the performance of the Commission's functions during that financial year.[877] • The Commission shall, on so laying such a report, publish the report in such manner as they determine.[878] • If the Commission makes any regulations, they must give a copy to the Secretary of State without delay.[879] • The Commission shall, after each applicable election, referendum, and	• An Electoral Commissioner shall cease to hold office if any of the following events occur: o He is nominated as a candidate for a general election; o He takes up office with a registered party, a registered third party, or a permitted participant; o He is named as a donor in the register of donations; or

[860] Ibid s 208G.
[867] *Political Parties, Elections and Referendums Act 2000* (UK) c 41, s 1(2).
[868] Ibid s 1(4).
[869] Ibid s 1(3).
[870] Ibid s 3(1).
[871] Ibid s 3(2).
[877] Ibid sch 1 s 20(1).
[878] Ibid sch 1 s 20(2).

Commission	Appointment	Rules on Advice and Reporting	Termination of Appointment
	• A person cannot be appointed as an Electoral Commissioner if the person: o Is a registered party member; o Is a registered party officer or employee o Is a registered party's accounting unit officer or employee o Is an MP in any Parliament in the UK o In the last 10 years has been a party office/employee, held a relevant officer or been a donor in the register of donations.[872] • An Electoral Commissioner shall hold office for the period he has been appointed.[873] This period shall be specified to him in the address under which he was appointed[874], and can be no longer than 10 years.[875]	Welsh Assembly poll[880], publish a report on the administration of the election.[881] • The Commission shall report from time to time on issues relating to elections, issues relating to referendums, the redistribution of seats, the registration of political parties and regulation of their income and expenditure, political advertising, and electoral law.[882] • At the request of the Secretary of State, the Commission shall report on any issue that the Secretary specifies.[883] • The Commission must not report on political party funding in Northern Ireland, the conduct of referendums in Scotland, Wales, and Northern Ireland, or the law relating to these two issues.[884] • Where any report refers to Northern Irish elections or referendums, the Commission shall consult the Chief Electoral Officer for Northern Ireland.[885] • The Commission must be consulted	o He becomes a registered party member.[891] • An Electoral Commissioner may be removed from office by the Queen after an address from the House of Commons.[892] This shall only occur if a report is presented demonstrating that: o he has failed to discharge his functions for 3 consecutive months; o he has failed to comply with the terms of his appointment; o he has been convicted of a criminal offence; o he is bankrupt; o he has made an arrangement or composition contract

[879] Ibid sch 1 s 21(1).
[872] Ibid s 3(4).
[873] Ibid sch 1 s 3(1).
[874] Ibid sch 1 s 3(2).

Commission	Appointment	Rules on Advice and Reporting	Termination of Appointment
	• An Electoral Commissioner can be reappointed.[876]	before various authorities make regulations/changes to the electoral law (relevant Acts listed in section). [886] • The Commission may participate with any relevant local authority in submission of proposals in relation to pilot schemes for changes in electoral procedure.[887] • The Commission may, at the request of any relevant body, provide the body with advice and assistance as respects any matter in which the Commission have skill and experience. The Commission may also advise registration officers, returning officers, registered parties, recognised third parties, and permitted participants. It can also advise other people when	with, or has granted a trust deed for, his creditors; or o he is otherwise unfit to hold office. This motion cannot be made if three months have passed since the report was made.[893] • An Electoral Commissioner can resign.[894]

[875] Ibid s 3(3).
[880] Ibid sch 1 s 5(1).
[881] Ibid sch 1 s 5(3).
[882] Ibid s 6(1).
[883] Ibid s 6(2).
[884] Ibid s 6(3).
[885] Ibid s 6(4).
[891] Ibid sch 1 s 3(3).
[892] Ibid sch 1 s 3(4).
[876] Ibid s 3(5).
[886] Ibid s 7.
[887] Ibid s 9.

Commission	Appointment	Rules on Advice and Reporting	Termination of Appointment
		required to do so to carry out its functions.[888] • Broadcasters must have regard to the views of the Commission before making any rules on party political broadcasts.[889] • The Commission shall submit to the Secretary of State recommendations for a Commission Scheme of 'policy development grants' – grants to ensure smaller parties in the House of Commons have the funds to develop policy.[890]	
3B. Chairman of the UK Electoral Commission	• Her Majesty shall appoint one of the Electoral Commissioners to be the chairman of the Commission.[895]		• The Chairman is appointed for a term specified in the address under which he is appointed.[896] • The Chairman can resign the office of Chairman.[897] • If the Chairman ceases to be an Electoral Commissioner,

[893] Ibid sch 1 s 3(5).
[894] Ibid sch 1 s 3(7).
[888] Ibid s 10.
[889]Ibid s 11.
[890] Ibid s 12.
[895] Ibid s 1(5).
[896] Ibid sch 1 s 4(2).
[897] Ibid sch 1 s 4(3).

Commission	Appointment	Rules on Advice and Reporting	Termination of Appointment
			he ceases to be Chairman.[898]
4A. Federal Electoral Commission	• There is established a commission to be known as the Federal Election Commission.[899] • The Commission is composed of the Secretary of the Senate and the Clerk of the House of Representatives or their designees, ex officio and without the right to vote[900], and 6 members appointed by the President, by and with the advice and consent of the Senate.[901] • No more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party.[902] • Members of the Commission shall serve for a single term of 6 years.[903] • A member of the Commission may serve on the Commission	• The Commission has the power to render advisory opinions under § 437f.[908] • Not later than 60 days after the Commission receives from a person a complete written request concerning the application of this Act with respect to a specific transaction or activity by the person, the Commission shall render a written advisory opinion relating to such transaction or activity to the person.[909] • If a candidate requests a written advisory opinion within the 60 day period before an election, the Commission shall render this opinion no less than 20 days after the request.[910] • No advisory opinions may be issued by the Commission except in accordance with § 437f.[911] • People involved the transaction mentioned in the request are entitled to	None listed.

[898] Ibid sch 1 s 4(4).
[899] *Federal Election Campaign Act of 1971*, 14 USC § 437c(1) (2008).
[900] Note that these ex-officio members were found to be unconstitutional in *FEC v NRA Political Victory Fund* 6.F3d 821 (DC Cir 1993) and so no longer sit on the Commission.
[901] *Federal Election Campaign Act of 1971*, 14 USC § 437c (1) (2008).
[902] Ibid.
[903] Ibid § 437c(2)(a).

Commission	Appointment	Rules on Advice and Reporting	Termination of Appointment
	after the expiration of his or her term until his or her successor has taken office as a member of the Commission.[904] • Members shall be chosen on the basis of their experience, integrity, impartiality, and good judgment.[905] • Members (other than the Secretary of the Senate and the Clerk of the House of Repre-sentatives) shall be individuals who, at the time appointed to the Commission, are not elected or appointed officers or employees in the executive, legislative, or judicial branch of the Federal Government.[906] • Member of the Commission cannot undertake employment. If doing so at the time of appointment, they must terminate	rely upon the advisory opinion.[912] • The Commission shall make public any request for an opinion. It will accept any written comments submitted by interested parties within the 10 day period once the request has been made public.[913] • The Commission shall transmit to the President and to each House of the Congress no later than June 1 of each year, a report which states in detail the activities of the Commission in carrying out its duties under this Act, and any recommendations for any legislative or other action the Commission considers appropriate.[914] • Note that the Commission must also file reports on the financing of national committees of political parties receiving public funding[915] and aid with reports for the IRS.[916]	

[908] Ibid § 437d(a)(7).
[909] Ibid § 437f(a)(1).
[910]Ibid § 437f(a)(2).
[911] Ibid § 437f(b).
[904] Ibid § 437c(2)(b).
[905] Ibid § 437c(3).
[906] Ibid.

Commission	Appointment	Rules on Advice and Reporting	Termination of Appointment
	this employment within 90 days.[907]		
4B. Chairman of Federal Election Commission	• The Commission shall elect a chairman and a vice chairman from among its members (other than the Secretary of the Senate and the Clerk of the House of Representatives) for a term of one year.[917] • A member may serve as chairman only once during any term of office to which such member is appointed.[918] • The chairman and the vice chairman shall not be affiliated with the same political party. [919]	None listed.	None listed.

[912] Ibid § 437f(c).
[913] Ibid § 437f (d).
[914] Ibid §438(a)(9).
[915] *Internal Revenue Code*. 26 USC §§ 9009(a), 9039(a) (2008).
[916] *Federal Election Campaign Act of 1971*, 14 USC § 438f (1) (2008).
[907] Ibid.
[917] Ibid § 437c(5).
[918] Ibid.
[919] Ibid.

APPENDIX SIX

DEFINITIONS OF POLITICAL DONATIONS - AUSTRALIA

Jurisdiction	Definition of Political Donation
1. Commonwealth	• ***gift*** means any disposition of property made by a person to another person, otherwise than by will, being a disposition made without consideration in money or money's worth or with inadequate consideration, and includes the provision of a service (other than volunteer labour) for no consideration or for inadequate consideration, but does not include: a) a payment under Division 3; or b) an annual subscription paid to a political party, to a State branch of a political party or to a division of a State branch of a political party by a person in respect of the person's membership of the party, branch or division.[920] • ***loan*** means any of the following: a) an advance of money; b) a provision of credit or any other form of financial accommodation; c) a payment of an amount for, on account of, on behalf of or at the request of, an entity, if there is an express or implied obligation to repay the amount; d) a transaction (whatever its terms or form) which in substance effects a loan of money.[921]
2. Australian Capital Territory	• (1) For this part, each of the following is a ***gift***: a) a disposition of property made by a person to another person without consideration in money or money's worth or with inadequate consideration; b) the provision of a service (other than volunteer labour) for no consideration or inadequate consideration. • (2) For this part, each of the following is also a ***gift***: a) if an annual subscription paid to a party by a person for the person's membership of the party is more than $250—the amount of the subscription that is more than $250; b) if a fundraising contribution in relation to a single fundraising event is more than $250—the amount of the contribution that is more than $250.

[920] *Commonwealth Electoral Act 1918* (Cth) s 287(definition of 'gift').
[921] Ibid s 306A(definition of 'loan').

Jurisdiction	Definition of Political Donation
	• (3) However, for this part, none of the following is a ***gift***: a) a disposition of property under a will; b) an annual subscription for membership of a party of $250 or less; c) if an annual subscription for membership of a party is more than $250—the first $250 of the subscription; d) a fundraising contribution in relation to a single fundraising event of $250 or less; e) if a fundraising contribution in relation to a single fundraising event is more than $250—the first $250 of the contribution; f) a gift mentioned in subsection (1) if— i. the gift is given to an individual in a private capacity for the individual's personal use; and ii. the individual does not use the gift solely or substantially for a purpose related to an election; g) a payment under division 14.3 (Election funding) or division 14.3A (Administrative expenditure funding); h) a payment made by an entity within a party grouping to another entity within the party grouping. • (4) Subsection (3) (h) and this subsection expire on 1 January 2014.[922] • ***loan*** means any of the following: a) an advance of money; b) a provision of credit or any other form of financial accommodation; c) a payment of an amount for, on account of, on behalf of or at the request of the receiver, if there is an express or implied obligation to repay the amount; d) a transaction (whatever its terms or form) that is, in substance, a loan of money.[923]
3. New South Wales	• (1)For the purposes of this Act, a ***political donation*** is: a) a gift made to or for the benefit of a party, or b) a gift made to or for the benefit of an elected member, or c) a gift made to or for the benefit of a candidate or a group of candidates, or d) a gift made to or for the benefit of an entity or other person (not being a party, elected member, group or candidate), the whole or part of which was used or is intended to be used

[922] *Electoral Act 1992* (ACT) s 198AA.
[923] Ibid s 198(definition of 'loan').

Jurisdiction	Definition of Political Donation
	by the entity or person: i. to enable the entity or person to make, directly or indirectly, a political donation or to incur electoral expenditure, or ii. to reimburse the entity or person for making, directly or indirectly, a political donation or incurring electoral expenditure.[924] • (2) An amount paid by a person as a contribution, entry fee or other payment to entitle that or any other person to participate in or otherwise obtain any benefit from a fund-raising venture or function (being an amount that forms part of the proceeds of the venture or function) is taken to be a gift for the purposes of this section.[925] • (3)An annual or other subscription paid to a party by: a) a member of the party, or b) a person or entity (including an industrial organisation) for affiliation with the party, is taken to be a gift to the party for the purposes of this section.[926] • (3A) The following dispositions of property are taken to be a gift for the purposes of this section: a) a disposition of property to a NSW branch of a party from the federal branch of the party, b) a disposition of property to a NSW branch of a party from another State or Territory branch of the party, c) a disposition of property from a party to another associated party (whether associated because of common membership, coalition arrangements or otherwise).[927] • (3B) Uncharged interest on a loan to an entity or other person is taken to be a gift to the person for the purposes of this section. Uncharged interest is the additional amount that would have been payable by the person if: a) the loan had been made on terms requiring the payment of interest at the generally prevailing interest rate for a loan of that kind, and b) any interest payable had not been waived, and c) any interest payments were not capitalised.[928] • (4) The following are not political donations:

[924] EFED Act s 85.
[925] Ibid.
[926] Ibid.
[927] Ibid.
[928] Ibid.

Jurisdiction	Definition of Political Donation
	a) a gift to an individual that was made in a private capacity to the individual for his or her personal use and that the individual has not used, and does not intend to use, solely or substantially for a purpose related to an election or to his or her duties as an elected member b) a payment under Part 5 (Public funding of election campaigns) or Part 6A (Political Education Fund).[929] • (5) However, if any part of a gift referred to in subsection (4) (a) is subsequently used to incur electoral expenditure, that part of the gift becomes a political donation.[930] • (1) For the purposes of this Act, a ***reportable political donation*** is: a) in the case of disclosures under this Part by a party, elected member, group, candidate or third-party campaigner—a political donation of or exceeding $1,000 made to or for the benefit of the party, elected member, group, candidate or third-party campaigner, or b) in the case of disclosures under this Part by a major political donor—a political donation of or exceeding $1,000 made by the major political donor to or for the benefit of a party, elected member, group, candidate or third-party campaigner.[931] • (2) A political donation of less than an amount specified in subsection (1) made by an individual is to be treated as a reportable political donation if that and other separate political donations made by that individual to the same party, elected member, group, candidate, third-party campaigner or person within the same financial year (ending 30 June) would, if aggregated, constitute a reportable political donation under subsection (1).[932] • (3) A political donation of less than an amount specified in subsection (1) made by an individual to a party is to be treated as a reportable political donation if that and other separate political donations made by that individual to an associated party within the same financial year (ending 30 June) would, if aggregated, constitute a reportable political donation under subsection (1). This subsection does not apply in connection with disclosures of political donations by parties.[933]

[929] Ibid.
[930] Ibid.
[931] Ibid s 86.
[932] Ibid.
[933] Ibid.

Jurisdiction	Definition of Political Donation
	• (4) For the purposes of subsection (3), parties are associated parties if endorsed candidates of both parties were included in the same group in the last periodic Council election or are to be included in the same group in the next periodic Council election.[934]
4. Northern Territory	• ***gift*** means any disposition of property made by a person to someone else, being a disposition made without consideration in money or money's worth or with inadequate consideration, and includes providing a service (other than volunteer labour) for no consideration or for inadequate consideration, but does not include: a) a disposition of property by will; or b) an annual subscription paid to a registered party by a person for the person's membership of the party.[935] • ***loan*** means any of the following: a) an advance of money; b) a provision of credit or any other form of financial accommodation; c) a payment of an amount for, on account of, on behalf of or at the request of the receiver, if there is an express or implied obligation to repay the amount; d) a transaction (whatever its terms or form) that in substance effects a loan of money.[936] • ***property*** includes money.[937]
5. Queensland	• (1) A ***political donation*** is— a) a gift made to a registered political party, candidate or third party that is accompanied by a statement from the person making the gift (the ***donor***) that the gift is intended for use for campaign purposes during the capped expenditure period for an election; or b) a disposition of property to a registered political party from another branch or division of the party or a related political party (the ***transferring branch or party***) that is stated by the transferring branch or party to be a disposition intended for use by the registered political party for campaign purposes during the capped expenditure period for an election; or c) a disposition of property to a candidate in an election from a federal or interstate branch or division of a political party that is stated by the branch or division to be a disposition intended

[934] Ibid.
[935] *Electoral Act 2004* (NT) s 176 (definition of 'gift').
[936] Ibid s 176 (definition of 'loan').
[937] Ibid s 176 (definition of 'property').

Jurisdiction	Definition of Political Donation
	for use by the candidate for campaign purposes during the capped expenditure period for an election; or d) a gift made to an entity (the ***recipient***) that was used or intended to be used by the recipient to enable the recipient to make a gift mentioned in paragraph (a).[938] • (2) Also, a gift in kind made to a registered political party, candidate or third party is a political donation if it is made during, or for use during, the capped expenditure period for an election for campaign purposes, whether or not it is accompanied by a statement from the person making the gift that the gift is intended for that use.[939] • (3) A statement made under subsection (1) by a donor or transferring branch or party must be— a) in writing; and b) given to the registered political party, candidate or third party at the same time, or within 14 days after, the gift or disposition is made.[940] • (4) However, the statement— a) need not be signed by the donor or transferring branch or party; and b) need not use a particular form of words to express the intention of the donor or transferring branch or party.[941] • (5) A gift made by a donor to a registered political party, candidate or third party is not a political donation if— a) the name and address of the donor are not known to the person receiving the gift; or b) at the time the gift is made, the donor gives to the person receiving the gift the donor's name and address and the person receiving the gift has grounds to believe the name and address given are not the true name and address of the person making the gift.[942] • (6) In this section— ***campaign purposes*** means— a) in connection with promoting or opposing, directly or indirectly, a registered political party or the election of a candidate; or b) for the purpose of influencing, directly or indirectly, voting at an election.[943]

[938] *Electoral Act 1992* (Qld) s 250.
[939] Ibid.
[940] Ibid.
[941] Ibid.
[942] Ibid.

Jurisdiction	Definition of Political Donation
6. South Australia	No definition given.
7. Tasmania	No definition given.
8. Victoria	• ***political donation*** means a gift to a registered political party.[944] • ***gift*** means any disposition of property otherwise than by will made by a person to another person without consideration in money or money's worth or with inadequate consideration, including— a) the provision of a service (other than volunteer labour); and b) the payment of an amount in respect of a guarantee; and c) the making of a payment or contribution at a fundraising function— but excluding— a) a payment under this Part; and b) an annual subscription paid to a political party by a person in respect of the person's membership of the party.[945]
9. Western Australia	• ***gift*** means any disposition of property made by a person to another person, otherwise than by will, being a disposition made without consideration in money or money's worth or with inadequate consideration, and includes the provision of a service (other than volunteer labour) for no consideration or for inadequate consideration, but does not include an annual subscription of not more than $200 paid by a person to a political party or to a division of a political party in respect of the person's membership of the party or division.[946]

[943] Ibid.
[944] *Electoral Act 2002 (Vic)* s 206(1) (definition of 'political donation').
[945] Ibid s 206(1) (definition of 'gift').
[946] *Electoral Act 1907* (WA) s 175 (definition of 'gift').

APPENDIX SEVEN

DEFINITIONS OF ELECTORAL EXPENDITURE – AUSTRALIA

Jurisdiction	Definition of Electoral Expenditure
1. Commonwealth	• (1)In this Division, ***electoral expenditure***, in relation to an election, means expenditure incurred (whether or not incurred during the election period) on: a) the broadcasting, during the election period, of an advertisement relating to the election; or b) the publishing in a journal, during the election period, of an advertisement relating to the election; or c) the display, during the election period, at a theatre or other place of entertainment, of an advertisement relating to the election; or; d) the production of an advertisement relating to the election, being an advertisement that is broadcast, published or displayed as mentioned in paragraph (a), (b) or (c); or e) the production of any material (not being material referred to in paragraph (a), (b) or (c)) that is required under section 328, 328A or 328B to include the name and address of the author of the material or of the person authorizing the material and that is used during the election period; or f) the production and distribution of electoral matter that is addressed to particular persons or organisations and is distributed during the election period; or g) the carrying out, during the election period, of an opinion poll, or other research, relating to the election.[947] • (2) For the purposes of this Division, electoral expenditure incurred by or with the authority of a division of a State branch of a political party shall be deemed to have been incurred by that State branch.[948] • (3) A reference in this Division to a participant in an election shall be read as a reference to: a) a political party, a State branch of a political party, a division of a State branch of a political party or a candidate; or b) a person (not being a political party, a State branch of a political party, a division of a State branch of a political party or a candidate) by whom or with the authority of whom electoral

[947] *Commonwealth Electoral Act 1918* (Cth) s 308.
[948] Ibid.

Jurisdiction	Definition of Electoral Expenditure
	expenditure in relation to an election was incurred.[949]
2. Australian Capital Territory	• ***electoral expenditure***, in relation to an election— a) means expenditure incurred on— i. broadcasting an electoral advertisement; or ii. publishing an electoral advertisement; or iii. displaying an electoral advertisement at a theatre or other place of entertainment; or iv. producing an electoral advertisement mentioned in subparagraph (i), (ii) or (iii); or v. producing, broadcasting, publishing, displaying or distributing any electoral matter (other than material mentioned in subparagraph (i), (ii) or (iii))— A. (A) to which section 292 applies, or would apply but for section 294 (1) (a), (b), (e), (f), (g), (h), (i), or (j); and B. (B) that is not paid for by the Legislative Assembly or the Territory; or vi. consultant's or advertising agent's fees in relation to— A. (A) services relating to electoral matter mentioned in subparagraph (i) to (v); or B. (B) material relating to electoral matter mentioned in subparagraph (i) to (v); or vii. carrying out an opinion poll or other research undertaken to support the production of electoral matter mentioned in subparagraph (i) to (vi); but b) does not include administrative expenditure.[950]
3. New South Wales	• (1) For the purposes of this Act, ***electoral expenditure*** is expenditure for or in connection with promoting or opposing, directly or indirectly, a party or the election of a candidate or candidates or for the purpose of influencing, directly or indirectly, the voting at an election.[951] • (2) For the purposes of this Act, ***electoral communication expenditure*** is electoral expenditure of any of the following kinds: a) expenditure on advertisements in radio, television, the Internet, cinemas, newspapers, billboards, posters, brochures, how-to-vote cards and other election material, b) expenditure on the production and distribution of election material,

[949] Ibid.
[950] *Electoral Act 1992* (ACT) s 198 (definition of 'electoral expenditure').
[951] EFED Act s 87 (definition of 'electoral expenditure').

Jurisdiction	Definition of Electoral Expenditure
	c) expenditure on the Internet, telecommunications, stationery and postage, d) expenditure incurred in employing staff engaged in election campaigns, e) expenditure incurred for office accommodation for any such staff and candidates (other than for the campaign headquarters of a party or for the electorate office of an elected member), f) such other expenditure as may be prescribed by the regulations as electoral communication expenditure, but is not electoral expenditure of the following kinds: g) expenditure on travel and travel accommodation, h) expenditure on research associated with election campaigns, i) expenditure incurred in raising funds for an election or in auditing campaign accounts, j) such other expenditure as may be prescribed by the regulations as not being electoral communication expenditure.[952] • (3) Electoral expenditure (and electoral communication expenditure) does not include: a) expenditure incurred substantially in respect of an election of members to a Parliament other than the NSW Parliament, or b) expenditure on factual advertising of: i. meetings to be held for the purpose of selecting persons for nomination as candidates for election, or ii. meetings for organisational purposes of parties, branches of parties or conferences, committees or other bodies of parties or branches of parties, or iii. any other matter involving predominantly the administration of parties or conferences, committees or other bodies of parties or branches of parties.[953] • (4) Electoral expenditure (and electoral communication expenditure) does not include expenditure incurred by an entity or other person (not being a registered party, elected member, group or candidate) if the expenditure is not incurred for the dominant purpose of promoting or opposing a party or the election of a candidate or candidates or influencing the voting at an election.[954]
4. Northern Territory	• ***electoral expenditure***, for an election, means expenditure incurred (whether or not incurred during the election period) on: a) publishing an electoral advertisement during the election period in a journal; or

[952] Ibid s 87 (definition of 'electoral communication expenditure').
[953] Ibid.
[954] Ibid.

Jurisdiction	Definition of Electoral Expenditure
	b) broadcasting an electoral advertisement during the election period; or c) displaying an electoral advertisement during the election period at a theatre or other place of entertainment; or d) producing an electoral advertisement that is published, broadcast or displayed as mentioned in paragraph (a), (b) or (c); or e) producing any printed electoral matter to which Part 13, Division 1, Subdivision 2 applies (other than material mentioned in paragraph (a), (b) or (c)) that is published during the election period; or f) producing and distributing electoral matter that is addressed to particular persons or organisations and is distributed during the election period; or g) carrying out an opinion poll or other research, about the election during the election period.[955]
5. Queensland	• In this part, ***electoral expenditure*** means expenditure incurred (whether or not incurred during the capped expenditure period for an election) on, or a gift in kind given that consists of— a) the broadcasting, during the capped expenditure period for the election, of an advertisement that advocates a vote for or against a candidate or for or against a registered political party; or b) the publishing in a journal, during the capped expenditure period for the election, of an advertisement that advocates a vote for or against a candidate or for or against a registered political party; or c) the publishing on the internet, during the capped expenditure period for the election, of an advertisement that advocates a vote for or against a candidate or for or against a registered political party, even if the internet site on which the publication is made is located outside Queensland; or d) the display, during the capped expenditure period for the election, at a theatre or other place of entertainment, of an advertisement that advocates a vote for or against a candidate or for or against a registered political party; or e) the production of an advertisement that advocates a vote for or against a candidate or for or against a registered political party, being an advertisement that is broadcast, published or displayed as mentioned in paragraph (a), (b), (c) or (d); or f) the production of any material (other than material mentioned in paragraph (a), (b), (c) or (d)) that— i. advocates a vote for or against a candidate or for or against a registered political party;

[955] *Electoral Act 2004* (NT) s 199 (definition of 'electoral expenditure').

Jurisdiction	Definition of Electoral Expenditure
	and ii. is required under section 181 to include the name and address of the author of the material or of the person authorising the material; and iii. is used during the capped expenditure period for the election; or g) the production and distribution of material that— i. advocates a vote for or against a candidate or for or against a registered political party; and ii. is addressed to particular entities; and iii. is distributed during the capped expenditure period for the election; or h) the carrying out, during the capped expenditure period for the election, of an opinion poll, or other research, relating to the election.[956]
6. South Australia	No definitions found.
7. Tasmania	• ***election expenditure***, in relation to a candidate at a Council election means, subject to subsection (2), expenditure that – a) relates to promoting or procuring the election of the candidate; and b) is incurred by or with the authority of the candidate – i. within the expenditure period; or ii. before the expenditure period in respect of goods, or goods and services, which are or are to be supplied or provided to, or made use of by or with the authority of, the candidate during the expenditure period.[957] • **(2)** Election expenditure does not include expenditure which relates to – a) the personal and reasonable living and travelling expenses of the candidate and of an election agent appointed by him or her; or b) the purchase of any roll; or c) the renting or hiring of premises for the purposes of that campaign; or d) the appointment of scrutineers; or e) the conveying of electors to and from polling places for the purpose of voting.[958]

[956] *Electoral Act 1992* (Qld) s 199.
[957] *Electoral Act 2004* (Tas) s 5.
[958] Ibid.

Jurisdiction	Definition of Electoral Expenditure
8. Victoria	• ***electoral expenditure***, in relation to an election, means expenditure incurred within the period of 12 months immediately before election day on— a) the broadcasting of an advertisement relating to the election; or b) the publishing in a journal of an advertisement relating to the election; or c) the display at a theatre or other place of entertainment, of an advertisement relating to the election; or d) the production of an advertisement relating to the election, being an advertisement that is broadcast, published or displayed as mentioned in paragraph (a), (b) or (c); or e) the production of any material in relation to the election (not being material referred to in paragraph (a), (b) or (c)) that is required under section 83 to include the name and address of the author of the material or of the person authorising the material; or f) the production and distribution of electoral matter that is addressed to particular persons or organisations; or g) fees or salaries paid to consultants or advertising agents for— i. services provided, being services relating to the election; or ii. material relating to the election; or h) the carrying out of an opinion poll, or other research, relating to the election;[959]
9. Western Australia	• ***electoral expenditure***, in relation to an election, means expenditure incurred (whether or not incurred during the election period) on — a) the broadcasting, during the election period, of an advertisement relating to the election; b) the publishing in a journal, during the election period, of an advertisement relating to the election; c) the display, during the election period, at a theatre or other place of entertainment, of an advertisement relating to the election; d) the production of an advertisement relating to the election, being an advertisement that is broadcast, published or displayed as mentioned in paragraph (a),(b) or (c); e) the production of any material (not being material referred to in paragraph (a), (b) or (c)) that is required under section 187 to include the name and address of the person authorising the material and that is used during the election period; ea) the production and distribution of electoral matter that is addressed to particular persons or

[959] *Electoral Act 2002* (Vic) s 206(1) (definition of 'electoral expenditure').

Jurisdiction	Definition of Electoral Expenditure
	organisations and is distributed during the election period; f) consultant's or advertising agent's fees in respect of — i. services provided during the election period, being services relating to the election; or ii. material relating to the election that is used during the election period; or g) the carrying out, during the election period, of an opinion poll, or other research, relating to the election.[960]

[960] *Electoral Act 1907* (WA) s 175 (definition of 'electoral expenditure').

APPENDIX EIGHT

DEFINITIONS OF ELECTORAL EXPENDITURE - CANADA, NEW ZEALAND, UNITED KINGDOM AND THE UNITED STATES

Jurisdiction	Definition of Electoral Expenditure
1. Canada	• An electoral campaign expense of a candidate is an expense reasonably incurred as an incidence of the election, including a) an election expense; b) a personal expense; and c) any fees of the candidate's auditor, and any costs incurred for a recount of votes cast in the candidate's electoral district, that have not been reimbursed by the Receiver General.[961] • (1) An election expense includes any cost incurred, or non-monetary contribution received, by a registered party or a candidate, to the extent that the property or service for which the cost was incurred, or the non-monetary contribution received, is used to directly promote or oppose a registered party, its leader or a candidate during an election period.[962] • (2) Expenses for a fund-raising activity and expenses to directly promote the nomination of a person as a candidate or as leader of a registered party, other than expenses referred to in paragraph (3)(*a*) that are related to such fund- raising and promotional activities, are not election expenses under subsection (1).[963] • (3) An election expense referred to in subsection (1) includes a cost incurred for, or a non-monetary contribution in relation to, a) the production of advertising or promotional material and its distribution, broadcast or publication in any media or by any other means; b) the payment of remuneration and expenses to or on behalf of a person for their services as an official agent, registered agent or in any other capacity; c) securing a meeting space or the supply of light refreshments at meetings; d) any product or service provided by a government, a Crown corporation or any other public

[961] *Canada Elections Act*, SC 2000, c 9, s 406.
[962] Ibid s 407.
[963] Ibid.

Jurisdiction	Definition of Electoral Expenditure
	agency; and e) the conduct of election surveys or other surveys or research during an election period.[964] • (4) In subsection (1), "cost incurred" means an expense that is incurred by a registered party or a candidate, whether it is paid or unpaid.[965] • (1) Personal expenses of a candidate are his or her electoral campaign expenses, other than election expenses, that are reasonably incurred in relation to his or her campaign and include a) travel and living expenses; b) childcare expenses; c) expenses relating to the provision of care for a person with a physical or mental incapacity for whom the candidate normally provides such care; and d) in the case of a candidate who has a disability, additional personal expenses that are related to the disability.[966]
2. New Zealand	• (1) **election expenses**, in relation to a candidate,— a) means the advertising expenses incurred in relation to a candidate advertisement that— i. is published, or continues to be published, during the regulated period; and ii. is promoted by— A. the candidate; or B. any person (including a registered promoter) authorised by the candidate; and b) includes— i. any election expense of an election advertisement that is apportioned to a candidate under section 205E or 205EA; and ii. as required by section 40 of the Electoral Referendum Act 2010, any Referendum expenses incurred in relation to an advertisement that comprises both— A. a candidate advertisement; and B. a referendum advertisement (within the meaning of section 31 of the Electoral Referendum Act 2010) **party advertisement** has the meaning given to it by section 3(1).[967] • (2) For the purposes of the definition of **election expenses**, it is immaterial whether an election

[964] Ibid.
[965] Ibid.
[966] Ibid s 409.
[967] *Electoral Act 1993* (NZ) s 205(1) (definition of 'election expenses').

Jurisdiction	Definition of Electoral Expenditure
	expense is paid or incurred before, during, or after the regulated period.[968] • (3) Nothing in sections 205K to 205R applies to a person who has not been nominated as a candidate for a seat in the House of Representatives.[969]
3. United Kingdom	• (2) "Campaign expenditure", in relation to a registered party, means (subject to subsection (7)) expenses incurred by or on behalf of the party which are expenses falling within Part I of Schedule 8 and so incurred for election purposes.[970] • (7) "Campaign expenditure" does not include anything which (in accordance with any enactment) falls to be included in a return as to election expenses in respect of a candidate or candidates at a particular election.[971] • 1. For the purposes of section 72(2) the expenses falling within this Part of this Schedule are expenses incurred in respect of any of the matters set out in the following list: 1. Party political broadcasts. Expenses in respect of such broadcasts include agency fees, design costs and other costs in connection with preparing or producing such broadcasts. 2. Advertising of any nature (whatever the medium used). Expenses in respect of such advertising include agency fees, design costs and other costs in connection with preparing, producing, distributing or otherwise disseminating such advertising or anything incorporating such advertising and intended to be distributed for the purpose of disseminating it. 3. Unsolicited material addressed to electors (whether addressed to them by name or intended for delivery to households within any particular area or areas). Expenses in respect of such material include design costs and other costs in connection with preparing, producing or distributing such material (including the cost of postage). 4. Any manifesto or other document setting out the party's policies. Expenses in respect of such a document include design costs and other costs in connection with preparing or producing or distributing or otherwise disseminating any such document. 5. Market research or canvassing conducted for the purpose of ascertaining polling intentions. 6. The provision of any services or facilities in connection with press conferences or other dealings with the media. 7. Transport (by any means) of persons to any place or places with a view to obtaining publicity

[968] Ibid.
[969] Ibid s 205(1) (definition of 'party advertisement').
[970] *Political Parties, Elections and Referendums Act 2000* (UK) c 41, s 72(2).
[971] Ibid.

Jurisdiction	Definition of Electoral Expenditure
	in connection with an election campaign. Expenses in respect of the transport of such persons include the costs of hiring a particular means of transport for the whole or part of the period during which the election campaign is being conducted. 8. Rallies and other events, including public meetings (but not annual or other party conferences) organised so as to obtain publicity in connection with an election campaign or for other purposes connected with an election campaign. Expenses in respect of such events include costs incurred in connection with the attendance of persons at such events, the hire of premises for the purposes of such events or the provision of goods, services or facilities at them.[972] • 2. Nothing in paragraph 1 shall be taken as extending to— a) Any expenses in respect of newsletters or similar publications issued by or on behalf of the party with a view to giving electors in a particular electoral area information about the opinions or activities of, or other personal information relating to, their elected representatives or existing or prospective candidates; b) any expenses incurred in respect of unsolicited material addressed to party members; c) any expenses in respect of any property, services or facilities so far as those expenses fall to be met out of public funds; d) any expenses incurred in respect of the remuneration or allowances payable to any member of the staff (whether permanent or otherwise) of the party; or e) any expenses incurred in respect of an individual by way of travelling expenses (by any means of transport) or in providing for his accommodation or other personal needs to the extent that the expenses are paid by the individual from his own resources and are not reimbursed to him.[973]
4. United States (Federal)	• (A) The term "expenditure" includes— i. any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and ii. a written contract, promise, or agreement to make an expenditure.[974] • (B) The term "expenditure" does not include— i. any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned

[972] Ibid sch 8 pt 1.
[973] Ibid.
[974] *Federal Election Campaign Act of 1971*, 14 USC § 431 (9) (2008).

Jurisdiction	Definition of Electoral Expenditure
	or controlled by any political party, political committee, or candidate; ii. nonpartisan activity designed to encourage individuals to vote or to register to vote; iii. any communication by any membership organization or corporation to its members, stockholders, or executive or administrative personnel, if such membership organization or corporation is not organized primarily for the purpose of influencing the nomination for election, or election, of any individual to Federal office, except that the costs incurred by a membership organization (including a labor organization) or by a corporation directly attributable to a communication expressly advocating the election or defeat of a clearly identified candidate (other than a communication primarily devoted to subjects other than the express advocacy of the election or defeat of a clearly identified candidate), shall, if such costs exceed $2,000 for any election, be reported to the Commission in accordance with section 434(a)(4)(A)(i) of this title, and in accordance with section 434(a)(4)(A)(ii) of this title with respect to any general election; iv. the payment by a State or local committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee with respect to a printed slate card or sample ballot, or other printed listing, of 3 or more candidates for any public office for which an election is held in the State in which such committee is organized, except that this clause shall not apply to costs incurred by such committee with respect to a display of any such listing made on broadcasting stations, or in newspapers, magazines, or similar types of general public political advertising; v. any payment made or obligation incurred by a corporation or a labor organization which, under section 441b(b) of this title, would not constitute an expenditure by such corporation or labor organization; vi. any costs incurred by an authorized committee or candidate in connection with the solicitation of contributions on behalf of such candidate, except that this clause shall not apply with respect to costs incurred by an authorized committee of a candidate in excess of an amount equal to 20 percent of the expenditure limitation applicable to such candidate under section 441a(b), but all such costs shall be reported in accordance with section 434(b); vii. the payment of compensation for legal or accounting services— I. rendered to or on behalf of any political committee of a political party if the person paying for such services is the regular employer of the individual rendering such services, and if such services are not attributable to activities which directly further the election of any designated candidate to Federal office; or II. rendered to or on behalf of a candidate or political committee if the person paying for

Jurisdiction	Definition of Electoral Expenditure
	such services is the regular employer of the individual rendering such services, and if such services are solely for the purpose of ensuring compliance with this Act or chapter 95 or chapter 96 of title 26, but amounts paid or incurred by the regular employer for such legal or accounting services shall be reported in accordance with section 434(b) by the committee receiving such services; viii. the payment by a State or local committee of a political party of the costs of campaign materials (such as pins, bumper stickers, handbills, brochures, posters, party tabloids, and yard signs) used by such committee in connection with volunteer activities on behalf of nominees of such party: *Provided*, That— 1. such payments are not for the costs of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising; 2. such payments are made from contributions subject to the limitations and prohibitions of this Act; and 3. such payments are not made from contributions designated to be spent on behalf of a particular candidate or particular candidates; ix. the payment by a State or local committee of a political party of the costs of voter registration and get- out-the-vote activities conducted by such committee on behalf of nominees of such party for President and Vice President: *Provided*, That— 1. such payments are not for the costs of campaign materials or activities used in connection with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising; 2. such payments are made from contributions subject to the limitations and prohibitions of this Act; and 3. such payments are not made from contributions designated to be spent on behalf of a particular candidate or candidates; and x. payments received by a political party committee as a condition of ballot access which are transferred to another political party committee or the appropriate State official.[975]

[975] Ibid.

APPENDIX NINE: POLITICAL DONATIONS RECEIVED BY MAIN POLITICAL PARTIES, 2007/2008 TO 2010/2011

Table 1: Australian Labor Party (NSW Branch)

	01/07/07-30/06/08	01/07/08-30/06/09	01/07/09-30/06/10	01/07/10-30/06/11
Total Small Donations	$8,199.00	$162,438.66	$242,157.47	$203,864.13
% Total Small Donations	0.08%	2.57%	4.48%	3.46%
Reportable Political Donations	$9,176,608.24	$5,179,565.41	$4,410,090.40	$3,693,463.01
% Reportable Political Donations	92.93%	81.93%	81.62%	62.70%
Annual Subscriptions	$689,822.00	$979,811.00	$751,067.00	$1,993,007.01
% Annual Subscriptions	6.99%	15.50%	13.90%	33.84%
Total All Donations	$9,874,629.24	$6,321,815.07	$5,403,314.87	$5,890,334.15

Table 2: Christian Democratic Party (Fred Nile Group)

	01/07/07-30/06/08	01/07/08-30/06/09	01/07/09-30/06/10	01/07/10-30/06/11
Total Small Donations	$587,010.00	$86,360.00	$166,644.00	$283,425.36
% Total Small Donations	88.94%	41.12%	49.07%	45.44%
Reportable Political Donations	$72,981.00	$20,397.00	$65,812.00	$241,466.57
% Reportable Political Donations	11.06%	9.71%	19.38%	38.71%
Annual Subscriptions	$0.00	$103,280.00	$107,118.00	$98,851.00
% Annual Subscriptions	0.00%	49.17%	31.54%	15.85%
Total All Donations	$659,991.00	$210,037.00	$339,574.00	$623,742.93

Table 3: Family First NSW Inc[976]

	01/07/07-30/06/08	01/07/08-30/06/09	01/07/09-30/06/10	01/07/10-30/06/11
Total Small Donations	$0.00	$0.00	$3,515.00	$14,797.00
% Total Small Donations	0.00%	0.00%	18.06%	42.91%
Reportable Political Donations	$0.00	$0.00	$14,525.00	$10,890.00
% Reportable Political Donations	0.00%	0.00%	74.62%	31.58%
Annual Subscriptions	$0.00	$0.00	$1,425.00	$8,800.00
% Annual Subscriptions	0.00%	0.00%	7.32%	25.52%
Total All Donations	$0.00	$0.00	$19,465.00	$34,487.00

Table 4: Liberal Party of Australia New South Wales Division

	01/07/07-30/06/08	01/07/08-30/06/09	01/07/09-30/06/10	01/07/10-30/06/11
Total Small Donations	$1,699,683.76	$1,215,647.62	$1,599,412.06	$2,244,706.11
% Total Small Donations	14.25%	22.90%	27.40%	19.99%
Reportable Political Donations	$9,632,250.94	$3,519,518.69	$3,672,979.44	$8,628,432.43
% Reportable Political Donations	80.77%	66.30%	62.92%	76.85%
Annual Subscriptions	$593,060.50	$573,023.00	$565,120.00	$355,105.79
% Annual Subscriptions	4.97%	10.80%	9.68%	3.16%
Total All Donations	$11,924,995.20	$5,308,189.31	$5,837,511.50	$11,228,244.33

[976] Family First not registered until 26 February 2010

Table 5: National Party of Australia - NSW

	01/07/07-30/06/08	01/07/08-30/06/09	01/07/09-30/06/10	01/07/10-30/06/11
Total Small Donations	$310,499.64	$438,921.00	$544,466.22	$715,008.18
% Total Small Donations	16.58%	24.82%	30.67%	22.24%
Reportable Political Donations	$943,091.72	$816,668.00	$706,654.03	$1,941,548.36
% Reportable Political Donations	50.36%	46.18%	39.81%	60.38%
Annual Subscriptions	$619,279.05	$512,860.40	$523,994.95	$558,959.20
% Annual Subscriptions	33.07%	29.00%	29.52%	17.38%
Total All Donations	$1,872,870.41	$1,768,449.40	$1,775,115.20	$3,215,515.74

Table 6: The Shooters and Fishers Party

	01/07/07-30/06/08	01/07/08-30/06/09	01/07/09-30/06/10	01/07/10-30/06/11
Total Small Donations	$15,905.00	$13,505.00	$18,485.00	$22,542.00
% Total Small Donations	100.00%	17.52%	4.50%	4.43%
Reportable Political Donations	$0.00	$33,550.25	$358,395.00	$450,900.00
% Reportable Political Donations	0.00%	43.51%	87.17%	88.55%
Annual Subscriptions	$0.00	$30,050.00	$34,275.00	$35,790.00
% Annual Subscriptions	0.00%	38.97%	8.34%	7.03%
Total All Donations	$15,905.00	$77,105.25	$411,155.00	$509,232.00

Table 7: The Greens NSW

	01/07/07-30/06/08	01/07/08-30/06/09	01/07/09-30/06/10	01/07/10-30/06/11
Total Small Donations	$139,600.82	$104,661.00	$168,806.85	$298,892.24
% Total Small Donations	25.77%	28.12%	49.84%	52.92%
Reportable Political Donations	$213,080.56	$85,515.44	$87,073.66	$110,077.92
% Reportable Political Donations	39.33%	22.98%	25.71%	19.49%
Annual Subscriptions	$189,087.00	$181,979.00	$82,805.00	$155,789.00
% Annual Subscriptions	34.90%	48.90%	24.45%	27.59%
Total All Donations	$541,768.38	$372,155.44	$338,685.51	$564,759.16

APPENDIX TEN: TOP THIRD-PARTY CAMPAIGNERS FOR DONATIONS MADE, 2010/2011

Name	Amount Donated
Electrical Trades Union of Australia NSW Branch	$351,980.00
Health Services Union East	$235,634.36
Shop Distributive & Allied Employees Association NSW Branch	$201,820.00
Transport Workers Union NSW	$179,507.68
Australian Manufacturing Workers Union	$90,671.20
Aust Rail Tram & Bus Industry Union NSW	$71,807.00
The Australian Workers Union Greater NSW Branch	$69,627.00
Construction Forestry Mining & Energy Union C&G Division NSW	$66,486.02
ASU NSW & ACT (Services) Branch	$55,729.04
National Roads and Motorists Association Ltd	$42,214.00
Unions NSW	$30,571.68
Textile Clothing Footwear Union NSW/SA/TAS	$29,854.96
CFMEU-Mining & Energy	$28,818.00
Dame Pattie Menzies Liberal Foundation	$27,000.00
Shop Assistants & Warehouse Employees Federation of Australia - Newcastle & Northern NSW	$25,318.00
CFMEU - Mining & Energy Nth District	$22,214.00
Sutherland District Trade Union Club	$20,892.68
NSW Business Chamber	$16,800.00
Police Association of NSW	$14,275.00
Liquor Hospitality Division LHMU	$14,250.00
National Union of Workers, New South Wales Branch	$14,080.00
Firearm Dealers Association QLD Inc.	$12,100.00
Australasian Meat Industry Employee Union Newcastle and Northern Branch	$9,896.32
The Australian Workers' Union National Office	$9,000.00

Name	Amount Donated
Australian Rail Tram & Bus Industry Union, National Office	$5,000.00
Public Service Association of NSW	$2,950.00
NSW Nurses Association	$925.00
Grand Total	**$1,649,421.94**

THE CONVERSATION
Academic rigour, journalistic flair

Finance Minister Mathias Cormann was questioned on Monday by Labor Senator Penny Wong about the Coalition government's expenditures on pre-election advertising. Lukas Coch/AAP

Government advertising may be legal, but it's corrupting our electoral process

April 10, 2019 6.04am AEST

Author

Joo-Cheong Tham
Professor, Melbourne Law School, University of Melbourne

The Coalition government's use of taxpayer money for political advertising – as much as A$136 million since January, according to Labor figures - is far from an aberration in Australia. It is part of a sordid history in which public resources have routinely been abused for electoral advantage.

For example, the Coalition governments of Tony Abbott and Malcolm Turnbull spent at least A$84.5 million on four major advertising campaigns to promote their policies and initiatives with voters. The ALP governments of Kevin Rudd and Julia Gillard spent A$20 million on advertising to promote the Gonski school funding changes and another A$70 million on a carbon tax campaign. Going further back, the Coalition government under John Howard spent A$100 million on its WorkChoices and GST campaigns.

Read more:* *The difference between government advertising and political advertising

This is also a history in which hypocrisy is not hard to find.

When in opposition, Rudd condemned partisan government advertising as "**a cancer on our democracy**". His government, however, **exempted** its A$38 million ad campaign on the mining super profits tax from the government guidelines put in place two years earlier.

In 2010, while an opposition MP, Scott Morrison decried such spending as "**outrageous**". In 2019, his government may be presiding over the most expensive pre-election government advertising blitz in recent history.

Few restrictions on government advertising

All of this is perfectly legal.

The High Court in **Combet v Commonwealth** made clear that legislation authorising government spending (appropriation statutes) imposes virtually no legal control over spending for government advertising, because of its broad wording.

In the absence of effective statutory regulations, there are **government guidelines** that prohibit overtly partisan advertising with government funds, such as "negative" ads and advertising that mentions party slogans and names of political parties, candidates, ministers and parliamentarians.

These guidelines nevertheless provide ample room for promotion of government policies under the guise of information campaigns – what Justice Michael McHugh in Combet described as "feelgood" advertisements. They permit advertising campaigns such as the Coalition government's "**Building a better tax system for hardworking Australians**" (which essentially promotes the government's tax cuts) and "**Small business, big future**" (which burnishes its "small business" credentials).

The government advertising campaign spruiking its tax reform measures.

Crucially, the guidelines fail to address the proximity of such taxpayer-funded advertising campaigns to federal elections. They fail to recognise what is obvious – the closer we get to the elections, the stronger the governing party's impulse to seek re-election, the greater the likelihood that "information" campaigns become the vehicle for reinforcing positive images of the incumbent party.

This risk is clearly recognised by the caretaker conventions, which mandate that once the "caretaker" period begins with the dissolution of the House of Representatives:

> *...campaigns that highlight the role of particular Ministers or address issues that are a matter of contention between the parties are normally discontinued, to avoid the use of Commonwealth resources in a manner to advantage a particular party*

The conventions further state:

> *Agencies should avoid active distribution of material during the caretaker period if it promotes Government policies or emphasises the achievements of the Government or a Minister*

The problem with these conventions, however, is that they kick in too late. By the time the House of Representatives is dissolved prior to an election, the major parties' campaigns have usually been in high gear for months.

Read more: Eight ways to clean up money in Australian politics

A form of institutional corruption

A pseudo-notion of fairness tends to operate in the minds of incumbent political parties when it comes to taxpayer-funded advertising.

When she was prime minister, Gillard defended her use of government advertising by pointing that the Howard government had spent more. And now, the Morrison government has sought to deflect criticisms of its current campaign by drawing attention to ALP's use of government advertising when it was last in power.

Our children are taught to be better than this – two wrongs do not make a right.

Indeed, government advertising for electioneering is a form of corruption. Corruption can be understood as the use of power for improper gain. It includes individual corruption where the improper gain is personal (for instance, bribery) but also what philosopher, Dennis Thompson, has described as institutional corruption, where the use of power results in a political gain.

Government advertising to reinforce positive impressions of the incumbent party is a form of institutional corruption – it is the use of public funds for the illegitimate purpose of electioneering. Its illegitimacy stems from the fact that it undermines the democratic ideal of fair elections by providing the incumbent party with an undue advantage.

Read more:* *Election explainer: what are the rules governing political advertising?

It is an instance of what the High Court in McCloy v NSW considered "war-chest" corruption – a form of corruption that arises when "the power of money … pose(s) a threat to the electoral process itself".

A longer government advertising ban?

I propose a ban on federal government advertising in the period leading up to federal elections.

Such bans are already in place in NSW, which prohibits government advertising during roughly two months before state elections, and the ACT, which bans government advertising 37 days before territory elections. To take into account the longer campaign period at the federal level, a federal ban should operate for at least three months before each federal election.

The absence of fixed terms in the federal parliament is not a barrier to adopting such a ban. With an average of two and a half years between federal elections, a three-month ban of sorts could take effect from two years and three months after the previous election until polling day of the next election.

By dealing with government advertising for electioneering, this ban will improve the integrity of federal elections.

Coalition **Julia Gillard** **Labor** **Kevin Rudd** **Scott Morrison** **government advertising** **Election 2019**

SUBMISSION TO JSCEM'S INQUIRY INTO 2010 FEDERAL ELECTION

DR. JOO-CHEONG THAM*

* Associate Professor, Melbourne Law School. This submission draws heavily upon various chapters of Joo-Cheong Tham, *Money and Politics: The Democracy We Can't Afford* (UNSW Press, 2010). Thank you to Clara Jordan-Baird for excellent research assistance.

TABLE OF CONTENTS

LIST OF RECOMMENDATIONS

Recommendation 1: The federal political funding scheme be based on the following principles:

1. Protecting the integrity of representative government;
2. Promoting fairness in politics;
3. Supporting parties to perform their functions;
4. Respect for political freedoms.

Recommendation 2: COAG and the electoral matters committees should liaise to ensure that federal, State and Territory laws governing political funding are properly integrated.

Recommendation 3: The Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010 (Cth) should be enacted subject to the following changes:

- 'due diligence' defences be available in relation to offences; and
- the definition of 'political expenditure' (which applies to third parties) be tightened up.

Recommendation 4: Registered political parties and associated entities be required to provide:

- expenditure disclosure returns; and
- donation reports (modelled upon the British system).

Recommendation 5: Weekly donations reports be required during the election period.

Recommendation 6: Federal election spending limits should apply 2 years and 5 months after the previous election.

Recommendation 7: Federal spending limits should apply to 'electoral expenditure' under the *Commonwealth Electoral Act* with an exclusion for expenditure incurred substantially in respect of an election to members of Parliament other than the Commonwealth Parliament.

Recommendation 8: Federal spending limits should apply to parties, candidates and third parties.

Recommendation 9: There should be federal spending limits applying at the

national, State and electorate levels.

Recommendation 10: Federal contribution limits should be introduced based on limits that apply under *EFED Act* with the following modifications:

- the limits should be set at a lower level (e.g. $1,000 per annum); and
- the limits applying to the party subscriptions exclusion should be lower (e.g. $500 per member).

Recommendation 11: There should be a compulsory third party registration scheme at the federal level requiring third parties that spend more than $2,000 in 'electoral expenditure' during the period which election spending limits apply to register.

Recommendation 12: This scheme should make public the following information regarding registered third parties:

- their constitutions and decision-making structures (including membership policies);
- the relationships third parties have with other third parties as well as political parties should also be made public.

Recommendation 13: Third parties should be required to seek specific authorisation from their members (or shareholders) before making political contributions or engaging in political spending on a periodic basis.

Recommendation 14: There should be a Party and Candidate Support Fund comprising three components:

- election funding payments (calculated according to a tapered scale based on the number of first preference votes with 20% of electoral expenditure floor);
- annual allowances (calculated according to number of first preference votes and membership);
- policy development grants (calculated according to number of first preference votes and membership).

Recommendation 15:

- The rules governing federal parliamentary entitlements should:
    - be made accessible and transparent; and
    - clearly limit the use of such entitlements to the discharge of parliamentary duties and prevent their use for electioneering.
- The amount of federal parliamentary entitlements should not be such so as to confer an unfair electoral advantage on federal parliamentarians.

Recommendation 16: The report of the Parliamentary Entitlements Review Committee should be released as soon as possible.

Recommendation 17: Recommendations 10 and 12 of the Senate Finance and Public Administration Committee in relation to the disclosure of information concerning government advertising should be fully adopted.

Recommendation 18: Federal government advertising guidelines and rules should be in a legislative form.

Recommendation 19: There should be a general ban on government advertising during the period that election spending limits apply.

Recommendation 20: Paragraph 5 of the *Guidelines on Campaign Advertising by Australian Government Departments and Agencies* which allows for exemption by Cabinet Secretary should be deleted.

LIST OF TABLES AND FIGURES

I INTRODUCTION

The federal funding and disclosure scheme was enacted in 1983.[1] Since then – more than two and half decades ago – there has not been fundamental change to the scheme. Indeed, no attempt has been made at such fundamental change since 1991 when the *Political Broadcasts and Political Disclosures Act 1991* (Cth) which sought to ban political advertising and institute a regime of 'free-time' was struck down as constitutionally invalid by the High Court in *Australian Capital Television Pty Ltd v Commonwealth* (*ACTV*).[2]

This stasis has resulted in federal regulation of political funding being 'by international standards … decidedly laissez faire'.[3] Unlike Canada, New Zealand and the United Kingdom, there are no limits on election spending. Moreover, the *ACTV* decision meant that Australia does not have a ban on federal political advertising[4] like that which applies in New Zealand and the United Kingdom. Whereas Canada and the United States have extensive limits on the amounts that can be contributed by individuals and organisations, unfettered freedom to contribute largely prevails at the federal level. Even the degree of transparency achieved by Australia's federal disclosure regime compares unfavourably. For instance, the schemes in Canada, the United Kingdom and the United States mandate far more frequent disclosure than the annual disclosures that are required in Australia and New Zealand.

The characterisation of federal regulation as laissez faire (or relatively so) is *not* a compelling case for increased regulation. The absence of regulation in itself is not sufficient cause for concern. We should resist what Graeme Orr has perceptively described as the 'regulatory instinct'[5] that automatically deems such absence as a lack that needs to be remedied by more legislation – not least because intensity of regulation does not necessarily produce better outcomes. Indeed, if the parties and

---

[1] *Commonwealth Electoral Legislation Amendment Act 1983* (Cth) cl 113, inserting *Commonwealth Electoral Act 1918* (Cth) pt XVI.
[2] (1992) 177 CLR 106.
[3] Graeme Orr, 'Political Finance Law in Australia' in K D Ewing and Samuel Issacharoff (eds), *Party Funding and Campaign Financing in International Perspective* (Hart, 2006) 99, 100.
[4] *ACTV* (1992) 177 CLR 106.
[5] See Graeme Orr, 'The Law Comes to the Party: the Continuing Juridification of Australian Political Parties' (2000) 3 *Constitutional Law and Policy Review* 41.

candidates were able to self-regulate to ensure fairness and integrity, this would be cause for celebration and testimony to a deep and robust democratic culture.

The facts, however, speak to the failure of self-regulation in the area of political finance. As the rest of this submission will document, this failure traverses the whole spectrum of political funding encompassing private funding and public funding, political contributions and political spending. It is this gross failure in the context of a laissez-faire system that provides the case for reform.

The case for reform is all the more compelling given that the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) (*EFED Act*) now provides for a comprehensive scheme of disclosure obligations, contribution and expenditure limits and a reconfigured public funding scheme. The Queensland Government has also signalled that it will follow New South Wales' (NSW) lead.[6] These measures are significant not only because they provide possible models but also because they suggest that one set of obstacles perceived to stand against political funding reform can be overcome - constitutional considerations, in particular those relating to the implied freedom of political communication. The measures suggest that these considerations, whilst they should be taken seriously especially in the design of the measures, should not be treated as being fatal to fundamental change.[7]

There are four substantive parts to this submission:

- Part II sets out the aims of a democratic political funding regime;
- Part III explains the funding and spending patterns of federal political funding;
- Part IV identifies key problems with federal political funding and its regulation; and
- Part V details a blueprint for reform.

[6] Queensland Government, *Reforming Queensland's Electoral System* (2010) <http://www.premiers.qld.gov.au/community-issues/open-transparent-gov/assets/electoral-reform-whitepaper.pdf>.
[7] This submission examines these issues in greater depth at text accompanying n 334-360, 429-440.

II AIMS OF A DEMOCRATIC POLITICAL FUNDING REGIME

One of the most important recommendations made by the NSW Joint Standing Committee on Electoral Matters in its 2010 report on the public funding of election campaigns was the enactment of a new Act on political funding based on four governing principles:

1. Protecting the integrity of representative government;
2. Promoting fairness in politics;
3. Supporting parties to perform their functions;
4. Respect for political freedoms.[8]

These principles should also be adopted in relation to the federal political funding scheme.

> *Recommendation 1:* The federal political funding scheme be based on the following principles:
>
> 1. Protecting the integrity of representative government;
> 2. Promoting fairness in politics;
> 3. Supporting parties to perform their functions;
> 4. Respect for political freedoms.

The following discussion elaborates upon these principles.

A *Protecting the Integrity of Representative Government*

As the Royal Commission on WA Inc rightly observed, the 'architectural principle' of the Australian governmental system is that elected officials are accountable to Australian citizens and expected to act in the public interest.[9] The first element of this principle, *accountability*, most importantly requires that elected officials be in 'a

---

[8] Joint Standing Committee on Electoral Matters, Parliament of New South Wales, *Inquiry into the Public Funding of Election Campaigns* (2010) 3, recommendation 3. These four principles were proposed by the New South Wales Electoral Commissioner (see Joint Standing Committee on Electoral Matters, *Inquiry into the Public Funding of Election Campaigns* 3 recommendation 3) and detailed in Joo-Cheong Tham, *Towards a More Democratic Political Funding Regime in New South Wales* (2010) 9-25 <http://www.efa.nsw.gov.au/__data/assets/pdf_file/0009/66465/Towards_a_More_Democratic_Political_Finance_Regime_in_NSW_Report_for_NSW_EC.pdf>

[9] Western Australia, WA Inc Royal Commission, *Report on WA Inc: Part II*, (1992) 1–10.

constant condition of responsiveness' to the citizens.[10] There is no such responsiveness without regular elections.[11] Not only should there be responsiveness during elections but also between elections, as was recognised by High Court Chief Justice Mason in *Australian Capital Television Pty Ltd v Cth:*

> the representatives who are members of Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as representatives of the people. And in the exercise of these powers the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act.[12]

Public accountability is also fundamentally concerned with public confidence - accountability to the public implies their trust or confidence. Hence, elected officials 'should act so as to create and maintain public confidence in their actions and in the legislative process'.[13]

The second element of this principle, *acting in the public interest,* can, of course, take on various meanings and is (and should be) hotly contested in the political arena.[14] However, what is perhaps central and uncontroversial is the merit principle: elected officials 'should act on reasons relevant to the merits of public policies or reasons relevant to advancing a process that encourages acting on such reasons'.[15]

Political funding can undermine the principles of accountability and acting in the public interest by leaving in its wake particular kinds of corruption.[16] Secrecy of such

---

[10] Hanna Fenichel Pitkin, *The Concept of Representation* (University of California Press, 1967), 233 (emphasis original).
[11] Ibid 234.
[12] *ACTV* (1992) 177 CLR 106, 138 (emphasis added).
[13] Dennis Thompson, *Ethics in Congress: From Individual to Institutional Corruption* (Brookings Institution, 1995) 70–71.
[14] Some of these disagreements stem from the complex character of political representation, see Pitkin, above n 10, Ch 10. Speaking of the American context, for instance, Thompson has spoken of '[the] classic tension in representative government … [t]he dual nature of Congress – as an assembly of local representatives and as a lawmaking institution': Thompson, above n 13, 69.
[15] Thompson, above n 13, 20.
[16] As the following discussion indicates, there are various shades and meanings of corruption: see, for example, Arnold J Heidenhiemer, Michael Johnston and Victor T LeVine (eds) 'Introduction' in Arnold J Heidenheimer, Michael Johnston and Victor T LeVine (eds), *Political Corruption: A*

funding can lead to *corruption of electoral processes*. Effective accountability through elections requires informed voting – citizens will not be able to cast informed votes if they are in the dark as to the finances of the parties and candidates. A democratic political finance regime should be an antidote to this type of corruption 'by providing details of the funding sources of political parties'.[17] As Kim Beazley, when proposing the federal funding and disclosure regime as Special Minister for State, emphasised:

> The whole process of political funding needs to be out in the open … Australians deserve to know who is giving money to political parties and how much.[18]

The other way political funding threatens the integrity of representative government is through *corruption of public office* or, put differently, the 'improper use of public office for private purposes'.[19] There are three main forms of such corruption. First, there is *corruption through graft* when the receipt of private funds directly leads to political power being improperly exercised in favour of contributors. Bribery of public officials is a prime instance of such corruption. Such corruption was at issue in WA Inc and the Fitzgerald Inquiry into the Joh Bjelke-Petersen Queensland Government. Similarly, it was of such corruption that former Queensland Minister, Gordon Nuttall, was found guilty.[20]

Second, there is *corruption through undue influence.* Such corruption is much more insidious and constitutes a species of conflict of interest. Substantial political

---

Handbook (Transaction Publishers, 1989) 3, 7–13; Syed Hussein Alatas, *Corruption: Its Nature, Causes and Functions*, (Avebury, 1990) 1–5; Oskar Kurer, 'Corruption: An Alternative Approach to its Definition and Assessment' (2005) 53 *Political Studies* 222.

[17] Joint Standing Committee on Electoral Matters, Parliament of Australia, *Interim Report on the Inquiry into the Conduct of the 1993 Election and Matters Related Thereto: Financial Reporting by Political Parties* (1994) [7].

[18] Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 1983, 2215 (Kim Beazley). For similar sentiments, see Electoral and Administrative Review Commission, *Report on Public Registration of Political Donations, Public Funding of Election Campaigns and Related Issues* (1992) [2.5].

[19] Thompson, above n 13, 7.

[20] Michael McKenna and Sarah Elks, 'Corrupt ex-minister Gordon Nuttall in jail facing extra charges', *The Australian* (Australia), 16 July 2009.

contributions tend to create a conflict between private interests and public duty[21] and, therefore, create the possibility that holders of public office will give undue weight to the interests of their financiers rather than deciding matters on their merits and in the public interest.[22] In contrast with corruption through graft, corruption through undue influence does not require explicit bargains or that a *specific act* results from the receipt of funds. Rather, it arises when the structure of incentives facing public officials results in *implicit bargains* of favourable treatment or a *culture* of delivering preferential treatment to moneyed interests. As the Bowen Committee on Public Duty and Private Interest explained:

> Conflict of interest generally differs from bribery because it does not require a transaction between two parties. It needs only one person, the officeholder possessing the interest in point. The distinction between bribery and this category … is that, whilst a benefit conferred as a bribe is directed to a particular transaction or series of transactions, gifts, hospitality or travel may be provided to create *a general climate of goodwill* on the part of the beneficiary. The 'debt' might not be called in for years or ever.[23]

Corruption through undue influence manifests itself in various ways. More blatant forms involve the sale of political access and influence (examined in Part IV). Here, formal and informal ways for money to influence politics come together in an unsavoury mix: some businesses secure favourable hearings by buying access and influence and also through the lingering effect of their contributions (a phone call from a big donor, for example, being more likely to be returned than one from a constituent). With perceptions of the merits of any issue invariably coloured by the arguments at hand, preferential hearings mean that when judging what is in the 'public interest', the minds of politicians will be skewed towards the interests of their financiers.[24]

---

[21] Daniel Lowenstein, 'On Campaign Finance Reform: The Root of All Evil is Deeply Rooted' (1989) 18 *Hofstra Law Review* 301, 323–29.
[22] Charles Beitz, 'Political Finance in the United States: A Survey of Research' (1984) 95(1) *Ethics* 129, 137; Thomas F Burke, 'The Concept of Corruption in Campaign Finance Law' (1997) 14 *Constitutional Commentary* 127; Thompson, above n13, 55.
[23] Committee of Inquiry Concerning Public Duty and Private Interest, *Public Duty and Private Interest* (1978) 14 (emphasis added).
[24] See Yasmin Dawood, 'Democracy, Power, and the Supreme Court: Campaign Finance Reform in Comparative Context' (2006) 4(2) *International Journal of Constitutional Law* 269, 280–81.

The third form of corruption of public office is *corruption through the misuse of public resources.* This occurs when public resources are used for illegitimate purposes. Such purposes might be grounded in personal or party interests. For instance, the party in government might use public monies to pay for advertising principally aimed at boosting electoral fortunes (see Part IV). More subtly, a governing party might use information secured through public office not for official purposes but, in an effort to fundraise for the parties, for instance, through 'off the record' briefings given by Ministers to fee-paying businesses.

The last example illustrates how these various forms of corruption of public office are not mutually exclusive and, indeed, may overlap – secret briefings by Ministers to their business patrons involves not only corruption through the misuse of public resources but also corruption through undue influence. Similarly, this example highlights how corruption stemming from private funding can intertwine with corruption related to public resources; this is not surprising considering that the motivation for corruption due to private funding tends to arise when the party or politician enjoys some degree of public power (and therefore, access to public resources).

A political finance regime should aim to prevent all of these forms of corruption of public office. This was a point well recognised by Kim Beazley. In his Second Reading Speech for the Political Broadcasts and Political Disclosures Bill 1991 (Cth) – the Bill that introduced a ban on political advertising and compelled (?) annual disclosure returns – Beazley noted that:

> There is no greater duty upon the representatives of the people in a democratic society than the duty to ensure that they serve all members of that society equally. This duty requires government which is *free of corruption and undue influence*.[25]

Not only should governments be free of graft and undue influence but:

[25] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1991, 3477 (Kim Beazley, Minister for Transport and Communications).

> The public is entitled to be assured that *parties and candidates* which make up the government or *opposition of the day* are free of undue influence or improper outside influence.[26]

These various forms of corruption of public office can be more fully understood through the distinction between individual corruption and institutional corruption. We can understand *individual corruption* as occurring when public officials render undeserved services in exchange for personal gain.[27] In these cases, the necessary link between the services and the gain is provided by corrupt motives.[28] Corruption through graft (for example, bribery of public officials), typically involves cases of individual corruption. With *institutional corruption,* on the other hand, 'the gain a [public official] receives is political rather than personal, the service the member provides is procedurally improper, and the connection between the gain and the service has a tendency to damage the legislature or the democratic process'.[29]

Whilst corruption through graft tends to take the form of individual corruption, the other forms of corruption – whether it be corruption of electoral processes, corruption through undue influence or corruption through the misuse of public resources – can take either the form of individual or institutional corruption. For example, the misuse of public resources like parliamentary entitlements and government advertising often take the form of institutional corruption (see Part IV).

Accordingly, a democratic political finance regime should aim to tackle both individual and institutional corruption. A focus or preoccupation with individual corruption (like corruption through graft) can lead to the dangerous neglect of institutional corruption through undue influence and misuse of public resources. While 'more ambiguous', the latter is 'often [a] more corrosive kind of corruption that

---

[26] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1991, 3482 (Kim Beazley, Minister for Transport and Communications) (emphasis added). For similar sentiments, see Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 1983, 2213-15 (Kim Beazley).
[27] See Thompson, above n 13, 28.
[28] Thompson, above n 13*,* 103–8.
[29] Ibid 7.

takes place within the heart of the institution'[30] because it can be 'so closely related to conduct that is a perfectly acceptable part of political life'[31] or 'the way things are done'.

In addressing institutional corruption, a political finance regime should be based on the 'appearance' standard. As the Bowen Committee stated:

> there is a test … in judging what is proper in particular circumstances: the test of appearance. Does that interest look to the reasonable person the sort of interest that may influence?[32]

The appearance standard rests on two related grounds. First, it protects an essential element of accountability, public confidence in governmental processes. One of its premises is that 'under certain institutional conditions the connection between contributions and services *tends* to be improper',[33] and that this tendency erodes public confidence in representative institutions. In this context, as the then Queensland Integrity Commissioner Gary Crooke put it, '[p]erception is reality'.[34] The second ground is evidential and is based on the premise that 'when confronted with a connection that exhibits these tendencies, citizens cannot be reasonably expected to obtain the evidence they need to judge whether the connection is actually corrupt'.[35] These grounds explain why breach of the appearance standard is 'a distinct wrong, independent of and no less serious than the wrong of which it is an appearance'.[36] They also highlight the importance of transparency or, more accurately, reveal how the secrecy of political funding breaches the appearance standard: political contributions given in secret not only tend to involve improper conduct but also defeat reasonable attempts by citizens to properly assess whether there was corrupt conduct.

---

[30] Ibid 25.
[31] Ibid 7.
[32] Committee of Inquiry Concerning Public Duty and Private Interest, above 23, 11. See also Thompson, above n 13, 32.
[33] Thompson, above n 13, 124.
[34] Queensland Integrity Commissioner, *Annual Report 2007–08* (2008) 8.
[35] Thompson, above n 13, 124.
[36] Ibid.

B *Promoting Fairness in Politics*

The principle of political equality lies at the heart of democracy. By insisting that each citizen has equal political status, this principle not only implies that political freedoms be formally available to all citizens but also as political philosopher, John Rawls has argued, that such freedoms have 'fair value'.[37] As Rawls has put it, '[t]he fair value of the political liberties ensures that citizens similarly gifted and motivated have roughly an equal chance of influencing the government's policy and of attaining positions of authority *irrespective of their economic and social class'*.[38] The aim here is to ensure that citizens have 'a genuine chance to make a difference'[39] – they should have leverage over the political process.

This aim is perhaps the most difficult challenge facing political finance regimes in capitalist economies like Australia. The value of political freedoms will depend upon background inequalities. Specifically, significant social and economic inequalities will undermine the value of such freedoms for those who are marginalised – the poor, the disadvantaged, the powerless. In such contexts (as in the case of Australia), there is a serious likelihood that such freedoms, while formally available, cannot be meaningfully exercised by many.[40] Indeed, Rawls has observed that laissez faire capitalism 'rejects … the fair value of equal political liberties'.[41]

Ensuring the fair value of political freedoms will involve a radical redesign of Australia's social, economic and political institutions, a task that clearly cannot be borne alone by a political finance regime. At the same time, proper design of a political finance regime is crucial to ensuring fair value of political liberties[42] and an over-riding aim of such a regime should be to ensure fairness in politics.

---

[37] John Rawls, *A Theory of Justice* (Oxford University Press, revised ed, 1999) 225; John Rawls, *Justice as Fairness: A Restatement* (Belknap Press of Harvard University Press, 2001) 149. Carmen Lawrence has noted that '[d]espite the otherwise general equality in voting power, many are suspicious that not all citizens are equally able to influence their representatives': Carmen Lawrence, 'Renewing Democracy: Can Women Make a Difference?' (2000) 12 (4) *The Sydney Papers* 54, 58.
[38] Rawls, *Justice as Fairness: A Restatement,* above n 37*,* 46 (emphasis added).
[39] Ronald Dworkin, 'Equality, Democracy, and Constitution: We the People in Court' (1990) 28(2) *Alberta Law Review* 324, 338.
[40] Norman Daniels, 'Equal Liberty and Unequal Worth of Liberty' in Norman Daniels (ed), *Reading Rawls: Critical Studies on Rawls' A Theory of Justice* (Basil Blackwell, 1975) 253, 253–81.
[41] Rawls, *Justice as Fairness: A Restatement*, above n 37, 137.
[42] See ibid 149.

This aim has several key elements. First, a political finance regime should facilitate fair access to the public arena, that is, the forums in which public opinion and policy is articulated, influenced and shaped. Citizens and their political organisations will only obtain leverage when there is such access. Such access moreover provides the principal guarantee that the public agenda is responsive to the opinions of the citizenry.[43] In other words, fair access to the public arena secures public accountability.

The 'public arena' is, of course, a multifarious and complex notion with public opinion and policy expressed and shaped in numerous ways including door-to-door campaigning, party newsletters, lobbying and, increasingly, advertisements through the mass media. It is also a 'limited space'[44] where the loudness of one voice can drown out others. In particular, those with far superior means of communication can exclude less resourced citizens or groups. In elections, for example, parties with the money to take out expensive advertising able to reach out to mass audiences will tend to receive a better hearing amongst the public than their less well-off competitors which rely upon letter-boxing and door-knocking. Preventing such unfairness is one of the central aims of a democratic political finance regime.

The importance of access to the public arena stems from the deliberative nature of democracy. Democracy is not simply a matter of the majority getting what it wants. Such crude majoritarianism fails to recognise that political competition involves – at its core – a battle of rival ideas, policies and ideologies: politics is conducted through debate and discussion. Such deliberation is the basis upon which citizens engage in the *making of laws* by arguing their various positions and seeking to influence others. Deliberation also plays another role. Many citizens will be bound by laws with which they disagree. Deliberation is a process of *justifying* laws and policies to the public. It is through such justification that respect is accorded to citizens as *subjects of laws* who may or may not agree with those laws.[45] In this sense, citizens are 'the "makers" and the "matter" of politics'.[46]

---

[43] See Charles Beitz, *Political Equality: An Essay in Democratic Theory* (Princeton University Press, 1989).
[44] Rawls, *Justice as Fairness: A Restatement*, above n 37, 150.
[45] See Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton University Press, 2004) 4–5. For a fuller discussion of the purposes of democratic deliberation, see Gutmann and

The centrality of democratic deliberation explains why the principle of political equality – the notion that each citizen has equal political *status* – does not imply equal political power, that is, each citizen having the same amount of political *power*. In rare situations, equal political power is mandated by the principle of political equality. Voting rights provide a relatively uncontroversial example. With these rights, we can see how political equality finds expression in the key objective advanced by the original *Commonwealth Electoral Act 1918,* that of 'equality of representation throughout the Commonwealth'.[47] In the realm of franchise, we can see the force of Harrison Moore's observation that the 'great underlying principle' of the Constitution is that citizens have 'each a share, and an equal share, in political power'.[48]

In other realms of political activity (including that of political funding), however, equal political power is generally not a requirement of political equality. Democratic deliberation means that not all ideas or voices are given equal weight. Ideally, superior ideas gain greater support while their lesser competitors fall by the wayside. In the context of political deliberation, what political equality generally requires is conditions of fair deliberation,[49] conditions that only exist with fair access to the public arena (discussed above).

Most importantly perhaps, a political finance regime should promote fairness in electoral contests. As the Royal Commission on WA Inc emphasised:

> The first institution of representative government, the Parliament, must be constituted in a way which fairly represents the interests and aspirations of the community itself. *The electoral processes must be fair*. [50]

Thompson, *Why Deliberative Democracy?* (Princeton University Press, 2004) 10–13 and Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Belknap Press, 1996) 41–44.

[46] Beitz, above n 43, 98.

[47] Commonwealth, *Parliamentary Debates*, Senate, 30 January 1902, 9529 (Richard O'Connor).

[48] Harrison Moore, *The Constitution of the Commonwealth of Australia*, (John Murray, 1st ed, 1902) 329. This statement was cited with approval in *ACTV* (1992) 177 CLR 106, 139–40 (Mason CJ).

[49] See discussion in Beitz, above n 43, 12–14, 15–16.

[50] WA Inc Royal Commission, above n 9, [1] –[10] (emphasis added). See also Corruption and Crime Commission of Western Australia, *Report on the Investigation of Alleged Public Sector Misconduct Linked to the Smiths Beach Development at Yallingup* (2007) 90.

Fairness in this context implies fair competition amongst candidates and parties.[51] This, firstly, means that a political finance regime should ensure open access to electoral contests. It should prevent the costs of meaningful access to the public arena escalating to prohibitive levels. It should be vigilant to the danger that meaningful access will be placed beyond the reach of most citizens through the 'competitive extravagance'[52] of parties that seek to outbid each other by spending excessive amounts in campaigning. This may warrant election spending limits, especially in light of escalating levels of campaign spending (see Part III). More than a century ago, Senator O'Connor, when introducing the original *Commonwealth Electoral Act,* justified the candidate expenditure limits enacted by the Act in this way:

> If we wish to secure a true reflex of the opinions of the electors, we must have … a system which will not allow the choice of the electors to be handicapped for no other reason than the inability of a candidate to find the enormous amount of money required to enable him (sic) to compete with other candidates.[53]

Ensuring meaningful access to the public arena may also require 'compensating steps',[54] for example, public funding so that the electoral contest is open to 'worthy parties and candidates [that] might not [otherwise] be able to afford the considerable sums necessary to make their policies known'.[55] New candidates and parties may need to be financially assisted so as to ensure that elections are open and not merely restricted to the established parties.

A political finance regime will also promote fair electoral competition by advancing 'fair rivalry'[56] between the main parties. Fair rivalry implies an absence of '[a]

---

[51] The notion being emphasised here is of fair competition and not competition per se. A competitive system, even a highly competitive one, is not necessarily fair: Beitz, above n 43, 200–1.
[52] T H Marshall, 'Citizenship and Social Class' in T H Marshall, *Class, Citizenship and Social Development* (Doubleday, 1964) 65, 90.
[53] Commonwealth, *Parliamentary Debates*, Senate, 30 January 1902, 9542 (Richard O'Connor).
[54] Rawls, *A Theory of Justice*, above n 37, 198.
[55] Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 1983, 2215 (Kim Beazley). This specific aim is long-standing.
[56] Keith Ewing, *The Funding of Political Parties in Britain* (Cambridge University Press, 1987) 182.

serious imbalance in campaign funding'[57] between the major and minor political parties. As Ewing has argued, 'no candidate or party should be permitted to spend more than its rivals by a disproportionate amount'.[58] Fair rivalry amongst the major parties, that is, the parties contending for government, may demand more than the absence of a gross disparity in resources. The most important choice citizens make in an election is to choose the party or coalition that will form government. For this choice to be meaningful in Australia's predominantly two-party system, the two alternatives may need to be equally represented. If so, then fair rivalry amongst the major parties would imply a situation approximating 'equality of arms'.

Also, there should be fairness between the electoral contestants, or the political parties and candidates, and other political participants such as lobby groups, trade unions, businesses and other non-government organisations. The latter, often referred to as third parties in electoral law jargon, should, firstly, have adequate access to the public arena as they play an essential role in elections. Their role should, however, be understood against the central function of elections as a process of determining who is to govern. This function suggests that the electoral contestants have a privileged (but not dominant) place during election time. At the very least, the role of electoral contestants should not be swamped by third parties. For example, third parties should not be able to outspend political parties and candidates. Neither should political parties and candidates be subject to unfair speech by third parties, for example, political attacks made by groups whose identities are not publicly known.

The principle of fairness also extends beyond electoral contests to governmental processes in between elections. The role played by elections is crucial but nevertheless limited. Elections are usually contested on broad issues. Moreover, the electoral policies of parties are sometimes vague and allow them significant room to manoeuvre once in office. This means that *electoral politics* does not always govern what parties do in parliament (*parliamentary politics*), or what a party in office does

[57] Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 1983, 2213 (Kim Beazley).
[58] Keith Ewing, *Money, Politics and Law: A Study of Electoral Finance Reform in Canada* (Clarendon Press, 1992) 18.

in relation to executive action (*policy politics*).[59] All three types of politics, however, should be subject to the principle of fairness. This underscores the importance of fair access to the public arena including avenues to influence the exercise of political power such as lobbying.

In this context, we can see a close connection between unfairness in politics and the various forms of corruption. It was explained earlier that individual corruption occurs when public officials render undeserved services in exchange for personal gain. Institutional corruption is involved when a public official receives a political gain while rendering a procedurally improper service. In the case of individual corruption, service will be undeserved when there is departure from the merit principle. Proper adherence to this principle, however, requires observance of fair processes; only in this way can there be any assurance that a robust notion of merit is articulated and applied. Similarly in the case of institutional corruption, fair processes are an imperative of procedural propriety.

C *Supporting Parties in Performing their Functions*

In his major study of Australian political parties, Dean Jaensch observed:

> There can be no argument about the ubiquity, pervasiveness and centrality of party in Australia. The forms, processes and content of politics – executive, parliament, pressure groups, bureaucracy, issues and policy making – are imbued with the influence of party, party rhetoric, party policy and party doctrine. Government is party government. Elections are essentially party contests, and the mechanics of electoral systems are determined by party policies and party advantages. Legislatures are party chambers. Legislators are overwhelmingly party members. The majority of electors follow party identification. Politics in Australia, almost entirely, is party politics.[60]

[59] For this distinction, see Ian Marsh, *Beyond the Two Party System: Political Representation, Economic Competitiveness and Australian Politics* (Cambridge University Press, 1995) 35–43.
[60] Dean Jaensch, *Power Politics: Australia's Party System* (Allen & Unwin, 1994) 1–2.

Parties are central to Australia's democracy and, indeed, 'modern democracy is unthinkable save in terms of parties'.[61] There is little doubt then that Australia's political finance regime should be rooted in the centrality of political parties. This means that such a regime should ensure that parties are adequately funded. Adequacy, though, does not mean what the parties want (or think they need for campaigning purposes) and must be strictly judged against the functions that parties ought to perform.

It may be said, however, that the only functions that parties perform are as vehicles to gain political power. This is true but only in part. What it obscures are the various democratic functions that parties perform. Foremost, political parties have *representative functions*, that is, functions aimed at reflecting public opinion. They perform an *electoral function* whereby political parties, in their efforts to secure voter support, respond to the wishes of the citizenry. They also have a *participatory function* as they offer a vehicle for political participation through membership, meetings and engagement in the development of party policy. The relationship between political parties and the citizenry is not, however, one way. As Giovanni Sartori has noted, '[p]arties do not only *express;* they also *channel*'.[62] Alongside their representative functions, political parties also perform an *agenda-setting function* in shaping the terms and content of political debates. For example, the platform of a major party influences, and is influenced by, public opinion. Political parties further perform a *governance function*. This function largely relates to parties that succeed in having elected representatives. These parties determine the pool of people who govern through their recruitment and preselection processes. They also participate in the act of governing. This is clearly the case with the party elected to government and also equally true of other parliamentary parties as they are involved in the lawmaking process and scrutinise the actions of the executive government.

There are, of course, many other intermediary organisations, many of which perform one or more of these functions that have been ascribed to political parties. The media,

[61] Elmer E Schattschneider, *Party Government* (Holt, Rinehart and Winston, 1942) 1. On the connection between different types of parties and democracy, see Gerald Pomper, 'Concept of Political Parties' (1992) 4(2) *Journal of Theoretical Politics* 143.
[62] Giovanni Sartori, *Parties and Party Systems: A Framework for Analysis: Volume 1* (Cambridge University Press, 1976) 28 (emphasis original).

for example, clearly performs an agenda-setting function and, to a lesser and controversial extent, a responsive function. Non-government organisations, like interest groups, also perform responsive and agenda-setting functions while the public service obviously has a governance function. But no other institution or group *combines* these various functions. That is why Sartori is correct to argue that '[p]arties are *the* central intermediate and intermediary structure between society and government'.[63]

D *Respecting Political Freedoms*

The aim of promoting fairness in politics implies respect for political freedoms. As noted earlier, this aim is directed at ensuring the fair value of political freedoms. However, given how deeply implicated such freedoms are in this area, in particular freedom of political expression and freedom of political association (as discussed below), respect for political freedoms deserves separate standing as a distinct end of a political finance regime.

1 *Respecting Freedom of Political Expression*

Freedom of political expression is essential for citizens to participate in democratic decision-making.[64] The reason is fairly obvious: democratic decision-making depends upon citizens being able to argue for their own views, to listen to the opinions of others, to debate and to dissent. At a most fundamental level, democratic deliberation depends on political expression.

Political funding can involve political expression in two fundamental ways. The giving of money itself by donors tends to be an act of political expression with the political contribution signalling support for a party or candidate (although not necessarily in a public manner). Moreover, money is an enabling resource for engaging in political expression: most of the essential tools of campaign communications (for example, pamphlets, posters and advertisements) have to be paid

[63] Ibid ix.
[64] In terms of freedom of *political* expression, the rationale based on democratic participation is the most pertinent and compelling, see Eric Barendt, *Freedom of Speech* (Oxford University Press, 2nd ed, 2005) vi, 18–19. See also Tom Campbell, 'Rationales for Freedom of Communication' in Tom Campbell and Wojciech Sadurski (eds), *Freedom of Communication* (Dartmouth, 1994) 17, 37–41.

for. It clearly follows that regulation of political funding throws up challenges for freedom of political expression. In Australia, these challenges also have constitutional significance as the High Court has implied a freedom of political communication into the *Commonwealth Constitution*.[65]

In understanding these challenges, it is useful to distinguish between two aspects of freedom of political expression. There is, firstly, 'freedom from' which emphasises the absence of state regulation of political expression or, put differently, freedom from state interference in political discussion (the aspect with which the constitutional freedom is centrally concerned). The other aspect, 'freedom to', turns on the ability of citizens to actually engage in political expression. While 'freedom to' of course depends on 'freedom from', it requires more than just the absence of state regulation and extends to a range of factors, notably, the adequacy of resources to engage in political expression. Both aspects of freedom of political expression need to be taken into account – citizens should be significantly free from legal constraints on political activity *as well as* having a meaningful capacity to engage in such activity. In Rawls' phraseology, freedom of political expression should not only be formally available to all citizens but should also have a fair value.

What follows is that respect for freedom of political expression does not dictate any particular formula or combination of 'freedom from' (state regulation) and 'freedom to'. The desirable balance between them is often a complex matter depending not only on normative principles, but also the specifics of the factual context. Because proper respect for freedom of political expression is contingent on such specifics, such freedom does not create an in-principle bar against state regulation of political expression.[66]

This point is sometimes obscured by excessive emphasis on the metaphor of the 'marketplace of ideas'. This metaphor likens the political forum to a market for goods and services and suggests a 'free' market of political debate on the basis that the absence of state regulation will result in a rich diversity of ideas. With this metaphor, freedom of political expression is typically equated to 'freedom from'. The essential

[65] See text accompanying nn 334-360, 429-440.
[66] See Beitz, above n 43, 209–13.

flaw of this metaphor (or at least uses of it) is that while it correctly takes into account state regulation, it ignores the structures of private power. It neglects the way that financial inequalities between citizens (in the context of expensive means of communications, for instance, radio and television) create blockages in accessing the public realm. These blockages mean that, rather than fostering a flourishing diversity of ideas, 'freedom from' (that is, an absence of state regulation of political expression) instead produces a political agenda biased in favour of powerful interests.[67] The result, for most citizens, is that whilst freedom of political expression is formally available, it has little or negligible value.

More useful metaphors for the public realm are those of a 'town hall' meeting[68] or 'public square' meeting. These metaphors suggest that the public realm is a limited space (only a limited number of persons can speak at a public meeting) that is not only governed by *state regulation* but also structures of *private power*. Further, it implies that state regulation has a role in setting out the rules and procedures for fair deliberation (like the rules of a public meeting).[69] Importantly, such regulation might be required to counteract the silencing effects of 'private aggregations of power'.[70] As Owen Fiss eloquently put it:

> It [the state] may have to allocate public resources – hand out megaphones – to those whose voices would not otherwise be heard in the public square. It may even have to silence the voices of some in order to hear the voices of the others.[71]

In terms of specific measures regulating political funding, protecting freedom of political expression may very well require state funding of parties and candidates and limits on political spending.

---

[67] See Stanley Ingber, 'The Marketplace of Ideas: A Legitimizing Myth' (1984) 1984 *Duke Law Journal* 1.
[68] This metaphor is famously used by Alexander Meiklejohn: Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (Harper & Brothers, 1948).
[69] The connection between political finance and democratic deliberation is powerfully made by Gutmann and Thompson: Gutmann and Thompson, *Democracy and Disagreement*, above n 45, 134; Gutmann and Thompson, *Why Deliberative Democracy*, above n 45, 48–49. See also Ian Shapiro, 'Enough of Deliberation: Politics is about Interests and Power' in Stephen Macedo (ed), *Deliberative Politics: Essays on Democracy and Disagreement* (Oxford University Press, 1999) 28, 34–36.
[70] Owen Fiss, *The Irony of Free Speech* (Harvard University Press, 1996) 2.
[71] Ibid 4.

The preceding discussion underlines how misleading the characterisation of the debate between those who favour state regulation of political expression on the one hand, and those who oppose such regulation on the other is as a conflict between political equality and liberty. This characterisation operates upon an unduly narrow conception of liberty that reduces freedom of political expression to 'freedom from'. A more expansive and plausible understanding of freedom of political expression that combines 'freedom from' and 'freedom to' reveals that 'what at first seemed to be a conflict between liberty and equality [is] a conflict between liberty and liberty'.[72]

Even when there is a genuine conflict between freedom of political expression on one hand, and equality (or, more accurately, political fairness) on the other, resolution of this conflict does not imply the absence of state regulation. Like all political freedoms, freedom of political expression is not absolute and can be legitimately limited on the grounds of competing public interests, whether they be political fairness or protecting the integrity of government. Whether such limitation is justifiable will depend on a complex series of factors, including the weight of the countervailing public interest, the extent to which the limitation is properly tailored to advancing this interest and the severity of the limitation (including the risk that the limitation will lead to an abuse of state power).

2 *Respecting Freedom of Political Association*

Various types of political associations are active in Australian politics. There are, of course, the political parties that put up candidates in a bid to gain public office. There are also groups which are not seeking public office but aim to influence the outcomes of elections or public debate more generally. These political associations are fundamental to the proper workings of Australian democracy. In a mass democracy, leverage is usually secured through acting collectively. It is very rare for a citizen of ordinary means to have political leverage on her or his own accord. It is only through mobilising in groups like parties, interest groups and community groups that a citizen is capable of securing meaningful political power; it is through collective actions – acting through associations – that citizens secure a modicum of influence over the

[72] Ibid 15. See also Beitz, above n 43, 209–13.

political process. In particular, associations are necessary in order to engage in meaningful political expression. As political philosopher Amy Gutmann put it:

> organized association is increasingly essential for the effective use of free speech … Without access to an association that is willing and able to speak up for our views and values, we have a very limited ability to be heard by many other people or to influence the political process, unless we happen to be rich or famous.[73]

The importance of political associations to citizens securing meaningful political power underscores how such associations, and the freedom to form and act through them, is crucial to fairness in politics and protecting the integrity of representative government, in particular, to ensure accountability in the exercise of public power.[74]

Underlying the importance of the freedom of political association is the principle of pluralist politics. This principle stipulates that citizens should have diverse avenues to combine in order to influence the political process and to express their views. This principle is also implicit in the functions to be performed by political parties: party politics should provide citizens with different ways to engage in political activity and to be represented; party policies and programmes should provide clear and meaningful choices.

The principle of pluralist politics provides further justification for freedom of political association.[75] Political associations require a meaningful degree of freedom from state regulation in order to develop their distinctive identities, messages and activities. This applies in particular to political parties: pluralism in party politics cannot be sustained without parties having meaningful autonomy in organising their affairs. Put

[73] Amy Gutmann, 'Freedom of Association: An Introductory Essay' in Amy Gutmann (ed) *Freedom of Association* (Princeton University Press, 1998) 3.
[74] For a general argument that freedom of association is based on the idea of popular sovereignty, see Jason Mazzone, 'Freedom's Associations' (2002) 77 *Washington Law Review* 639.
[75] See generally Howard Davis, *Political Freedom: Associations, Political Purpose and the Law* (Continuum, 2000) 47.

differently, freedom of party association from state regulation is necessary so that parties can perform their functions in a democratic society.[76]

As with freedom of political expression, freedom of political association does not imply an absence of state regulation. State regulation might be necessary in order to promote 'freedom to' associate, for instance, through state funding assisting disadvantaged sectors of society in forming organisations. Freedom of political association is also not absolute and can be properly limited in certain circumstances. The functions of the parties themselves may, for example, furnish reasons for limiting such freedom. For instance, parties cannot properly discharge their participatory functions if their membership rolls have been corrupted, a problem that may require state intervention. Moreover, state regulation might be necessary in order to secure pluralism and fairness in politics. It might also be needed as an antidote to the '[t]he monopolistic position of parties'[77] or the 'oligopoly' status of major parties.[78] Whether these rationales justify limitation of freedom of political association will depend (as with freedom of political expression) on various circumstances,[79] including the weight of such rationales, the extent to which the limitation is adapted to advancing this rationale and the severity of the limitation (including the risk that the limitation will lead to an abuse of state power).[80]

[76] For a rejection of a rights-based approach to freedom of party association and a preference for a functional analysis, see Samuel Issacharoff, 'Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition' (2001) 101(2) *Columbia Law Review* 274.
[77] Davis, above n 75, 45.
[78] Beitz, above n 43, 191.
[79] For fuller examination of this point, see Jeremy Moss and Joo-Cheong Tham, 'Freedom of Association, Political Parties and Party Funding' in Joo-Cheong Tham, Brian Costar and Graeme Orr (eds), *Electoral Regulation and Prospects for Australian Democracy* (Melbourne University Press, 2011 forthcoming). See generally Peter de Marneffe, 'Rights, Reasons, and Freedom of Association' in Amy Gutmann (ed), *Freedom of Association* (Princeton University Press, 1998) ch 6.
[80] The last point threads through Nathaniel Persily's argument for non-interference in the primary elections of American political parties, see Nathaniel Persily, 'Toward a Functional Defense of Political Party Autonomy' (2001) 76 *New York University Law Review* 750, 751.

III FUNDING AND SPENDING PATTERNS OF FEDERAL POLITICAL FUNDING

This section will examine the following:

- private funding of federal political parties and candidates;
- public funding of federal political parties; and
- election spending of federal political parties and third parties.

A *Private Funding of Federal Political Parties and Candidates*

An analysis of the budgets of political parties for the financial years 1999–2000 to 2001–02 shows how heavily dependent the major parties (the ALP and the Coalition) are on private money with more than 80 per cent of their funding coming from this source. The minor parties were slightly less dependent with half to three quarters of their budgets privately financed.[81] AEC analysis of returns made for the 2004 federal election cycle results in a similar conclusion. For the financial years 2002–03 to 2004–05, private funding of the ALP and the Liberal Party respectively stood at 81 per cent and 79 per cent of their total budgets.[82]

There is nothing fundamentally wrong with parties being dependent upon private money. Indeed, a funding base comprising many small donations would reflect a vibrant party with strong grass-roots support. Big money in small sums would testify to a robust democracy where many citizens engage with the political process by donating money to their preferred candidates and parties. Such a development could be a crucial antidote to the hollowing-out of the party system that has witnessed falling party membership and affiliation.

It is clear that parties are awash with big money: the budgets of major parties are in the order of millions. But for the most part, they are neither in small sums nor from individual citizens; big money comes from large donations. While donations of less than $1500 formed 42% of the *number of donations* made in 2004-05, a federal election year, to the federal political parties, they amounted to only four per cent of the *amount donated*. A reverse situation applied to donations of $25 000 or more: they

[81] Joo-Cheong Tham and David Grove, 'Public Funding and Expenditure Regulation of Australian Political Parties' (2004) 32(3) *Federal Law Review* 397, 401.
[82] Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure* (2008) 12.

formed only four per cent of the number of donations but amounted to 48% the amount donated.[83] Donations of this magnitude are far out of the reach of ordinary Australians. In 2009, the average annual earnings of an Australian employee was $48604.40.[84] A donation of $25 000 would be more than half of this amount.

Not surprisingly, individual donations form only a fraction of party finances. It is institutional contributions, that is, money from corporations and trade unions, that constitute the lion's share of party finances. *All of the major parties* depend on corporate funding. The figures are stark: in the financial years 1999–2000 to 2001–02, the dollar amount of corporate donations received by the Liberal Party was more than 18 times the amount of individual donations received. The ratio for the National Party stood at slightly over 11. Even with the ALP, corporate donations are more important than either individual or trade union donations. In the 2001–02 financial year, for example, corporate donations received by the ALP were nearly 2.5 times the amount of trade union donations.[85] Of the main parties, it is only the Greens that can plausibly claim to have a strong funding base grounded in individual donations.[86]

The ALP and Liberal Party also receive a significant amount of money from their own investment activities, much of which appears to be conducted by their commercial arms (many of which seem to operate as property trusts).[87] With no readily available information, it is difficult to precisely ascertain the amount of income generated by these investment vehicles. An indication of the importance of these vehicles, all of which are considered 'associated entities' under the *Commonwealth Electoral Act,* can be gleaned from Table 1 below. The table reveals the aggregate revenue of associated entities as a proportion of the revenue received by the parties. While this proportion fluctuates according to the electoral cycle, the figures demonstrate the extensive use of 'associated entities' by the ALP and the

---

[83] Australian Electoral Commission, *Election Funding and Disclosure Report: Federal Election 2007* (2010) 15.
[84] Australian Bureau of Statistics, *Average Weekly Earnings, Australia: Catalogue 6302.0* (August 2009) <http://www.abs.gov.au/ausstats/abs@ nsf/mf/6302.0>.
[85] Dean Jaensch, Peter Brent and Brett Bowden, Democratic Audit of Australia, *Australian Political Parties in the Spotlight: Democratic Audit of Australia Report No 4* (2004) 29.
[86] Tham and Grove, above n 81, 402.
[87] See Senate Standing Committee on Economics, Parliament of Australia, *Disclosure Regimes for Charities and Not-for-Profit Organisations* (2008) [7.5]

Liberal Party. The lowest proportion, occurring in the financial year 2001–02, shows a figure that is still close to half of the parties' respective revenues.

Table 1: Party-Revenue compared with Revenue Received by Associated Entities

	Federal election year, 2001–02 ($m)	Federal non-election year, 2002–03 ($m)	Federal non-election year, 2003–04 ($m)
Revenue received by political parties (RPP)	$147.24	$91.14	$91.93
Revenue received by associated entities (RAE)	$63.59	$80.12	$72.60
RAE as a proportion of RPP (RAE/RPP x 100)	43.19%	87.91%	78.97%

Source: Australian Electoral Commission, *Funding and Disclosure Report: Election 2004* (2005) 19 (Table 6).

Further indication of the importance of these vehicles can be gathered from Table 2. It lists the prominent investment vehicles of the ALP and the Liberal Party, their total receipts for 2005–06 to 2007–08, and the amounts they gave and loaned to their associated political parties.

Table 2: Selected Investment Vehicles of the ALP and Liberal Party, 2005–06 to 2007–08

Associated entity	Political party associated to	Total receipts	Amount provided to political party associated to (all branches)	Loans provided to political parties associated to (all branches)
John Curtin House Ltd	ALP	$58 516 841	$12 447 810.52	$4 509 838.77
Labor Holdings Pty Ltd	ALP	$51 199 627	$4 499 999	NIL
Labor Resources	ALP	$3 005 933	$3 000 000	NIL
Progressive Business Association Inc	ALP	$2 482 008	$1 441 558.66	NIL

Bunori Pty Ltd	LP	$6 459 194.62	NIL	$5 579 423.50
Cormack Foundation	LP	$8,900,751.51	NIL	$100 000.00
The Free Enterprise Foundation	LP	$1 020 238	$963 000	NIL
Greenfields Foundation	LP	$151 375	NIL	$11 550 000.00
The 500 Club (Vic)	LP	$1 532 239.95	$314 280	NIL
Vapold Pty Ltd	LP	$1 767 554	$569 308	$679 585

Source: AEC Annual Returns 2005–06 to 2007–08, available from Australian Electoral Commission, *Annual Returns Locator Service,* (28 January 2011) <http://periodicdisclosures.aec.gov.au/>.

Private funding is predominantly channelled to political parties. Funding provided directly to candidates comprises a very small component of the total funding made to political parties and candidates. Table 3 illustrates this point by comparing donations received by candidates standing in the 2007 federal election and donations received by the federal branches of the parties in 2007–08.

Table 3: Donations Received by Candidates in 2007 Federal Election

	ALP (Federal)	**Liberal Party (Federal)**	**National Party (Federal)**	**Greens (Federal)**
Donations received by candidates	$428 465.85	$55 100.00	$50 733.00	$100 515.37
Party receipts	$61 764 260.22	$34 662 036.00	$1 809 362.00	$1 965 185.00
Donations received by candidates as a proportion of party receipts	0.69%	0.16%	2.80%	5.11%

Source: AEC 2007–08 party returns and 2007 federal election candidate returns, available from Australian Electoral Commission, *Annual Returns Locator Service,* (28 January 2011) <http://periodicdisclosures.aec.gov.au/>.

There are, of course, exceptions to the rule of funding being party-centred. The most notable is probably Malcolm Turnbull, former leader of the Opposition. So much is illustrated by the activities of Mr Turnbull's fund-raising organisation, Wentworth Forum. Reporting on the Forum, *The Age* has revealed how it offers different types of membership packages, ranging from $5 500 to become a 'member' to $55 000 to become a 'governor'. Those taking up membership include some of the richest individuals in Australia with Seven Network chairman Kerry Stokes, Westfield founder Frank Lowy and Aussie Home Loans executive chairman, John Symond.[88]

1 *Corporate Political Contributions*

While empirical study of corporate political contributions in Australia is at an incipient stage,[89] existing research reveals several features of such giving. Surprisingly perhaps, only a minority of large businesses make regular political contributions. A study by Iain McMenamin of 450 large businesses has revealed that 47 per cent of these businesses did not make *any* payments to political parties during the seven-year period between 1998–99 and 2004–05, while only 15 per cent of the sample made a payment to political parties *every year* during this time.[90] At the same time, the study also found that the larger the business, the more likely it is to contribute. Moreover, business contributions are also more likely to be made as elections approach. The study, however, concluded that while the likelihood to contribute varies between each industry sector, it is difficult to state with any certainty which sectors are more likely to contribute.[91]

How then do businesses distribute their political money once they have decided to contribute? An analysis by Ian Ramsay and others of corporate contributions made in the three year period 1995–96 to 1997–98 found that 99 per cent of these contributions went to the Coalition parties and the ALP,[92] in a context where '[t]he Liberal Party consistently outperformed the other parties in terms of attracting

---

[88] Richard Baker, 'Rich mates fill Turnbull poll coffers', *The Age* (Melbourne), 15 July 2009, 1.
[89] In fact, empirical study of Australian political contributions is *generally* at an incipient stage.
[90] Iain McMenamin, 'Business, Politics and Money in Australia: Testing Economic, Political and Ideological Explanations' (2008) 43(3) *Australian Journal of Political Science* 377, 381.
[91] Ibid 382.
[92] Ian Ramsay, Geoff Stapledon and Joel Vernon, 'Political Donations by Australian Companies' (2001) 29(2) *Federal Law Review* 201.

corporate donations'.[93] The study by McMenamin similarly concluded that businesses principally channelled their money to the ALP and the Coalition parties. It also added that:

> Australian businesses have a strong underlying ideological predilection towards the conservative coalition of Liberals and Nationals. Nonetheless, they react strongly to changing political conditions. If the ALP has the political advantage, in terms of either control of government or a lead in the polls, businesses tend to be even handed. By contrast, if the Coalition has the political advantage businesses target the vast majority of their money on the Coalition.[94]

These comments indicate that for businesses which make political contributions, whilst ideology clearly matters, its significance is tempered – perhaps even rivalled – by a pragmatism whereby *corporate money follows power*. An important reflection of this logic is the practice of businesses hedging their bets by giving to both the ALP and the Coalition. For instance, nine of the top ten corporate donors in the financial years 1995–96 to 1997–98 gave to both the ALP and the Liberal Party with seven of them donating to both of these parties as well as to the National Party.[95] More recently, in the 2005–06 financial year, Inghams Enterprises, ANZ and Westpac ranked amongst the top ten donors to *both* the ALP and Liberal Party federal branches.[96]

Work by Harrigan has cast some light on the characteristics of companies that split their contributions between these parties. According to Nicholas Harrigan, these bipartisan contributors are more likely to be corporations located in highly regulated industries or potential defence contractors. Donors that only give to the Coalition parties, on the other hand, tend not to have these characteristics and are more likely to have rich individuals on their boards and ties with other Coalition-donors or conservative think-tanks. What seems to be at play here are ideological motivations

---

[93] Ibid 204.
[94] McMenamin, above n 90, 391.
[95] Ramsay, Stapledon & Vernon, above n 92, 201–2.
[96] AEC Annual Returns for 2005–06, available from Australian Electoral Commission, *Annual Returns Locator Service,* (28 January 2011) <http://periodicdisclosures.aec.gov.au/>.

with contributions aimed at securing support for a business-friendly political agenda.[97]

2 *Trade Union Political Contributions*

Trade union contributions to political parties falls into two categories: party affiliation fees and non-membership subscriptions. Party affiliation fees are fees paid by a union to a political party as a condition of taking out organisational membership of the party. Non-membership contributions are essentially political donations made by unions to support the cause or policies of a political party.

Of the main political parties, the ALP is clearly the principal recipient of trade union contributions (though, as will be seen later, the Greens are beginning to receive modest amounts of trade union money). The ALP receives trade union money both in the form of affiliation fees and non-membership contributions while the Greens only receive non-membership contributions.

For the ALP, trade union money is clearly of importance. Table 4 provides two measures of the ALP's dependence on trade union money: itemised union receipts as a percentage of the sums itemised by all branches of the ALP and itemised union receipts as a percentage of total receipts declared by these branches. It can be seen from this table that the importance of trade union money to the ALP, while significant, should not be overstated. Even at its highest proportion for the financial years 2006–07 and 2007–08, trade union money constituted less than one-sixth of the ALP's total income.

[97] Nicholas Harrigan, '*Political Partisanship and Corporate Political Donations in Australia'* (2007), viewed 11 April 2008, <http://www.mysmu.edu/faculty/nharrigan/2007,%20Partisanship.doc>.

Table 4: Itemised Trade Union Contributions as Proportion of ALP Income, 2006–07 to 2007–08

	2006–07	2007–08
Itemised trade union receipts as percentage of all itemised receipts by the ALP	13.09%	10.8%
Itemised trade union receipts as percentage of total receipts by the ALP	7.52%	8.18%

Source: AEC Annual Returns (ALP), 2006–07 to 2007–08, available from Australian Electoral Commission, *Annual Returns Locator Service,* (28 January 2011) <http://periodicdisclosures.aec.gov.au/>.

Table 5 seeks to divide the amounts received by all branches of the ALP for the financial year 2006–07 (a non-federal election year) and 2007–08 (a year in which a federal election was held) into affiliation fees and non-membership contributions. Sums declared by trade unions as 'Other Receipts' and 'Subscriptions' are treated as affiliation fees while sums identified as 'Donations' are treated as non-membership contributions. This breakdown provides only a rough-and-ready analysis for two reasons. First, the description of sums as 'Other Receipts', 'Subscriptions' or 'Donations' is based on a system of self-classification. Second, the table only works on sums that are required to be itemised by the ALP and not on the total amounts received by the ALP.[98]

Bearing these limitations in mind, Table 5 suggests that the balance between affiliation fees and non-membership contributions shifts according to whether it is a federal election year or not. In both 2006–07 and 2007–08, the amount received in affiliation fees was somewhat steady at slightly over $4 million dollars. In comparison, the amount received in non-membership contributions nearly tripled from $1.3 million in 2006–07 to $4.8 million in 2007–08. The effect was that non-membership subscriptions amounted to more than half of trade union money to the ALP in 2007–08.

[98] The disparity between the total of itemised amounts and total receipts is quite significant. The amounts itemised for the 2006–07 and 2007–08 financial years were respectively 57.49 per cent and 75.78 per cent of the total funding (calculated from Annual Returns to the AEC 2006–07 to 2007–08, available from Australian Electoral Commission, *Annual Returns Locator Service,* (28 January 2011) <http://periodicdisclosures.aec.gov.au/>.). At the same time, this disparity might not mean significant understatement of trade union political contributions to the ALP as these contributions are likely to have exceeded the threshold for itemisation.

Table 5: Breakdown of ALP Receipts: Trade Union Affiliation Fees and Non-Membership Contributions, 2006–07 to 2007–08

	2006–07	2007–08
Affiliation fees	$4 066 930.51	$4 206 835.74
Affiliation fees as a % of itemised trade union funding	75.44%	46.57%
Non-membership contributions	$1 323 800.00	$4 826 176.84
Non-membership contributions as a % of itemised trade union funding	24.56%	53.43%
Total itemised trade union funding	$5 390 730.51	$9 033 012.58

Source: AEC Annual Returns, 2006–07 to 2007–08 available from Australian Electoral Commission, *Annual Returns Locator Service,* (28 January 2011) <http://periodicdisclosures.aec.gov.au/>.

We can now turn to the question of which unions provide affiliation fees and non-membership contributions to the ALP. With affiliation fees, it is important to appreciate that trade union affiliation occurs through the state branches of the ALP. The decision to affiliate is, therefore, made by the state branches of the various unions. As a result, for a particular union some branches might be affiliated to the ALP while others are not.

What is striking is that an overwhelming majority of trade unions are affiliated to the ALP. Of the unions registered with various federal, state or territory industrial registrars, more than 80 per cent are affiliated to the ALP in each of these jurisdictions with the number reaching 100 per cent in Queensland, Australian Capital Territory and the Northern Territory. In some cases, all branches of a particular union are affiliated to the ALP. The list of such unions includes the Shop, Distributive and Allied Employees Association (SDA); Liquor Hospitality and Miscellaneous Union (LHMU); Communications, Electrical and Plumbing Union (CEPU); Australian Services Union (ASU); Australian Manufacturing Workers Union (AMWU); and the Transport Workers Union (TWU). With some other unions, all but one of their branches are affiliated to the ALP. These include the Construction, Forestry, Mining

and Energy Union (CFMEU); Rail, Tram and Bus Industry Union (RTBU); National Union of Workers (NUW); Maritime Union of Australia (MUA); Australian Workers' Union (AWU); and the Australian Meat Industry Employees' Union (AMIEU). There are, however, major unions that are not affiliated to the ALP. No branches of the National Tertiary Education Union (NTEU) or the Association of Professional Engineers, Scientists and Managers Association (APESMA) are affiliated to the ALP and only one branch of the Australian Nursing Federation (ANF) is affiliated to the ALP.[99]

Interestingly, non-membership contributions by trade unions to the ALP seem to be made either by state labour councils or affiliated trade unions. In the 2006–07 and 2007–08 financial years, not a single non-affiliated trade union made a non-membership contribution to the ALP.[100] Table 6 identifies the top five unions in terms of non-membership contributions given to the ALP by all branches of the various unions (as noted earlier, trade union contributions identified as 'donations' are treated as non-membership contributions).

Table 6: Top Five Trade Union Contributors to the ALP in Terms of Non-Membership Contributions, 2006–07 to 2007–08

2006–07		2007–08	
CEPU (including ETU)	$631 800.00	**CEPU (including ETU)**	$1 318 122.80
CFMEU	$192 000.00	**LHMU**	$274 000.00
LHMU	$180 000.00	**CFMEU**	$230 650.00
ETU	$120 000.00	**AWU**	$227 000.00
ASU	$100 000.00	**HSU**	$176 000.00

Source: AEC Annual Returns, 2006–07 to 2007–08 available from Australian Electoral Commission, *Annual Returns Locator Service,* (28 January 2011) <http://periodicdisclosures.aec.gov.au/>.

Table 7 goes beyond the amounts declared as 'donations' and lists the top five union contributors to the ALP for the financial years 2006–07 and 2007–08 based on the total amount of itemised contributions given to the ALP by all branches of the various

[99] The information contained in this paragraph was collected from two types of sources: information published on the websites of the various ALP state branches and correspondence with these branches and some unions (copies of correspondence on file with author).
[100] Annual Returns to the AEC, 2006–07 to 2007–08 above n 98.

unions. In other words, the figures in Table 7 include items declared as 'donations', 'subscriptions' and 'other receipts', and so now also include membership fees.

Table 7: Top Five Trade Union Contributors (all Contributions) to the ALP 2006–07 to 2007–08

2006–07		2007–08	
CEPU (including ETU)	$1 333 397.70	**CEPU (including ETU)**	$1 728 621.41
LHMU	$661 022.17	**SDA**	$1 488 591.18
SDA	$628 245.12	**CFMEU**	$1 339 385.76
CFMEU	$609 799.84	**LHMU**	$764 906.19
AMWU	$385 277.18	**AMWU**	$650 934.07

Source: AEC Annual Returns, 2006–07 to 2007–08 available from Australian Electoral Commission, *Annual Returns Locator Service,* (28 January 2011) <http://periodicdisclosures.aec.gov.au/>.

It remains to discuss trade union funding to the Greens. In the financial years 2006–07 and 2007–08, three unions gave money to the Greens: AMWU, CFMEU and ETU. The biggest giver was the ETU which contributed $219 506 during this period. The CFMEU and the AMWU donated much smaller amounts respectively giving $60 000 and $30 000. Trade union funding does not form a significant part of the Greens' budget. Of the disclosed amounts that have been itemised, trade union funding of the Greens was respectively 6.4 per cent and 3.3 per cent for the 2006–07 and 2007–08 financial years.[101]

B *Public Funding of Federal Political Parties: Election Funding and Tax Subsidies*

Public funding of federal political parties occurs in various ways:

- election funding;
- tax subsidies;
- parliamentary entitlements; and
- government advertising.

[101] Annual Returns to the AEC, 2006–07 to 2007–08, above n 98.

The following examines the first two forms of public funding while parliamentary entitlements and government advertising are discussed in later sections.

1 Election Funding

Political parties and candidates are eligible to receive election funding under the federal scheme if they reach the threshold of 4% of the first preference votes in the constituencies they have contested.[102] The rate for such funding is indexed and was 231.191 cents per eligible (first preference) vote for the 2010 federal election.[103]

Table 8 details the amount of federal election funding provided in relation to federal elections that were held from 1984 to 2007.

Table 8: Federal Election Funding, 1984–2007

Federal election	Amount of election funding
1984	$7 806 778.00
1987	$10 298 657.00
1990	$12 878 920.00
1993	$14 898 807.00
1996	$32 154 800.55
1998	$33 920 787.43
2001	$38 559 409.33
2004	$41 926 158.91
2007	$49 002 638.51

Source: Joint Standing Committee on Electoral Matters, Parliament of Australia, *Advisory Report on the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008* (2008) 13.

Election funding provides an important, albeit limited, source of income to political parties. Based on figures from the annual returns lodged between 1999–2000 and 2001–02 (for both federal and state branches of the parties), Table 9 highlights that despite the provision of election funding, private funding remains the key source of income. For this period, election funding constituted less than one–sixth of the

[102] *Commonwealth Electoral Act 1918* (Cth) ss 294, 297, 321.
[103] Australian Electoral Commission, *Current Funding Rate* (5 January 2011) <http://www.aec.gov.au/Parties_and_Representatives/public_funding/Current_Funding_Rate.htm>

budgets of each of the ALP and Coalition parties. On the other hand, we see a far greater reliance on election funding by the minor parties.

Table 9: Reliance of Political Parties on Election Funding, 1999–2000 to 2001–02

Party	Total receipts	Private funding (% of total receipts)	Public funding (% of total receipts)	Election funding (% of total receipts)
ALP	$117 273 999	81.85	18.15	13.57
Liberal Party	$95 542 648	83.61	16.39	14.57
National Party	$21 725 957	84.89	15.11	11.43
Australian Democrats	$6 667 728	56.90	43.10	38.80
Greens	$6 495 651	74.56	25.44	23.94

Source: Joo-Cheong Tham and David Grove, 'Public Funding and Expenditure Regulation of Australian Political Parties' (2004) 32 *Federal Law Review* 397, 401 (Table 1).

2 Tax Subsidies

Under Division 30–DA of the *Income Tax Assessment Act 1997* (Cth) ('*ITAA 1997*'), individuals and companies are entitled to a tax deduction in respect to contributions or gifts made to political parties. Prior to 22 June 2006, these deductions were limited to donations of up to $100 per annum and deductions were only available to parties registered under the *Commonwealth Electoral Act 1918* (Cth), thereby excluding independent candidates and parties registered under state and territory legislative regimes. In 2006, amendments to the *ITAA 1997* increased the maximum deduction to donations of up to $1500 per annum and extended deductions to parties registered under relevant state and territory legislation and independent candidates.[104]

The take-up rate of these deductions appears to be relatively low. The Explanatory Memorandum to Schedule 1 of the Tax Laws Amendment (2008 Measures No.1) Bill 2008, a Bill that sought to remove the availability of these deductions, indicates the Bill would result in savings of $31.4 million over three years.[105] It can, therefore, be inferred that around $10 million per annum is claimed through these tax deductions.

[104] *ITAA 1997* ss 30–243 as amended by the *Electoral and Referendum Amendment (Electoral Integrity and other Measures) Act 2006* (Cth).
[105] Explanatory Memorandum, Tax Laws Amendment (2008 Measures No.1) Bill 2008 (Cth) 3.

C *Election Spending of Federal Political Parties and Third Parties: Intensifying Arms Races*

In analysing patterns of election campaign spending, a threshold difficulty concerns the availability of data. This is not a difficulty that significantly applies to spending by candidates and third parties – under the *Commonwealth Electoral Act,* both groups are respectively required to disclose their electoral and political expenditure. Rather, the difficulty lies with the election campaign spending of federally registered political parties. When the federal funding and disclosure scheme was introduced in 1984, these parties were required to lodge returns specifying the amount of electoral expenditure. This requirement was, however, abolished after the 1996 federal election and has not been reinstated since. As a result, the federal election spending of such parties has to be inferred from the total amount of spending made by these organisations.

These limitations in mind, we can still identify various features of federal election campaign spending. There appears, firstly, to be a parallel in the funding and spending of political parties and candidates in that both occur primarily through their party organisations rather than directly through candidates. Table 10 illustrates this by drawing out the relative importance of candidate election spending in the 2007 federal election. Two measures indicate how candidate election spending pales in comparison with party election spending. The first relates to the number of candidates who have lodged returns disclosing independent electoral expenditure. Those who have not lodged returns are essentially declaring that they have not engaged in independent electoral expenditure exceeding $10 500 for that election.[106] It can be seen from Table 10 that most candidates of the major parties did not lodge these returns.

The second indicator is a comparison of candidate election spending with party election spending. As noted above, there is no specific data for party election campaign spending so the total expenditure of the various parties for the financial year 2007–08 has been used as a proxy. These figures strongly suggests that the ALP and the Liberal Party conduct highly centralised election campaigns with less than

[106] See Australian Electoral Commission, *Funding and Disclosure Handbook for Candidates* (2007 ed) <http://www.aec.gov.au/pdf/political_disclosures/handbooks/2007/candidates/candidates_handbook_2007.pdf>.

one per cent of such spending occurring through independent candidate spending. A greater proportion of spending occurs through candidates for the National Party and the Greens but the share of such spending is still quite low.

Table 10: Candidate vs. Party Election Spending for 2007 Federal Election

	ALP	Liberal Party	National Party	Greens
Total number of candidates	172	157	38	141
Number of Candidate Returns lodged	13	13	5	20
Candidate election spending	$326 680	$157 577	$256 661	$102 976
Party expenditure for 2007–08 financial year	$60 850 361	$35 590 845	$2 168 372	$1 996 044
Candidate election spending as a percentage of total party spending	0.54%	0.44%	11.84%	5.16%

Source: AEC Annual Returns 2007–08 and Candidate Election Returns for the 2007 federal election, available from Australian Electoral Commission, *Annual Returns Locator Service,* (28 January 2011) <http://periodicdisclosures.aec.gov.au/>.

Another feature of election campaign spending of the major parties is that it has been steadily increasing in relation to federal elections for more than two decades (i.e. since disclosure returns were introduced at the federal level). As noted above, for elections held between 1984 and 1996, political parties were required to disclose their electoral expenditure. According to Australian Electoral Commission (AEC) analysis of this data, the amounts disclosed by all branches of the ALP and the Liberal Party increased in real terms by approximately 60 per cent and 45 per cent respectively in this period.[107] The AEC's calculations reveal even more dramatic increases for the national branches of these parties with the election spending of the federal branches of the ALP and the Liberal Party increasing by approximately 116 per cent and 136 per cent between the 1984 and 2004 federal elections.[108]

[107] Australian Government, *Electoral Reform Green Paper*, above n 82, 11.
[108] Ibid.

Another conclusion that can be drawn from the available data relating to election campaign spending is that there has been a recent increase in expenditure by third parties in federal elections. In the 2004 federal election, spending by political parties predominated: for instance, the parties spent $37.4 million on election advertising while the amount of third party election spending on advertising was slightly over a tenth of this amount at $4.4 million.[109]

Table 11 attempts to gauge the position in relation to the 2007 federal election. It should be noted, first, that the data in the various columns is not strictly comparable. The figures in the second column relating to federal major party expenditure are derived from the total spending made by federal branches of the ALP, Coalition parties and the Greens (which is not restricted to election spending), while the third party figures in the third column are restricted to political expenditure made in 2007–08. This lack of comparability is, however, not a great issue, since it can be reasonably assumed that the lion's share of the federal major party expenditure in a financial year leading up to a federal election comprises election spending.

Table 11 indicates that third party spending for the 2007 federal election was more than half of federal major party expenditure and, standing at slightly more than $50 million, was nearly 12 times the amount third parties spent on election advertising for the 2004 federal election. It is not possible yet to fully assess the position in relation to the 2010 federal election as third parties have only lodged political expenditure returns for 2009/2010 financial year. These returns do not cover nearly two months leading up to the 21 August 2010 federal election.

[109] Australian Electoral Commission, *Funding and Disclosure Report – Federal Election 2004* (2005) 28.

Table 11: Major Party vs. Third Party Expenditure in 2007 Federal Election

	Federal major party expenditure (2007–08)	Third party political expenditure	Combined expenditure
Amount	$100 605 622.15	$50 592 204.89	$151 197 827.04
Group expenditure as a proportion of total expenditure	66.5%	33.5%	100%

Source: AEC Annual Returns 2007–08 and Third Party Returns for 2007–08, available from Australian Electoral Commission, *Annual Returns Locator Service,* (28 January 2011) <http://periodicdisclosures.aec.gov.au/>.

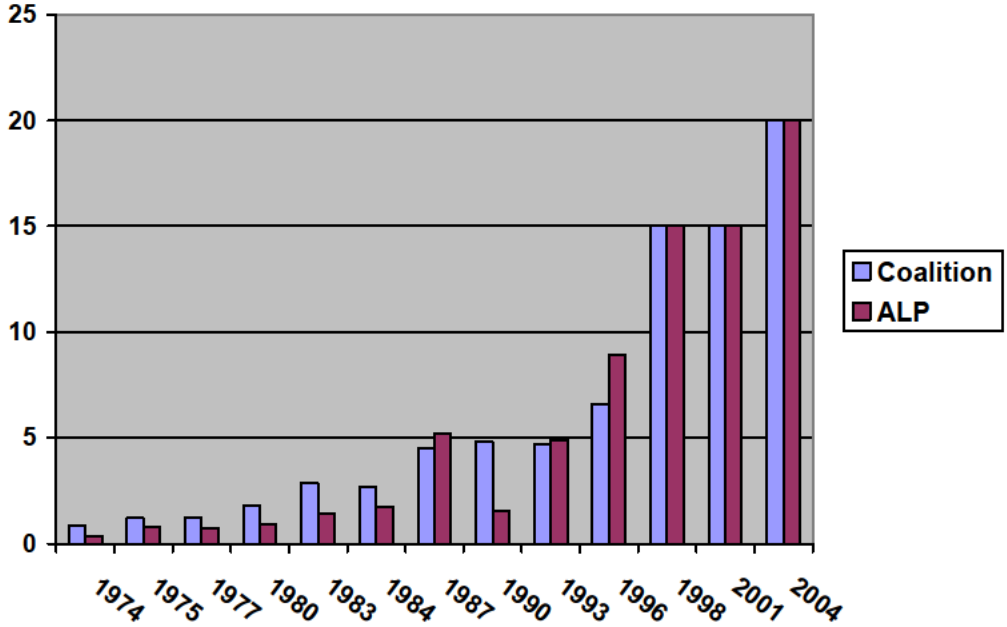
At times, these *increases* in election campaign spending are described as giving rise to an 'arms race'.[110] This is not entirely correct. Each electoral cycle gives rise to an arms race with parties needing to build up their resources for the next election campaign. With these resources largely depleted after the election campaign, another arms race begins as parties start preparing for the next electoral contest. These rolling series of arms races are inherent in regular elections and drive much of party activity, especially fundraising practices. Hence, even when the level of election campaign spending does not increase, there is still an arms race amongst the political parties.[111] What spending increases point to is an *intensifying* arms race, as the stakes get higher with parties having to amass increasingly large war-chests for their election campaigns.

While there are various factors explaining the increases in election spending ranging from decreased reliance upon the volunteer labour of (shrinking) party membership to more capital-intensive campaign techniques,[112] a clear contributor is spending on political advertising. Figure 1 illustrates the growth in spending on political advertising by using disclosure returns for elections for the years 1974–1996, and, from 1996 onwards, data obtained from media monitoring companies which estimate how much the parties are spending during each election. Although the latter are only estimates, they are one of the only contemporary sources available to determine

[110] Australian Government, *Electoral Reform Green Paper*, above n 82, 1.
[111] I owe this insight to Keith Ewing.
[112] See discussion in Ian Ward, 'Cartel Parties and Election Campaigning in Australia' in Ian Marsh (ed), *Political Parties in Transition?* (Federation Press, 2006) 70, 75–79.

election advertising spending since the obligation on media companies to lodge returns was abolished in 1998.

Figure 1: Political (Election) Advertising in $ Millions, 1974–2004



Source: Sally Young, 'Party Expenditure' in Sally Young and Joo-Cheong Tham (eds), *Political Finance in Australia: A Skewed and Secret System* (Democratic Audit of Australia, 2006) Figure 5.1.

IV KEY PROBLEMS WITH FEDERAL POLITICAL FUNDING AND ITS REGULATION

The part of the submission catalogues the key problems concerning federal political funding and its regulation, namely:

- A porous disclosure scheme;
- Corruption through the sale of access and influence;
- The undermining of the health of political parties;
- Ineffectual and unfair public funding through election funding and tax subsidies;
- Abuse of parliamentary entitlements for electioneering;
- Party-political government advertising; and
- An unfair playing field.

A *Porous Disclosure Scheme*

At the federal level, the main way in which private political funding is regulated is through a disclosure scheme. The key principle underlying this scheme is transparency of political funding. Such transparency is required to protect the integrity of representative government in three ways. It aids informed voting, thereby buttressing the integrity of electoral processes. Moreover, it is a crucial tool for preventing corruption – graft and undue influence in the case of private political funding and misuse of public resources in the case of public funding. Further, such transparency is in itself necessary to protect public confidence in representative government. (Besides these broader rationales, transparency of political funding is also necessary to ensure the effectiveness of specific regulatory measures. For instance, contribution and election spending limits can only work effectively if accompanied by adequate disclosure of political contributions and spending.)

The federal disclosure scheme, however, seriously fails to give effect to these principles. Timeliness of disclosure is necessary if this scheme is to prevent graft and undue influence, as well as to ensure that citizens are equipped with the relevant information prior to casting their votes. The AEC has, however, observed in relation to federal annual returns that '[t]his form of … reporting and release can result in

delays that can discount the relevance of making the information public'.[113] Specifically, the dated nature of the returns means that voters do not have access to the relevant information when determining their voting choices. For example, in late September 2004, British Lord Michael Ashcroft donated $1 million to the federal Liberal Party,[114] barely a fortnight before the October 2004 federal election. Citizens casting their votes in that election were completely unaware of this contribution and only found out more than 15 months later, on 1 February 2005, when the AEC released the disclosure returns.

The detail of the information disclosed is also inadequate. Registered parties and associated entities are not legally required to accurately categorise a receipt as a 'donation' or otherwise. The voluntary system of self-declaration that results is a recipe for errors and under-reporting. Moreover, a breakdown of donations received from particular types of donors, for instance companies and trade unions, can only be extricated with a great deal of effort. This fact has been learnt the hard way by academics, political researchers and activists seeking to distil such information.[115]

What is perhaps the most serious loophole of the federal disclosure scheme is the astonishing level of non-disclosure permitted by its high disclosure thresholds. This is a direct consequence of the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth) which greatly relaxed the disclosure obligations of federally registered parties and their associated entities. These entities are now required only to itemise sums exceeding an indexed threshold instead of disclosing details of receipts of $1500 or more (as was the case under the previous law). The threshold, which was $10 000 when these changes took effect, now stands at $11 500.[116]

---

[113] Australian Electoral Commission, Submission No 26 to the Joint Standing Committee on Electoral Matters, *Inquiry into Electoral Funding and Disclosure*, 17 October 2000, [2.10].
[114] Donor return lodged by Lord Michael Ashcroft, viewed at Australian Electoral Commission, *Annual Returns Locator Service* (28 January 2011) <http://fadar.aec.gov.au/>.
[115] Similar criticisms have been made by Ramsay et al, 'Political Donations by Australian Companies' (Melbourne University Research Report, University of Melbourne, 2001); Ramsay et al, 'Political Donations by Australian Companies' (2001) 29 *Federal Law Review* 177.
[116] See Australian Electoral Commission, *Disclosure Threshold* (23 December 2010) <http://www.aec.gov.au/Parties_and_Representatives/public_funding/threshold.htm>. See generally Colin Hughes and Brian Costar, *Limiting Democracy: The Erosion of Electoral Rights in Australia* (University of New South Wales, 2006) ch 3.

According to Commonwealth Parliamentary Library research, the previous disclosure threshold of $1500 or more resulted in nearly three-quarters, that is, 74.7 per cent, of declared total receipts being itemised over the period spanning from the 1998–99 financial year to the 2004–05 financial year. If the threshold of more than $10 000 were applied to the same data, this figure would drop to 64.1 per cent.[117] Updating the research of the Commonwealth Parliamentary Library, the Joint Standing Committee on Electoral Matters found that under the $10 300 threshold (which applied in 2006–07), only 52.6 per cent of the income of the ALP and Coalition parties was itemised for that year.[118] On these calculations, we have a remarkable situation where the source of *nearly half* of the income of the major parties is unknown.

While these figures give some indication of the level of non-disclosure under the federal scheme, it may underestimate the proportion of funds that remain undisclosed. As non-disclosure is increasingly legitimised, it is likely that parties will take greater advantage of the regulatory gaps that are opened up by the changes. One gap stems from disclosure thresholds applying *separately* to each registered political party. In a context where the national, state and territory branches of the major political parties are *each* treated as a registered political party, this means that a major party constituted by nine branches has the cumulative benefit of nine thresholds. For example, a company can presently donate $11 500 to each state and territory branch of the Labor Party as well as to its national branch – a total of $103 500 – without the Labor Party having to reveal the identity of the donor. There is little doubt on this point – having such a high threshold can only mean more secret donations.

The *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth) also increased the threshold at which the prohibition against anonymous donations and loans applies from amounts greater than $1000 to sums exceeding $10 000 (indexed). It is this increase that will perhaps most seriously compromise transparency. This change is less about public disclosure of donations and loans and more about records kept by parties: it will mean that parties can legally

[117] Sarah Miskin and Greg Baker, 'Political Finance Disclosure under Current and Proposed Thresholds' (Research Paper No 27, Parliamentary Library, Parliament of Australia, 2006).
[118] Joint Standing Committee on Electoral Matters, Parliament of Australia, *Advisory Report on the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008* (2008) 33.

accept larger sums without recording details of the donor. This potentially renders the whole notion of disclosure thresholds meaningless.

Take, for instance, a situation where the Liberal Party, through its various branches, accepts anonymous donations from a single company in the amount of $103 500. The company then gives an additional $10 000 that is publicly disclosed. Under the current law, details of the entire $113 500 should be disclosed. The ability to legally accept $103 500 in anonymous circumstances, however, potentially destroys the paper trail required to enforce such an obligation. At best, this change is an invitation to poor record keeping; at worst, it is a recipe for wholesale circumvention of the disclosure scheme.

The secrecy resulting from the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth) is hardly an unintended consequence. Senator Eric Abetz, the Minister sponsoring the Act, perhaps spoke for many others in his party when he said that he hoped for 'a return to the good old days when people used to donate to the Liberal Party via lawyers' trust accounts'.[119] The Act has also produced greater secrecy in some states and territories, since the federal scheme acts as a default scheme for jurisdictions that do not provide for separate funding disclosure schemes (that is South Australia, Tasmania, Victoria). Moreover, Western Australia and the Northern Territory allow state parties and associated entities to comply with the much less demanding disclosure obligations under the federal scheme in lieu of adhering to the requirements under their respective statutes.[120]

These shortcomings of current disclosure schemes vividly illustrate how Australia has a 'lackadaisical law' regulating political money.[121] Lackadaisical laws are moreover accompanied by lackadaisical attitudes. There is good evidence that the parties are not treating their disclosure obligations under the federal scheme seriously. The AEC has observed:

---

[119] Richard Baker, 'Are our politicians for sale?', *The Age* (Melbourne), 24 May 2006, 15.
[120] See Joo-Cheong Tham, *Money and Politics: The Democracy We Can't Afford* (University of New South Wales Press, 2010) 30-32.
[121] Graeme Orr, 'Political Disclosure Regulation in Australia: Lackadaisical Law' (2007) 6(1) *Election Law Journal* 5.

> The legislation's history to date can be characterised as one of only partial success. Provisions have been, and remain, such that full disclosure can be legally avoided. In short, the legislation has failed to meet its objective of full disclosure to the Australian public of the material financial transactions of political parties, candidates and others.[122]

Much of the AEC's cause for complaint is based on its view that a culture of evasion exists in some quarters. It has previously stated that 'there has been an unwillingness by some to comply with disclosure; some have sought to circumvent its intent by applying the narrowest possible interpretation of the legislation'.[123]

Arguably, evasion of disclosure obligations is facilitated in two other ways. First, there is the receipt of foreign-sourced contributions. As Table 12 indicates, the main parties did not receive many of such contributions in the period 1998–99 to 2002–03. Nevertheless, these contributions still pose the challenge of ensuring the accuracy of information provided given the constrained ability of electoral commissions to verify such information.

Table 12: Foreign Contributions to Parties, 1998–2003

Party	Amount from overseas addresses
ALP	$82 529.76
Liberal Party	$41 609.05
National Party	Nil
Australian Democrats	$2200
Greens	$31 573.57

Source: Calculated from Australian Electoral Commission, Submission No 11 to the Joint Standing Committee on Electoral Matters, Parliament of Australia, *Inquiry into Disclosure of Donations to Political Parties and Candidates*, 26 April 2004, 26.

Second, there is the enormous amount of money being channeled through the associated entities of the major parties (see Table 2). Such use of associated entities is not necessarily motivated by an attempt to evade disclosure. For instance, parties might be using an associated entity as a vehicle for investment purposes. The benefits

[122] Australian Electoral Commission, Submission No 26 to the Joint Standing Committee on Electoral Matters, *Inquiry into Electoral Funding and Disclosure*, 17 October 2000, [2.9].
[123] Australian Electoral Commission, *Funding and Disclosure Report Following the Federal Election Held on 3 October 1998* (2000) [2].

of investing through an associated entity might include the limited liability of such an entity, if incorporated, and the opportunity to have directors who have stronger investment expertise. Also, there may be a perception that donors are more willing to contribute to an organisation that appears to be at arms-length from the party.

On the other hand, the use of an 'associated entity' might be aimed at compromising transparency. Party officials may wish to avoid the formal decision-making processes of the party. While most disclosure schemes subject associated entities to obligations identical to those that apply to registered parties, money received by such entities might not be as well scrutinised by the media or other organisations when compared with those funds directly received by the parties.

Party officials might also suspect that the electoral commissions themselves face greater difficulties in enforcing the law against associated entities. The case of the Greenfields Foundation is instructive. In 1996, the foundation was assigned a loan of $4.45 million from the Liberal Party after then Liberal Party National Treasurer and prominent businessman Mr Ron Walker discharged the guarantee of an existing debt of the party. In 1998, the AEC required the trustees of the foundation to lodge an 'associated entity' return, which it refused. The *Commonwealth Electoral Act* was then amended to confer upon the AEC the power to inspect records of an organisation for the purpose of determining whether it was an associated entity. After exercising this power, the AEC formed the view that the foundation was an associated entity and required it again to lodge 'associated entity' return. Under protest, the foundation eventually lodged such returns in September 1999.[124] What the Greenfields Foundation episode demonstrates is that when an organisation resists its obligations as an associated entity, electoral commissions may have to redouble their efforts and, in some situations, secure legislative amendment, before successfully enforcing the law against such an organisation.

B *Corruption through the Sale of Access and Influence*

[124] See ibid 15.

The New South Wales Liberal Party runs a body called the Millennium Forum. A testimonial from former Prime Minister John Howard describes it as 'one of Australia's premier political corporate forums' that 'provides a wealth of opportunities for the business community and political leaders at federal and state levels to meet and discuss key issues within an informal setting'.[125] 'Wealth', it seems, is the operative word. For sponsorship fees ranging from $10 000 upwards, company representatives are not only entitled to '[a]n ENGAGING programme of professional corporate events and "Off the Record" briefings'[126] but also a chance to play golf with John Howard on Sydney's Bonnie Doon golf course.[127] Corporate Australia has not been reluctant to seize these opportunities. The roll-call of the Forum's sponsors include British American Tobacco Australia, Publishing and Broadcasting Ltd, Tenix Group, major construction companies like Leighton Holdings and Multiplex Constructions and key accountancy firms such as Deloitte and Ernst & Young.[128]

The New South Wales ALP has also not been shy in selling access and influence to business. For $102 000, a company can become a 'foundation partner' of the New South Wales ALP's 'Business Dialogue' and secure five places to events, such as boardroom lunches and dinners with the Premier and State Government Ministers.[129] In late 2006, a few months prior to the state selection, the New South Wales ALP held a fundraising event at the Convention Centre, Darling Harbour, which was attended by nearly 1000 people. General admission cost $500 per head; attending an exclusive cocktail party with Ministers cost $15 000 for nine guests; and dining with (former) Premier Morris Iemma was priced at a hefty $45 000.[130]

---

[125] Millennium Forum, http://www.millenniumforum.com.au/first.htm, viewed 7 June 2007. Note that this page is no longer available online. However, the more recent link to the Millennium Forum website contains a similar quotation: <http://www millenniumforum.com.au/index.php?option=com_content&view=article&id=37:the-hon-john-howard-ac&catid=9:testimonials&Itemid=11>

[126] Millennium Forum, <http://www millenniumforum.com.au/first htm> (emphasis original). As above, note that this page is no longer available online.

[127] E Mychasuk and P Clark, 'Howard and his team rented by the hour', *Sydney Morning Herald* (Sydney), 13 June 2001, 1.

[128] A list of Millennium Forum's sponsors used to be available online: Millenium Forum, http://www.millenniumforum.com.au/index.php?option=com_content&view=article&id=9&Itemid=10, viewed 25 January 2010. The current website for the forum requires a username and password.

[129] Andrew Clennell, 'Coalition wins vote for donations inquiry', *Sydney Morning Herald* (Sydney), 28 June 2007, 4.

[130] Anne Davies and Jonathan Pearlman, 'Top Libs split on corporate donations', *Sydney Morning Herald* (Sydney), 3 November 2006, 1.

In Victoria, the ALP's Progressive Business has been described as 'one of the most efficient money-making operations in the country'.[131] According to its website, its 'express purpose [is] building dialogue and understanding between the business community and government'. It currently offers to two types of membership, corporate and small business, priced at $1550 and $990 per annum respectively, entitling the company to a set number of breakfast and twilight ministerial briefings.[132] The 2009 annual Progressive Business dinner, for example, witnessed Latrobe Fertilisers, a company vigorously advocating the use of Gippsland coal mines for the production of fertiliser, paying $10 000 to the ALP so that its chairman, Allan Blood, could sit at the side of Victorian Premier John Brumby and, in Blood's words, 'ben[d] his ear'.[133]

These activities merely illustrate a wider set of unsavoury practices. There are other vehicles for peddling influence. For example, membership of the Liberal Party's 500 Club will provide 'a tailored series of informal, more personally styled, early evening events' thus 'adding a new level of value for … Club members'.[134] Party meetings are also a favoured venue for selling influence. In the lead up to the 2004 federal election, Mark Latham, then federal Labor Party leader, hosted an 'It's Time' dinner at Sydney's Westin Hotel with $10 000 charged per table. During the same period, the Liberal Party charged $11 000 for seats at John Howard's table as part of a fundraiser at Sydney's Wentworth Hotel that included 10-minute briefings with Ministers.[135] At the 2007 federal ALP conference, major companies including NAB, Westpac and Telstra engaged a high-price escort service. At $7000 per person, their representatives were accompanied by federal ALP frontbenchers for the span of the conference.

---

[131] Michael Bachelard, 'Taking their toll', *The Age* (Melbourne), 14 May 2007, 9.
[132] Information about Progressive Business is available from its website: Progressive Business, *Home* <http://www.pb.org.au/>. Details about membership fees are also available online: Progressive Business, *Membership* <http://www.pb.org.au/page/membership.html>.
[133] Royce Millar and Paul Austin, '$10 000 to sit next to Brumby', *The Age* (Melbourne), 3 November 2009, 1.
[134] Details about Millennium Forum's events used to be available through its website http://www.millenniumforum.org.au/index.php?option=com_content&view=category&layout=blog&id=6&Itemid=7, viewed 25 January 2010.
[135] Jason Koutsoukis and Misha Schubert, 'Political donors put money where a mouth is', *The Sunday Age* (Melbourne), 1 August 2004, 8.

Tables at the conference dinner were also sold for up to $15 000 for the privilege of sitting next to Shadow Ministers.[136]

Indeed, the former Prime Minister John Howard was not shy in using his official residence for fundraising.[137] In June 2007, business observers paid more than $8000 each to attend a Liberal Party meeting held at Kirribilli House.[138] The prize for the most successful fundraiser perhaps goes to Malcolm Turnbull who charged $55 000 per head for a fundraising dinner to support his bid for re-election.[139] Not much seems to have changed since the election of the Rudd Government with the *Sydney Morning Herald* reporting in 2008 that a deal had been struck between the then federal ALP national secretary, Tim Gartrell, and his counter-part, the federal Liberal Party director, Brian Loughnane, to use the Great Hall and the Mural Hall of Parliament House for party fundraising purposes.[140]

With the sale of access and influence, we witness the logic of the market being ruthlessly applied to political power. Demand on the part of business for political influence is being met by supply on the part of the major parties and their leaders. As a senior ALP figure put it, '[w]e use our political leadership to raise funds because they are (sic) the best product we have to sell'.[141] Like other markets, the greater the value of the product, the higher the price. Referring to ministerial lunches organised by Progressive Business, an experienced Victorian lobbyist has said:

> The cost depends on how senior the Minister is. If you want a key Minister, companies pay $10 000.[142]

The clearest instances of access and influence being sold occur when payment is expressly exchanged for privileged access, say $10 000 for a Minister. It would be a

---

[136] Michelle Grattan & Katharine Murphy, 'Hope in the hearts of Labor faithful', *The Age* (Melbourne), 27 April 2007, 1.
[137] For details, see Michelle Grattan, 'Labor legal advice: PM function was a gift', *The Age* (Melbourne), 16 June 2007, 2.
[138] Brendan Nicholson, 'Rudd open to Melbourne PM pad', *The Age* (Melbourne), 11 June 2007, 5.
[139] Clare Masters, 'How $55, 000 will buy you a slice of Malcolm', *Daily Telegraph* (Sydney), 1 August 2007, 23.
[140] Alan Ramsey, 'Junee farmer tables dinner time complaint', *Sydney Morning Herald* (Sydney), 5 April 2008.
[141] Baker, above n 119, 15.
[142] Bachelard, above n 131, 9.

mistake to think that they are the only ways in which access and influence are being sold. In some cases, large 'donations', though not directly tied to access and influence, are given to achieve the same result. Referring to a $50 000 sum given to the Victorian ALP in 2000 by Walker Corporation, a property developer, John Hughes, the company's managing director, said:

> It does not get you access on the spot, but what it does, it allows us to support the government of that particular day, if it was (former Victorian Premier) Bracks you said. If we wished to be able to put a case at some point in the future, then one could hope that it would favourably get you that access faster than others, but it does not achieve anything. At the end of the day being able to have an appointment with somebody, to be able to put your case, does not guarantee a result.[143]

In a similar vein, Mark Fitzgibbon, former head of the Clubs NSW, the peak industry body for clubs registered in New South Wales, has said of the thousands of dollars Clubs NSW donated to the New South Wales ALP: 'I have no doubt it had some influence . . . supporting (the ALP's) fundraising helped our ability to influence people'.[144]

This process of granting and securing influence seems to be driven by the parties as much as their corporate sponsors. In fact, there is evidence of some public officials seeking to extract rent from their positions. An example from the WA Inc debacle involves the conduct of former WA Premier Brian Burke and his brother Terry Burke, who was then Cabinet Secretary. Referring to their conduct, the Royal Commission on WA Inc concluded that

> [the Burkes] were actively engaged in soliciting campaign donations from prospective corporate donors. In his approaches, the Premier was direct to the point at times of being forceful. He nominated the amounts he expected. They

[143] As quoted in Select Committee on Public Land Development, Parliament of Victoria, *Final Report*, (2008) [383].
[144] As quoted in Anthony Klan, 'Political donors play to win, as the pokies saga during Bob Carr's tenure illustrates', *The Weekend Australian* (Australia), 13-14 February 2010, 5.

> were far in excess of amounts previously donated in the course of campaign fundraising in this State.[145]

Those defending such practices sometimes deny that influence is being sold. According to them, all that is sold is access to political leaders with leaders free to make up their minds on particular issues. This is highly questionable: influence is inseparable from access.[146] Businesses that pay for 'off the record' briefings with Ministers not only get to meet the Ministers but, in the words of the Millennium Forum's website, secure an opportunity to 'promote issues of concern and importance' to them.[147] The website of Progressive Business used to be very up-front about what was being traded when it stated that '[j]oining this influential group allows you to participate in the decision making progress (sic)'.[148]

The way in which the corporate patrons of the ALP and Liberal Party obtain influence over party leaders can be quite subtle. Reporting on the fundraisers of Progressive Business, *The Age* journalist Michael Bachelard said:

> It's an unwritten rule that there will be no overt lobbying: businesses are there to be seen, to put a face to the name, to establish a profile in the minister's mind.[149]

While nothing specific is promised or discussed in such events, there is still value for businesses. As an executive from a property development company observed, '[i]t just smoothes the path to get something heard'.[150]

---

[145] WA Inc Royal Commission, above n 9, 1–3.
[146] As David Truman correctly observed, 'power of any kind cannot be reached by a political interest group, or its leaders, without access to one or more key points of decision in the government. Access, therefore, becomes the facilitating intermediate objective of political interest groups': David Truman, *The Governmental Process: Political Interests and Public Opinion*, (Knopf, 2nd ed, 1971) 264.
[147] Details used to be available from Millennium Forum, <http://www.millenniumforum.com.au/>.
[148] ALP website, *Progressive Business* <http:///www.alp.org.au/action/progressive>. Note that this page on the ALP website is no longer active. The current website to view information about Progressive Business, viewed 5 February 2010, is located at: Progressive Business, *Home* <http://www.pb.org.au/>.
[149] Bachelard, above n 131, 9.
[150] Ibid.

Much less commented on but perhaps even more important is the impact of such influence on the broader political agenda. Those who are able to pay for access are in a privileged position to highlight matters of significance to them. Inevitably, Ministers who they can directly access will tend to pay more attention to these matters compared with others issues of public interest, unless these other issues are also taken up by powerful and articulate advocates.

What is also clear is that businesses buying such access and influence tend not to be pursuing an electoral strategy – they are not channelling funds to parties as an open endorsement of their policies in an effort to secure their electoral success. Rather, what is being largely pursued is an access strategy: money is being given to parties to secure access and influence after the parties have been elected to public office with general indifference as to the respective merits of the party policies. By paying hefty fees, companies are able to exercise influence in clandestine circumstances such as 'off the record' briefings.[151]

This is an emphatic instance of what Walzer characterises as a 'blocked exchange', where money is used to buy political power.[152] The result is corruption through undue influence: the purchase of access and influence creates a conflict between public duty and the financial interests of the party or candidate,[153] resulting in some public officials giving an undue weight to the interests of their financiers rather than deciding matters in the public interest.[154]

That the bargains struck in the sale of access and influence are not overt or explicit makes little difference to the question of corruption through undue influence: the structure of incentives facing parties and their leaders once a contribution is received remains the same with their judgment improperly skewed towards the interests of their financiers.[155] With these incentives, there is a double injury to the democratic process: wealthy donors are unfairly privileged while the interests of ordinary citizens become sidelined. Such injury highlights how the sale of access and influence is not

[151] The website of the organization promises sponsors '"Off the Record" briefings that will keep you up to date with important political and economic developments that impact on your business': Ibid 9.
[152] Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books, 1983) 100.
[153] Lowenstein, above n 21, 323–29.
[154] Beitz, above n 43, 137.
[155] See ibid.

only corrupt because it undermines merit-based decision-making but is also unfair: contributors are illegitimately *empowered* in the political process while others are illegitimately *disempowered.*

Further, corruption through undue influence tends to take the form of institutional corruption. When access and influence is sold, the gain is principally political (and not personal) as money is usually channelled to the campaign coffers of the party rather than to the purse of the individual candidate. It is also procedurally improper as opportunities to influence the political process, often in circumstances of secrecy, are being given solely because money is being paid. Such practices clearly damage the democratic process not only through the secrecy and unfairness accompanying them but by also undermining the merit principle.

What's worse is how such corruption pervades Australian politics and how, in some quarters, it is perfectly normal. At the 2007 Liberal Party federal council, federal Ministers auctioned off their time to the tune of thousands of dollars: a harbour cruise with Tony Abbott, then Health Minister, fetched $10 000 while a night at the opera with Helen Coonan, then Minister for Communications, Information Technology and the Arts, picked up a princely sum of $12 000, all this under the council theme of 'Doing what's right for Australia'.[156]

With some companies, complicity with such practices has, in fact, become a mark of a 'real' business. As one leading Victorian business figure has observed, '[m]ost of the serious players in business are paying to both sides for access'.[157] Or as another business figure observed: '[y]ou've got to be seen to be there. We do it because everyone else does it … we know it gets us access'. [158] Perhaps nobody can put it more plainly than Ashley Mason, the external affairs executive for Leighton Holding, when he said of buying access and influence through Progressive Business:

> It's part of the system … It's seen as part of the process.

[156] Misha Schubert, 'Party hopes party won't end so soon', *The Age* (Melbourne), 4 June 2007, 6.
[157] Baker, above n 119, 15.
[158] Ibid.

In his defence of Progressive Business and its sale of access and influence, Victorian Premier John Brumby referred to his support for the 'democratic right' of people and businesses to donate.[159] There is some plausibility to Brumby's position – after all, political contributions can animate the democratic process. This perspective is, however, self-servingly selective. Not only does it gloss over questions of corruption (discussed in the previous section), it seems to invoke a partial notion of 'right' or 'freedom' that rests principally on being free from legal restrictions. It is insufficiently cognisant of the value of such freedom or, put differently, the 'freedom to' make donations.[160] Importantly, it fails to fully recognise how the economic inequalities of Australian society renders a formal freedom to donate largely meaningless for most of its members - the amounts involved in political contributions, including those made by corporate financiers of Progressive Business, are out of the reach of most Australian citizens (see discussion above).

These blind spots pave the way for what is the most damaging aspect of the peddling of influence, its governing principle that political power can and should be bought and sold like any other product on the market. The commodity principle is, however, deeply anathema to democracy. As noted earlier,[161] at the heart of democratic principles is a commitment that each citizen has an equal status in the political process, a commitment that underlies the principle of political fairness. This implies that each citizen, *regardless* of class and wealth, shall be treated with equal respect and concern. This is why property votes are alien to democratic traditions and were abolished in the process of instituting the democratic franchise.

Contrast this with the logic of the market where power is purchasing power. This is a place where money not only talks but it is the only currency that matters. The true measure of one's worth in the market is determined by the size of one's bank balance. This shows why the commodification of political power is such a vicious assault upon Australia's democracy. While we no longer have property votes,[162] moneyed interests have discovered other ways of translating their wealth into political power – influence

[159] Millar and Austin, above n 133.
[160] See text above accompanying nn 65-72.
[161] See text above accompanying nn 37-39.
[162] At least for state and federal elections. The position is different with some local government elections.

is sought through more covert means like 'off the record' ministerial briefings. With the peddling of influence, we see the force of the following comments made by Jeff Kennett, former Liberal premier of Victoria:

> The professionalism of selling time has risen to such a level that it has corrupted the democratic process; it corrupts the principle all people are equal before the law.[163]

When applied to political power, the commodity principle also undermines the notion of the public interest. In a democracy, the calculus for the public interest gives equal weight to the concerns of each citizen. In doing so, it draws a crucial distinction between the private interest of the holders of public office and the broader interest of the community. Government property, for example, is not treated like the property of the party in power. Rather it is held in trust on behalf of citizens and can only be used in the public interest. Queensland Integrity Commissioner, Gary Crooke provided an insightful analysis of this set of issues, parts of which merit full reproduction. '[C]alling in aid a concept of capital in relation to government property', Crooke observed that:

> All the components of government property (whether physical, intellectual or reputational) are really no more, and no less, than the property of the community, the capital of which is held in trust by elected or appointed representatives or officials.
>
> The term 'capital' is an amorphous one and includes all the entitlement to respect and inside knowledge that goes with holding a high position in public administration.
>
> The trust bestowed importantly includes an obligation to deal with government property or capital only in the interests of the community. As such, it is singularly inappropriate for any person to use it for personal gain.[164]

[163] Royce Millar, 'Brumby in rethink on fund-raising', *The Age* (Melbourne), 8 December 2009, 1.

Speaking of party fundraising, Crooke further noted that:

> It seems to be a common strategy to hold a dinner or like function where entry is often by invitation, and usually at a price well beyond the cost of the provision of any food or services at the function. Often, it is openly advertised that such payment will ensure access to a Minister or other high-ranking politician.
>
> Having regard to my reference to 'capital' and trusteeship of the same, it seems to me that questions such as the following need to be asked:
>
> - What is being sold and who (or what entity) receives or controls the proceeds?
> - Whose is it to sell, or can it appropriately be sold?
> - Is what is on offer, being offered on equal terms to all members of the community?
> - What is the likely understanding or expectation, of the payer on the one hand, and of the reasonable member of the community on the other, of what the buyer is paying for?
> - If there is a Government decision to be made, is a perception likely to arise that those interested, and not attending the function, whether competitors for a tender, or opponents to a proposal, are at a disadvantage?
>
> Unless questions such as the above can be unequivocally answered in a way which is consistent with the integrity issues raised in the previous discussion of capital and trusteeship, it would not be appropriate to engage in, or continue this practice.[165]

This analysis reveals that the selling of access and influence not only involves corruption through undue influence and political unfairness but also suggests corruption through the misuse of public resources, in particular, the privileges or 'capital' of public office.

---

[164] Queensland Integrity Commissioner, *Annual Report 2007–08* (2008) 7.
[165] Ibid 7–8.

It also reveals why the use of Kirribilli House, the Lodge and Parliament House for party fundraising should be vigorously condemned. If political power is to be bought and sold like any other commodity then its exercise is no longer oriented to the public interest and is, in fact, treated just like any other piece of property. It is just a small step from this to treating the national estate like the private property of the party in government with 'those in power … acting as if they own the trappings of office'.[166] Worryingly, this is already occurring. Federal Opposition Leader, Tony Abbott, has argued that holding Liberal Party fundraisers at Kirribilli House was entirely proper and simply a case of 'someone inviting people to a private home'.[167]

C *Undermining the Health of the Political Parties*

The health of the Australian party system suffers from the undue influence that is spawned by the sale of access and influence. As corporate financiers of the major parties increasingly call the shots, the interests and rights of citizens that should be represented become sidelined. The ideal of governing in the public interest is placed in jeopardy when, as former High Court Chief Justice Gerard Brennan observed:

> The financial dependence of a political party on those whose interests can be served by the favours of government … cynically turn[s] public debate into a cloak for bartering away the public interest.[168]

The agenda-setting function of the party system is also impaired, as the policies of the major parties are disproportionately influenced by a small band of businesses.

There are other serious effects on the major parties. Their ability to effectively govern is undermined by the time consumed by subsequent rounds of fundraising.[169] Former federal Human Services Minister Joe Hockey, for instance, is reported to have complained in the Liberal Party room about the constant pressure to attend

---

[166] Quoted in Editorial, 'Political hubris laid bare in a tale of two lodges', *The Age: Insight* (Melbourne), 16 June 2007, 8.
[167] Quoted in ibid.
[168] *ACTV* (1992) 177 CLR 106, 159.
[169] For a similar argument in the US context, see Vincent Blasi, 'Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All' (1994) 94 *Columbia Law Review* 1281, 1283.

fundraisers.[170] A submission of the New South Wales ALP has similarly observed that:

> Under the current system, it is an unfortunate reality that Party Officials and MPs must dedicate a considerable amount of their time to fundraising efforts. This is time which could be better spent promoting progressive policies and advocating on behalf of constituents.[171]

The quality of the candidates that parties recruit may also suffer from this pre-occupation with fundraising. The importance of fundraising ability in Liberal Party pre-selections, for instance, has been frankly acknowledged by former Treasurer Peter Costello:

> In my time in politics, the amount of time and effort put into fund-raising has exploded. Fund-raising is considered such an integral part of an MP's job that candidates for pre-selection are assessed for their fund-raising potential. A candidate who can bring in campaign funds is as highly prized as one that will bring in votes.[172]

The significance of fundraising ability can also be seen in the following instances. In the aftermath of the recent federal election, one of the factors said to have enhanced Malcolm Turnbull's chances of winning leadership of the federal Liberal Party was his ability to raise money to restore the party's depleted funds.[173] The same was also said of Alan Stockdale's (successful) candidature for presidency of the federal Liberal Party.[174] This is not to deny that Turnbull or Stockdale are worthy candidates. Rather, the point is that the calculus of merit appears to have been weighted too heavily in favour of their ability to fundraise and, arguably, has detracted attention from more

---

[170] Michelle Grattan, 'Our Political Guns for Hire', *The Age* (Melbourne), 25 May 2005, 21.
[171] Australian Labor Party (NSW Branch), Supplementary submission No 107a to Select Committee on Electoral and Political Party Funding, *Inquiry into Electoral and Political Party Funding*, 25 March 2008, 2.
[172] Peter Costello, 'Beware cashed-up influence peddlers', *Sydney Morning Herald* (Sydney), 12 August 2009.
[173] See, for example, Tony Wright, 'Bold offer might help Lib reset', *The Age* (Melbourne), 26 November 2007.
[174] See, for example, Michelle Grattan, 'Lib Senate leader urges conservatives to unite', *The Age* (Melbourne), 26 January 2008.

important leadership attributes, such as their policies and ability to effectively challenge the ALP.

Fundraising practices may also lessen the ability of the major parties to act as vehicles for popular participation. Their appeal to ordinary citizens will lessen as these practices tend to hollow out the meaning of party membership. As parties sell influence to moneyed interests, they also send out a signal to their rank-and-file members that the voices that will be listened to are those with large purses, rather than those who faithfully subscribe to party principles.

The role of party members is also sidelined in other ways. 'Capitalist financing' increasingly outstrips 'democratic financing' through membership subscriptions in terms of financial importance.[175] This occurs through corporate fundraising, but also through the growing reliance of the major parties on investment (discussed earlier). The federal Government's *Electoral Reform Green Paper: Donations, Funding and Expenditure,* for instance, estimates that three-quarters of the major parties' private funding derives from fundraising activities, investments and debts.[176]

This 'business' model of the party tends to centralise power within the party. It vests increasing control over fundraising in the party leadership, control that is made more effective when the investment arrangements are opaque with lines of accountability blurred or hidden from view. More subtly, it contributes to 'the increasing *professionalization* of party organizations'.[177] According to some commentators, the major parties are increasingly becoming electoral-professional parties[178] where 'a much more important role is played by professionals (the so-called experts, technicians with special knowledge)'[179] in the context of a weak membership base.[180] The 'business' model of the party will shape what is seen as 'professional' and,

[175] Maurice Duverger, *Political Parties: Their Organization and Activity in the Modern State* (Barbara and Robert North trans, Meuthen, 2nd ed, 1959) 63 [trans of: *Les Partis Politiques* (first published 1954)].
[176] Australian Government, *Electoral Reform Green Paper,* above n 82, 41.
[177] Angelo Panebianco, *Political Parties: Organization and Power* (Marc Silver trans, Cambridge University Press, 1988) 264 [trans of*: Modelli di partito: Organizzazione e potere nei partiti politici* (first published 1982)] (emphasis original).
[178] See Ian Ward, 'The Changing Organisational Nature of Australia's Political Parties' (1991) 29(2) *The Journal of Commonwealth and Comparative Politics* 153.
[179] Panebianco, above n 177, 264.
[180] Ibid 264.

consequently, the distribution of power within the party: as the ability to fundraise and manage investments is seen as key to the success of the party, party officials having these skills will gain more power within the party.[181] With growing centralisation, responsiveness to rank-and-file members correspondingly decreases. ALP Senator John Faulkner has, for example, argued that, for the Labor Party, '[g]rass-roots members are an afterthought and for many in the machine, an inconvenience'.[182] Developments such as this directly undermine the participatory function of the major parties. In addition, the bypassing of rank-and-file members saps the ability of these parties to generate new ideas and policies and weakens their claims to be representative of citizens.

D *Ineffectual and Unfair Public Funding through Election Funding and Tax Subsidies*

1 *Election Funding*

There are two central purposes of the federal election funding scheme. The first is to promote fairness in politics, specifically, electoral fairness. When introduced in 1983, federal election funding was directed at ensuring that 'different parties offering themselves for election have an equal opportunity to present their policies to the electorate'.[183] Such equal or fair opportunity is advanced by opening up the electoral contest to 'worthy parties and candidates [that] might not [otherwise] be able to afford the considerable sums necessary to make their policies known'.[184] In promoting electoral fairness in this way, election funding clearly enhances 'freedom to' engage in political expression. Electoral fairness is also furthered by attempting to reduce candidates' and parties' reliance on private funding for campaigns, thereby preventing '[a] serious imbalance in campaign funding'[185] of the political parties.[186] The second purpose of election funding schemes is aimed at protecting the integrity of

[181] Ibid 35–36.
[182] Senator John Faulkner, 'Apathy and Anger: Our Modern Australian Democracy' (Speech delivered at the 3rd Henry Parkes Oration, Henry Parkes Memorial School of Arts, 22 October 2005).
[183] Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 1983, 2215 (Kim Beazley).
[184] Ibid.
[185] Ibid 2213.
[186] Ewing has also noted that equality of electoral opportunity requires that 'no candidate or party should be permitted to spend more than its rivals by a disproportionate amount': Ewing, above n 56, 18.

representative government: in seeking to lessen reliance on private funding, election funding schemes not only seek to promote electoral fairness but also to lessen the risk of corruption accompanying private funding. The federal election funding schemes, however, fares poorly against its fairness and anti-corruption rationales. Worse still, it has in fact contributed to electoral unfairness and possibly increased the risk of corruption.

With the fairness rationale, we can begin by considering the effect of election funding schemes on levelling out the financial inequalities amongst the main parties. Table 13 provides an indication of this effect. It attempts to gauge how the amount of each party's funding compares with their electoral support by dividing the amount of total funding, private funding and election funding received by a party for the period 1999–2000 to 2001–02 by the number of first preference votes the party received in the 2001 federal election. This measure is used to indicate how the funding received by each party corresponds to its electoral support (as indicated by first preference votes).

These figures reveal a dramatic funding inequality between the ALP, Liberal Party and National Party, on one hand, and the Democrats and the Greens, on the other. The former received more than $20 per 2001 election vote. The Democrats and Greens, however, received around $10 per 2001 election vote. Table 13 indicates that this inequality is due largely to the different amounts of private money received by the parties with the pattern of private money received per vote corresponding with the pattern of total funding received per vote.

In terms of the levelling effect of election funding, one measure is to assess the extent to which such funding narrows the disparity in private funding per vote. Using this measure, we see that overall election funding has a limited levelling effect on the funding inequality between the parties. However, this effect varies significantly according to the party. For example, the effect is quite substantial in relation to the Democrats. As an illustration, the ratio of private funding per vote for the ALP and the Democrats stands at 1:3.62. The corresponding ratio of total funding (which includes electoral funding) per vote is, however, 1:2.51. In contrast, the levelling effect is very modest in relation to the Greens. For example, the ratio of private funding per vote for the Liberal Party and the Greens is 1:2.19 whereas the

corresponding ratio of total funding per vote was marginally less at 1:1.95. Such difference will largely be due to the inferior electoral funding that the Greens received because of the 4 per cent threshold which applies to election funding.[187]

Table 13: Funding per Vote, 1999–2000 to 2001–02

Party	First preference votes in 2001 election	Total funding per vote	Private funding per vote	Election funding per vote
ALP	4 341 419	$27.01	$22.14	$3.67
Liberal Party	4 291 033	$22.27	$18.62	$3.25
National Party	643 924	$33.74	$28.64	$3.86
Democrats	620 248	$10.75	$6.12	$4.17
Greens	569 075	$11.41	$8.51	$2.73

Source: Joo-Cheong Tham and David Grove, 'Public Funding and Expenditure Regulation of Australian Political Parties' (2004) 32 *Federal Law Review* 397, 404 (Table 3).[188]

Together with having a limited levelling effect, there are also features of election funding schemes that result in greater electoral unfairness. Funding under these schemes is calculated based on past electoral support, a method that inevitably means that established parties enjoy a financial advantage over newer parties. Instead of promoting open electoral contests, the 4 per cent threshold that applies to these schemes clearly discriminates against minor parties and newcomers.[189] Indeed, it has been argued that the current system of election funding 'reinforces the duopoly that the major parties have over political office'.[190]

---

[187] See also discussion in Graeme Orr, 'The Currency of Democracy: Campaign Finance Law in Australia' (2003) 26 *University of New South Wales Law Journal* 1, 27.

[188] The following definitions have been used in relation to this table:
-*Electoral funding:* Funding received from federal and state electoral commissions.
-*Public funding:* Funding from all government bodies. This would include *Electoral funding* as well as payments from governmental bodies like the Australian Taxation Office
-*Private Funding:* Total funding minus public funding.
-*Total funding:* The total receipts indicated on the returns minus *Internal Transfers*.

[189] For similar sentiments, see Orr, above n 187, 21.

[190] David Tucker & Sally Young, 'Public Financing of Election Campaigns – A Solution or a Problem?' in Glenn Patmore (ed), *Labor Essays 2002: The Big Makeover: A New Australian Constitution*, (Pluto Press in association with the Australian Fabian Society, 2001) 60, 69.

Worse, election funding might, in fact, exacerbate electoral unfairness by functioning as 'an add-on that allows the competing political parties to spend more on advertising and other electoral purposes than they would otherwise choose to do'.[191] The issue here is whether election funding fuels increases in campaign expenditure. While a definitive answer awaits a systematic analysis, there is good reason to suspect this to be the case. There is, firstly, no natural limit to campaign expenditure or, more generally, to the parties' expenditure. The only real limit is the size of the parties' budgets. Thus, if the parties' budgets expand because of election funding, we should expect increases in campaign expenditure in the absence of other constraints like election spending limits.[192] Furthermore, there is anecdotal evidence that broadcasters charge the parties an additional premium for political advertising.[193] If this is true, by boosting advertising rates election funding would necessarily increase campaign expenditure. If election funding does, in fact, fuel campaign expenditure, such funding indirectly sets up a barrier against newcomers. Such newcomers will invariably be discouraged by the prohibitive costs of political campaigns.

These features of the federal election funding schemes realise, to some extent, a fear voiced by opponents of increased public funding of political parties. This is the fear that public funding will ossify the existing party system by generously supporting existing parties while creating a '"vicious circle" for smaller parties which would be unable to receive funding because they had no representation and would be unable to field candidates because they lacked the necessary funding'.[194]

What then of the anti-corruption rationale of election funding schemes? The fact that federal election funding is not tied to any conditions or obligations relating to the receipt of private funding makes a mockery of this rationale. It is fanciful, for

---

[191] Ibid 67.
[192] Even with robust regulation of campaign expenditure, public funding is still likely to fuel the parties' expenditure in other areas, for example, through the employment of increased numbers of party staff members and more expensive party events like conferences.
[193] Stephen Mills, *The New Machine Men: Polls and Persuasion in Australian Politics* (Penguin, 1986) 189–90.
[194] United Kingdom Electoral Commission, *The Funding of Political Parties: Background Paper* (2003) 22. See also Committee on Standards in Public Life, *Fifth Report: The Funding of Political Parties in the United Kingdom*, Cm 4057–I (1998) 91–92 (often referred to as the Neill Committee Report after its Chair, Lord Neill). For similar sentiments, see Sally Young, 'Killing Competition: Restricting Access to Political Communication Channels in Australia' (2003) 75(3) *AQ: Journal of Contemporary Analysis* 9, 9–11.

example, to suggest that election funding acts as an antidote to the unsavoury fundraising practices of political parties. Indeed, the vice of election funding might, in fact, go beyond ineffectiveness. If it were true that federal electoral funding inflates campaign expenditure, such funding would then perversely increase reliance on private funding as parties seek more donations to meet their perceived expenditure needs. So, far from 'purifying' the political process by reducing the reliance of political parties on large donations and insulating them from the risk of corruption,[195] election funding might perversely be a corrupting element.

There are two other criticisms of election funding schemes to consider. First, such schemes are said to sap the vitality of political parties by reducing their need to have members or engage with them and the broader citizenry in order to raise funds.[196] The risk here is that election funding detracts from the participatory function of political parties. It is not easy to evaluate this claim not least because a proper inquiry into the connection between election funding (or public funding more generally) and the vitality of Australian political parties has yet to be undertaken. This much, however, can be said – current election funding schemes do little to enhance the participatory function of political parties, a matter that will be revisited shortly.

Second, election funding schemes are said to pose a danger of corruption through the misuse of public resources. This has come to the fore with claims of 'profiteering' from such schemes. The most prominent instance has been with candidates associated with Pauline Hanson, former leader of the One Nation party. These candidates received almost $200 000 in election funding in relation to the 2007 federal election but only spent $35 427 on campaigning costs - the implication being that the difference between the amount of election funding received and the campaign spending was 'pocketed' by Hanson.[197]

---

[195] Arguments based on 'purification' have been made by UK proponents of increased state funding, see Committee on Standards in Public Life, above n 194, 90–91.
[196] See Dean Jaensch, 'Party Structures and Processes' in Ian Marsh (ed), *Political Parties in Transition* (Federation Press, 2006) 24, 30. Blondel has also raised the prospect that public funding of parties might diminish their 'fighting spirit': Jean Blondel, *Political Parties: A Genuine Case for Discontent?* (Wildwood House, 1978) 91.
[197] Joint Standing Committee on Electoral Matters, *Advisory Report: Commonwealth Electoral Amendment Bill 2008*, above n 118, 14.

In response to this issue of 'profiteering', the Commonwealth Electoral Amendment (Political Donations and other Measures) Bill 2008 seeks to bring the federal election funding arrangements in line with other schemes by limiting the amount of such funding to 'electoral expenditure' incurred by the eligible party or candidate. In its report on the Bill, the Joint Standing Committee on Electoral Matters supported the central thrust of this amendment but agreed with the suggestion of the Democratic Audit of Australia that the definition of 'electoral expenditure' should be broadened to include rental of campaign premises, employment of campaign staff and office administration.

This is a sensible position but does not go far enough. Whilst corruption through the misuse of public resources occurs when election funding is used for the private purposes of a candidate, there is little ground for concluding the same when such funding is used for party activities other than campaigning (e.g. party administration costs). True, the original rationale of the federal election funding scheme was aimed at promoting the electoral function of political parties (by promoting electoral fairness) but it is time for fuller recognition of the fact that parties have other functions, all of which should also be adequately resourced through state funding. As will be argued below, such recognition will come about by moving from election funding schemes to Party and Candidate Support Funds.

2 *Tax Subsidies*

Three distinct aims may justify such subsidies. Tax deductions may be said to:

- encourage small contributions so as to diversify the funding base of parties and, therefore, reduce the influence of 'big money';
- promote political participation through increased party membership; and
- help ensure that parties are adequately funded.

All three aims are integral to the democratic functions of political parties – the first two links more specifically to the participatory function of political parties, while the last seeks to generally promote democratic functions of parties.

Measured against these three aims, however, tax subsidies are both *inefficient* and *inequitable*. They are inefficient because neither small contributions - say contributions of a hundred dollars or less - nor party membership is a condition for tax deductibility. Specifically, eligibility for tax deduction is cast too wide with large contributions coming within the scope of the current provisions. Another cause of inefficiency is that the money provided from the public purse goes to tax payers rather than to the parties[198] - if these provisions are meant to assist in ensuring that parties are adequately funded, they do so in a rather indirect and limited fashion. There may also be another reason why tax deductions are an inefficient way to achieve the above aims. Such a system places the incentive to make contributions and take out membership on the taxpayer more so than on the parties themselves to solicit contributions and membership. A system of public subsidy that relies more directly on strengthening incentives for parties may be more effective.

Tax subsidies of the kind that currently exist are also inequitable on several counts. They discriminate against those who do not have to pay tax: job seekers,[199] retirees without income, full-time parents and students not engaged in paid work who make small contributions or take out party membership are denied the benefit of the current system. This leads to a broader point: a system of tax relief tends to disproportionately benefit wealthy sections of society.[200] Whilst there is no data to indicate which taxpayers have relied upon the tax subsidies under the *ITAA 1997,* the Canadian experience of using tax relief to encourage political contributions is instructive. Canadian federal law provides for a Political Contribution Tax Credit (PCTC). Under this scheme, individuals and corporations can deduct a portion of their political contributions from their tax liability. The deductible amounts are based on a sliding scale as depicted in the table below.

[198] For similar sentiments, see Lowenstein (1989), above n 21, 364–65.
[199] See Ewing, *The Funding of Political Parties in Britain*, above n 56, 139.
[200] See KD Ewing, *The Cost of Democracy: Party Funding in Modern British Politics* (Hart, 2007) 194.

Table 14: Canadian Political Contribution Tax Credit

Amount of contribution	Tax credit
C$0 to C$100	75% of contribution *For example C$75 credit for C$100 contribution*
C$101 to C$550	C$75 + 50% of amount of contribution exceeding C$100 *For example C$275 credit for C$500 contribution*
Over C$550	The lesser of $500 or C$300 + 33 1/3% of amount of contribution exceeding C$550 *For example C$450 credit for C$1000 contribution*

Source: *Income Tax Act,* RSC 1985 , c 1, s 42(2) (Canada)

In her analysis of the impact of the PCTC, Young, while acknowledging that the scheme may encourage small contributions, observed its unfair operation. Drawing upon a breakdown of tax data for 2000 (which were based on a scheme providing slightly different amounts of tax credits from the current one), she said:

> The almost half of all Canadian tax filers whose income fall into the lowest bracket comprise only 10 per cent of all PCTC claimants, while the 3 percent of tax filers in the highest bracket make 18 percent of all claims. The pattern is even more skewed when one compares the value of the tax credit for low and high income earners, as the latter are prone to make large contributions. Despite its other merits, then, the PCTC reinforces an inequitable pattern of giving to parties and candidates.[201]

In fact, Young's observations may have greater force now. In 2000, the PCTC allowed tax credits of 75 per cent for contributions up to C$200 whereas that limit has since been increased to C$400.[202]

A similar system of tax relief operates in the Canadian province of Quebec although at less generous rates.[203] Nevertheless, the inequity of such a system is apparent. Data from 1997 indicates that while taxpayers earning C$20 000 or less per annum

[201] Lisa Young, 'Regulating Campaign Finance in Canada: Strengths and Weaknesses' (2004) 3(3) *Election Law Journal* 444, 452.
[202] Ibid 447, 459.
[203] See Louis Massicotte, 'Financing Parties at the Grass-Roots Level: The Quebec Experience' in K D Ewing & Samuel Issacharoff (eds), *Party Funding and Campaign Financing in International Perspective* (Hart, 2006) 151, 159–60.

constituted 54 per cent of all taxpayers, they only constituted 15 per cent of those who claimed a credit under the Quebec system. Those earning C$50 000 or more, on the other hand, represented 43 per cent of those who claimed the credit, while only constituting 10 per cent of all taxpayers.[204]

This brief review of the Canadian evidence indicates that a system of *tax relief* aimed at encouraging political contributions disproportionately benefits the wealthy for two reasons. First, the rich are more likely to make financial contributions to parties than the less well off. In Massicote's words, such contribution is 'a rather elitist activity'.[205] Second, because the rich are more likely to make larger contributions, the amount of tax relief they can claim is correspondingly increased.[206]

Such inequity may exacerbate the unfairness of political competition. Given the lack of information regarding the use and impact of current tax deductions, it would be unwise to be too emphatic about this point. That said, it is likely to be the case that under a system of tax relief, inequity amongst citizens will translate to inequity amongst the parties. Parties with rich members and supporters will probably reap significant rewards from this system while the benefit to parties with poorer members and supporters may very well be marginal.

Worse, several features of the current scheme exacerbate the risk of such unfairness. Allowing deductions for donations up to $1500 per annum provides tax relief for political donations that are out of reach of ordinary Australians. Moreover, the current provisions allow corporations to claim tax deductions for their political contributions. This runs contrary to the aim of reducing the influence of 'big money'. Because corporate money tends to go overwhelmingly to the major parties, subsidising corporate contributions threatens to exacerbate the financial divide between the major and minor parties. Of fundamental concern is why public subsidy should facilitate contributions by entities that are clearly not citizens nor organised in a democratic

[204] Ibid 173.
[205] Ibid 172.
[206] Similar points are made by Ewing: K D Ewing, *Trade Unions, the Labour Party and Political Funding: The Next Step: Reform with Restraint* (Catalyst, 2002) 39–40.

fashion but instead are plutocratic organizations whose general principle is 'one share, one vote'.[207]

There is, therefore, a compelling case for abolishing these tax deductions (and for the enactment of Schedule 1 of the Tax Laws Amendment (2008 Measures No. 1) Bill 2008 (Cth))[208]. Whilst the various aims that may justify tax subsidies are sound, these aims should be pursued through other regulatory measures. The general aim of promoting the functions of parties should be advanced by the establishment of Party and Candidate Support Funds (as discussed earlier in this chapter). Annual allowances which are calculated in part according to the number of party members should encourage party membership. In terms of encouraging small contributions, a system of matching funds could be put in place. For example, for each contribution of $50 or less received per annum by candidates and registered parties, public funds could be provided to match 10 per cent of the value of these contributions. It is important to stress that, in addition to limiting this system to small contributions, the scheme should only involve a modest public subsidy in total. Both of these factors are necessary in order to alleviate the risk of such a system being biased towards wealthy citizens and parties.

E *Abuse of Parliamentary Entitlements for Electioneering*

We now shift our focus from the public funding available to political parties and candidates to that specifically provided to parliamentarians. Some questions immediately arise: Why should public funding be provided specifically to parliamentarians? If public funding is to be provided at all, why is it not provided to all parties and candidates?

The answers to these questions lie with the distinctive duties of parliamentarians. Parliamentarians are not merely successful candidates, but are also holders of *public* office. As holders of public office, parliamentarians have two key duties. The first is to represent the constituents of their electorate (and not just their supporters, the

[207] RP Austin & IM Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 2007) 298.
[208] See generally Joint Standing Committee on Electoral Matters, *Advisory Report: Commonwealth Electoral Amendment Bill 2008*, above n 118.

members of their party or their party organisation). It is this duty that informs the description of parliamentarians as the 'Member *for* [name of electorate]'. Secondly, parliamentarians have a duty to participate in the governance of their country, state or territory, notably, through participation in parliament. Such participation will embrace involvement in law making, scrutiny of executive action and deliberation of important public issues.

Performance of these duties encompasses a range of activities, most of which require money and personnel. Proper performance of these duties firstly requires a full-time commitment from parliamentarians. To avoid elected office becoming the privilege of the wealthy, adequate remuneration should be provided to the parliamentarians themselves so that they can deliver on this commitment. Basic infrastructure (like an office with adequate facilities and staff) is also necessary for the performance of these duties. Communicating with constituents is essential and some methods of doing so will require funding.

It is in recognition of the public duties of parliamentarians (and the resources that are necessary for the performance of such duties) that all jurisdictions (including the Commonwealth) have established parliamentary entitlements. Common entitlements include, for example, parliamentary salaries, office accommodation and facilities, travel and accommodation entitlements and the use of government vehicles.[209] Commonwealth, state and territory parliamentarians are also provided with a (differing) range of allowances. All parliamentarians are, for example, provided with an electorate allowance that, as the name suggests, is to be used to service the needs of their electorates.[210]

---

[209] See Department of the Legislative Council, Parliament of New South Wales, *Legislative Council Members' Guide* (2007); Department of the Legislative Council, Parliament of New South Wales, *Members' Handbook: A Guide to the Support Available to Members of the New South Wales Legislative Assembly* (2008); Parliamentary Service of Queensland, *Members' Entitlements Handbook: Benefits Afforded Members and Former Members of the Queensland Legislative Assembly* (2009); Legislative Council, Parliament of South Australia, *Handbook for Members of the Legislative Council of South Australia* (2009); *Parliamentary Allowances Regulations 2003* (Vic); Legislative Assembly for the Australian Capital Territory, *Members' Guide: Guide to Services, Facilities and Entitlements for Non-Executive Members and Their Staff* (2008); Northern Territory of Australia Remuneration Tribunal, *Report on the Entitlements of Assembly Members and Determination No 1 of 2009* (2000).

[210] Queensland Parliamentarians are not entitled to an electorate allowance but are provided similar allowances, namely, the General and Miscellaneous allowances: Parliamentary Service of Queensland, *Members' Entitlements Handbook*, above n 209, 5, 7. Similarly, there is no specific electorate allowance for members of the ACT Legislative Assembly. These members are, however, entitled to a

What seems to be the most complicated framework governing parliamentary entitlements is that of the Commonwealth. This framework is comprised of five separate pieces of legislation. The salary and electorate allowance of Commonwealth parliamentarians are provided under the *Remuneration and Allowances Act 1990* (Cth).[211] Various other entitlements are provided under the *Parliamentary Entitlements Act 1990* (Cth) including office accommodation, postage allowance and travel entitlements.[212] The regulations for this statute authorise other entitlements,[213] notably, a printing and communications entitlement.[214] Finally, there are various allowances determined by the Commonwealth Remuneration Tribunal under the *Parliamentary Allowances Act 1952* (Cth) and the *Remuneration Tribunal Act 1973* (Cth).[215] There are no specific principles prescribed to guide the Tribunal's determinations.

Whilst the provision of parliamentary entitlements has, at its base, a compelling justification, it also carries two related risks: corruption through the misuse of public resources; and unfairness in politics, specifically electoral unfairness. With parliamentary entitlements, corruption through the misuse of public resources occurs when entitlements are used for a purpose other than the performance of parliamentary duties, for example, for the personal benefit of parliamentarians or to advance the electoral position of parliamentarians or their parties. In the latter situation, corruption through the misuse of public resources comes hand in hand with electoral unfairness.[216] The danger of such unfairness is inherent in the provision of parliamentary entitlements. These entitlements are provided to parliamentarians but not to their unelected competitors. Furthermore, parliamentary activities are inseparable from campaign activities in many cases.[217] The result is that various parliamentary entitlements (for example, the provision of office, staff and electorate

---

similar allowance, an annual Discretionary Office allocation. For members other than the Speaker or the Leader of the Opposition, the amount of the allocation is $4,600 per annum: Legislative Assembly for the Australian Capital Territory, *Members' Guide*, above n 209, 120.

[211] *Remuneration and Allowances Act 1990* (Cth) ss 6–7, schs 3–4.

[212] *Parliamentary Entitlements Act 1990* (Cth) s 4, sch 1.

[213] Ibid s 5(1)(b).

[214] *Parliamentary Entitlements Regulations 1997* (Cth) reg 3AA.

[215] *Parliamentary Allowances Act 1952* (Cth) s 4; *Remuneration Tribunal Act 1973* (Cth) ss 7(1), 7(4).

[216] For similar sentiments, see Thompson, above n 13, 74.

[217] Ibid 73.

allowances) can easily be used to resource the campaigns of parliamentarians to the detriment of their unelected rivals.

This is hardly an insignificant risk. There are various examples of parliamentary entitlements having been used for campaign purposes. At the Commonwealth level, printing and communication allowances have been flagrantly abused to resource the election campaigns of federal parliamentarians (discussed below), a development that has coincided with the trend of increased use of parliamentarians' office accommodation and facilities during election periods.[218]

Corruption through the misuse of public resources can take the form of individual corruption. Take, for example, the situation where a parliamentarian uses his travel entitlements to fund a holiday. In this situation, the gain to the parliamentarian is personal and the gain is undeserved as the travel entitlements are being illegitimately used. When there is corruption through the misuse of public resources involving electoral unfairness, however, such corruption tends to take the form of institutional corruption. The gain that is secured in such cases is political not personal as it is aimed at boosting the electoral position of the parliamentarian (or his or her party), the use of public resources is procedurally improper because of its illegitimate purpose and this purpose clearly damages the democratic process by promoting electoral unfairness.

In addressing the cognate dangers of corruption through the misuse of public resources and electoral unfairness, three principles should be followed:

- Principle One: The rules governing parliamentary entitlements should be accessible and transparent;
- Principle Two: The rules should clearly limit the use of parliamentary entitlements to the discharge of parliamentary duties and prevent their use for electioneering; and
- Principle Three: The amount of parliamentary entitlements should not confer an unfair electoral advantage upon parliamentarians.

[218] Australian National Audit Office, *Administration of Parliamentarians' Entitlements by the Department of Finance and Deregulation: Auditor-General Report No 3 / 2009–2010* (2009) 141.

The rationale for Principle One is clear: use of public funds should be transparent and publicly accountable. Principle Two seeks to prevent the illegitimate use of parliamentary entitlements. Principle Three recognises that, in the context of parliamentary activities being sometimes inseparable from campaign activities, Principle Two is insufficient to prevent electoral unfairness, hence the need to ensure that the value of parliamentary entitlements does not unfairly advantage parliamentarians.

When evaluated against these principles, the arrangements governing federal parliamentary entitlements fall seriously short.

Principle One: The Rules Governing Parliamentary Entitlements Should be Accessible and Transparent

The rules governing federal parliamentary entitlements are contained in the relevant legislation and determinations of the Commonwealth Remuneration Tribunal. They are also included in the handbook issued to parliamentarians regarding these entitlements. The relevant legislation and determinations are clearly accessible and transparent and the handbook was publicly released in 2010.[219]

This principle has, however, been breached through the development of opaque conventions, arguably in breach of formal legal rules. In 2009, the Auditor-General handed down a comprehensive report on parliamentary entitlements that found that their use was influenced by two documents developed by the then federal government, '31 Statements' and '42 Questions and Answers', which purported to capture accepted practices.[220] These documents, as the Auditor-General curtly observed, were 'not made public'.[221] Moreover, legal advice received by the Auditor-General indicated that these documents were not consistent with the statutory

[219] Commonwealth of Australia, *Senators and Members' Entitlements* (2010) <http://www finance.gov.au/parliamentary-services/docs/senators_and_members_entitlements.pdf>
[220] See Australian National Audit Office, *Administration of Parliamentarians' Entitlements: Auditor-General Report No 3/ 2009-2010,* above n 218, 54–67.
[221] Ibid 19–20.

provisions governing the Printing Entitlement, resulting in the entitlement being frequently used in breach of its conditions.[222]

Principle Two: The Rules Should Clearly Limit the Use of Parliamentary Entitlements to the Discharge of Parliamentary Duties and Prevent their Use for Electioneering

This principle suggests four elements:

- a general policy that parliamentary entitlements only be used for parliamentary duties;
- a clear elaboration or definition of such duties;
- a general prohibition of the use of entitlements for electioneering; and
- specific rules elaborating upon this prohibition.

All four elements are *not* met in relation to federal parliamentary entitlements. There is no general policy that these entitlements only be used for parliamentarian duties, nor is there a general prohibition against their use for electioneering. For a handful of entitlements (for instance, the postage allowance), there is a requirement that they be used for 'parliamentary or electorate business (other than party business)'.[223] Despite this restriction, the entitlements remain quite malleable and can fund electioneering activities. This malleability is due to the fact that the legislative instruments do not define either 'parliamentary or electorate business' or 'party business'. As a result, there is no statutory delineation between legitimate and illegitimate uses, despite calls from bodies like the Australian National Audit Office for clearer definitions and guidance.[224] As a consequence of this ambiguity, a liberal view of 'parliamentary or electorate business' has been adopted resulting in various forms of electioneering being included within the definition. One stark example is a general acceptance that the use of electorate staff to aid the re-election of incumbent parliamentarians constitutes a permissible use of such entitlements.[225]

---

[222] Ibid 21.
[223] *Parliamentary Entitlements Act 1990* (Cth) sch 1 pt 1 item 3.
[224] Australian National Audit Office, *Parliamentarian Entitlements: 1999–2000* (2001) [2.61]–[2.68]; Australian National Audit Office, *Administration of Parliamentarians' Entitlements: Auditor-General Report No 3/ 2009-2010,* above n 218, 15.
[225] Australian National Audit Office, *Administration of Staff Employed Under the Members of Parliament (Staff) Act 1984: Auditor-General Audit Report No 15 / 2003–2004* (2003) 16.

Not only do the arrangements governing Commonwealth parliamentary entitlements fail to prohibit their use for electioneering and campaigning purposes, they have gone further by officially sanctioning such use. One of the most egregious examples is provided by the printing entitlement.[226] Prior to October 2009, the *Parliamentary Entitlement Regulations 1997* (Cth) allowed the Special Minister of State to approve further categories of printed material that could be distributed to constituents through the use of this entitlement.[227] In 2004, approval was given by the then Minister to use this entitlement to print 'postal vote applications and other voting information'.[228] In his 2009 report on federal parliamentary entitlements, the Auditor-General found that such use of the printing entitlement often resulted in postal vote applications being accompanied by campaign material for the party.[229] Worse, such use gave rise to obvious waste: 16.5 million applications were printed in this way, 2.9 million more postal vote applications than the total number of voters enrolled.[230] The Auditor-General found a similar (ab)use of the printing entitlement to produce 'How to Vote' cards (included as 'other voting information'),[231] with cards sent by parliamentarians tailored to reflect key elements of their party's election campaign strategy.[232]

Here, an officially sanctioned use of the printing entitlement for particular electioneering purposes (such as printing 'postal vote applications and other voting information') intermingles with an illegitimate use for other electioneering purposes. This tension is clearly illustrated by the Auditor-General's analysis of items produced by the printing entitlement in the months leading up to the 2007 federal election. The Report found that 74 per cent of the analysed sample was at risk of being deemed illegitimate, principally because the content of the printed material contained 'high levels of material promoting party political interests and/or directly attacking or

---

[226] The printing entitlement has now been merged with the communications allowance: see *Parliamentary Entitlements Regulations 1997* (Cth) reg 3AA.
[227] Ibid reg 3(1)(c), 3A(1)(c), as repealed by *Parliamentary Entitlements Amendment Regulations 2009* (No 1) (Cth).
[228] Australian National Audit Office, *Administration of Parliamentarians' Entitlements: Auditor-General Report No 3/ 2009-2010,* above n 218*,* 146.
[229] Ibid 148.
[230] Ibid 147.
[231] Ibid 163.
[232] Ibid 165–66.

scorning the views, policies or actions of others, such as the policies and opinions of other parties'.[233]

In light of its findings, it is not surprising that the Auditor-General concluded that 'fundamental reform of the overall entitlements framework is needed'.[234] The Auditor-General's damning findings have not gone unheeded. In September 2009, the ALP Government took important steps to curb the use of the printing entitlement and the communications allowance for electioneering and campaigning. Taking effect from 1 October 2009, amendments to the *Parliamentary Entitlements Regulations 1997* (Cth) merged both allowances into one printing and communications entitlement, with a decrease in the total amount of the entitlement. As a result, Senators are entitled to $40 000 per annum[235] while the annual entitlement for Members of the House of Representatives is now $75 000 plus an amount equal to the standard rate of postage multiplied by the number of voters enrolled in each respective constituency.[236] The amendments further stipulate that this entitlement 'must only be used for parliamentary or electorate purposes and must not be used for party, electioneering, personal or commercial purposes'.[237] 'Electioneering' is defined as communication that explicitly:

- 'seeks support for, denigrates or disparages… the election of a particular person or persons… or a particular political party or political parties';
- 'encourages a person to become a member of a particular political party, or political parties'; or
- 'solicits subscriptions or other financial support'. [238]

The ability of the Special Minister of State to approve further uses of this entitlement has been removed and use of the entitlement to produce how-to-vote material is now prohibited.[239] Limits on the number of postal vote applications that can be printed

[233] Ibid 36–37. See also Ibid 199–214.
[234] Ibid 18.
[235] *Parliamentary Entitlements Regulations 1997* (Cth) reg 3AC(2).
[236] Ibid reg 3AB(6).
[237] Ibid regs 3AA(3)–(4).
[238] Ibid reg 3AA(11).
[239] Ibid reg 3AA(3).

using the entitlement have also been introduced.[240] The federal government has also committed to installing a more rigorous vetting and checking system within the Department of Finance to ensure that the entitlement is being properly used.[241]

Unfortunately, the resolve, which the ALP federal Government initially demonstrated in reforming the printing and communications entitlement, seems to have dissipated. In December 2009, three months after the above changes were made, regulations were quietly tabled changing the rules governing this entitlement, the most important of which removed the prohibition on using this entitlement for 'electioneering', a change that was backdated to 1 October 2009.[242] With an imminent federal election, this timing of this change is hardly coincidental.

Principle Three: The Amount of Parliamentary Entitlements Should not Confer an Unfair Electoral Advantage upon Parliamentarians

Parliamentary entitlements provide an enormous amount of resources to parliamentarians. In 2008–09, entitlements provided to federal parliamentarians were worth $331 million.[243] Similarly the cost of federal parliamentary entitlements during the 1999–2000 financial year amounted to $354 million.[244] To get a sense of proportion, the total combined budget for the ALP, the Coalition, the Greens and the Democrats for the *three* financial years of 1999–2000, 2000–01 and 2002–03 was less than this amount and stood at approximately $248 million.[245] Based on reports of the Auditor-General, Sally Young has estimated that between $887 024 and $899 324 worth of parliamentary entitlements was available to each federal parliamentarian in 2002.[246]

---

[240] Ibid reg 3AA(10).
[241] Senator Joe Ludwig, 'Reform of Parliamentary Entitlements' (Media Release, 8 September 2009) <http://www.smos.gov.au/media/2009/mr_352009 html>.
[242] *Parliamentary Entitlements Amendment Regulations 2009 (No 2)* (Cth), sch 1 reg 1.
[243] Australian National Audit Office, *Administration of Parliamentarians' Entitlements: Auditor-General Report No 3/ 2009-2010,* above n 218, 11, 45–46.
[244] Australian National Audit Office, *Parliamentarian Entitlements: 1999–2000,* above n 218, [2]–[3].
[245] Tham and Grove, 'Public Funding and Expenditure Regulation of Australian Political Parties', above n 81, 401 (calculated from Table 1).
[246] Sally Young & Joo-Cheong Tham, *Political Finance in Australia: A Skewed and Secret System* (Democratic Audit of Australia, 2006) 58 (Table 3.7).

There is a serious risk that these entitlements will provide an unfair electoral advantage to parliamentarians. As noted above, several of these entitlements can easily (and unavoidably) be used for electioneering. This is especially the case with the electorate allowance which currently provides $22 685 – $32 895 per annum to each federal parliamentarian.[247] Even if these amounts were not used for electioneering – an assumption that flies in the face of reality – the amounts provided by parliamentary entitlements are likely to confer an unfair electoral advantage upon incumbent parliamentarians because the performance of parliamentary duties is inseparable from campaigning activity. Of note is that this advantage is distributed inequitably even amongst incumbent parliamentarians. The ALP and the Liberal Party tend to reap a disproportionate benefit because their parliamentary representation is greater than their electoral support. This can be explained by two features of Australia's electoral system. First, House of Representatives seats are single-member electorates (unlike the Senate, where politicians are elected according to a proportional system).[248] This favours the larger parties. For example, in the 2001 federal election, the Liberal Party and ALP respectively received 37.08 per cent and 37.84 per cent of the first preference votes, while their share of seats in the House of Representatives stood at 45.3 per cent and 43.3 per cent.[249] Secondly, the number of House of Representatives members is constitutionally mandated to be twice the number of Senators.[250]

In order to avoid, or at least ameliorate this risk, the position of parties with no elected representatives needs to be 'levelled up', a strategy that involves a reconfiguration of the system of public funding of parties (as discussed earlier). Further, the financial resources specifically available to parliamentarians need to be 'levelled down'. At the very least, there should be an urgent review of the amounts provided for such entitlements. Moreover, when Remuneration Tribunals determine the amount to allocate for various parliamentary entitlements, they should be required to give effect to Principle Three.

---

[247] *Remuneration and Allowances Act 1990* (Cth) s 6 sch 3 cl 2.
[248] *Commonwealth Electoral Act 1918* (Cth) ss 273 (Senate), 274 (House of Representatives).
[249] Figures derived from Australian Electoral Commission, *AEC: When: Past Electoral Events* <http://results.aec.gov.au/10822/Website/index.html > Historical election result data also available from Parliamentary Library, Parliament of Australia, *Detailed Results: House of Representatives* <http://www.aph.gov.au/library/Pubs/RB/2004-05/05RB11-1f.HTM>.
[250] *Commonwealth of Australia Constitution Act 1900* (Cth) s 24.

F *Party-political Government Advertising*

There is no doubting the significance of government advertising. Australian governments are amongst the biggest advertisers in the country.[251] Between 1996 and 2003, Australian state and federal governments spent a total of US$14.95 per capita on advertising, making Australia the country that spent the most on government advertising per head for that period (see Table 15).

Table 15: Worldwide Spending on Government Advertising, 1996–2003

Country	Amount spent (in US$ million)	Population	Spending per head of population (in US$)
Australia (state and federal governments)	$294.10	19 731 984	$14.91
Belgium	$69.70	10 330 824	$6.74
Ireland	$19.00	3 924 023	$4.84
United Kingdom	$271.40	60 094 648	$4.51
Singapore	$13.50	4 276 788	$3.15
Spain	$58.80	40 217 413	$1.46
South Africa	$45.90	44 481 901	$1.03
Mexico	$46.60	103 718 062	$0.44
Thailand	$27.80	63 271 021	$0.43
Brazil	$68.10	182 032 604	$0.37
Peru	$2.30	27 158 869	$0.08
Paraguay	$0.41	6 036 900	$0.06

Source: Sally Young, 'Government and the Advantages of Office' in Sally Young and Joo-Cheong Tham (eds), *Political Finance in Australia: A Skewed and Secret System* (Democratic Audit of Australia, 2006) 81.

According to official figures, the federal government spent over AU$1.5 billion (in 2004–2005 prices) for the period 1991–92 to 2004–05 (see Table 16 below) on government advertising. Moreover, these figures underestimate the full amounts spent on government advertising as they only relate to the 'media spend' (the purchase of advertising space) and do not include the cost of advertising agency services, the

[251] Sally Young, 'Government and the Advantages of Office' in Sally Young and Joo-Cheong Tham (eds), *Political Finance in Australia: A Skewed and Secret System* (Democratic Audit of Australia, 2006) 74.

production of advertising material and the market research that informed advertising campaigns.[252] The extent of this underestimate is probably quite significant. For instance, the *Strengthening Medicare* advertising campaign involved $15.7 million in 'media spend' but had a total campaign cost of $21.5 million.[253]

Table 16: Federal Government Expenditures for Advertising Campaigns over $10 000, 1991–92 to 2004–05

	AUD$million (nominal amounts)	AUD$million (in 2004–05 prices)
1991–92	$48	$63
1992–93	$70	$91
1993–94	$63	$81
1994–95	$78	$100
1995–96	$85	$106
1996–97	$46	$56
1997–98	$76	$92
1998–99	$79	$96
1999–00	$211	$250
2000–01	$156	$177
2001–02	$114	$126
2002–03	$99	$106
2003–04	$143	$149
2004–05	$138	$138
TOTAL	**$1406**	**$1525**

Source: Fiona Childs, 'Federal Government Advertising 2004–2005' (Research Note No 2/2006-07, Parliamentary Library, Parliament of Australia, 2006).

To draw attention to the vast amount of money spent on federal government advertising does not necessarily lead to the conclusion that such advertising is problematic. Indeed, government advertising clearly has a legitimate role in a representative democracy. At a general level, governments should (and need to) communicate with citizens. Laws and policies need to be publicised so citizens can

[252] Senate Finance and Public Administration References Committee, Parliament of Australia, *Government Advertising and Accountability* (2005) 16–17.
[253] Ibid 17.

organise their lives. Such publicity is not only necessary in order to provide justice to citizens who are bound by these laws and policies but also to promote efficacy of government. It is also vital in terms of ensuring accountability as publicity is a necessary pre-requisite for public comment and criticism of government. Routine operations also require governments to engage in particular forms of communication, for instance, by advertising job vacancies.

We can further understand the specific role that government advertising plays in a representative democracy by distinguishing between two broad types of government advertising: 'campaign' advertising, namely, advertising relating to specific government programs; and 'non-campaign' advertising, for example, job vacancies and public notices.[254] There is clearly a role for 'non-campaign' advertising and, in the controversies surrounding government advertising, this type of advertising has not been at issue. While more susceptible to controversy, there is also a legitimate place for 'campaign' advertising. For instance, the detail of specific government programs may need to be communicated to citizens so they can access these programs. Or laws may have been passed requiring citizens to change their behaviour, a change that may be effectively brought about by bringing the law to the attention of the public through advertising. It is also increasingly accepted that government advertising can be used as a form of social marketing, that is, used to bring about positive behaviour change (whether or not such change is legally required). The advertisements run by the Victorian Transport Accident Commission to reduce the road toll is a good example of such use.[255]

At one level, it is not surprising then that millions are (legitimately) spent on 'campaign' advertising. As Table 17 indicates, the federal government currently spends more than a hundred million dollars per annum on such advertising.

Table 17: Federal Government 'Campaign' Advertising, 2004–05 to 2008–09

Financial year	$million
2008–09	$130.10

[254] Ibid 6–7.
[255] See Sally Young, 'A History of Government Advertising in Australia' in Sally Young (ed), *Government Communication in Australia* (Cambridge University Press, 2007) 181, 185–190.

2007–08	$185.30
2006–07	$170.10
2005–06	$120.50
2004–05	$70.60

Source: Department of Finance and Management, Australian Government, *Campaign Advertising by Australian Government Departments and Agencies: Full Year Report 2008-09* (2009) 46.

Controversy, however, arises when 'campaign' advertising is said to be party-political. Party-political advertising occurs when government advertising is aimed at enhancing the electoral prospects of the governing party rather than advancing the legitimate needs of government. As so understood, party-political advertising involves two wrongs: *corruption through the misuse of public resources* because government advertising is principally directed at the illegitimate purpose of securing electoral advantage for the governing party, and *electoral unfairness* because such resources are only available to the governing party. As with the abuse of parliamentary entitlements, corruption through misuse of public resources that involves electoral unfairness tends to take the form of institutional corruption: the gain is typically political not personal, being aimed at enhancing the electoral position of the party in government, and the use of public resources is procedurally improper of its illegitimate purpose, a purpose which clearly damages the democratic process by resulting in greater electoral unfairness.

At the very least, suspicions of party-political advertising have been aroused by spikes in the amount of federal government advertising in the lead up to elections.[256] There have been a number of notable controversies. To mention a few, prior to the 1993 federal election, the Keating ALP Government spent $3.5 million on a Medicare advertising campaign and just prior to the 1996 election, an additional $9.4 million on 'Working Nation' advertisements on employment.[257] In the months leading up to the 1998 federal election, the Howard Coalition Government spent $14.9 million on its

[256] See generally Senate Finance and Public Administration References Committee, *Government Advertising and Accountability*, above n 252, 31–32.
[257] Sally Young, *The Persuaders: Inside the Hidden Machine of Political Advertising*, (Pluto Press, 2004) 124–25.

proposal to implement a Goods and Services Tax, a tax which was to be introduced if the Coalition were re-elected.[258]

More recently, there was heated controversy over the Howard Coalition Government's 'WorkChoices' advertisements. Costing an estimated $55 million,[259] the advertisements were aired in two tranches, during July 2005 and October 2005, both prior to the actual legislation being introduced in the federal Parliament on 2 November 2005. Included in such advertisements were the following statements:

- 'Australia can't afford to stand still';
- 'Countries have the choice of either going forward or backwards. Marking time is not an option'; and
- WorkChoices 'will improve productivity, encourage more investment, provide a real boost to the economy and lead to more jobs and higher wages'.[260]

The use of government advertising for party-political campaigns has continued under the federal ALP government. The most glaring example relates to the government's 'mining tax' ads. On 24 May 2010, the Cabinet Secretary exempted this advertising campaign from compliance with the government's guidelines on advertising 'on the basis of urgency and compelling reasons'.[261] In a space of less than a month, 29 May to 24 June 2010, $9.7 million of public funds were spent on this exempted campaign.[262]

G *Unfair Playing Field*

The flow of private money creates a dramatic funding inequality amongst the parties. When the private money received by the main parties between 1999–2000 and 2001–

[258] For fuller details, see Australian National Audit Office, *Performance Audit: Taxation Reform: Community Education and Information Program* (1998) 8, 20–21. For comment, see Geoffrey Lindell, 'Parliamentary Appropriations and the Funding of the Federal Government's Pre-Election Advertising in 1998' (1999) 2(2) *Constitutional Law and Policy Review* 21.
[259] Senate Finance and Public Administration References Committee, *Government Advertising and Accountability*, above n 252, xv. For fuller details of the expenditure, see ibid 47.
[260] For fuller detail, see Senate Finance and Public Administration References Committee, *Government Advertising and Accountability*, above n 252, 50–51.
[261] Department of Finance and Deregulation, Australian Government, *Campaign Advertising by Australian Government Departments and Agencies: Full Report 2009/2010* (2010) 9.
[262] Ibid 37.

02 is divided by the first preference votes they received in the 2001 federal election, a sharp cleavage emerges between the major parties, on one hand, and the minor parties on the other. For each dollar of private money received per vote by the Democrats, more than three dollars was received by the ALP. And for each dollar of private money received per vote by the Greens, the Liberal Party received two dollars. It is this unequal flow of private money that largely explains why the major parties received more than $20 per 2001 election vote, while the minor parties received less than half that amount.[263]

The imbalance stems from various sources. We saw earlier that the ALP and the Coalition very much have a monopoly over corporate political money. The parties also enjoy significant income from their investment vehicles. The financial position of the ALP is further consolidated by its receipt of trade union money. Come election time then, the playing field is far from level. Armed with larger war chests, the major parties are able to vastly outspend their competitors. The unfair advantage secured by these parties through private funds is further amplified by inequitable election funding of parties and incumbency benefits like parliamentary entitlements and government advertising. The result is that, rather than having fair elections, there is a skewed situation with electoral competition favouring the Coalition and the ALP. This highlights a corrosive dynamic where money follows the (greater) political power of the major parties and their power, in turn, is consolidated by such money.

The unequal flow of private money highlights how big corporations that hedge their bets by giving to the ALP and the Coalition parties rely upon a pseudo-notion of fairness. For these companies like Leighton Holdings, there is even-handedness as donations are given 'in a bipartisan way'.[264] Rather than explaining away any unfairness, such bipartisanship, in fact, underscores the inequity of such practices. Because the major parties are the principal beneficiaries of corporate money, not only are other parties and groups placed at a financial disadvantage but their views are also sidelined in the marketplace of ideas.

---

[263] Tham & Grove, 'Public Funding and Expenditure Regulation of Australian Political Parties', above n 81, 403–4.
[264] Bachelard, above n 131, 9.

There is also an interesting twist to the inequality stemming from corporate money. The receipt by the ALP of corporate money *and* trade union funds has led the Liberal Party to cry foul. In the 2007 Liberal Party federal council, the party treasurer, Mark Bethwaite, criticised the fact that '[c]orporate attitudes to political donations have become fixed on achieving a balance between Liberal and Labor'. He warned the business community that it:

> must realise that we do not face a level playing field at the coming election. We will need to fund-raise at a much more significant level than we have achieved before if we are able to match Labor and their union bosses.[265]

There is considerable force to these claims: the ALP is the principal recipient of trade union money and, as will be explained below, there was a lack of 'equality of arms' between the Coalition and the ALP in the 2007 federal election favouring the ALP. At the same time, it is important to keep these claims in perspective. As was noted earlier, trade union money, even at its highest proportion for the financial years 2006–07 and 2007–08, constituted less than one-sixth of the ALP's total income. Moreover (as will explained below), the inequality of arms favouring the ALP is a recent phenomenon pertaining to the 2007 federal election with the position reversed for the previous three elections. Having lodged these caveats, it remains the case that the inequality between the ALP and the Coalition parties is of significance in terms of political fairness. The submission will now take up this matter by firstly, examining the impact of election spending on election outcomes and, secondly, by detailing the unfairness resulting from the current patterns of election spending.

1 *Money Buying Elections?*

As election campaign spending increases, concerns grow that such spending distorts election outcomes. In its strongest form, the argument is that money can buy elections and, consequently, to the biggest spender go the spoils of office. If correct, there is a clear subversion of democratic process with elections determined not by open deliberation in which citizens can fairly participate, but by the amount of money that

[265] Michelle Grattan, 'Liberals' treasure attacks two-bob each-way donors', *The Age* (Melbourne), 2 June 2007, 2.

is spent. In these circumstances, we have grave reason to suspect that the trappings of democracy merely conceal a plutocracy.

The proposition that 'campaign expenditure buys votes' is, however, untenable.[266] For instance, the biggest spenders on political broadcasting for the federal elections running from 1974 to 1996 only won half of these contests.[267] The flaw in this proposition is its assumption of the overriding significance of campaign spending in determining voting behaviour. Such behaviour is, on the contrary, shaped by a complex series of factors. There is the influence of long-term variations, whether it is cultural (e.g. a history of loyalty to a particular party), demographic (e.g. different voting inclinations between older versus younger citizens) or class-based (e.g. voting behaviour of low-income versus high-income citizens); there is also the effect of short-term circumstances including the impact of election campaigns.[268] Moreover, the impact of election campaigns is not *solely* determined by the amount of campaign spending, as 'money is only one of several kinds of campaign resources'.[269] Further, these factors, both short and long-term, interact in complicated ways with their respective weight varying not only in different electoral systems but also for elections held in the same electoral system.

Not surprisingly then, there is a complex relationship between campaign expenditure and voter support[270] or put differently, between 'spending and electoral payoffs'.[271] Given the complexity *and* variability of this relationship, it is perhaps unsurprising that the academic literature has reported mixed findings on the effect of campaign spending on voting behaviour. Much of the overseas research has concluded that increasing relative spending on campaigning has a positive impact on a party or candidate's share of vote. This was a key finding of analyses of the 1981[272] and

---

[266] Committee on Standards in Public Life, above n 194, 117.
[267] Sally Young, 'Spot On: The Role of Political Advertising in Australia' (2002) 37 *Australian Journal of Political Science* 81, 91.
[268] James Forrest, 'Campaign Spending in the New South Wales Legislative Assembly Elections of 1984' (1991) 26 *Australian Journal of Political Science* 526, 526.
[269] Charles Beitz, *Political Equality* (Princeton University Press, 1989) 199.
[270] Young, 'Spot On', above n 267, 89.
[271] Justin Fisher, 'Next Step: State Funding for the Parties?' (2002) 73 *Political Quarterly* 392, 396.
[272] R J Johnston and P J Perry, 'Campaign Spending and Voting in the New Zealand General Election 1981: A Note' (1983) 39 *New Zealand Geographer* 81.

2005[273] New Zealand elections, and also recent Canadian elections.[274] Extensive investigation into the impact of constituency-level campaigning in British general elections has also issued the same conclusion. [275] Academic research is, however, not of one voice on this issue with several studies of British general elections casting doubt on whether there is a positive correlation between increased campaign spending and voter support. [276]

Another finding reported by much of the literature is that the electoral value of campaign spending varies according to whether the candidate is a challenger or an incumbent. Some studies of American and British elections have concluded that such spending is of greater value to a challenger candidate.[277] Similarly, an analysis of the 2005 New Zealand election concluded that the key beneficiaries of increased spending during this election were the smaller parties.[278] Research on recent Canadian elections has, however, drawn the seemingly opposite conclusion that incumbent candidates benefited more from expenditure compared to challengers.[279] Various American studies have qualified the proposition that challenger spending is of more value by contending that, while such spending is more effective when the total absolute amount was low, it was subject to diminishing returns, and that incumbent candidates spent larger amounts more profitably.[280]

---

[273] Ron Johnston and Charles Pattie, 'Money and Votes: A New Zealand Example' (2008) 27 *Political Geography* 113.
[274] Marie Rekkas, 'The Impact of Campaign Spending on Votes in Multiparty Elections' (2007) 89(3) *Review of Economics and Statistics* 573.
[275] R J Johnston, C J Pattie and L C Johnston, 'The Impact of Constituency Spending on the Result of 1987 British General Election' (1989) 8 *Electoral Studies* 143; R J Johnston and C J Pattie, *Putting Voters in their Place: Geography and Elections in Great Britain* (Oxford University Press, 2006).
[276] R J Johnston, 'Campaign Expenditure and the Efficacy of Advertising at the 1974 General Election' (1979) 27 *Political Studies* 114; R J Johnston, 'Campaign Spending and Voting in England: Analysis of the Efficacy of Political Advertising' (1983) 1 *Environment and Planning C: Government and Policy* 117; R J Johnston, 'Information Flows and Votes: An Analysis of Local Campaign Spending in England' (1986) 17 *Geoforum* 69; Justin Fisher, 'Party Expenditure and Electoral Prospects: A National Level Analysis of Britain' (1999) 18 *Electoral Studies* 519.
[277] G C Jacobson, 'Money and Votes Reconsidered: Congressional Elections, 1972–1982' (1985) 47 *Public Choice* 7; Charles Pattie, Ronald Johnston & Edward Fieldhouse, 'Winning the Local Vote: The Effectiveness of Constituency Campaign Spending in Great Britain, 1983–1992' (1995) 89(4) *American Political Science Review* 969; R J Johnston and C J Pattie, 'Campaigning and Advertising: An Evaluation of the Components of Constituency Activism at Recent British General Elections' (1998) 28 *British Journal of Political Science* 677.
[278] Johnston and Pattie, 'Money and Votes', above n 273, 130–32.
[279] Rekkas, above n 274, 573.
[280] See D P Green & J S Krasno, 'Salvation for the Spendthrift Incumbent: Reestimating the Effects of Campaign Spending in House Elections' (1988) 32 *American Journal of Political Science* 884; R B Grier, 'Campaign Spending and Senate Elections 1978–84' (1989) 63 *Public Choice* 201; D P Green &

Given that the effect of campaign spending on increasing voter support depends on the type of electoral system, it is research on Australian elections to which we must pay most attention. There is a relatively small body of research that has been undertaken on this topic, all by academic geographer James Forrest.[281] Forrest has undertaken an analysis of the New South Wales state elections held in 1984, 1988, 1991 and 1995, and the 1990 federal election. At the risk of some oversimplification, the following conclusions can be drawn from these studies. All of the studies concluded that an increase in spending *relative* to that by competitors resulted in more votes. The effect of spending in increasing voter support, while significant, was modest given other factors that influence voting behaviour including industry, demographic and employment factors. This was especially so in elections where support for major parties is volatile.[282] Moreover, *how* money was spent was as important as the level of spending in determining voter support.[283] The impact of this spending also varied according to the target groups. According to Forrest:

> different aspects of media activity impact differently on each. Wavering … voters more actively use the election campaign to determine how to vote, and for these subsets campaign advertising in its widest sense has an important persuading role. For the committed voter, partisanship is the dominant influence.[284]

J S Krasno, 'Rebuttal to Jacobson's "New Evidence for Old Arguments" ' (1990) 34 *American Journal of Political Science* 363.

[281] As Forrest has noted, 'one area … largely if not totally ignored in the Australian context surrounds the impact on voter behaviour of party spending during the course of an election campaign': Forrest, 'Campaign Spending in the New South Wales Legislative Assembly Elections of 1984', above n 268, 526.

[282] J Forrest, R J Johnston & C J Pattie, 'The Effectiveness of Constituency Campaign Spending in Australian State Elections During Times of Electoral Volatility: the New South Wales Case, 1988–95' (1999) 31 *Environment and Planning A* 1119, 1127.

[283] The summary of Forrest's research has been distilled from the following: Forrest, 'Campaign Spending in the New South Wales Legislative Assembly Elections of 1984', above n 268, 531–32; James Forrest, 'The Geography of Campaign Funding, Campaign Spending and Voting at the New South Wales Legislative Assembly Elections of 1984' (1992) 23 *Australian Geographer* 66, 75; James Forrest, 'The Effect of Local Campaign Spending on the Geography of the Flow-of-the-Vote at the 1991 New South Wales State Election' (1997) 28(2) *Australian Geographer* 229, 229, 234; James Forrest and Gary Marks, 'The Mass Media, Election Campaigning and Voter Response: The Australian Experience' (1999) 5 *Party Politics* 99, 110.

[284] Forrest and Marks, 'The Mass Media, Election Campaigning and Voter Response', above n 283, 110.

2 *Elements of Unfairness*

On the best available research, we can conclude that an increase in relative election spending tends to result in more votes in Australian elections. The impact of such spending, however, is likely to go beyond its specific impact on the level of voter support. While research has yet to determine the exact relationship between election spending and political debate, patterns of election spending are likely to influence the boundaries and content of political debate (what issues are on the public agenda and what are not, what topics are given prominence and what fall by the wayside). If so, the *amount* of election spending can influence the outcomes of elections in terms of voter support as well as the character of such contests. These relationships between election campaign spending and election outcomes give rise to the acute risk of unfair elections.

The question of unfairness in elections can be more specifically analysed. Part II, 'The Aims of a Democratic Political Finance Regime', identified key dimensions of electoral fairness: open access to electoral contests; fair rivalry amongst competing candidates and parties (including an absence of a serious imbalance between major and minor parties and some degree of 'equality of arms' between the major parties); and fairness between parties and candidates on the one hand, and third parties on the other.

Determining whether these principles are met is not a straightforward task. They involve comparative judgments admitting questions of degree. The various criteria of fairness are also far from precise: what does 'open access' or 'serious imbalance' actually mean?[285] That said, these principles and their criteria are not meaningless: as the following discussion will show, their meaning can be elaborated upon by a close consideration of actual patterns of election campaign spending.

Open access to electoral contests requires at least that the sums involved in engaging in a meaningful campaign should not deter candidates or parties that enjoy significant support in the electorate. There are clearly challenges in meeting this principle in the

[285] This is part of the difficulty in developing criteria for fairness. See Stanley Ingber, above n 67, 51–55.

Australian context – millions of dollars need to be raised for a meaningful national campaign with the amount running to hundreds of thousands of dollars at the state level. These amounts will typically pose a barrier to newcomers, as they would usually not have ready access to resources that established political parties enjoy. Whilst this barrier to open access stems from the (ineradicable) fact that national and state elections involve campaigns reaching out to thousands of voters, it is, however, exacerbated by the intensifying arms races as they increase the amounts that are necessary for a meaningful election campaign.

As noted earlier, fair rivalry amongst the competing parties implies an absence of a serious imbalance between minor and major parties. Any notion of imbalance clearly depends on a conception of the appropriate balance among the parties. One way to understand the appropriate balance is through the idea of 'barometer equality'.[286] What this idea conveys is the notion that, all things being equal, parties and candidates should spend amounts of money commensurate to the public support they enjoy.

Table 18 attempts to assess whether there is a serious imbalance amongst major and minor parties in federal elections according to this idea of 'barometer equality'. The measure it uses is the amount of election spending per first preference vote secured in the previous election. As there is no specific data on election campaign spending, total expenditure by all branches of the parties for a financial year in which a federal election was held has been used as a proxy for election spending. The rationale in using the number of first preference votes secured in the *previous election* is that these figures provide a crude indicator of the public support enjoyed by the parties in a particular election.

[286] R Hasen, *The Supreme Court and Election Law: Judging Equality from* Baker v. Carr *to* Bush v. Gore (NYU Press, 2003) 111.

Table 18: Election Spending per First Preference Vote for Previous Election

Party	1998 federal election	2001 federal election	2004 federal election	2007 federal election
ALP[287]	$7.15	$6.63	$7.59	$12.86
Coalition[288]	$6.35	$7.73	$8.31	$8.16
Greens	$3.49	$6.73	$5.72	$4.41
Democrats	$1.93	$3.60	$0.77	$1.88

Source: AEC Annual Returns 1998–99, 2001–02, 2004–05, 2007–08 available from Australian Electoral Commission, *Annual Returns Locator Service,* (28 January 2011) <http://periodicdisclosures.aec.gov.au/>.; AEC Election Results 1996, 1998, 2001, 2004, available from Australian Electoral Commission, *Federal Elections* (15 February 2011) <http://www.aec.gov.au/Elections/federal_elections/>.

According to the notion of 'barometer equality' adopted by Table 18, there is good reason to conclude that, with the exception of the 2001 federal election, there is a serious imbalance between the minor parties (the Democrats and Greens) on one hand and the major parties (the ALP and Coalition parties) on the other.

What about 'equality of arms' amongst the major parties in federal elections? Table 19 provides data specifying ALP election spending as a proportion of Coalition election spending. Again because there is no specific data on election spending, the figures for total payments made in a financial year in which a federal election was held have been used as proxies. We can see from this table that for the past four federal elections, there has not been 'equality of arms' between the ALP and the Coalition. This absence has not, however, consistently favoured one side over the other. In the 2007 federal election, the ALP spent a bit over 120 per cent of the amount spent by the Coalition. In the 2001 and 2004 federal elections, however, ALP spending constituted roughly 80 per cent of Coalition spending and in the 1998 federal election, ALP spending was around 93 per cent of Coalition spending.

[287] ALP figures in these two tables include Country Labor (abbreviated in AEC election voting data as 'CLR').
[288] Coalition' figures in these two tables include the Liberal Party, the National Party (including the Liberal/National joint Senate ticket) and the Country Liberal Party.

Table 19: ALP Election Spending as a Proportion of Coalition Election Spending for Federal Elections: 1998, 2001, 2004 and 2007

	1998 federal election	2001 federal election	2004 federal election	2007 federal election
ALP spending as a proportion of Coalition spending	92.4%	85.9%	82.6%	124.7%

Source: AEC Annual Returns 1998–99, 2001–02, 2004–05, 2007–08 available from Australian Electoral Commission, *Annual Returns Locator Service,* (28 January 2011) <http://periodicdisclosures.aec.gov.au/>.

Fairness in electoral contests is also determined by the amount and pattern of third party expenditure. There are two aspects of fairness implicated by such spending: first, fairness between the parties and candidates on one hand, and third parties on the other; and, second, fair rivalry amongst the parties and candidates. With the first aspect, political parties and candidates have a privileged role during election time because they are standing for election. This implies that their role should not be swamped by third parties, in particular, by such groups being able to outspend political parties and candidates. While third party expenditure clearly increased in the previous federal election, we have not yet reached the point where we can say that third parties are outspending political parties and candidates. Table 11 (above) has shown that third party expenditure stands at slightly over half the spending of the federal branches of the major parties.

Third party expenditure can also impact upon fair rivalry amongst political parties and candidates as such expenditure can be directed at supporting or opposing particular political parties. A full examination of how such expenditure has been used to support or oppose the various political parties is beyond the scope of this submission, as it would require detailed analysis of campaigning messages and techniques used by third parties. We can, however, get a very rough sense by dividing the amount of third party expenditure according to the type of third party, that is, whether the third party was a business, trade union, individual or a group (other than a business or trade union). Table 20 does this in relation to third party expenditure for the 2007 federal election. It can be seen here that of the various groups, trade unions were the biggest spenders with more than half of the third party expenditure coming from this source.

Business groups came in second having spent nearly a third of the total third party expenditure (Interestingly, this pattern of political expenditure stands in contrast with the pattern of political contributions where corporate contributions predominate).

Table 20: Third Party Political Expenditure for 2007 Federal Election Categorised According to Type of Third Party

	Business	Trade unions	Other groups	Individuals	Total
Total expenditure	$16 357 542.59	$27 040 514.33	$6 881 568.97	$312 579.00	$50 592 204.89
Proportion of total third party expenditure	32.3%	53.4%	13.6%	0.6%	100.0%

Source: AEC Annual Returns 2007–08 available from Australian Electoral Commission, *Annual Returns Locator Service,* (28 January 2011) <http://periodicdisclosures.aec.gov.au/>.

In the context of an election fought on industrial relations issues, we can make a crude assumption that business spending would have tended to favour the Coalition through its support for the *Work Choices* regime while trade union spending, mostly carried through the ACTU's 'Rights at Work' campaign,[289] would have typically favoured the ALP through its opposition to this regime. Could it be said that the relatively greater trade union spending tipped the balance unfairly in favour of the ALP and, therefore, further undermined 'equality of arms' between the ALP and the Coalition? It is true that the trade union campaign generally worked in the ALP's favour but this does not mean that it worsened the problem in relation to 'equality of arms'. This principle relates to fairness in the resources of major parties as they *compete for electoral support.* The principle does *not* require that major parties shall have *equal support;* to require the latter would clearly be contrary to the idea of a competition. Because the principle of 'equality of arms' concerns the level of resources as the major parties compete for electoral support, it only requires evaluation of the position of the major parties themselves and not the position of the major parties *together with* their supporters. The number of supporters that a major party has and the intensity of

[289] See generally K Muir, *Worth Fighting For: Inside the Your Rights At Work Campaign* (University of New South Wales Press, 2008) chs 3–5.

the campaigning engaged by these supporters are more an indicator of the success of the party in gathering support rather than a factor counting towards unfairness.

Could it, however, be said that the trade union campaign, specifically the 'Rights at Work' campaign, was an ALP campaign or, in more colloquial terms, a 'front group' for the ALP? There is, of course, good reason to suspect so because of trade union affiliation to the ALP. There is, however, strong countervailing evidence. True, there was clearly co-operation between 'Rights at Work' and the ALP but this does not yield the conclusion that the campaign was *controlled or directed* by the ALP. This is not least because the 'Rights at Work' campaign contemplated issuing 'how to vote' cards that did not endorse a vote for the ALP because of dissatisfaction with the ALP's industrial relations policy.[290]

The argument so far has been built upon complex concepts and various calculations. This thicket of figures and abstraction should not obscure – indeed, the argument depends on it – what is the central conclusion of this analysis: current patterns of federal election spending have meant increasingly unfair elections. Such spending has placed limits on open access to such elections, resulted in a serious imbalance between the major and minor parties and compromised 'equality of arms' amongst the major parties in a manner that favours the ALP.

Such unfairness also has significant implications for the principle of respecting political freedoms, in particular, freedom of political expression as election spending is largely directed at political communication, notably through political advertisements. Respect for freedom of political expression requires both 'freedom from' state regulation and 'freedom to' engage in political expression (see Part II, 'Aims of a Democratic Political Finance Regime'). 'Freedom from' clearly prevails in the Australian context with virtually no legal restrictions on the ability of parties, candidates and third parties to engage in election campaign spending in order to promote their positions (see below). The patterns of such spending, however, have undermined 'freedom to' or, put differently, the fair value of freedom of political

[290] Ibid 179–82. In insisting that the 'Rights at Work' campaign be controlled or directed by the ALP, the approach taken by this article bears some affinity to the concept of 'co-ordinated expenditure' under American campaign finance laws: see Samuel Issacharoff, Pamela Karlan and Richard Pildes, *The Law of Democracy: Legal Structure of the Political Process* (Foundation Press, 2007) 353–54.

expression, specifically, that of newcomers, minor parties and, to a lesser extent, the Coalition.

IV A BLUEPRINT FOR REFORM

In order to address the serious deficiencies relating to federal political funding and its regulation, broad-ranging reform is necessary. The key elements of such change are:

- Comprehensive and integrated regulation through federal, State and Territory schemes;
- A scheme for transparency;
- Election spending limits;
- Contribution limits (with an exemption for membership fees);
- Enhanced accountability for third party political spending;
- A Party and Candidate Support Fund;
- Measures to reduce the risk of parliamentary entitlements being used for electioneering; and
- Measures to prevent party-political government advertising.

A *Comprehensive and Integrated Regulation through Federal, State and Territory Schemes*

In devising a reform agenda for the federal scheme, it is vital to appreciate the role that such a scheme plays in broader regulation of Australian political funding. A crucial point here is that federal regulation *cannot* (and should not) provide a *comprehensive* political funding scheme – a scheme that fully regulates political funding at all levels of government.

This is due to constitutional constraints. Whilst the Commonwealth Parliament has legislative power over federal[291] (and Territory)[292] elections, it does not have an express power over State elections. Even when the Commonwealth Parliament has power to regulate particular aspects of State elections (for instance, through its regulation of federal elections), there may be limits on such power due to the doctrine of intergovernmental immunities.[293] This means that federal law cannot fully regulate the funding and spending involved in State elections.

---

[291] *Australian Constitution* ss 29-31, 34.
[292] *Australian Constitution* s 122.
[293] See *Austin v Commonwealth* (2003) 215 CLR 185.

State laws clearly cannot provide for a comprehensive *national* scheme due to their (limited) territorial reach. Moreover, State laws, even when restricted to election funding and spending occurring within the particular State, are constitutionally constrained from regulating those aspects related to federal elections.[294] Comprehensive national regulation of political funding then has to consist of federal, State and Territory laws.

It is not enough, however, that such laws be comprehensive in scope but they should also be *integrated.* This is especially given that inconsistencies between federal laws, on one hand, and State and Territory laws, on the other, will result in the latter be rendered inoperative.[295] The process of ensuring integration should be driven by both the executive and parliamentary arms of government; the Council of Australian Governments (COAG) provides an appropriate forum for the former while the various federal, State and Territory electoral matters committees should be the vehicle for the latter.

> *Recommendation 2:* COAG and the electoral matters committees should liaise to ensure that federal, State and Territory laws governing political funding are properly integrated.

B *A Scheme for Transparency*

Currently before the Commonwealth Parliament is the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010 (Cth).[296] It is this Bill that represents the most important disclosure measure proposed in recent times. If adopted, it will significantly enhance the transparency of political finance in Australia.

---

[294] See discussion in Queensland Government, *Reforming Queensland's Electoral System*, above n 6.
[295] *Australian Constitution* s 109.
[296] This Bill is based on two previous Bills, the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008 (Cth) and the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2009 (Cth). The later Bills were amended to take into account two of the recommendations made by the Joint Standing Committee on Electoral Matters, *Advisory Report: Commonwealth Electoral Amendment Bill 2008*, above n 118.

The Bill seeks to introduce a biannual disclosure system for registered parties, associated entities, donors and third parties based on a $1000 (non-indexed) threshold.[297] The threshold will not apply to political parties separately; instead, 'related' political parties will be treated as one.[298] Lodgement periods have been shortened and penalties have also been increased.[299] The Bill also proposes various bans in relation to gifts of foreign property. If enacted, it will be unlawful for:

- registered political parties and their state branches to receive such gifts;[300]
- candidates and groups of candidates to receive such gifts for specified periods;[301] and
- third parties, candidates and groups of candidates to incur political expenditure if a gift of foreign property enabled such expenditure and the donor's main purpose was to enable such persons or entities to incur political expenditure.[302]

The Bill also proposes various prohibitions relating to anonymous gifts. Subject to an exemption for certain anonymous gifts under $50,[303] it will be unlawful under these prohibitions for:

- registered political parties and their state branches to receive anonymous gifts;[304]
- candidates and groups of candidates to receive such gifts for specified periods;[305]

---

[297] Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010 (Cth), proposed amendments to *Commonwealth Electoral Act 1918* (Cth) ss 303A–305B, 314AA–314AEC.
[298] Ibid s 4(1).
[299] Ibid ss 304(2)–(3), 305A(3), 305B(1), 309(2)–(3), 314AB(1), 314AEA(1), 314AEB(3)(a), 314AEC(3)(a), 315(1)–(4). For details, see Joint Standing Committee on Electoral Matters, *Advisory Report: Commonwealth Electoral Amendment Bill 2008*, above n 118, 66–70.
[300] Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010 (Cth), proposed amendments to *Commonwealth Electoral Act 1918* (Cth) s 306AC.
[301] Ibid.
[302] Ibid ss 306AD(1)–(2).
[303] See definition of 'permitted anonymous gift': Ibid s 306AF. This exception is an adoption of a recommendation made in the Joint Standing Committee on Electoral Matters, *Advisory Report: Commonwealth Electoral Amendment Bill 2008*, above n 118, 64.
[304] Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010 (Cth), proposed amendments to *Commonwealth Electoral Act 1918* (Cth) s 306AH.
[305] Ibid s 306AH.

- associated entities to receive such gifts if the donor's main purpose was to enable the entities to incur political expenditure;[306] and
- third parties, candidates and groups of candidates to incur political expenditure if an anonymous gift enabled such expenditure.[307]

The bans relating to anonymous gifts and gifts of foreign property will be enforced in two ways: the amount involved in breaches of the bans will be payable to the Commonwealth and such breaches will also be criminal offences.[308]

Table 21 summarises the key differences between the current provisions and the provisions that will apply if the Bill is passed.

Table 21: Comparison of Current Provisions (*Commonwealth Electoral Act 1918*) with those of the Electoral Amendment (Political Donations and Other Measures) Bill 2010 (Cth)

	Current provisions: *Commonwealth Electoral Act 1918*	**Proposed provisions: Electoral Amendment (Political Donations and Other Measures) Bill 2010 (Cth)**
Registered political parties	Annual return (2009/2010) • Amounts exceeding $11 200 (indexed) to be itemised • Return to be lodged 20 weeks after financial year	Biannual return • Amounts of $1000 or more to be itemised • Return to be lodged 8 weeks after reporting period
Associated entities		
Candidates and groups of candidates	Post-election gift disclosure return (2009/2010) • Amounts exceeding $11 200 (indexed) to be itemised • Return to be lodged 15 weeks after polling day Post-election election expenditure return • Return to be lodged 15 weeks after polling day	Post-election gift disclosure return • Amounts of $1000 or more to be itemised • Return to be lodged 8 weeks after polling day Post-election election expenditure return • Return to be lodged 8 weeks after polling day

[306] Ibid s 306AD(3).
[307] Ibid s 306AJ.
[308] Ibid s 315.

Donors	Post-election return for gifts made to candidates and groups of candidates (2009/2010) • Any gifts received by the donor exceeding $11 200 (indexed) that were then used to make gifts to candidates or groups of candidates must be itemised • Return to be lodge 15 weeks after polling day Annual return for gifts made to registered political parties (2009/2010) • Any gifts received by the donor exceeding $11 200 (indexed) that were then used to make gifts to registered political parties must be itemised • Return to be lodged 20 weeks after end of financial year Annual political expenditure return (2009/2010) • Expenditure exceeding $11 200 (indexed) to be detailed • Return to be lodged 20 weeks after financial year	Post-election return for gifts made to candidates and groups of candidates • Any gifts received by the donor exceeding $1000 that were used by the donor to make gifts to candidates or groups of candidates must be itemised • Return to be lodged 8 weeks after polling day Biannual return for gifts made to registered political parties • Any gifts received by the donor exceeding $1000 that were then used to make gifts to registered political parties must be itemised • Returns to be lodged 8 weeks after reporting period Biannual political expenditure return • Expenditure of $1000 or more must be detailed • Return to be lodged 8 weeks after reporting period
Third parties	Annual returns for gifts enabling political expenditure if such expenditure exceeds $11 200 (indexed) (2009/2010) • Gifts that enabled political expenditure that exceed $11 200 (indexed) to be itemised • Return to be lodged 20 weeks after end of financial year Annual political expenditure return if such expenditure exceeds $11 200 (indexed) (2009/2010) • Return to be lodged 20 weeks after end of financial year	Biannual returns for gifts enabling political expenditure if such expenditure $1000 or more • Gifts that enabled political expenditure of $1000 or more to be itemised • Return to be lodged 8 weeks after end of reporting period Biannual political expenditure return if such expenditure exceeds $1000 • Return to be lodged 8 weeks after end of reporting period

Bans on anonymous gifts	Ban on receipt of anonymous gifts exceeding $11 200 (indexed) (2009/2010)	Ban on receipt of all types of all anonymous gifts except for certain anonymous gifts that are of less than $50 Ban on incurring political expenditure enabled by such anonymous gifts (excepting those of less than $50)
Ban on gifts of foreign property	None	Ban on receipt of foreign property Ban on incurring political expenditure enabled by gifts of foreign property

Source: *Commonwealth Electoral Act 1918* (Cth); Electoral Amendment (Political Donations and Other Measures) Bill 2010 (Cth).

There is great merit to most of the measures proposed by the Bill. The Bill will address the gaping holes in the federal disclosure scheme that result from the increasingly high disclosure thresholds and the ability to split contributions between different branches of a political party. It will also remove the current (nominal) prohibition against anonymous gifts and put in its place a much sturdier ban. It clearly increases the timeliness of disclosure by registered parties, associated entities, donors and third parties through biannual returns. Compliance is promoted through higher penalties and bans on gifts of foreign property.

In other respects, however, the Bill does not go far enough. It fails to propose any electoral (or political) expenditure disclosure obligations on registered political parties and their associated entities, an especially anomalous limitation given the obligations imposed on third parties. Further, no amendments have been proposed to make the disclosed information more meaningful. One way forward in this respect would be to adopt the British system of donation reports, whereby political parties are required to submit reports for all transactions considered to be donations which not only disclose the amount and date of such donations but also identify the status of the donor as an individual, trade union, company or other entity.[309]

[309] *Political Parties, Elections and Referendums Act 2000* (UK) c 41, sch 6.

Biannual returns do improve the frequency of disclosure but still do not provide the 'real time disclosure' required for informed voting (as discussed earlier). Various options can be adopted to address this issue. The Queensland provision of disclosure of gifts exceeding $100 000 within 14 days, or weekly donation reports during election periods such as applies under the British system could be required.[310] Another possibility worth seriously considering is that proposed by the Democratic Audit of Australia, a continuous disclosure scheme modelled upon the system supervised by the New York Campaign Finance Board.[311]

In other respects, the Bill goes too far. The offences relating to gifts of foreign property can be committed even when the recipient has conducted 'due diligence' on whether the gift had such a status and concluded that it did not. This stems from penalties relating to the offences generally applying as a matter of strict liability.[312] For instance, a party official who reasonably believed that a gift was not foreign-sourced based on the information s/he had, and after making extensive inquiries, might still be caught by these offences. These provisions should be amended to allow for a 'due diligence' defence.

The Bill also imposes overly onerous obligations in relation to third parties. The Bill preserves the structure of third party disclosure obligations whilst increasing their frequency from annual to biannual, and lowering the disclosure threshold from $11 200 (indexed) to $1000. This exacerbates current problems with these obligations. First, third parties are required to detail 'political expenditure' made in any financial year if such expenditure exceeds $11 200 (indexed). This includes 'the public expression of views on an issue in an election by any means'.[313] As Andrew Norton has correctly observed, this is difficult to determine prospectively, giving rise to

[310] Ibid ss 62–63.
[311] Democratic Audit of Australia, Submission to the Joint Standing Committee on Electoral Matters, Parliament of Australia, *Inquiry into the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008 (Cth)*, undated; New York Campaign Finance Board, *About Us* (2008) <http://www nyccfb.info/about/>.
[312] See Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010 (Cth), proposed amendments to *Commonwealth Electoral Act 1918* (Cth) s 315.
[313] *Commonwealth Electoral Act 1918* (Cth) s 314AEB(1)(a)(ii).

challenges in complying with the obligations.[314] Second, third parties are required to disclose gifts enabling 'political expenditure' if such gift/s exceed $11 200 (indexed). This, as Norton pointed out, captures donations to third parties that are not intended to fund 'political expenditure'.[315] The Bill represents a missed opportunity to tighten up these provisions.

Recommendation 3: The Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010 (Cth) should be enacted subject to the following changes:

- 'due diligence' defences be available in relation to offences; and
- the definition of 'political expenditure' (which applies to third parties) be tightened up.

Recommendation 4: Registered political parties and associated entities be required to provide:

- expenditure disclosure returns; and
- donation reports (modelled upon the British system).

Recommendation 5: Weekly donations reports be required during the election period.

C *Election Spending Limits*

1 *The Case for Election Spending Limits*

A range of measures needs to be adopted to tackle such unfairness and its impact upon freedom of political expression. The position of newcomers and minor parties needs to be *levelled up* in order to ameliorate the barriers to open access and the imbalance between minor and major parties. This task largely falls on the provision of public funding (discussed below). Also, the spending of the major parties, in particular that of the ALP, needs to be *levelled down.* This will help address the problems relating to open access and the imbalance between minor and major parties

[314] Andrew Norton, 'Diminishing Democracy: The Threat Posed by Political Expenditure Laws' (2009) 114 *The Centre for Independent Studies: Issue Analysis* 7 <http://www.cis.org.au/images/stories/issue-analysis/ia114.pdf>.
[315] Ibid 9.

but also those concerning 'equality of arms' amongst the major parties. A key measure in levelling down the spending of major parties is election spending limits and it is such regulation that forms the focus of the rest of this chapter.

Until the *EFED Act* came into effect on 1 January this year, the only election spending limits were those that apply to elections for the Tasmanian Legislative Council. These limits firstly ban persons and entities other than Legislative Council candidates and their agents from spending money in order to promote or secure the election of a candidate.[316] Second, they limit the amount that can be spent by Legislative Council candidates (and their agents). In 2011, the limit, which increases by $500 each year, stands at $13 000.[317] At the federal level, and in all other states and territories, there were no overall limits on the election spending of parties or candidates. This was not always the case. Expenditure limits on *candidate spending* were, in fact, a long-standing feature of political finance regulation in Australia. They were in place at the federal level for 80 years and were also common at the state level, including Victoria, South Australia and Western Australia. However, after decades in operation these limits on the campaign expenditure of candidates were removed in 1980.[318] Moreover, an attempt in 1991 to restrict campaign spending through a ban on political advertising together with a 'free-time' regime came unstuck after being ruled constitutionally invalid by the High Court (further discussed below).

There are compelling reasons to reinstate election spending limits, particularly at the federal level. The *fairness* rationale has already been alluded to. As Eric Roozendaal, former General Secretary of the New South Wales ALP and current New South Wales Treasurer has argued, these limits have 'the purpose of achieving a fairer political process'.[319] This rationale was implicit in the justification that Senator O'Connor gave more than a century ago for candidate expenditure limits enacted by the original *Commonwealth Electoral Act*:

---

[316] *Electoral Act 2004* (Tas) s 159.
[317] Ibid s 160.
[318] See Deborah Cass and Sonia Burrows, 'Commonwealth Regulation of Campaign Finance – Public Funding, Disclosure and Expenditure Limits' (2000) 22 *Sydney Law Review* 477, 484–85, 491.
[319] New South Wales, *Parliamentary Debates*, Legislative Council, 21 September 2004, 11118 (Eric Roozendaal).

> If we wish to secure a true reflex of the opinions of the electors, we must have … a system which will not allow the choice of the electors to be handicapped for no other reason than the inability of a candidate to find the enormous amount of money required to enable him [sic] to compete with other candidates.[320]

There are clear connections between the fairness rationale and election spending limits: if properly designed, they will facilitate open access to electoral contests by reducing the costs of meaningful campaigns, thereby increasing the competitiveness of these contests; they will further assist in addressing the imbalance between the minor and major parties and will contain departures from 'equality of arms' amongst the major parties.

Research on New Zealand and Canadian spending limits support these arguments. Academics Johnston and Pattie have argued that:

> In New Zealand, the low spending limits for candidates in the MMP electorate contest clearly do [create a relatively 'level playing field'], by making it possible for the smaller parties' candidates in the MMP electorates contests to campaign as intensively as those representing the two larger parties [Labour and National], without having to raise large sums. This clearly acts as a substantial constraint on those two larger parties whose candidates are generally able to outspend their opponents and in many places to obtain sufficient money to come close to the expenditure maximum.[321]

Similarly, research on the Canadian spending limits has concluded that these measures are mostly binding on incumbent candidates and that higher limits correlated with lower electoral turnout, less close races and fewer candidates running.[322]

---

[320] Commonwealth, *Parliamentary Debates*, Senate, 30 January 1902, 9542 (Richard O'Connor).
[321] Johnston and Pattie, 'Money and Votes', above n 273, 132.
[322] Kevin Milligan and Marie Rekkas, 'Campaign Spending Limits, Incumbent Spending, and Election Outcomes' (2008) 41(4) *Canadian Journal of Economics* 1351.

The other rationale for regulating political spending lies not so much with its impact upon electoral outcomes but its relationship to fundraising. While research into this relationship is virtually non-existent, a tight relationship between the demand for funds and the supply of funds can be assumed.[323] Notwithstanding the complicated effect of election campaign spending on voter support, what is crucial in this dynamic is that parties and candidates *perceive* increased spending to have a positive impact on voter support (or at least not to have a negative impact). It is this perception that fuels the need to engage in more intensive fundraising like the sale of access. These fundraising practices, in turn, undermine the ability of political parties to perform their legitimate functions. The New South Wales Select Committee on Electoral and Political Party Funding captured these problems in lucid terms when it stated:

> The Committee is concerned about escalating spending levels, and in particular the extensive use of political advertising. The Committee does not consider this escalation to be healthy or sustainable. It increases pressure on parties and candidates to engage in more fundraising, thus taking time from their other representative and policy functions … The increased reliance on private funding also fosters strong ties between politicians and donors, giving rise to perceptions of undue influence.[324]

What this suggests is that there is a separate case for regulating spending in order to tackle *corruption*. The anti-corruption rationale[325] argues that election spending limits can perform a *prophylactic* function by *containing* increases in campaign expenditure and therefore, the need for parties to seek larger donations, especially donations which carry the risk of graft and undue influence.[326] If effective, these limits will also regulate the time spent by the parties on fundraising and allow them to devote more time to their other functions, for instance, their agenda-setting and governance functions (see Part II, 'Aims of a Democratic Political Finance Regime'). The

[323] There are, of course, other factors that influence fundraising including incumbency (in assisting in raising funds) and the marginality of a seat (that is, the more marginal, the more emphasis on fundraising). See Forrest, 'The Geography of Campaign Funding, Campaign Spending and Voting at the New South Wales Legislative Assembly Elections of 1984' above n 268, 67.
[324] Select Committee on Electoral and Political Party Funding, Parliament of New South Wales, *Electoral and Political Party Funding in New South Wales* (2008) [8.8].
[325] Keith Ewing, 'Promoting Political Equality: Spending Limits in British Electoral Law' (2003) 2 *Election Law Journal* 499, 507.
[326] Committee on Standards in Public Life, above n 194, 116–17.

prophylactic function of expenditure regulation can be performed by limits set at present levels of campaign expenditure. Such limits will clearly ensure that campaign expenditure does not increase beyond this point. Otherwise, a future increase in real campaign expenditure would lead political parties, in the absence of more generous public funding, to seek extra and/or larger donations to meet burgeoning campaign costs. This pressure will increase the risk of corruption that arises with political donations.

Besides a prophylactic function, spending limits can also perform a *remedial function*. In light of the recent rapid increases in election spending, there is good cause to conclude that present spending levels are excessive and to carry an inordinate risk of corruption. If so, spending limits should be aimed at decreasing the amount of real spending and, in turn, the risk of graft and undue influence.

Election spending limits will also assist in ensuring that other regulatory measures work more effectively. Increased public funding of political parties and candidates (as recommended below) raises a serious danger of inflating campaign expenditure, a risk which can be dealt with by properly designed election spending limits.

Election spending limits further enhance the operation of contribution limits in two ways. First, it will be recommended below that these limits be subject to an exemption for membership fees including trade union affiliation fees. This exemption would likely mean that that the ALP would increase its funding advantage over the Coalition. Election spending limits are necessary to meet this problem by preventing the ALP from being able to *use* its funding advantage.

Second, contribution limits will significantly reduce the private income of the major parties with consequent impact on their 'freedom to' engage in political expression. Election spending limits can, however, go some way to ameliorating this impact. As philosopher John Rawls has correctly observed, the public arena is a finite and 'limited space'.[327] Hence, what matters in terms of political deliberation is the *relative* capacity of citizens and their groups to engage in political expression. This is

[327] Rawls, *Justice as Fairness: A Restatement*, above n 37, 150.

especially true in relation to electoral *contests*. For instance, what matters more is whether the Coalition can match the level of ALP spending rather than the objective levels of its spending (e.g. how many millions are being spent?). It is here that election spending limits can make a distinct contribution. By capping the maximum amount that any party can spend, it does, at the very least, contain the costs of an 'adequate' campaign for the major parties. If set at a level lower that present campaign expenditure, it can also reduce such costs. Thus, if election spending limits are enacted together with contribution limits, the adverse impact of the latter on 'freedom to' can be significantly contained by the former.

There are then cogent reasons for election spending limits. Nevertheless, various arguments have been made against such measures. It might be said that rather than having election spending limits, there should be a ban on political advertising like that enacted by the *Political Broadcasts and Political Disclosures Act 1991* (Cth). While the High Court did find this ban to be constitutionally invalid in the *ACTV* case (discussed below), this decision does not rule out a differently designed ban that more fully addressed the concerns raised by the High Court.

However, there are good in reasons in principle why a ban on political advertising should not be adopted. If enacted without spending limits, the ban will be under-inclusive and fail to capture key items of election spending, for instance, direct mail, opinion polling and consultancies. Even if enacted with spending limits, there are reasons for not proceeding with a ban on political advertising. Principally, the aims that are pursued by a ban are similar to those that underlie election spending limits, the fairness and anti-corruption rationales. The difference between a ban and such limits, aside from their different scope, is that the former by its nature involves a much more severe limitation of freedom of political communication. There is, however, little justification for such limitation if spending limits can effectively pursue the fairness and anti-corruption rationales.

There are two other arguments against election spending limits. There is the argument that expenditure limits are 'unenforceable'[328] or 'unworkable', which are usually

[328] Committee on Standards in Public Life, above n 194, 172.

presupposed by Australia's experience with expenditure limits.[329] Arguments based on 'unenforceability' or 'unworkability', however, typically suffer from vagueness. In Australia, these arguments, as they relate to campaign expenditure limits, appear to be a proxy for two specific arguments: that '[a]ny limits set would quickly become obsolete';[330] and that such limits would be overly susceptible to non-compliance.[331]

It is possible to quickly dispense with the first argument. For instance, the problem with obsolescence can be dealt with by automatic indexation of limits together with periodic reviews. As to the question of non-compliance, it is useful at the outset to make some general observations concerning the challenges faced by the enforcement of party finance regulation. Certainly, all laws are vulnerable to non-compliance. Political finance regulation is no exception and the degree of compliance will depend on various factors. It will depend on the willingness of the parties to comply. This, in turn, will be shaped by their views of the legitimacy of the regulation process and their self-interest in compliance. The latter cuts both ways. For example, breaching expenditure limits might secure the culpable party a competitive advantage through increased expenditure, but this needs to be balanced against the risk of being found out and the resulting opprobrium. Weak laws without adequate enforcement or penalties invite weak compliance.

The extent of compliance will also depend on methods available to the parties to evade their obligations. The effectiveness of political finance laws invariably rubs up against the 'front organisation' problem. This problem arises when a party sets up entities that are legally separate from the party but can still be controlled by that party. Political finance laws will be undermined if parties channel their funds and expenditure to these entities and these entities fall outside the regulatory net or are subject to less demanding obligations. The answer to this problem is to adopt the

---

[329] Commonwealth of Australia, *Inquiry into Disclosure of Electoral Expenditure* (1981) 8–9, 13.
[330] Committee on Standards in Public Life, above n 194, 172.
[331] Before they were repealed, the Australian expenditure limits were, in fact, subject to widespread non-compliance. For example, 433 out of 656 candidates for the 1977 federal elections did not file returns disclosing their expenditure: Commonwealth of Australia, *Inquiry into Disclosure of Electoral Expenditure*, above n 329, 18. However, this is largely because the laws were left to decay. Indeed as early as 1911 the Electoral Office and the Attorney-General's Department signalled lax compliance in a policy of not prosecuting unsuccessful candidates for failure to make a return: Patrick Brazil (ed), *Opinions of the Attorneys-General of the Commonwealth of Australia: Vol 1 1901–14* (Australian Government Publishing Service, 1981) 499–500.

fairly robust approach towards 'front organisations' found in the *Commonwealth Electoral Act.* The definition of 'associated entity' is potentially broad and the scheme treats 'associated entities' as if they were registered political parties by subjecting both to identical obligations.[332]

A separate issue faced by political finance laws lies with third parties. The challenge posed by third parties is not that the laws provide a vehicle for parties to evade their obligations simply because third parties are, by definition, not appendages of the parties. Political finance laws that do not deal adequately with the 'third party' problem risk not evasion but irrelevance. For instance, if there was substantial third-party electoral activity, then a regulatory framework centred upon parties and their associated entities would, in many ways, miss the mark by failing to regulate key political actors. This is not an insurmountable problem though and can be easily dealt with by extending regulation to third parties (discussed below).

The above circumstances demonstrate that political finance regulation will *always* face an enforcement gap. But to treat these circumstances as fatal to any proposal to regulate party finance would be to give up on such regulation. By parity of reasoning, it should not necessarily be fatal to the proposal to impose expenditure limits because it experiences the problem of enforcement attending all political finance regulation. The key issue is whether there is something peculiar to such limits that make it particularly vulnerable to non-compliance. It is this that is hard to make out. On its face, the regulation of political expenditure would be easier to enforce than regulation of political funding because a large proportion of such expenditure is spent on visible activity like political advertising and broadcasting. Further, the parties themselves, in a competitive system, have incentives to monitor each others' spending.

Finally, there is the argument that election spending limits constitute an unjustified interference with freedom of political communication.[333] This argument must be taken seriously, not only because it poses a question of principle but also because in Australia, a statute which unjustifiably infringes the constitutional freedom of

[332] The principle of subjecting 'front organisations' to the same obligations which apply to political parties dates back to the Joint Select Committee on Electoral Reform, Parliament of Australia, *First Report*, (1983) 166.
[333] See Committee on Standards in Public Life, above n 194, 118.

political communication will be unconstitutional. These questions will be taken up in the following section.

2 *A Case Against Election Spending Limits? Freedom of Political Expression and the Commonwealth Constitution*

The High Court has implied a freedom of political communication from sections of the *Commonwealth Constitution* relating to representative and responsible government, specifically sections 7, 24, 64 and 128.[334] This freedom, while derived from the *Commonwealth Constitution*, also applies to state and territory legislation by virtue of the fact that discussion of matters at the level of State and Territory (or local government) are able to bear upon the choices to be made at federal elections. According to the High Court, this inter-relationship results from national political parties, the financial dependence of state, territory and local governments on federal funding and 'the increasing integration of social, economic and political matters in Australia'.[335]

The current test for determining whether this freedom has been breached (often referred to as the *Lange* test) has two limbs:

- Does the law (of a state or federal parliament or a territory legislature) effectively burden freedom of communication about government or political matters either in its terms, operation or effect?
- If the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end (in a manner) which is compatible with the prescribed system of representative and responsible government?[336]

At the outset, it is important to clear up a possible misunderstanding: the view that the High Court's decision in *Australian Capital Television Pty Ltd v Commonwealth*[337] (*ACTV*) stands in the way of regulating election spending. What follows is an

[334] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 566–67.
[335] Ibid 571–72. See also *ACTV* (1992) 177 CLR 106, 142 (Mason CJ), 168–69 (Deane and Toohey JJ), 215–17 (Gaudron J); *Coleman v Power* (2004) 220 CLR 1, 45 (McHugh J).
[336] The test stated in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 571–72 as modified by a majority in *Coleman v Power* (2004) 220 CLR 1, 50 (McHugh J), 78 (Gummow and Hayne JJ), 82 (Kirby J).
[337] (1992) 177 CLR 106.

extended treatment of this decision and its implications for regulating election spending.

The provisions challenged in that case were found in Part IIID of the *Broadcasting Act 1942* (Cth). These provisions, which were added into the principal statute by the *Political Broadcasts and Political Disclosures Act 1991* (Cth), had several key elements. Foremost, they prohibited political advertising on radio and television during federal, state, territory and local government elections. Exceptions were, however, made for various types of broadcasts including policy launches, news and current affairs programs. Alongside the bans on political advertising was a scheme that provided 'free' broadcasting time to political parties. While allocated by the Australian Broadcasting Tribunal, 90% of the time was reserved to parties represented in the previous parliament that were contesting the current election.

In a 5–2 decision, the High Court struck down the legislation for breaching the implied freedom of political communication. All the judges accepted that there were legitimate objectives underlying the legislation, but the majority did not regard the scheme as pursuing these objectives in a constitutionally appropriate manner. In his leading judgment, Mason CJ focussed on what his Honour saw as the discriminatory aspects of the legislation. Speaking of the ban on political advertising, Mason CJ said:

> Pt IIID severely restricts freedom of communication in relation to the political process, particularly the electoral process, in such a way as to discriminate against potential participants in that process. The sweeping prohibitions against broadcasting directly exclude potential participants in the electoral process from access to an extremely important mode of communication with the electorate. Actual and potential participants include not only the candidates and established political parties but also the electors, individuals, groups and bodies who wish to present their views to the community.[338]

The 'free-time' scheme, according to Mason CJ, was similarly defective as it was 'weighted in favour of established political parties represented in the legislature

[338] Ibid.

immediately before the election and the candidates of those parties; it discriminates against new and independent candidates'.[339]

While welcomed by some academic commentators as reflecting a concern for freedom of political speech, the *ACTV* decision has also had its share of detractors. While recognising that the invalid scheme was far from perfect, some critics have argued that it still improved the fairness of Australian elections. Tucker, for instance, has contended that 'it is difficult to maintain that the proposed changes would have made the system of electoral competition more unfair than it is now'.[340] Fastening upon the established parties-bias of the 'free-time' scheme, Sarah Joseph has similarly argued that:

> It is true that Division 3 [of Part IIID: 'Free election broadcasting time'] effectively guaranteed that the little remaining broadcast advertising would be dominated by established political elites. However, statistics indicate that newer political parties use *less than* 10% of broadcast political advertising space. Therefore, Division 3 largely improved broadcast access for non-incumbents, while Part IIID as a whole removed the advantage gained by wealthy parties able to engage in saturation advertising.'[341]

This outcome led Joseph to conclude that 'the High Court majority essentially reinforced the entrenched power of wealthy political elites and their corporate backers by giving them a constitutional 'right' to drown out the voices of less wealthy political players'.[342] For Tucker, what appears at first glance as a general defence of freedom of political expression has much more partisan implications with 'the judges who support the majority in *Australian Capital Television* … more concerned to protect the right of wealthy citizens, corporations and lobby groups to distort the system of communications'.[343] All this seems to stem from the High Court's neglect

---

[339] Ibid.
[340] David Tucker, 'Representation-Reinforcing Review: Arguments about Political Advertising in Australia and the United States' (1994) 16 *Sydney Law Review* 274, 284.
[341] Sarah Joseph, 'Political Advertising and the Constitution' in Glenn Patmore (ed), *Labor Essays 2002: The Big Makeover: A New Australian Constitution* (Pluto Press in association with the Australian Fabian Society, 2001) 53.
[342] Ibid.
[343] Tucker, 'Representation-Reinforcing Review', above n 340, 283–86.

of the context in which the legislation was introduced and its passing over of crucial questions like 'who is doing all the speaking, how they are doing it, how much they are paying for it and what effect it is having upon the democratic system which free speech is designed to protect'.[344]

Deeper concerns have also been expressed as to the legitimacy of the High Court's decision. The act of implying the freedom itself has been criticised,[345] as has the High Court majority's rejection of the conception of democracy and freedom of political communication advanced by the legislature. As Tucker[346] and Campbell[347] have noted, the Commonwealth Parliament was motivated by the aim of enhancing the democratic process and the *ACTV* decision is not a case where the High Court majority upheld democratic principles against a self-serving Parliament but rather a case of disagreement between the legislative and judicial branches as to which conception of democratic principles should prevail.[348]

These criticisms remain relevant to the current debate as to the constitutionality of election spending limits. They put the *ACTV* case in better perspective and clearly suggest that its outcome was far from inevitable. A differently-constituted High Court might very well follow the dissent of Brennan J which accepted that there was an implied freedom of political communication, but nevertheless found that the scheme was not invalid as it was 'comfortably proportionate to the important objects which it seeks to obtain … ensuring an open and equal democracy'.[349] Indeed, in 2008, the UK House of Lords upheld a ban on political advertising that was much more severe than the scheme challenged in the *ACTV* case as being compatible with the free speech guarantee of the *Human Rights Act 1998* (UK).[350]

---

[344] Deborah Cass, 'Through the Looking Glass: The High Court of Australia and the Right to Political Speech' in Tom Campbell & Wojciech Sadurski (eds), *Freedom of Communication* (Dartmouth, 1994) 170, 193.
[345] See generally Tom Campbell, 'Democracy, Human Rights, and Positive Law' (1994) 16 *Sydney Law Review* 195.
[346] Tucker, 'Representation-Reinforcing Review', above n 340, 283–84.
[347] Campbell, 'Democracy, Human Rights, and Positive Law', above n 345, 202–3.
[348] The latter would often characterise judicial decisions on the protection of rights: see Jeremy Waldron, *Law and Disagreement* (Clarendon Press, 1999) chs 10–13.
[349] *ACTV* (1992) 177 CLR 106, 161.
[350] *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] 3 All ER 193.

In any event, the *ACTV* decision, or for that matter the implied freedom of political communication, does not prohibit regulation of political communication, in particular election campaign spending. Neither stand for the proposition that bans on political advertising are necessarily unconstitutional. As George Williams has correctly observed, while the High Court struck down the ban challenged in *ACTV*, 'the Court did not indicate that other schemes regulating political advertising will also be unconstitutional'.[351] On the contrary, in the *ACTV* case even judges in the majority considered that restrictions on political communication may still be constitutional. For instance, Chief Justice Mason, after accepting that there were legitimate concerns regarding corruption and the advantage of the wealthy in the political debate, stated:

> Given the existence of these shortcomings or possible shortcomings in the political process, it may well be that some restrictions on the broadcasting of political advertisements and messages could be justified, notwithstanding that the impact of the restrictions would be to impair freedom of communication to some extent. In other words, a comparison or balancing of the public interest in freedom of communication and the public interest in the integrity of the political process might well justify some burdens on freedom of communication.[352]

More fundamentally perhaps, the regulation of political communication is clearly permitted (or, more accurately, not prohibited) by the *Lange* test. In *Coleman v Power,* Justice McHugh explained one of the key reasons for this*:*

> Communications on political and governmental matters are part of the system of representative and responsible government, and they may be regulated in ways that enhance or protect communication of those matters. Regulations that have that effect do not detract from the freedom. On the contrary, they enhance it.'[353]

---

[351] George Williams, Submission to the Joint Standing Committee on Electoral Matters, Parliament of Australia, *Inquiry into Disclosure of Donations to Political Parties and Candidates,* 5 April 2004).
[352] *ACTV* (1992) 177 CLR 106, 145.
[353] *Coleman v Power* (2004) 220 CLR 1, 52 (McHugh J).

In brief, the raison d'être of the implied freedom itself permits regulation of political communication in order to enhance political communication.

Having cleared this possible misunderstanding, we can now proceed to specifically analyse the election spending limits. With the first limb of the *Lange* test, it is clear that such limits burden the freedom to communicate about government or political matters because election spending is principally devoted to covering the costs of paid political communication, notably radio, television and newspaper advertisements.

In relation to the second limb of the *Lange* test and the question of legitimate aims, election spending limits are animated by two central purposes: they aim to prevent corruption and its risk, as well as seek to promote fairness in elections (see earlier discussion). Both the anti-corruption and fairness rationales of election spending limits will most likely be considered legitimate aims under the *Lange* test. The anti-corruption rationale is directed at protecting the integrity of representative government; in *ACTV,* Chief Justice Mason accepted as legitimate the aim of the legislation 'to safeguard the integrity of the political system by reducing, if not eliminating, pressure on political parties and candidates to raise substantial sums of money in order to engage in political campaigning on television and radio, a pressure which renders them vulnerable to corruption and to undue influence by those who donate to political campaign funds'.[354]

In relation to the fairness rationale, both Chief Justice Mason and Justice McHugh in *ACTV* accepted the objective of promoting a 'level playing field' in elections as a legitimate aim.[355] This conclusion is perhaps unsurprising from the perspective of first principles. A key element of the system of representative government prescribed by the *Commonwealth Constitution* is that members of the federal Parliament be 'directly chosen' by the people of the Commonwealth.[356] In *Lange,* the High Court variously characterised this element as requiring a 'true choice' 'with an opportunity to gain an appreciation of the available alternatives' or as mandating a 'free and

[354] *ACTV* (1992) 177 CLR 106, 129.
[355] Ibid 146 (Mason CJ), 239 (McHugh J).
[356] *Australian Constitution* ss 7, 24.

informed choice as electors'.[357] This was a key step towards implying the freedom of political communication, the reasoning being that there could not be such choice if electors were not able to obtain information relevant to their voting decisions.[358]

The aim of promoting fair elections is similarly aimed at supporting 'true' or 'informed' choice. By lessening the risk of those with more money dominating elections through their spending, it allows other parties and candidates to put forth their policies and positions. In the words of Justice Brennan in *ACTV,* it seeks 'to reduce the untoward advantage of wealth in the formation of political opinion',[359] thereby providing electors with fuller information concerning the various alternatives in making their voting decisions. In accordance with the sentiments expressed by Justice McHugh in *Coleman v Power,* the fairness rationale in this respect, whilst burdening or regulating political communication, is aimed at enhancing such communication.

To sum up the argument so far: election spending limits do place a burden on freedom of political communication but do so in pursuit of the legitimate aims of preventing corruption and promoting fairness in elections. The final question under the *Lange* test remains: Are these limits reasonably appropriate and adapted to serve such aims? This question cannot be answered in the abstract and much will depend upon the design of the limits,[360] a matter that will be taken up in the following discussion.

[357] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560 (adopting Dawson J's dicta in *ACTV* (1992) 177 CLR 106, 187).
[358] Ibid.
[359] *ACTV* (1992) 177 CLR 106, 158.
[360] For fuller discussion of the constitutional issues concerning specifically designed election spending limits, see Tham, *Towards a More Democratic Political Funding Regime in New South Wales*, above n 8, 101-109.

3 *Australian and Overseas Spending Limits*

There is a range of ways to configure election spending limits so that they lessen the risk of corruption and promote electoral fairness (thereby enhancing 'freedom to' engage in political expression), whilst also ensuring that political expression enjoys meaningful 'freedom from' regulation, so as to conform to constitutional restrictions. The key aspects of such limits that need to be determined are:

- the political expenditure to which they apply;
- the period for which they apply;
- the political participants covered by the limits (for example, political parties, candidates, third parties);
- types of limits (national, state and/or electorate); and
- the amounts at which they are set and how they are calculated.

In designing federal spending limits, there are various precedents that can be relied upon both locally and overseas. As mentioned earlier, Tasmania currently has spending limits that apply to its upper house elections. The *Election Funding, Expenditure and Disclosures Act 1981* (NSW) (*'EFED Act'*) presently has the most comprehensive spending limits in Australia. They apply to 'electoral communication expenditure' during the 'capped expenditure period'.[361] Section 87 of the Act defines 'electoral communication expenditure' in the following way:

> **87 Meaning of "electoral expenditure" and "electoral communication expenditure"**
>
> (1) For the purposes of this Act, "electoral expenditure" is expenditure for or in connection with promoting or opposing, directly or indirectly, a party or the election of a candidate or candidates or for the purpose of influencing, directly or indirectly, the voting at an election.
> (2) For the purposes of this Act, "electoral communication expenditure" is electoral expenditure of any of the following kinds:

[361] *EFED Act* s 95I.

(a) expenditure on advertisements in radio, television, the Internet, cinemas, newspapers, billboards, posters, brochures, how-to-vote cards and other election material,

(b) expenditure on the production and distribution of election material,

(c) expenditure on the Internet, telecommunications, stationery and postage,

(d) expenditure incurred in employing staff engaged in election campaigns,

(e) expenditure incurred for office accommodation for any such staff and candidates (other than for the campaign headquarters of a party or for the electorate office of an elected member),

(f) such other expenditure as may be prescribed by the regulations as electoral communication expenditure,

but is not electoral expenditure of the following kinds:

(g) expenditure on travel and travel accommodation,

(h) expenditure on research associated with election campaigns,

(i) expenditure incurred in raising funds for an election or in auditing campaign accounts,

(j) such other expenditure as may be prescribed by the regulations as not being electoral communication expenditure.

(3) Electoral expenditure (and electoral communication expenditure) does not include:

(a) expenditure incurred substantially in respect of an election of members to a Parliament other than the NSW Parliament, or

(b) expenditure on factual advertising of:

(i) meetings to be held for the purpose of selecting persons for nomination as candidates for election, or

(ii) meetings for organisational purposes of parties, branches of parties or conferences, committees or other bodies of parties or branches of parties, or

(iii) any other matter involving predominantly the administration of parties or conferences, committees or other bodies of parties or branches of parties.

'Capped expenditure period' is the concept that captures the period to which these limits apply. For the March 2011 NSW elections, this period will run from 1 January 2011 to the end of the polling day, 26 March 2011.[362] In subsequent elections, section 95H provides for the following rules:

95H Capped expenditure period

> The applicable cap on electoral communication expenditure for a State election applies to electoral communication expenditure during each of the following periods (the "capped expenditure period"):
>
> . . .
>
> (b) in the case of a subsequent general election to be held following the expiry of the Legislative Assembly by the effluxion of time-the period from and including 1 October in the year before which the election is to be held to the end of polling day for the election
>
> (c) in any other case-the period from and including the day of the issue of the writ or writs for the election to the end of polling day for the election.

What these rules provide is a default position where the spending limits apply for close to six months prior to the NSW elections.

Table 22 summarises other aspects of the spending limits under *EFED Act*.

Table 22: Spending Caps under *Election Funding, Expenditure and Disclosures Act 1981* (NSW)

Political actor	Applicable cap
Political parties with Legislative Assembly candidates	• $100,000 x number of electoral districts in which a candidate is endorsed; • Additional cap of $50,000 for each electorate.
Political parties that have 10 or fewer Legislative Assembly candidates	$1, 050, 000

[362] Ibid s 95H(a).

Group of Legislative Council candidates not endorsed by any party	$1,050,000
Party-endorsed Legislative Assembly candidates	$100,000
Legislative Assembly candidates not endorsed by any party	$150,000
Third-party campaigners	• $1,050,000 if registered prior to commencement of capped expenditure period; • $525,000 in any other case; • Additional cap of $20,000 for each electorate.

Source: *EFED Act* s 95F

It should be noted that NSW scheme has important provisions aggregating expenditure for the purposes of these limits.[363] Notably, there are provisions relating to 'associated parties'. Section 95G(1) provides that registered parties are "associated" if:

> (a) they endorse the same candidate for a State election, or
>
> (b) they endorse candidates included in the same group in a periodic Council election, or
>
> (c) they form a recognised coalition and endorse different candidates for a State election or endorse candidates in different groups in a periodic Council election.

Section 95G(2) further provides that:

(2) Aggregation of expenditure of associated parties If 2 or more registered parties are associated:

> (a) the amount of $100,000 of electoral communication expenditure in respect of any electoral district in which there are candidates endorsed by the associated parties is, for the purpose of calculating the applicable cap on electoral communication expenditure by those parties under section 95F (2), to be shared by those parties (and is not a separate amount for each of those parties), and

[363] See *EFED Act* s 95G.

> (b) the amount of $1,050,000 of electoral communication expenditure in respect of any group of candidates endorsed by those parties is, for the purpose of calculating the applicable cap on electoral communication expenditure by those parties under section 95F (4), to be shared by those parties (and is not a separate amount for each of those parties).

The Queensland Government's publication, *Reforming Queensland's Electoral System*[364] proposes spending limits modelled upon the NSW scheme. The Queensland proposals bear the following similarities to the NSW scheme:

- the limits will apply for six months prior to the latest possible date for a State election;
- there will be state-wide and electorate specific limits (it is unclear, however, whether there will be provisions aggregating expenditure – in particular, those relating to 'associated parties');
- Political parties, candidates and third parties will be to these limits.[365]

An important difference between the Queensland proposal and the NSW scheme, however, concerns the political expenditure to which the respective limits apply. As noted above, the NSW scheme applies to 'electoral communication expenditure', a sub-set of 'electoral expenditure' under the *EFED Act* (see above). The Queensland Government, however, proposes to subject all 'electoral expenditure' under the *Electoral Act 1992* (Qld) to the spending limits. Under this Act, 'electoral expenditure' is defined in the following way:[366]

electoral expenditure, for an election, means expenditure incurred (whether or not incurred during the election period) on—

> (a) the broadcasting, during the election period, of an advertisement relating to the election; or
> (b) the publishing in a journal, during the election period, of an advertisement relating to the election; or

[364] Queensland Government, *Reforming Queensland's Electoral System*, above n 6.
[365] Ibid 11-12.
[366] *Electoral Act 1992* (Qld) sch 1 s 308.

(ba) the publishing on the internet, during the election period, of an advertisement relating to the election, even if the internet site on which the publication is made is located outside Queensland; or

(c) the display, during the election period, at a theatre or other place of entertainment, of an advertisement relating to the election; or

(d) the production of an advertisement relating to the election, being an advertisement that is broadcast, published or displayed as mentioned in paragraph (a), (b) or (c); or

(e) the production of any material (other than material mentioned in paragraph (a), (b) or (c)) that is required under section 161 to include the name and address of the author of the material or of the person authorising the material and that is used during the election period; or

(f) the production and distribution of electoral matter that is addressed to particular persons or organisations and is distributed during the election period; or

(g) the carrying out, during the election period, of an opinion poll, or other research, relating to the election.

The significance of this difference will be discussed later.

Guidance can also be sought from the spending limits that exist in Canada, New Zealand and the United Kingdom. Table 23 sets out the main features of these spending limits as they apply to parties and candidates.

Table 23: Election Spending Limits in Canada, New Zealand and the United Kingdom

	Period for which limits apply	Spending covered	Level of limits
Canada			
Parties	'Election period', that is, the period beginning with the issue of the writ and ending on poll day	'Election expenses', that is, costs incurred to directly promote or oppose a registered political party, its leader or its candidate during an 'election period'	Based on the number of electors for the electoral district in which a party has fielded a candidate (For the 2006 general election, the maximum stood at C$18 3 million)
Candidates			Based on the number of electors in an electoral district with limits varying amongst districts, with adjustments for geographically large districts and increases in limits proportionately reducing with the number of electors (For the 2006 general election, the average limit was C$81,159)
New Zealand			
Parties	'Regulated period', that is, generally three months before poll day or the period starting from 1 January of election year, whichever is longer	'Election expenses', that is, costs incurred in producing party advertisements	NZ$1 million plus NZ$20 000 per electoral district contested
Candidates		'Election expenses', that is, costs incurred in producing candidate advertisements	NZ$20 000 per candidate
United Kingdom			

Parties	One year before poll day	'Campaign expenditure' that is, expenditure aimed at promoting or procuring electoral success for the party or directed at enhancing the standing of the party (Expenses are 'campaign expenditure' if they fall within one of the eight separate categories of expenses listed in Part I, Schedule 8 of the PPERA, namely, party political broadcasts, advertising, unsolicited material, manifestos and other documents, market research, press conferences and dealings with the media, transport and rallies and other events)	Generally based on number of seats with £30 000 per seat (For the 2005 general election, parties contesting all Great Britain seats were subject to a limit of £18 84 million)
Candidates	No specific period laid down, applies after individual becomes a candidate	'Election expenses', that is, generally all expenses used for the purposes of the candidate's election	Varies for each constituency with formula taking into account the size and nature of the constituency (For the 2005 general election, the limit for country and borough/burgh constituencies were respectively £7150 plus 7p per elector and £7150 plus 5 p per elector)

Source: *Canada Elections Act*, SC 2000, c 9, ss 2, 407, 422, 440–441; Elections Canada, *Report of the Chief Electoral Officer of Canada on the 39th General Election of January 23, 2006* (2006) 94; *Electoral Finance Act 2007* (NZ) ss 4, 72(1)–(2), 76, 94(1)–(2), 98; *Political Parties, Elections and Referendum Act 2000* (UK) c 41, s 79, sch 9, cl 3; UK Electoral Commission, *Election 2005: Campaign Spending* (2006) 13; *Representation of People Act 1983* (UK) ch 2, ss 76, 90ZA; UK Electoral Commission, *Election 2005: Campaign Spending* (2006) 30

4 *Preliminary Observations on the Design of Federal Spending Limits*

If election spending limits are to apply to federal elections, they should apply for a period long enough to capture the main period of campaigning. The Canadian system of applying limits upon the issuing of writs, for example, seems to be too short. A period of six months prior to the day of polling would seem to be a minimum period. Here the NSW scheme (as well as the Queensland proposal) provides excellent precedent.

It should also be noted that the absence of fixed-term federal elections is not a bar to the workability of spending limits. All the above overseas spending limits exist in electoral systems where the terms are not fixed.[367] While the absence of fixed-term elections clearly renders the workings of spending limits more difficult,[368] the continued existence of these limits strongly suggest that it is far from impossible to have effective limits without fixed-term elections.

The question does arise, however, as to how to determine when the six-month period should commence (and end). The Queensland proposal uses the latest possible date for an election as a general reference point, dating the six-month period from that point.[369] This approach, however, will result in the spending limits applying in practice for less than six months as elections (whether federal or State) are usually called before the latest possible date. A preferable approach that will result in practice to a longer capped period is to use the date of the last election as the reference point and have the spending limits commence a certain period after that date. On the basis of the federal elections held from 1990 to 2010, Table 24 indicates that the average duration between federal elections is approximately 2 years and 11 months. Using this average, the capped period should begin 2 years and 5 months after the previous election.

---

[367] See Elections Canada, *The Electoral System of Canada* (2nd ed, 2007); Elections New Zealand, *General Election Date and Timetable*, undated <http://www.elections.org nz/rules/timetable-overview.html>. It should be noted that after the 2009 Canadian general election, Canada now has four-year term elections: *Canada Elections Act*, SC 2000, c 9, s 56.

[368] The UK Electoral Commission has observed that '[t]he difficulty for parties is, of course, that elections to Westminster are not fixed and parties do not know when the 365-day period begins. It can only be calculated retrospectively once the Prime Minister announces the date': UK Electoral Commission, *Election 2001: Campaign Spending* (2002) 45.

[369] Queensland Government, *Reforming Queensland's Electoral System*, above n 6, 11.

Recommendation 6: Federal election spending limits should apply 2 years and 5 months after the previous election.

Table 24: Duration Between Federal Elections, 1990-2010

	Election	Election Date (Polling Day)	Duration between Elections (period between polling days)	Average Duration Between Elections
1	1990 Election	24 March 1990		1066 days, or 2 years, 11 months, 1 day (approximately)
2	1993 Election	13 March 1993	1086 days, or 2 years, 11 months, 18 days	
3	1996 Election	2 March 1996	1086 days, or 2 years, 11 months, 19 days	
4	1998 Election	3 October 1998	946 days, or 2 years, 7 months, 2 days	
5	2001 Election	10 November 2001	1135 days, or 3 years, 1 month, 8 days	
6	2004 Election	9 October 2004	1065 days, or 2 years, 11 months	
7	2007 Election	24 November 2007	1142 days, or 3 years, 1 month, 16 days	
8	2010 Election	21 August 2010	1002 days, or 2 years, 8 months, 29 days	

In terms of spending to be covered by the limits, the 'electoral communication expenditure' approach adopted by the NSW scheme (see above) suffers from two vices. It is, firstly, too narrow in excluding various forms of campaign expenditure (e.g. travel, research). Second, it is overly complicated with three steps involved in

determining expenditure is 'electoral communication expenditure' under the *EFED Act:*

- whether the expenditure is 'electoral expenditure';
- if yes, whether the 'electoral expenditure' comes within the identified categories of 'electoral communication expenditure'; and
- whether the expenditure is caught by the various exclusions.

The Queensland proposal of basing the spending limits on 'electoral expenditure' is to be preferred as it is broader and simpler (by removing one of the three steps above). There also should not be so many exclusions as currently exist under the NSW scheme – the only one that is justified (for constitutional reasons) is the exclusion for 'expenditure incurred substantially in respect of an election to members of Parliament other than the NSW Parliament'.[370]

> *Recommendation 7:* Federal spending limits should apply to 'electoral expenditure' under the *Commonwealth Electoral Act* with an exclusion for expenditure incurred substantially in respect of an election to members of Parliament other than the Commonwealth Parliament.

Alongside election spending limits being applied to political parties and candidates, there should also be limits on third party election spending. The first reason lies with preserving the integrity of the limits applied on parties and candidates. Without third party limits, political parties and candidates may be able to use front groups to engage in spending otherwise prohibited if they had done so directly. The other reason concerns fairness to those who are standing for office. Limits on candidate and party spending without corresponding limits on third parties mean that parties are at a disadvantage in relation to third parties in election contests. This turns on its head the principle that parties and candidates should have a privileged role in election contests and clearly has the effect of undermining the party system.[371]

---

[370] *EFED Act* s 87(3)(a).
[371] Samuel Issacharoff & Pamela Karlan, 'The Hydraulics of Campaign Finance Reform' (1999) 77 *Texas Law Review* 1705, 1714–15.

Here we see a complex interplay between the fairness and anti-corruption rationales of spending limits. The latter applies with greater force to parties and candidates as they are seeking to become public office-holders. Emphasising the anti-corruption rationale without full regard to the fairness rationale may insist only on limits being applied to political parties and candidates. Such a lopsided approach will, however, leave parties and candidates less at risk of corruption but in a much weakened state to effectively assert their role in elections.

Are such limits, however, likely to be unconstitutional for breaching the implied freedom of political communication? In a report to the New South Wales government, Anne Twomey concluded in the affirmative: '[i]f [expenditure] limits are imposed on third parties, there is a high risk of constitutional invalidity'.[372] The report does not, however, properly substantiate this conclusion. Its discussion of the topic of third party expenditure limits primarily comprises descriptions of third-party limits in Canada, New Zealand and the United Kingdom together with discussion of some of the cases involving challenges to these limits.[373] Why such description results in a conclusion that these limits are fraught with a 'high risk of constitutional invalidity' is unclear. There is, firstly, no attempt to draw out why such decisions are relevant in the application of the implied freedom of political communication, a weakness that is especially notable in light of the caution some High Court judges have strongly urged in using overseas jurisprudence for this purpose.[374] Second, the limits in all three of these countries remain intact and while some cases have struck down the limits for being too low,[375] others have upheld differently designed limits.[376]

Given that third party spending limits are not necessarily unconstitutional in Australia, we can now turn to the design of such limits. Table 22 above provides details of the third party limits under the NSW scheme while Table 25 documents the

---

[372] Anne Twomey, *The Reform of Political Donations, Expenditure and Funding: Report prepared for the Department of Premier and Cabinet of New South Wales* (2008) 2.
[373] Ibid 32–37.
[374] See *Levy v Victoria* (1997) 189 CLR 579, 598 (Brennan CJ); *Coleman v Power* (2004) 220 CLR 1, 48 (McHugh J).
[375] For example, see discussion of *Bowman v United Kingdom* (1998) 26 Eur Court HR 1 in Anne Twomey, above n 372, 35–36.
[376] See, for example, discussion of *Harper v Canada* [2004] 1 SCR 827 in Anne Twomey, above n 372, 33–35.

main features of these limits as they exist in Canada, New Zealand and the United Kingdom.

Table 25: Third Party Spending Limits in Canada, New Zealand and United Kingdom

	Requirement to register	Period for which limits apply	Spending covered	Level of limits
Canada	Required to register if have incurred more than C$500 in election advertising expenses	'Election period', that is, period beginning with issue of the writ and ending on poll day	Election advertising expenses	For 2006 general election, C$172 050 for a national campaign and C$3441 for an electoral district
New Zealand	Obligation to register if spend more than NZ$12 000 nationally or NZ$1000 in relation to an individual candidate	'Regulated period', that is, generally three months before date of poll or period from 1 January of election year, whichever is longer	'Election advertisement', that is, any form of words that can be reasonably regarded as encouraging or persuading voters to vote or not to vote for a party or candidate (including material that describes a candidate or party by reference to views etc held or not held by the candidate or party)	Registered third parties can spend up to NZ$120 000 nationally or NZ$4000 in relation to an individual candidate
United Kingdom	Required to register if wanting to spend more than £10 000 in England or £5000 in Scotland, Wales and Northern Ireland respectively	One year before date of poll	'Controlled expenditure', that is, spending on publicly-available material and that can be reasonably regarded as intended to promote or procure electoral success for a party or a candidate	Registered third parties, that is, 'recognised third parties' can respectively spend up to £793 500; £108 000; £60 000 and £27 000 in England, Scotland, Wales and Northern Ireland

Source: *Canada Elections Act,* SC 2000, c 9, ss 2, 349–50, 353; Elections Canada, *Report of the Chief Electoral Officer of Canada on the 39th General Election of January 23, 2006* (2006) 95; *Electoral Finance Act 2007* (NZ) ss 4, 5(1), 63(3)(d), 118; *Political Parties, Elections and Referendum Act 2000* (UK) c 41 ss 85, 88, 94(1), 94(3)–(5), sch 10, cl 3(2)–(3).

Australian third party limits should follow these examples, firstly, by requiring third parties to register should they wish to spend above a certain amount (say $10 000) in the six months prior to polling day. In common with these other countries, the level of third party limits should be set at a level lower than political party spending limits. Australian federal elections are (and should be) primarily contests amongst rival political parties and, while third parties have a legitimate role in these contests, they should not be allowed to swamp the centrality of contesting political parties by outspending the political parties. On the other hand, the level should not be set so low as to preclude meaningful participation by third parties. As for the period and the spending covered by third party limits, they should be identical to that which applies to party and candidate spending limits.

> *Recommendation 8:* Federal spending limits should apply to parties, candidates and third parties.

In terms of the level of limits, this should be further investigated. At the very least, the national limit should not be higher than the largest amount currently spent by a single party. Moreover, election spending limits should be imposed not only at a national and constituency level but also at a state level to address the question of spending for Senate elections. In terms of the level of state and constituency limits, the Canadian approach is appealing. Under the *Canada Elections Act*, the limit is calculated according to the number of electors but the amount allocated per elector decreases as the number of electors increases. Under the current provisions, C$2.07 is allocated for each of the first 15 000 electors, C$1.04 for each of the next 10 000 electors and then C$0.52 each for the remaining electors. The amount allocated for each elector also increases according to a formula for districts with lower population density.[377]

> *Recommendation 9:* There should be federal spending limits applying at the national, State and electorate levels.

[377] *Canada Elections Act*, SC 2000, c 9, s 441(3), (10).

D *Contribution Limits (with an Exemption for Membership Fees)*

Greater restrictions on political contributions have support across the political spectrum. In a response to the Wollongong City Council scandal, former New South Wales Premier Morris Iemma advanced the radical proposal of completely banning political contributions in favour of a system of complete public funding.[378] Following not too far behind, his predecessor Bob Carr has advocated banning political contributions from organisations like trade unions and companies and only allowing those made by individuals. Former Leader of the Opposition Malcolm Turnbull[379] and the New South Wales Greens[380] have similar positions. In a bipartisan report, the New South Wales Legislative Council Select Committee on Electoral and Political Party Funding (NSW Select Committee) recommended that there be a ban on all political donations except for those by individuals. Contributions by individuals are further to be limited to $1000 for each political party per annum (and $1000 for each independent candidate per electoral cycle).[381] The spirit of this recommendation has now been adopted in legislative form with the *EFED Act* putting in place a regime of contribution limits (see below). Moreover, the Queensland Government is proposing to follow the NSW example by enacting contribution limits for Queensland.[382]

There are compelling arguments for contribution limits such as those found in the *EFED Act*. Such limits will clearly act as a preventive measure in relation to graft. Moreover, as the amount of money contributed by an individual increases, the risk of undue influence heightens. Therefore, bans on large contributions can directly deter corruption through undue influence (and also obviate the need for selective bans on property developers[383] and holders of gambling licences[384]). On a related point, such limits will promote fairness in politics as they prevent the wealthy from using their money to secure a disproportionate influence on the political process. The result is to

---

[378] See Australian Labor Party (NSW Branch), Submission No 107 to the Select Committee on Electoral and Political Party Funding, Parliament of New South Wales, *Inquiry into Electoral and Political Party Funding*, 15 February 2008.
[379] Malcolm Turnbull, Submission No 196 to the Joint Standing Committee on Electoral Matters, *Inquiry into the 2004 Federal Election*, 11 August 2005.
[380] See Select Committee on Electoral and Political Party Funding, Parliament of New South Wales, *Report of Proceedings Before the Select Committee on Electoral and Political Party Funding: Inquiry into Electoral and Political Party Funding* (2008).
[381] Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, above n 324, 105 (recommendation 7).
[382] Queensland Government, *Reforming Queensland's Electoral System*, above n 6, 9-11.
[383] *Election Funding and Disclosures Act 1981* (NSW) ss 96GA-96GE.
[384] *Electoral Act 2002* (Vic) ss 216–217.

promote the fair value of political freedoms despite limiting the formal freedom to contribute.[385] By doing so, they break the hold of the commodity principle that is implicit in the sale of access and influence (see Part IV). Further, by requiring parties to secure the support of a large base of small contributors, such limits are likely to enhance their participatory function.

Significant objections to contribution limits do, however, need to be addressed.[386] First and foremost, instituting such limits by themselves will leave the parties seriously under-funded given that they are presently heavily reliant on large contributions (see Part II). In the context of party government, jeopardising the existence of the parties must mean placing the system of government at risk. It is also unclear what impact the contribution limits will have on fairness amongst the parties. Further, contribution limits are likely to mean that parties will spend more time fundraising – they will need to persuade more individuals to part with their money, a development that is likely detract from the performance of their democratic functions (apart from the participatory function). This will intensify especially if the 'arms race' between the parties continues (see Part II).

These objections are, however, not insurmountable. It is, firstly, imperative that contribution limits be adopted as part of a broader package of reform. One of the central difficulties with the position of those who advocate contribution limits as the principal, at times the only, reform measure is that they do not fully deal with potential (adverse) impact of such limits. To ameliorate such impact, there needs to be a reconfiguration of public funding of parties and candidates, including a significant increase in such funding to make up for the shortfall resulting from limits on contributions (discussed below). Such funding should provide for sustainable parties, redress any inequities that arise from contribution limits and also lessen the risk of parties devoting an undue amount of time to fundraising. Further, contribution limits must be accompanied by election spending limits (advocated above). The latter limits will staunch the demand that fuels the parties' aggressive fundraising activities.

---

[385] John Rawls has referred to restrictions on contributions as a possible means for ensuring fair value of political liberties: see John Rawls, *Political Liberalism* (Columbia University Press, 1996) 357–58; Rawls, *Justice as Fairness: A Restatement*, above n 37, 149.
[386] See K D Ewing, *The Cost of Democracy,* above n 200, 227-230.

1 *An Exemption for Membership Fees (Including Union Affiliation Fees)*

Whilst recommending a ban on all but small donations by individuals, the NSW Select Committee proposed that membership fees be exempted from the ban provided that they are set at a reasonable level (with that level being determined by the Auditor-General).[387] This is a position with considerable merit. As the NSW Select Committee correctly recognised, 'membership of political parties is an important means for individuals to participate in the political process'.[388] Specifically, it involves participation *within* political parties, thereby directly enhancing the participatory function of parties with party members taking out membership in order to advance their understanding of what is in the 'public interest' through the respective party, with a view to putting that conception of the public interest to the electorate; These features of membership fees explain why there should be an exemption for membership fees. Whilst contribution limits permit membership fees below the limits, an exemption goes beyond such permissiveness by *encouraging* party membership.

What perhaps is the most controversial aspect of this exemption for membership fees is whether it should be extended to organisational members, in particular, trade union affiliates of the ALP. Indeed, what is shaping up as one of the most controversial issues concerning contribution limits is how it should apply to trade union affiliation fees.

This very much looks like a case of union obstructionism thwarting the public interest. One could be excused for asking: If political contributions are to be restricted, why should union affiliation fees be exempt? Aren't such fees, like other political contributions, paid as an attempt to influence the political process through money and, if so, shouldn't they be regulated as any other contribution? As some

[387] New South Wales Select Committee, *Electoral and Political Party Funding in New South Wales*, above n 324, 113 (recommendation 9).
[388] Ibid.

would further argue, '[i]f big business is to be prevented from bankrolling political parties in return for favourable policies, surely the same rule must apply to unions'.[389]

This submission takes a contrary view: the exemption for membership fees should extend to organisational membership fees including trade union affiliation fees. As will be argued below, a ban on organisational membership fees will give rise to anomalies, is misdirected at 'trade union bosses' and constitutes an unjustified limitation on freedom of party association.

4 *The Anomalies of Banning Organisational Membership Fees*

A ban on organisational membership fees will produce striking anomalies. Presumably, parties will still be allowed to have state and territory-based branches with intra-party transfers exempted from contribution limits. If so, collective affiliation based on geographical areas will still be allowed. But if collective affiliation is permitted on this basis, why limit collective affiliation based on ideological grounds (for example, environmental groups seeking to affiliate to the Greens) or those based on occupation or class (for example, farmers' groups seeking to affiliate to the National Party)?

A ban on organisational membership will also detract from the participatory function of parties. In case of the ALP, there will be the loss of membership participation provided by trade union affiliates. However attenuated, such participation is still a form of participation. If limits applying to party contributions are enacted without limits on third parties and their spending then money may very well flow on to third-party activity.[390] This would express a preference for pressure group politics over party politics as it will strongly encourage political groups to engage in independent third-party activity rather than become members of political parties. Such a preference may favour issue politics over broader and more inclusive forms of politics that are more likely to emerge through the interest-aggregation performed by political

[389] Janet Albrechtsen, 'End the stench of political donations', *The Australian* (Australia), 24 February 2008.
[390] See Issacharoff and Karlan, 'The Hydraulics of Campaign Finance Reform', above n 371, 1714–15.

parties.[391] By weakening the party system, these (likely) effects fly in the face of one of the key principles of a democratic political finance regime, support for parties in performing their functions.

3 *A Ban on Organisational Membership Fees: Misdirected at 'Trade Union Bosses'*

A ban on organisational membership fees (including trade union affiliation fees) will have a severe impact upon the trade union-ALP link by either prohibiting or severely limiting the amount of money that trade unions can contribute to the ALP. By banning or at least reducing significantly the flow of trade union affiliation fees to the ALP, such measures will most likely weaken the relationship that the trade union movement has with the ALP.

Indeed, this is one of key aims of some advocates of contribution limits. For example, former NSW Premier Bob Carr has endorsed his successor, Morris Iemma's call for banning organisational contributions on the basis that unions will not be able to affiliate to the ALP on a collective basis.[392] Discontented with the power wielded by 'trade union bosses' within the ALP, some would prefer that the ALP-union link be made illegal.

There are, in fact, three main complaints bundled up in the epithet, 'trade union bosses' and it is crucial to consider them separately. The first is the claim that the presence within the party of 'trade union bosses', or more kindly, the influence of trade union officials within the ALP, is making the ALP unelectable or at least preventing it from becoming 'the natural party of Federal government'.[393] The concern here is that the influence of trade unions has the effect of the ALP not being properly representative of the Australian community, thereby impairing – perhaps even severely damaging – its electoral prospects.

---

[391] See also Ewing, *Trade Unions, the Labour Party and Political Funding*, above n 206, [4.6]–[4.7]. This is not to deny that the Australian Labor Party is already influenced by pressure group politics. For a case-study, see Philip Mendes, 'Labourists and the Welfare Lobby: The Relationship Between the Federal Labor Party and the Australian Council of Social Service (ACOSS)' (2004) 39(1) *Australian Journal of Political Science* 145.
[392] Editorial, 'Limit political donations: Carr', *The Australian* (Australia) 4 May 2008.
[393] Mark Aarons, 'The Unions and Labor' in Robert Manne (ed), *Dear Mr Rudd: Ideas for A Better Australia* (Black, 2008) 86, 91.

Such views may or may not be correct. The issue here, however, does not turn on the veracity of these views; the question here is whether a ban on organisational membership fees is a legitimate way of dealing with concerns regarding the electability of the ALP (or for that matter, the electability of any party). The answer is "surely not": these are matters for the ALP and its members to decide, not one for regulation, let alone contribution limits involving a ban on organisational membership fees. Should these concerns not be dealt with properly then the discipline of the ballot box will operate with voters choosing not to support the ALP.

There are two other complaints implied by criticisms of 'trade union bosses': one relating to internal party democracy and the other to trade union democracy. Mark Aarons, a former union official who was also an adviser to Bob Carr when he was New South Wales Premier, has argued that the ALP is organised in 'a most undemocratic way'[394] because affiliated trade unions exercise 'a grossly out-of-proportion, even extraordinary, influence over policy formulation'.[395] This lack of proportion is said to arise because the level of power trade union delegates exercise within the ALP is not justified by the level of union density: how can it be right that trade unions have 50 per cent of delegates in ALP conferences when less than one-fifth of the workforce is unionised?[396]

This argument, however, turns on a fallacious use of the term, 'undemocratic'. It is true that parties have a representative function in that *parties or the party system as a whole* should represent the diversity of opinion within a society (as discussed in Part II, 'Aims of a Democratic Political Finance Regime'). This is, however, not the same as saying that *a single party* should seek to represent the entire spectrum of this opinion. Not only is this practically impossible but paradoxically, parties discharge their representative function by representing different sections of society. It is the cumulative effect of such sectional representation that stamps a party system as representative in overall terms. In this context, characterising the manner in which the

[394] Ibid 88.
[395] Ibid 88.
[396] In 2007, union density stood at 19 per cent of the Australian workforce: Australian Bureau of Statistics, 'Employee Earnings, Benefits and Trade Union Membership, Australia, August 2007' (Statistics, Australian Bureau of Statistics, 2007) cat. no. 6310.0.

ALP is organised as being undemocratic simply because its membership base is not wholly representative of the Australian public is somewhat perverse.

To say this is to emphasise that there is nothing self-evidently 'undemocratic' about such influence. It is not to imply that the extent of union influence over the ALP is justifiable or desirable. Some, for example, might argue that such influence results in a rather partial notion of the 'public interest'. Just as the relationships between the Liberal Party and its business supporters, the National Party and agricultural producers, and the Greens and the environmental groups, are relevant considerations for the voters in deciding whether a political party adequately represents the 'public' or 'national' interest, such matters are clearly legitimate considerations for citizens deciding whether or not to vote for the ALP.

There is another difficulty with characterising the manner in which the ALP is organised as being undemocratic: reducing trade union influence will not necessarily revitalise the internal democracy of the ALP.[397] So much can be seen through a rough depiction of the power relations within the ALP as given in Table 26. The party elite comprises the parliamentary leadership, the members of parliament and their staff,[398] the union leadership (including union delegates), and the party officials and bureaucrats. The rank and file, on the other hand, consists of the party members.

Table 26: Power Relations within the ALP

Party elite	Union leadership	Parliamentary leadership	Party officials and bureaucracy
Rank and file	Party members		

These relations can be analysed according to horizontal and vertical dimensions. Reducing the influence of the union leadership does not mean that power will flow vertically to the rank and file. In the context of shrinking party membership within the

[397] This point is made well by Bolton: John R Bolton, 'Constitutional Limitations on Restricting Corporate and Union Political Speech' (1980) 22 *Arizona Law Review* 373, 417.
[398] This would include political advisers, some of which have been criticised as exercising 'power without responsibility': Anne Tiernan, *Power Without Responsibility: Ministerial Staffers in Australian Governments from Whitlam to Howard* (University of New South Wales Press, 2007). Tiernan's study was focussed on ministerial advisers.

ALP,[399] it is far more likely that power will be redistributed horizontally to others remaining within the party elite. Where the 'party in public office', the parliamentary leadership, is already ascendant over the 'party on the ground' as well as the 'party central office',[400] it is a fair bet that the parliamentary leadership will be a key beneficiary of this redistribution of power. A similar conclusion results when one casts an eye to power relations beyond the party. Looking at the 'material constitution'[401] of the ALP, that is, its relationship with class forces, diminishing the influence of trade unions within the ALP is likely to mean a corresponding empowerment of business interests but not of the rank and file. Moreover, the power of the government bureaucracy also needs to be factored in, especially when the ALP is in government: its influence is likely to increase as sources of countervailing power like trade unions weaken in strength.

Underlying all this is a risk of throwing the baby out with the bath water. While it is true that the internal democracy of the ALP is undermined in some cases by trade unions because of their oligarchical tendencies (see above discussion), the answer is not to excise trade unions from the party. Collective organisations like trade unions play a necessary, though at times problematic, role in empowering citizens. The ambivalent character of such organisations is well captured by sociologist Robert Michels. As noted earlier, Michels is famous for his iron law of oligarchy: '[w]ho says organization, says oligarchy'.[402] He is perhaps less well known for his observation that '[o]rganization … is the weapon of the weak in their struggle with

[399] For figures, see Gary Johns, 'Party Organisation and Resources: Membership, Funding and Staffing' in Ian Marsh (ed), *Political Parties in Transition?* (Federation Press, 2006) 46, 47; Ward, 'Cartel Parties and Election Campaigns' in ibid 73–75.
[400] Ward, 'Cartel Parties and Election Campaigns', above n 399, 70, 72, 85–88. On the power of trade unions within the ALP, see Kathryn Cole, 'Unions and the Labor Party' in Kathryn Cole (ed), *Power, Conflict and Control in Australian Trade Unions* (Pelican Books, 1982) where it was concluded that 'the power of unions within the ALP is far more circumscribed than is commonly believed and the process which each of the party's two sections (i.e. industrial and political wings) accommodates to the demands and needs of the other is complex and tortuous': Cole, *Power, Conflict and Control in Australian Trade Unions*, 100.
[401] Tom Bramble & Rick Kuhn, 'The Transformation of the Australian Labor Party' (Speech delivered at the Joint Social Sciences Public Lecture, Australian National University, 8 June 2007).
[402] Robert Michels, *Political Parties: A Sociological Study of the Oligarchical Tendencies of Modern Democracy* (Collier Books, 1962) 365. Michels' iron law is better understood as pointing to the 'oligarchical tendencies' of organisations. The title of the last part of Michels' book is, in fact, 'Synthesis: The Oligarchical Tendencies of Organizations': Michels, *Political Parties*, 365.

the strong'.[403] Within the ALP, collective organisations like trade unions allow individual members to band together to secure a voice that they would not have otherwise. While they do give rise to the risk of oligarchy within the organisations themselves, functioning well they provide 'effective internal polyarchal controls'[404] that counter the oligarchical tendencies of the party. By severely diminishing the role of trade unions within the ALP, undifferentiated contribution limits will likely increase the oligarchical tendencies within the party.

The other complaint in relation to 'trade union bosses' concerns trade union democracy. Aarons has argued that because 'individual unionists have no practical say in whether they are affiliated to the ALP and whether a proportion of their membership fees pay for this [and] … in how their union's votes will be cast', there is 'not a democratic expression of the union membership's wishes'.[405] This criticism, however, is doubly misconceived. First, under any system of representative governance, most decisions are made by representatives without the direct say of their constituencies. It is this feature that contrasts representative systems from those based on direct democracy and, indeed, this is how the Australian system of parliamentary representation is supposed to work. The key question in such contexts is not whether members have a direct say but whether the representatives are effectively accountable to their constituencies, in this case, trade union delegates to their members. The real problem here is one of 'union oligarchies'[406] that are insulated from effective membership control (discussed above). Yet, and this brings us to the second misconception, a ban on organisational membership (including trade union affiliation fees) will do little to meaningfully address this problem.[407] At best, what they would do is carve out certain decisions from the remit of trade union oligarchies while still leaving the oligarchies intact.

---

[403] Michels, above n 402, 61. Schattscheider has similarly observed that '[p]eople do not usually become formidable to governments until they are organised': E E Schattscheider, *Party Government* (Holt, Rinehart and Winston, 1942) 28.
[404] Charles E Lindblom, *Politics and Markets: the World's Political Economic Systems*, (Basic Books, 1977) 141.
[405] Aarons, 'The Unions and Labor,' above n 393, 86, 89.
[406] Andrew Parkin, 'Party Organisation and Machine Politics: the ALP in Perspective' in Andrew Parkin and John Warhurst (eds), *Machine Politics in the Australian Labor Party* (George Allen & Unwin, 1983) 15, 22.
[407] Aarons has argued that problems with 'trade union bosses' requires review of the funding provided by trade unions to the ALP: Mark Aarons, 'Rein in union strongmen's ALP power', *The Australian* (Australia), 18 March 2008.

4 *Unjustified Limitation of Freedom of Political Association*

It is essential that political finance regulation respect freedom of political association because such freedom is crucial to the proper workings of Australian democracy. Specifically, it is necessary in order to ensure pluralism in Australian politics, pluralism that is required both to protect the integrity of representative government as well as fairness in politics. This does not, however, mean that state regulation of political associations is impermissible. There can be public interest grounds for limiting freedom of political association. Whether particular measures are justified will depend upon the weight of such rationales, the extent to which the limitation is adapted to advancing such rationale/s and the severity of the limitation (see further Part II, 'Aims of a Democratic Political Finance Regime').

In evaluating a ban on organisational membership fees, it is convenient to begin with the last factor, the severity of the ban. Freedom of political association possesses several key aspects, notably:

- the individual's right to form political associations, act through such associations and to participate in the activities of these associations; and
- the association's ability to determine its membership, the rules and manner of its governance and the methods it will use to promote its common objectives.[408]

Here we focus on freedom of party association and, in particular, the ability of political parties to determine their membership. Some parties, such as the Liberal Party[409] and the National Party[410], for instance, may restrict themselves to individual memberships and are, in this way, *direct parties.* Others like the ALP[411] and the New South Wales Greens[412] allow both individual membership and membership by groups

[408] Affidavit of Keith Ewing to IDSA litigation. See also Howard Davis, *Political Freedom,* above n 75, 46.
[409] See, for example, Liberal Party of Australia (NSW), 'Constitution and Regulations of the Liberal Party of Australia (NSW)' (Constitution, Liberal Party of Australia (NSW), 1978) cl 2.1.
[410] See, for example, National Party of Australia (NSW), 'Constitution and Rules of the National Party of Australia (NSW)' (Constitution, National Party of Australia (NSW), 1988) cl 2.
[411] See, for example, Australian Labor Party (NSW), 'Rules of the Australian Labor Party (NSW) 2005-2006' (Constitution, Australian Labour Party (NSW) 2006) cl A.2–A.3.
[412] The Greens (NSW), 'Constitution of the Greens (NSW)' (Constitution, The Greens (NSW), 1993) cl 2.1.

and are therefore *mixed parties*. The Constitution of the federal National Party also allows it to be a mixed party as organisations can become associations of the Party where there is no state branch.[413] Some parties like the New South Wales Shooters Party fall somewhere in the middle: membership is formally restricted to individuals,[414] while close links are maintained with various groups.[415] In these situations such groups, while not members of the party, act as *ancillary organisations*.[416] Such diversity of party structures should be respected because it is one of the main ways in which the pluralism of Australian politics is sustained (see further Part II, 'Aims of a Democratic Political Finance Regime').[417]

When viewed from this perspective, the impact of a ban on organisational membership fees on the freedom of party association is quite severe: it will mandate a particular party structure, direct parties and, while not directly banning parties that allow for organisational membership, generally make them unviable unless such parties are able to secure sufficient public funding.[418]

The specific impact on the trade union-ALP relationship can be illustrated through the typology developed by industrial relations experts Matthew Bodah, Steve Coates and David Ludlam. According to these authors, there are two dimensions to union-party

---

[413] National Party of Australia (NSW), 'Constitution and Rules of the National Party of Australia (NSW)', above n 410, cl 71. Before 1945, various farmers' organisations had formal relationships with the Country Party, the predecessor of the National Party: Keith O Campbell, 'Australian Farm Organizations and Agricultural Policy' in Colin Hughes (ed), *Readings in Australian Government* (University of Queensland Press, 1968) 438.

[414] Australian Shooters and Fishers Party (NSW), 'Constitution of The Shooters Party (NSW)' (Constitution, Australian Shooters and Fishers Party (NSW) by-law (2).

[415] In the case of the Shooters Party, this is made clear by its Constitution, which states that one of its aims is '*[t]o exert a discipline through shooting organizations and clubs and within the non-affiliated shooting community*, to curb the lawless and dangerous element; and to help shooters understand that they hold the future of their sport in their own hands by their standards of conduct': Australian Shooters and Fishers Party (NSW), above n 414, cl 2(g) (emphasis added). In relation to the 2003 State Election, The Shooters Party received thousands of dollars in contributions from various hunting and pistol clubs including the Federation of Hunting Clubs Inc, Singleton Hunting Club, St Ives Pistol Club, Illawarra Pistol Club and the NSW Amateur Pistol Association: Election Funding Authority (NSW), *Details of Political Contributions of More than $1,500 Received by Parties that Endorsed a Group and by Independent Group at the Legislative Council 2003* <http://efa nsw.gov.au/__data/assets/pdf_file/0007/63718/2003PartyContributions.pdf>.

[416] For fuller explanations of direct and indirect party structures, see Duverger, above n 175, 6–17.

[417] For fuller discussion, see Ewing, *The Cost of Democracy*, above n 200, 35–38.

[418] This seems to be the position in relation to the Canadian New Democratic Party that still allows trade unions to affiliate on a collective basis: see Harold Jansen & Lisa Young, 'Solidarity Forever? The NDP, Organised Labour, and the Changing Face of Party Finance in Canada' (Paper presented at the Annual Meeting of the Canadian Political Science Association, London Ontario, 2–4 June 2009). See also the discussion in Ewing, *The Cost of Democracy*, above n 200, 220–21.

linkages, formal organisational integration and a level of policy-making influence, which give rise to four types of linkages:

- external lobbying type – that is, no formal organisational integration between unions and parties, with unions having no or little influence in party policy-making;
- internal lobbying type – that is, no formal organisation integration between unions and parties, but unions are regularly consulted in policy-making;
- union/party bonding type – that is, unions occupy important party positions but do not enjoy domination of party policy-making; and
- union dominance model – that is, unions occupy important party positions and dominate party policy-making.[419]

According to this typology, the trade union-ALP link fits either the union/party bonding type or the union dominance model because of the organisational integration of trade union affiliates into the ALP. As members of state and territory branches of the ALP, affiliated trade unions are guaranteed 50 per cent representation at state and territory conferences.[420] These conferences determine state and territory branch policies and elect state party officials and delegates to National Conference.[421] The latter functions as 'the supreme governing authority of the Party'[422] and elects members of the National Executive, 'the chief administrative authority' of the party.[423] A ban on organisational membership fees will, however, make organisational integration between the ALP and unions much less viable; the menu of options is effectively restricted to the external/internal lobbying types.

---

[419] Matthew Bodah, Steve Ludlam and David Coates, 'The Development of an Anglo-American Model of Trade Union and Political Party Relations' (2003) 28(2) *Labor Studies Journal* 45, 46; see also Steve Ludlam, Matthew Bodah and David Coates, 'Trajectories of Solidarity: Changing Union-Party Linkages in the UK and the USA' (2002) 4(2) *British Journal of Politics and International Relations* 222, 233–41. For an application of the typology to the Australian context, see Gerard Griffin, Chris Nyland and Anne O'Rourke, 'Trade Unions, the Australian Labor Party and the Trade-Labour Rights Debate' (2004) 39(1) *Australian Journal of Political Science* 89.

[420] See, for example, Australian Labor Party (NSW), above n 411, cl B.25(a), B.26; Australian Labor Party (Victoria), 'Rules of Australian Labor Party Victorian Branch' (Constitution, Australian Labor Party, 2009) cl 6.3.2.

[421] See, for example, Australian Labor Party (NSW), above n 411, clause B.2; Australian Labor Party (Victoria), above n 411, cl 6.2.

[422] Australian Labor Party, 'National Constitution of the ALP' (Constitution, Australian Labor Party, 2009) cl 5(b).

[423] Ibid cl 7(a).

Is there a compelling justification for such a severe incursion into the freedom of the ALP to organise itself as it sees fit? It is exceedingly difficult to see one. There is, firstly, the prima facie legitimacy of membership fees. Further, as the previous discussion has argued, the 'trade union bosses' objections are misdirected: amongst others, a ban on organisational membership fees will neither enhance internal party democracy nor invigorate trade union democracy. Absent an adequate rationale for limiting freedom of party association, it is hard to escape the conclusion that such a ban represents an unjustified limitation on freedom of party association.

It was such a concern with freedom of party association that led the NSW Select Committee to include trade union affiliation fees in their exemption for membership fees.[424] The key reasons given by the six-member committee, which had only two ALP members, are worth reproducing:

> The Committee considers that membership fees should not be encompassed by the Committee's proposed ban on all but small individual donations … *Similarly, the Committee believes that trade union affiliation fees should be permissible, despite the proposed ban on union donations. To ban union affiliation fees would be to place unreasonable restrictions on party structures.*[425]

This view has further been adopted by the *EFED Act* with party subscriptions of $2,000 or less disregarded for the purpose of its donation caps. This includes affiliation fees with the exclusion limited, in the case of party subscriptions calculated by reference to the number of members of the affiliate, to an amount of $2,000 times the number of these members (the limit is $2,000 otherwise).[426] The Queensland Government has also followed this approach: it proposes to exclude membership fees of $500 or less per financial year from the State's donations caps; this will include

[424] Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, above n 324, 107–8, 113 (recommendation 9).
[425] Ibid 113 (emphasis added).
[426] *EFED Act* s 95D.

affiliation and organisational fees (although it is unclear what limits apply to these fees) which cannot be used for campaign purposes.[427]

5 *Re-emphasising the Scope of the Argument*

There are many critics of the trade union-ALP relationship: considerable number of voters believe that this relationship casts doubt on the ability of the ALP to govern for all; within the union movement there are union members – even union leaders[428] - who strongly take the view that this relationship fails to serve their best interests; and, even within the ALP this relationship does not enjoy unqualified support with some rank-and-file members feeling disenfranchised by the influence enjoyed by union affiliates and more than a few key party officials expressing concern that the relationship undermines the party's ability to win public office.

For the most part, this submission says very little, often nothing, on these questions. It has focussed on whether there should be a ban on organisational membership fees (including trade union affiliation fees) under a regime of contribution limits. In concluding that there should be an exemption for such fees, the submission does not amount to a general defence of the trade union-ALP relationship. The central point is that this relationship should not be prohibited as a matter of law. The broader question as to whether this relationship is desirable or justified raises a complex range of issues, most of which fall outside the scope of this submission.

One issue that does fall within the scope of this submission is the unfairness that is likely to result from an exemption for membership fees including trade union affiliation fees. As has been explained above, there is currently a lack of 'equality of arms' between the ALP and the Coalition parties resulting in part from the fact that the ALP receives trade union income together with corporate money. This inequality will likely worsen under an exemption for membership fees. Such unfairness should be addressed but not through contribution limits (or removing the exemption for

[427] Queensland Government, *Reforming Queensland's Electoral System*, above n 6, 10.
[428] See, for example, Dean Mighell, 'Unions must leave Labor', *The Age* (Melbourne), 11 February 2010.

membership fees). Rather, as has been argued above, the burden of this task falls on election spending limits.

6 *Contribution Limits and the Implied Freedom of Political Communication*

What is perhaps the most controversial constitutional issue concerning contributions limits[429] is whether these limits are in breach of the implied freedom of political communication, a question that will form the focus of the present discussion.

As noted earlier, the current test for determining whether this freedom has been breached (often referred to as the *Lange* test) has two limbs:

- Does the law (of a state or federal parliament or a territory legislature) effectively burden freedom of communication about government or political matters either in its terms, operation or effect?
- If the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end (in a manner) which is compatible with the prescribed system of representative and responsible government?[430]

Applying the first limb of the *Lange* test, it is clear that limits on political contributions burden the freedom to communicate about government or political matters. This occurs in two ways. First, making a political contribution is, in most cases, a way of communicating support for the recipient party or candidate. Limits on contributions, therefore, burden the formal ability of citizens to communicate in this way by making contributions exceeding the limits. Second, political contributions enable parties and candidates to communicate about government and political matters hence, limits on such contributions will impact upon their ability to do so.

Turning to the second limb of the *Lange* test, there are two principal issues:

---

[429] Tham, *Towards a More Democratic Political Funding Regime in New South Wales*, above n 8, 95-102.

[430] The test was stated in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 571–72 as modified by a majority in *Coleman v Power* (2004) 220 CLR 1, 50 (McHugh J), 78 (Gummow and Hayne JJ), 82 (Kirby J).

- Do the contribution limits serve legitimate aims that are compatible with the system of representative and responsible government prescribed by the *Commonwealth Constitution*?
- Are such limits reasonably appropriate and adapted to serve such aims in a manner compatible with the system of representative and responsible government prescribed by the *Commonwealth Constitution*?

On the question of legitimate aims, the key rationales of contribution limits are to lessen the risk of corruption through graft and undue influence as well as its perception. They are also aimed at promoting the fair value of political freedoms by preventing wealth from enabling a disproportionate influence over the political process.

Reasoning from first principles, both the anti-corruption and fair value rationales of contribution limits are mostly likely compatible with the system of representative and responsible government prescribed by the *Commonwealth Constitution*. The former aim is directed at protecting the integrity of representative government. Not surprisingly, in *Australian Capital Television Pty Ltd v Commonwealth* (*ACTV*), the High Court fully accepted that a ban on political broadcasting (together with the free-time regime) served a legitimate aim of lessening the risk of corruption.[431] The fair value rationale is directly derived from the principle of political equality (see further Part II, 'Aims of a Democratic Political Finance Regime'), a principle that informs the system of representative government prescribed by the *Commonwealth Constitution*. In *ACTV,* for instance, then High Court Chief Justice Mason quoted with approval Harrison Moore's observation that the 'great underlying principle' of the *Commonwealth Constitution* is that citizens have 'each a share, and an equal share, in political power'.[432]

It remains to be considered whether the types contribution limits proposed are reasonably appropriate and adapted to serving these rationales. In determining this

[431] See, for example, *ACTV* (1992) 177 CLR 106, 144–45 (Mason CJ).
[432] Harrison Moore, *The Constitution of the Commonwealth of Australia* (John Murray, 1st ed, 1902) 329. This statement was cited with approval in *ACTV* (1992) 177 CLR 106, 139–40 (Mason CJ).

issue, the High Court will provide a 'margin of appreciation'[433] or 'margin of choice'[434] to legislative judgment as to what regulation should be adopted. The terms of the *Lange* test reflects this judicial deference: the test is whether the regulation is *reasonably* appropriate and adapted to serve a legitimate end and not whether it is *best suited* to serve this end. In particular, the *Lange* test does not require that Australian legislatures adopt regulation serving a legitimate end that involves the least burden on freedom of political communication. Whilst two High Court judges have considered that regulation of the content of political communication would require a higher level of justification,[435] this view does not apply to contribution limits.

The deference informing the *Lange* test rests on two crucial considerations. The first concerns the proper role of Australian courts. Contrasting the implied freedom of political communication with the United States First Amendment jurisprudence, then High Court Chief Justice Brennan in *Levy v Victoria* stated that:

> Under our Constitution, the courts do not assume the power to determine that some more limited restriction than that imposed by an impugned law could suffice to achieve a legitimate purpose. The courts acknowledge the law-maker's power to determine the sufficiency of the means of achieving the legitimate purpose, reserving only a jurisdiction to determine whether the means adopted could reasonably be considered to be appropriate and adapted to the fulfilment of the purpose.[436]

This approach is, as noted by Gleeson CJ in *Coleman v Power,* based on 'the respective roles of the legislature and the judiciary in a representative democracy'.[437] Second, the concepts of representative and responsible government that inform the provisions of the Constitution which gave rise to the implied freedom are 'descriptive of a whole spectrum of political institutions', permitting 'scope for variety' in the design of electoral institutions, including the regulation of political finance.[438]

---

[433] *ACTV* (1992) 177 CLR 106, 15 (Brennan J).
[434] *Coleman v Power* (2004) 220 CLR 1, 52–53 (McHugh J).
[435] *ACTV* (1992) 177 CLR 106, 143 (Mason CJ), 234–235 (McHugh J).
[436] *Levy v Victoria* (1997) 189 CLR 579, 598.
[437] *Coleman v Power* (2004) 220 CLR 1, 31 (Gleeson CJ).
[438] *Attorney-General (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 57 (Stephen J).

Taking account of such deference, whether contribution limits are reasonably appropriate and adapted to serving their aims in a manner compatible with the system of representative and responsible government prescribed by the Commonwealth Constitution depends on a range of factors. Chief amongst these are 'the extent of the restriction, the nature of the interest served and the proportionality of the restriction to the interest served.'[439]

Turning first to the extent of the restriction, contribution limits burden the freedom of political communication by: firstly, restricting the ability of citizens to communicate by making contributions above the limit; and secondly, by reducing the income available to parties and candidates and therefore their ability to engage in political communication. The first burden is likely to be very limited. Contributions below the limits can still convey a message of support to the recipient party or candidate. Further, the limits only affect those having the ability to make contributions above them. A limit of $1000 per annum (as recommended by the NSW Select Committee) would probably only affect the small minority of citizens having the ability to make contributions exceeding this limit (see Part III).

The more significant burden is on the ability of parties and candidates to engage in political communication. Specifically, contribution limits will reduce the private funding available to political parties. The extent of this reduction will, of course, depend on the level at which the limits are set. This burden is, however, offset by the exemptions for membership fees and volunteer labour. Parties that are successful in attracting more members and supporters are likely to able to retain, if not enhance, their ability to engage in political communication. Importantly, the burden placed by contribution limits is also offset by other measures recommended by this submission. Public funding will compensate for the fall in private income through the Party and Candidate Support Fund and, in particular, provide greater subsidies to newcomers (than currently is the case). Election spending limits will limit the significance in the reduction of the overall budgets of the major parties by containing the costs of electioneering (see further above).

[439] *ACTV* (1992) 177 CLR 106, 144–45 (Brennan J).

As with the nature of the interests being served, both the anti-corruption and fair value rationales of contribution limits go to the heart of representative and responsible government. Both rationales have heightened importance in light of the corruption through undue influence that now pervades Australia's political system, developments that threaten to worsen due to the intensifying arms races.

The final consideration under this head is the proportionality of restriction to the interest served. This aspect concerns the design of the contribution limits and the extent to which they are properly tailored to its anti-corruption and fair value rationales. There are compelling reasons in principle for considering these limits to be proportionate to their anti-corruption rationale: they do not impose a blanket ban on political contributions but only prohibit those which carry a significant risk of corruption (i.e. large contributions) and further provide exemptions for contributions (e.g. membership fees) where such a risk is minimal or non–existent. Similarly, with the fair value rationale, by prohibiting large contributions the limits should target contributions which allow wealth to have a disproportionate influence.

In conclusion, there are cogent reasons to conclude that contribution limits set at appropriate levels do not breach the implied freedom of political communication. True, they do burden the freedom but they do so in service of the legitimate aim of preventing corruption and promoting the fair value of political freedoms. Further, there are strong arguments that they are reasonably appropriate and adapted to serve these aims because of the limited burden they involve (in the context of election spending limits and increased public funding), the importance of the aims and the proportionality of the limits to these aims.

7 *Design of Federal Contribution Limits*

The *EFED Act* provides for (indexed)[440] caps on political donations in relation to State elections.[441] The following caps took effect on 1 January 2011:

- political donations to registered political parties will be capped at $5,000 per financial year[442] and $2,000 per financial year for unregistered political parties;[443]

[440] *EFED Act* s 95A(5).
[441] *Electoral Funding and Disclosures Act 1981* (NSW), inserting *EFED Act* div 2A.

- political donations to candidates[444] and elected members[445] will be capped at $2,000 per financial year (donations to candidates and elected members endorsed by a political party will be aggregated for this purpose);[446]
- political donations to groups of candidates will be capped at $5,000 per financial year;[447]
- third parties (referred to in Act as 'third-party campaigners') may not receive more than $2,000 per financial year from each donor;[448]
- each donor is limited to no more than three donations of up to $2,000 per financial year to 'third-party campaigners';[449]
- political donations that are that is paid into accounts kept exclusively for the purposes of federal or local government election campaigns are exempted from the caps;[450] and
- party subscriptions of $2,000 or less disregarded for the purpose of its donation caps (including affiliation fees with the exclusion limited, in the case of party subscriptions calculated by reference to the number of members of the affiliate, to an amount of $2,000 times the number of these members (the limit is $2,000 otherwise).[451]

The NSW scheme of contribution limits provides an excellent model for federal measures. They should, however, be adopted subject to two modifications. First, the limits are set at too high a level. The limits should be closer to the $1,000 per annum limit recommended by the NSW Select Committee. Second, the limits applying to the party subscriptions exclusion are too generous at $2,000 per member – the Queensland model of $500 per member is preferable.

---

[442] *EFED Act* ss 95A(1)(a), 95B(1).
[443] Ibid ss 95A(1)(b), 95B(1).
[444] Ibid ss 95A(1)(e), 95B(1).
[445] Ibid ss 95A(1)(c), 95B(1).
[446] Ibid s 95A(3).
[447] Ibid ss 95A(1)(d), 95B(1).
[448] Ibid ss 95A(1)(f), 95B(1).
[449] Ibid s 95C.
[450] Ibid s 95B(2).
[451] Ibid s 95D.

Recommendation 10: Federal contribution limits should be introduced based on limits that apply under *EFED Act* with the following modifications:

- the limits should be set at a lower level (e.g. $1,000 per annum); and
- the limits applying to the party subscriptions exclusion should be lower (e.g. $500 per member).

E *Enhanced Accountability for Third Party Political Spending*

Third parties are significant actors in Australian politics (and perhaps increasingly so). Whilst third parties by definition are not running for office, this simple fact means they should be subject to the principle of accountability. Moreover, there is good reason to devise specific accountability measures for third party political spending given that they are not subject to accountability through the ballot box – third parties can neither be voted in nor voted out.

Accountability in this context has two aspects, external accountability to the citizens and internal accountability to the members of the third parties. In relation to external accountability, at the very least basic information regarding third parties should be made public including their constitutions and decision-making structures (including membership policies). The relationships third parties have with other third parties as well as political parties should also be made public. Such information allows the public the hold third parties accountable for their political activities.

An effective way to provide for such information is through compulsory registration of third parties that spend above a certain amount. It is such a system that has been introduced by the *EFED Act.* Under this Act, 'third-party campaigners' (defined as 'an entity or person (not being a registered party, elected member, group or candidate) who incurs electoral communication expenditure during a capped expenditure period . . . that exceeds $2,000 in total) are prohibited from making payments for electoral communication expenditure during a capped expenditure period, or accept political donations for the purpose of incurring such expenditure, unless they are registered under the Act.[452] The Register of Third-party Campaigners under the Act will make

[452] Ibid s 96AA(1)(a).

public the names and addresses of the third-party campaigners and 'such other particulars as the (NSW Election Funding) Authority thinks fit'.[453] The timing of registration also has an effect on the 'electoral communication expenditure' cap that applies to the third party.[454]

There should also be a compulsory third party registration scheme at the federal level. There should, however, be two departures from the NSW scheme. Rather than basing the scheme on 'electoral communication expenditure', the scheme should be based on the notion of 'electoral expenditure' for the reasons explained earlier.[455] Moreover, the information to be disclosed should be expanded to include those just discussed.

> *Recommendation 11:* There should be a compulsory third party registration scheme at the federal level requiring third parties that spend more than $2,000 in 'electoral expenditure' during the period which election spending limits apply to register.
>
> *Recommendation 12:* This scheme should make public the following information regarding registered third parties:
>
> - their constitutions and decision-making structures (including membership policies);
> - the relationships third parties have with other third parties as well as political parties should also be made public.

We can now turn to the question of internal accountability. This question takes different forms with different third parties. For trade unions, this is a question of democratic accountability.[456] At present, federal industrial legislation require federally registered trade unions to set out rules in relation to the spending of monies,[457] and to spend sums of more than $1000 only when authorised by the union committee of management, which must be satisfied that such spending is in

[453] Ibid s 38B(2).
[454] Ibid s 95F(10).
[455] See text above accompanying n 370.
[456] See, for example, *Fair Work (Registered Organisations) Act 2009* (Cth) s 5(3)(d).
[457] Ibid ss 141(1)(b)(ix)–(xi).

accordance with the rules of the union.[458] There is *no* requirement that such unions adopt specific rules in relation to political spending.

In some cases, unions have of their own volition adopted specific rules in relation to political spending. The rules of the AMWU, for example, require that any spending to further political objectives shall only be made from a Political Fund. The Political Fund is financed by members making a specific contribution and is segregated from other union monies. Under the AMWU rules, members also have a right to be exempted from making this contribution.[459] In most cases, however, it seems that the rules of unions do not make specific provision for political spending. The rules of the CEPU (General),[460] LHMU[461] and CFMEU,[462] for example, essentially reproduce the statutory requirements and generally authorise their committees of management to make decisions in relation to spending.

These arrangements in the context of formally democratic elections[463] provide a notional guarantee of internal accountability. Such a guarantee is, however, liable to be subverted by the reality of power relations. Here we confront the problem of oligarchy in relation to large organisations identified by Robert Michels more than four decades ago. Michels famously argued that there was a tendency towards oligarchy in large organisations, that is, the ruling elite holding effective control, because of the general passivity of rank-and-file members and the elite's superior political skills and its control over finances and the means of communications. This, according to Michels, was the iron law of oligarchy.[464] Studies of trade union internal democracy, whilst identifying particular circumstances where such democracy can flourish (most importantly, the institutionalisation of organised opposition), have been

---

[458] Ibid s 149.
[459] 'Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union' known as the Australian Manufacturing Workers' Union (AMWU), 'Rules of the AMWU' (Rules, AMWU, November 2009) cl 21.
[460] Communication, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Services Union of Australia (CEPU), 'Rules of the CEPU' (Rules, CEPU, 2009) cl 19.
[461] Liquor, Hospitality and Miscellaneous Union (LHMU), 'Rules of the LHMU' (Rules, LHMU, 2011), cl 31.
[462] Construction, Forestry, Mining and Energy Union (CFMEU), 'Rules of the CFMEU' (Rules, CFMEU, 2010) c 49.
[463] See, for example, *Fair Work (Registered Organisations) Act 2009* (Cth), ss 143–44.
[464] Michels, above n 402.

similarly pessimistic.[465] These various studies underscore the persistent and complex challenge of installing internal democracy in large organisations including unions.

Promoting internal union democracy in relation to political expenditure is not exempt from this challenge. Indeed, decisions relating to political expenditure may involve particularly serious threats to internal union democracy. The processes of making such decisions are often hidden from the gaze of ordinary union members. With decisions on strictly industrial issues, for instance, wage rises to be claimed, union members ordinarily need to be consulted not least to enlist their support for the industrial claims to be made by the union. This is, however, not the case with decisions to engage in political expenditure whether through contributions to political parties or independent political spending, that is, third party spending. For unions that affiliate to the ALP, the influence their representatives wield by virtue of their membership of the ALP, for instance in the pre-selection of candidates, is also typically shrouded in secrecy. For example, in 2009, unions affiliated to the Victorian ALP were involved in a 'secret peace deal' that decided who should be pre-selected as ALP candidates in the upcoming federal and state elections.[466]

There is also a long list of union officials who have moved on to become ALP parliamentarians with recent additions including Greg Combet, former Secretary of the Australian Council of Trade Unions, now a Minister in the Rudd Labor Government, and Bill Shorten, former National Secretary of the Australian Workers' Union, currently a parliamentary secretary. There is of course nothing wrong in itself with these transitions. These established pathways do, however, throw up a risk that the prospect of a parliamentary career will tempt some union officials, whether

[465] See, for example, the study by Seymour Martin Lipset, Martin Trow and James Coleman of the International Typographical Union where the authors concluded: '[w]e have shown that there is much more variation in the internal organization of associations than the notion of an iron law of oligarchy would imply, but nevertheless, the implications of our analysis for democratic organizational politics are almost as pessimistic as those postulated by Robert Michels': Lipset, Trow and Coleman, *Union Democracy: The Internal Politics of the International Typographical Union* (Free Press, 1956) 405. For discussion of the Australian situation, see S Deery, D Plowman and C Fisher, *Australian Industrial Relations* (McGraw-Hill, 1980) 247-253; Peter Fairbrother, 'Union Democracy in Australia: Accommodation and Resistance' in Lawson Savery and Norman Dufty (eds), *Readings in Australian Industrial Relations* (Harcourt Brace Jovanovich, 1991) 297; Carol Fox, William Howard and Marilyn Pittard, *Industrial Relations in Australia: Development, Law and Operation* (Longman Australia, 1995) 209–15.

[466] Mathew Dunckley, 'ALP peace deal falls foul of unions' *Australian Financial Review* (Australia), 19 January 2009; Paul Austin and Marc Moncrief, '"Peace" deal has ALP in turmoil', *The Age* (Melbourne), 20 January 2009.

consciously or not, to either prefer their interests or the interests of the ALP over that of their members when making decisions on political spending.

Some may also infer oligarchical decision-making in relation to these decisions from the voting record of union members. This record clearly shows that not all union members support the ALP. For example, only 63 per cent of union members from 1966 to 2004 voted for the ALP.[467] This figure, however, does not necessarily provide any further evidence of oligarchical decision-making in relation to trade union political spending. Several key unions have neither affiliated nor contributed to the ALP (see above). While further examination is required, it may be the case that the number of members in unions that are supportive of the ALP corresponds to the number who voted for it. Moreover, it is quite rational for union members to endorse their union's decision to support the ALP in order to promote the importance of the union agenda, while deciding in overall terms that the Coalition is better suited for government.

Turning to corporate contributors, we are also faced with the problem of internal accountability but in a different form. It is not a question of democratic accountability or the problem of oligarchy simply because commercial corporations, as plutocratic organisations, have no pretensions to democratic decision-making. As Lipset, Trow and Coleman correctly pointed out, '[o]ligarchy becomes a problem only in organizations which assume as part of their public value system the absence of oligarchy, that is, democracy'.[468]

Plutocratic organisations nevertheless still rely upon notions of accountability, but these notions are based on accountability to providers of capital. With corporate political contributions, there is the specific question of accountability to shareholders and whether these contributions have been made in the interests of the shareholders. Dangers analogous to those that threaten democratic decision-making in relation to trade union political spending are also present. Secrecy generally attends processes in relation to whether political contributions should be made, as they tend to be made by

[467] Andrew Leigh, 'How Do Unionists Vote? Estimating the Causal Impact of Union Membership on Voting Behaviour from 1966 to 2004' (2006) 41(4) *Australian Journal of Political Science* 537.
[468] Lipset, Trow & Coleman, *Union Democracy*, above n 465, 5.

company boards rather than the shareholders at large. There is also the risk of managers making contributions in order to further their self-interest rather than the interest of the company.[469]

For some, the dangers are all the more acute given that companies tend not to be overtly political organisations. To illustrate, a senior business figure has been quoted as being uneasy with the decision of the Business Council of Australia and Australian Chamber of Commerce and Industry to create the National Business Action Fund to fund advertisements to campaign in favour of *Work Choices,* on the basis that '[b]usiness associations are about issues and the best interests of their members. They shouldn't be part of the political process like this'.[470] In a similar vein, the policy of the Australian Shareholders Association on political donations states that:

> Companies must operate within the legal and regulatory system applying in the places in which they operate. Theirs is an economic role – as expressed in the dictum 'The business of business is business' – not a political one.

Accordingly, the Australian Shareholders Association completely opposes political contributions by public companies.[471]

With other third parties, the question of internal accountability also arises but sometimes, it is not clear what kind of internal accountability does – and should – apply. Take, for example, GetUp! At time of writing, GetUp! states that it has 432 966 members. [472] It appears from the website that one can join to be a member online by providing an email address, name and postcode[473] - no payment or declaration of support for GetUp!'s objectives is required.

These members presumably should have a crucial role in GetUp!'s decision-making processes given that GetUp! states that it 'is an independent, *grass-roots* community

[469] See Ramsay, Stapledon & Vernon, 'Political Donations by Australian Companies', above n 92, 186–87, 189–90.
[470] Phillip Coorey, 'Exposed: the Secret Business Plot to Wreck Labor', *Sydney Morning Herald* (Sydney), 20 June 2007, 1.
[471] See Australian Shareholders' Association, *Political Donations: Policy Statement* (2004).
[472] Getup, *Getup! Action for Australia* <http://www.getup.org.au>.
[473] Getup, *Getup! Register* <https://www.getup.org.au/community/join/>.

advocacy organisation giving everyday Australians opportunities to get involved and hold politicians accountable on important issues'.[474] It is, however, not easy to discern what role GetUp! provides for its members in its decision-making processes. Indeed, it is not clear what GetUp!'s decision-making processes are. The annual reports it has made public on its website reveals that GetUp! is a company with a board of directors that advises its staff.[475] There is, however, little information on GetUp!'s decision-making processes beyond this. Important questions arise here:

- Who appoints (or elects) the board of directors?
- Who appoints the staff?
- What is the formal relationship between the board of directors and the staff?
- What formal role do members have in relation to the board of directors and the staff?
- Who determines the campaign priorities of GetUp! and how the campaigns are run?

I think I am a 'member' of GetUp! in the sense of having signed up to receive its emails. In my experience, I have not had the opportunity to:

- vote for GetUp!'s board of directors; and
- attend an annual meeting assessing GetUp!'s activities for the year.

I suspect my experience would mirror those of other 'members' of GetUp!. If so, 'members' of GetUp!, then, are not able to effectively hold its staff and board of directors properly accountable. We have to ask then: in what sense are 'members' of GetUp! genuine members of the organisation?[476]

There are then significant challenges to internal accountability in relation to third party political spending. To meet these challenges, there should be a requirement that third parties respectively seek specific authorisation from their members (or shareholders) before making political contributions or engaging in political spending.

---

[474] Getup, *Getup! About Getup* <https://www.getup.org.au/about/> (emphasis added).
[475] According to the latest annual report on the website, the 2008/2009 annual report, the members of the board of directors are Dr Amanda Tattersall, Jeremy Heimans, David Madden and Catriona Faehrmann: see Getup, 'Final Annual Report 2008-2009' (Report, Getup, 2009) <https://www.getup.org.au/filaes.campaigns/finalannualreport200809.pdf>.
[476] I have made these points previously in a public lecture, see Joo-Cheong Tham, 'Money and Politics: Why It Matters to Human Rights' (Speech delivered at the Castan Centre for Human Rights Law, Monash University, Melbourne, 4 November 2010).

An authorisation requirement in relation to trade union political expenditure has Australian precedent: for a few years, Western Australian trade unions were required to set up a separate fund for political spending.[477] Similarly, former Democrats Senator Andrew Murray has recommended that businesses and trade unions respectively seek authorisation from their shareholders and members at annual general meetings or at least every three years.[478]

Another possible model (which can broadened) is the UK controls on donations made by trade unions and companies. British trade unions are required to ballot their members every ten years for authority to promote their political agendas. Once authorised, political expenditure by a trade union must be made from a separate political fund to which individual members have a right to refrain from contributing. British companies, on the other hand, are required to seek authorisation from their shareholders every four years to make political donations and/or political expenditure.[479]

> *Recommendation 13:* Third parties should be required to seek specific authorisation from their members (or shareholders) before making political contributions or engaging in political spending on a periodic basis.

F *A Party and Candidate Support Fund*

Public funding can play a vital role in democratising the federal political finance regime. If contribution limits are imposed, such funding will be necessary to (partly) make up for the shortfall in income experienced by political parties. In doing so, public funding will directly support these parties in discharging their functions. Together with such limits, public funding will also wean these parties off of large political contributions, thereby lessening the risk of corruption. Most importantly

---

[477] *Industrial Relations Act 1979* (WA), s 97P (repealed). This requirement was in force from 1997 to 2002.
[478] See Andrew Murray, 'Dissenting Report' in Joint Standing Committee on Electoral Matters, Parliament of Australia, *Funding and Disclosure: Inquiry into Disclosure of Donations to Parties and Candidates* (2006), [2.2] (trade unions), [5.5] (corporations).
[479] For the requirements applying to trade union political expenditure, see discussion in Ewing, *The Cost of Democracy*, above n 200, ch 3; and Keith Ewing, *Trade Unions, the Labour Party and the Law: A Study of the Trade Union Act 1913* (Edinburgh University Press, 1982).

perhaps, public funding is, as John Rawls has recognised, an important way to promote the fair value of political freedoms,[480] in particular greater electoral fairness.

There are, however, significant faults with current election funding schemes: their positive effect in promoting electoral fairness is limited; unfairness results from the 4 per cent threshold and through the schemes possibly inflating campaign expenditure. There is also no evidence to suggest that they have reduced reliance on private funding or lessened the risk of corruption through graft and undue influence (indeed, there is good argument to the contrary). Further, such schemes do little to enhance the participatory function of parties and may even detract from it.

Some of these problems cannot be addressed through changes to election funding schemes alone. Election spending limits (as advocated above) are necessary in order to deal with the increase in campaign expenditure that may result from providing public funding. Other deficiencies will be better dealt with through other regulatory measures. The aim of lessening dependence on private funding may be achieved by making receipt of election funding contingent upon various conditions, but is more effectively achieved through contribution limits (as proposed above). Alongside these other measures, however, there should be significant changes to the federal election funding scheme - it should be more expressly directed at promoting the functions of parties (including but going beyond their electoral function).

One possible model for such changes are those introduced by the *EFED Act.* There are three separate funds under this Act, Election Campaigns Fund, Administration Fund and the Policy Development Fund. While these funds have different eligibility criteria and amounts, their basic design can be summarised as such:

- the Election Campaigns Fund is a post-election reimbursement (of electoral expenditure) scheme that has an eligibility threshold of 4% of first preference votes (or an elected member) and provides for reimbursement on a declining scale;[481]

[480] Rawls, *Political Liberalism*, above n 37, 357–58; Rawls, *Justice as Fairness: A Restatement*, above n 37, 149.
[481] *EFED Act* ss 56-60.

- the Administration Fund is a scheme for independent members and parties that have elected members and provides for annual payments of 'administrative expenditure' with maximum payments calculated according to the number of elected members; ;[482] and
- the Policy Development Fund is a scheme for parties that are not eligible for payments from the Administration Fund (i.e. those without elected members) and provides for annual payments for 'policy development expenditure' with maximum payments calculated according to the number of first preference votes received in the previous State election.[483] Parties are for the first eight years after registration under the *EFED Act* entitled to at least maximum annual payments of $5,000 (indexed).[484]

We see here that the *EFED Act* provides for three ways to calculate public funding to parties and candidates: reimbursement of electoral expenditure; number of elected members; and number of first preference votes. The last, being the most accurate measure of electoral support, is the fairest way to allocate public funding. The number of elected members is more indirect a measure while a reimbursement model bears no relationship to electoral support. A reimbursement model does, however, have the advantage of providing parties and candidates with some certainty as to the public funding they would receive to cover their electoral expenditure (a point to which will revisited very shortly).

Rather than follow the NSW public funding scheme, the federal election funding scheme should be reconfigured into Party and Candidate Support Funds. These funds should have three components. The first, *election funding payments,* will replicate the payments made under current election funding schemes but, instead of the 4 per cent threshold, there should be a lower threshold (e.g. 2 per cent).[485] To better promote electoral fairness, the payment amount should be subject to a tapered scheme with the payment rate per vote decreasing according to the number of first preference votes received. For example 5 per cent of first preference votes could entitle a party to a

[482] Ibid ss 97B, 97D-97G.
[483] Ibid ss 97H-97I.
[484] Ibid s 97I(5).
[485] For instance, whereas a 2 per cent threshold used to apply in relation to the ACT funding and disclosure regime, the threshold is now 4 per cent: *Electoral Act 1992* (ACT) s 208.

payment of $2.00 per vote, while a payment rate of $1.50 per vote applies to the next 20 per cent of first preference votes and a payment rate of $1.00 per vote attaches to votes received beyond the 25 per cent mark. This tapered scheme is akin to a progressive income tax system, with less resourced parties helped to a greater degree. This tapered scheme should operate with a floor of 20% of electoral expenditure, that is, parties and candidates, regardless of the number of first preference votes they receive, will be entitled to election funding payments that cover at least 20% of their electoral expenditure.

Second, Party Support Funds should provide for *annual allowances.* Parties and candidates eligible for election funding payments should be eligible for these annual allowances. In addition, parties that have individual membership exceeding a certain level, for example 500, should also be eligible for these payments. The formula for distributing these allowances should be based on both votes received in the previous election and current membership figures. Linking annual allowances to membership figures may result in parties recruiting more members and thereby, invigorating their participatory function.

Third, the Party Support Funds should include *policy development grants.* These could be modelled on the policy development grants operating under the British political finance scheme.[486] Eligibility for these grants should be the same as that which applies to annual allowances. These funds should only be used to fund activities that are strictly aimed at policy development and not electioneering. The policy development grants should encourage parties to devote more time and energy to generating new ideas and policies and, hopefully, enhancing their agenda–setting function.

> *Recommendation 14:* There should be a Party and Candidate Support Fund comprising three components:
>
> - election funding payments (calculated according to a tapered scale based on the number of first preference votes with 20% of electoral expenditure floor);

[486] *Political Parties, Elections and Referendums Act 2000* (UK) c 41, s 12.

- annual allowances (calculated according to number of first preference votes and membership);
- policy development grants (calculated according to number of first preference votes and membership).

G *Reducing the Risk of Parliamentary Entitlements Being Used for Electioneering*

The earlier analysis of parliamentary entitlements[487] leads to the following recommendation:

Recommendation 15:

- The rules governing federal parliamentary entitlements should:
  - be made accessible and transparent; and
  - clearly limit the use of such entitlements to the discharge of parliamentary duties and prevent their use for electioneering.
- The amount of federal parliamentary entitlements should not be such so as to confer an unfair electoral advantage on federal parliamentarians.

In October 2009, the federal government established an independent Parliamentary Entitlements Review Committee.[488] The committee provided its report to the government on 9 April 2010 but this report has not been publicly released as yet; nor has the government issued its response to the report.[489] At the time of writing, ten months would have elapsed since the committee submitted its report to the government. There is little justification for the report being kept secret for such a period.

Recommendation 16: The report of the Parliamentary Entitlements Review Committee should be released as soon as possible.

---

[487] See text accompanying nn 218-250.
[488] Joe Ludwig, 'Government Welcomes Submissions to Parliamentary Entitlements Review Committee' (Media Release, 40/2009, 9 October 2009) <http://www.smos.gov.au/media/2009/mr_402009 html>.
[489] Department of Finance and Deregulation, 'Annual Report 2009-2010' (Report, Department of Finance and Regulation, 2010) Outcome 3 <http://www finance.gov.au/publications/annual-reports/annualreport09-10/index html>.

H *Preventing Party-political Government Advertising*

The acute risk of party-political government advertising by the party in power would strongly suggest a need for robust regulation of government advertising so as to prevent its abuse as a vehicle for party-political messages. Two related but distinct arguments have, however, been made against such regulation. The first contends that it is impossible to regulate to prevent party-political government advertising because everything can be portrayed as party-political.[490] This objection is misconceived. It is not government advertising that is political in a broad sense that is to be regulated but advertising that is aimed at enhancing the electoral prospects of the governing party (or damaging the electoral prospects of its competitors). To be sure, much government advertising will tend to have as *one of its purposes (or effects)*, the enhancement of the electoral prospects of the governing party. As the South Australian Auditor-General perceptively observed:

> A government is elected on a party political platform and, once elected, is entitled to inform the public about the implementation of that political platform. Consequently, the party which forms government may derive a collateral benefit in electoral terms from any advertising undertaken about the implementation of the policy platform on which it was elected.[491]

In such circumstances, government advertising should not be characterised as party-political and illegitimate simply because one of the purposes is boosting the electoral prospects of the governing party. A higher threshold is required and one option is to adopt the position of the South Australian Auditor-General that 'where the substantial purpose was the advancement of the electoral prospects of the party in power', government advertising would be considered improper.[492]

---

[490] Elements of this objection can be found in Liberal MP Petrou Georgiou's objection to federal government advertising being subject to a guideline that '[m]aterial should not be liable to misrepresentation as party political' on the basis that 'in a highly combative political system, materials which are totally non-partisan are open to misrepresentation as party political': see Joint Committee of Public Accounts and Audit, Parliament of Australia, *Report 377: Guidelines for Government Advertising* (2000) 3.

[491] South Australian Auditor-General, *Report of the Auditor-General for the Year Ending 30 June 1997* (1998) Part A.4.

[492] Ibid.

The second argument against regulation claims that determining what is party-political advertising is highly contextual and regulation will not be sufficiently precise in order to provide effective guidance.[493] It is true that '[i]t is a question of fact and law as to whether any expenditure is or is not appropriate in this context'.[494] This argument, however, overreaches. The presence of party-political government advertising, or advertising where a substantial purpose is to enhance the electoral prospects of the party in power (or damage those of its competitors), will be clear in various situations. Government advertising that expressly advocates a vote for the party in power or directly criticises the Opposition are cases on point. The Victorian Auditor-General has also identified various situations where material could be reasonably interpreted as party-political including regular use of the name of the State Premier (for example 'the Bracks Government' or 'the Bracks Labour Government') and attacking or scorning views of others (for example: 'Under the former Kennett Government, Melbourne's hospitals were not only surviving on the smell of an oily rag but were secretly selling off the family silver').[495]

Other situations would provide strong circumstantial evidence of party-political advertising. A circumstance suggestive of party-political advertising is when government advertising takes place close to election time. Another circumstance is when the advertising relates to policies that have yet to be adopted. Both these circumstances combined in the case of the 'WorkChoices' advertising campaign, lending compelling force to the following observations of the majority of the Senate Finance and Public Administration Committee:

> in the absence of enacted legislation and detailed information, what can the WorkChoices campaign achieve? The real purpose of the campaign seems to be to try to persuade the public, in advance of any scrutiny or debate on the

[493] See, for example, Petrou Georgiou's dissent at Joint Committee of Public Accounts and Audit, *Report 377*, above n 490, 3.
[494] South Australian Auditor-General, *Report of the Auditor-General for the Year Ending 30 June 1997*, above n 491, Part A.4.
[495] Victorian Auditor-General, *Report on Public Sector Agencies* (2002) 306–307 <http://download.audit.vic.gov.au/files/PSA_report_2002.pdf>.

> substance of the reforms, that whatever the legislation contains it must be supported. Such a campaign is properly called propaganda.[496]

That said, the point remains that the question whether government advertising is party-political is deeply contextual. Whether such advertising is party-political will depend on various factors including whether it can be justified by reference to specific informational needs; its content and timing; the amount spent; and the broader political context of such advertising. The complexity attending such judgments does not mean regulation is unworkable in practice. What it means is that there must be an emphasis on requiring governments to *justify* the need for the advertising in which they engage with a specific onus on governments to explain why such advertising is not party-political.

This implies a focus on strengthening the broader framework of political accountability applying to government advertising. The argument here is not only that specific measures directed at preventing party-political government advertising are important. Equally, and this point should be emphasised, a robust accountability framework is essential to prevent party-political government advertising. For instance, requiring governments to justify advertising campaigns based on specific informational needs will be one way to filter out party-political advertisements because such advertising is often not directed towards specified information need.[497]

1 *Accountability Through Parliamentary Scrutiny*

Accountability relating to government advertising can occur through parliamentary scrutiny either prospectively, through the appropriation process, or retrospectively, after the money has been spent on the advertising.

Prospective parliamentary scrutiny arises through the requirement that there be an appropriation of money through the parliamentary process before public funds can be

---

[496] Senate Finance and Public Administration References Committee, *Government Advertising and Accountability*, above n 252, 51.
[497] See generally The Audit Office of New South Wales, *Performance Audit: Government Advertising*, (2007) 28.

spent by the executive.[498] This requirement is of vital importance in terms of democratic accountability. The relevant provisions of the *Commonwealth Constitution*, sections 81 and 83,[499] for instance, have been described by the High Court as assuring 'the people effective control of the public purse'.[500]

While of general importance in ensuring democratic accountability, this mechanism is significantly limited when it comes to government advertising. More often than not, government advertising is not specifically itemised in appropriation bills making it difficult, if not impossible, for parliamentarians to evaluate whether money should be allocated to such advertising. This difficulty has been compounded by the move to outcome budgeting, that is, the practice of allocating monies against outcomes rather than for the provision of particular services or activities.

The limitations of the parliamentary appropriation process at the federal level have been highlighted *and* exacerbated by the High Court's decision in *Combet v Commonwealth.*[501] The key issue in this case was whether the 'WorkChoices' advertising was authorised by Schedule 1 of the *Appropriation Act No 1 2005–2006 2005* (Cth) (*Appropriation Act No 1 2005*). Schedule 1 (reproduced below) was based on outcome budgeting with millions of dollars, and sometimes more than a billion dollars, allocated against broad outcomes (e.g. 'Higher productivity, higher pay workplaces').

---

[498] For equivalent provisions in other jurisdictions, see *Constitution Act 1902* (NSW) s 45; *Constitution of Queensland Act 2001* (Qld) s 66; *Public Finance and Audit Act 1987* (SA) s 6; *Public Accounts Act 1986* (Tas) s 8; *Constitution Act 1975* (Vic) s 92; *Constitution Act 1889* (WA) s 72; *Financial Management Act 1996* (ACT) ss 6, 8; *Financial Management Act 1995* (NT) s 5(2).

[499] For a recent article examining these provisions, see Charles Lawson, 'Reinvigorating the Accountability and Transparency of the Australian Government's Expenditure' (2008) 32 *Melbourne University Law Review* 879.

[500] *Brown v West* (1990) 169 CLR 195, 205.

[501] For excellent analyses of this decision, see Lotta Ziegert, 'Does the Public Purse Have Strings Attached? *Combet & Anor v Commonwealth of Australia & Ors'* (2006) 28 *Sydney Law Review* 387; Geoffrey Lindell, 'The *Combet Case* and the Appropriation of Taxpayers' Funds for Political Advertising – An Erosion of Fundamental Principles?' (2007) 66(3) *Australian Journal of Public Administration* 307; Graeme Orr, 'Government Communication and the Law' in Sally Young (ed), *Government Communication in Australia* (Cambridge University Press, 2007) 22–24.

Table 27: Appropriations (Plain Figures) Listed in Schedule 1, Employment and Workplace Relations Portfolio of *Appropriation Act No 1 2005–2006 2005* (Cth), 78.

	Departmental outputs	Administered expenses	Total
Outcome 1 – Efficient and effective Labour market assistance	$1 235 216 000	$1 970 400 000	$3 205 616 000
Outcome 2 – Higher productivity, higher pay workplaces	$140 131 000	$90 559 000	$230 690 000
Outcome 3 – Increased workforce participation	$72 205 000	$560 642 000	$632 847 000
Total	$1 447 552 00	$2 621 601 000	$4 069 153 000

Source: *Appropriations Act (No 1) 2005–06 2005* (Cth) sch 1.

By a 5–2 majority, the High Court found that Schedule 1 authorised the 'WorkChoices' advertising. Then Chief Justice of the High Court Gleeson, as part of the majority, found that there was a rational connection between such advertising and Outcome 2. His Honour reasoned that because the Portfolio Budget Statement which informed the interpretation of Schedule 1 stipulated that 'providing policy advice and legislation services' met Outcome 2, it followed that informing the public and obtaining their acceptance of such legislation would also meet this outcome.[502]

The joint judgment of Justices Gummow, Hayne, Callinan and Heydon went further in concluding that there was *no* need for any connection between the 'WorkChoices' expenditure and the outcomes stated in Schedule 1. According to their Honours, such expenditure was a 'departmental output' / 'departmental item' and not an 'administered expense' / 'administered item'. In their view, '[d]epartmental items are not tied to outcomes; administered items are'.[503] This conclusion, firstly, rested upon a comparison of s 7(2) of the *Appropriation Act No 1 2005* which stated that money allocated 'for a departmental item for an entity may only be applied for the

[502] *Combet v Commonwealth* (2005) 224 CLR 494, 530.
[503] Ibid 565 (Gummow, Hayne, Callinan and Heydon JJ).

departmental expenditure of the entity' and s 8(2) which provided that the amount issued for an administered item 'may only be applied for expenditure for the purpose of carrying out activities for the purpose of contributing to achieving that outcome' – a comparison that suggested to their Honours that departmental items were not tied to outcomes. A further reason for this conclusion was the note for the definition of 'departmental item' which provides as follows:

> The amounts set out opposite outcomes, under the heading 'Departmental Output' are 'notional'. They are not part of the item, and do not in any way restrict the scope of the expenditure authorised by the item.[504]

The dissenting judges, Justices McHugh and Kirby, concluded that there needed to be a rational connection between the advertising expenditure and the outcomes stipulated in Schedule 1. They found this connection to be absent.[505] Justice McHugh, for instance, curtly observed that '[t]he advertisements provide no information, instruction, encouragement or exhortation that could lead to higher productivity or higher pay'.[506] In strong words, the dissenters variously described the majority judgment as 'erroneous'[507] and 'seriously flawed'.[508]

The majority decision in the *Combet* case has been heavily criticised by commentators with one going so far as to query whether it erodes fundamental constitutional principles.[509] Whatever the merits of these criticisms, it is clear that *Combet* has broader implications for the general appropriation process at the federal level and not just federal government advertising. Specifically, it has brought to the fore the challenge to financial accountability that may arise with outcome budgeting.[510] The problem here is not with outcome budgeting itself but the practice of describing outcomes in vague terms. This was clearly brought out by former

---

[504] Ibid 564–65 (Gummow, Hayne, Callinan and Heydon JJ).
[505] Ibid 532 (McHugh J), 605–08 (Kirby J).
[506] Ibid 532.
[507] Ibid 535.
[508] Ibid 610.
[509] See Lindell, 'The *Combet Case* and the Appropriation of Taxpayers' Funds for Political Advertising', above n 501, 307.
[510] See, for example, discussion at Senate Standing Committee on Finance and Public Administration, Parliament of Australia, *Transparency and Accountability of Commonwealth Public Funding and Expenditure* (2007) 46–49.

Democrats Senator Andrew Murray in his report to the federal ALP Government, *Review of Operation Sunlight: Overhauling Budgetary Transparency*. In this report, Senator Murray observed that 'many agencies have formulated broad and potentially meaningless outcome descriptions that counter the Parliament's ability to understand, assess, monitor and approve Government expenditure'.[511] In a stinging criticism, Senator Murray said:

> In the worst cases you have to wonder at the attitude that encourages useless and generalised outcome descriptions, and then ties large appropriations to them, consequently allowing for such wide ministerial and bureaucratic discretion that accountability loses any meaning. Such latitude, especially if rubber-stamped by a supine or Executive-dominated Parliament, can result in legitimacy being confirmed simply because the law does not prohibit such practice.[512]

There are promising signs that some of the deficiencies associated with outcome budgeting will be addressed by the federal ALP Government. Its policy document, *Operation Sunlight: Enhancing Budget Transparency*,[513] criticises current practices on the basis that '[s]ome outcomes are so broad and general as to be virtually meaningless for the Budget accounting purposes leading taxpayers to only guess what billions of dollars are being spent on',[514] giving as an example the hundreds of millions of dollars allocated to the Department of Employment and Workplace Relations for 'Higher pay, higher productivity'.[515] In that document, the ALP Government has committed to a range of measures to tighten up the outcomes budget framework, in particular: making specified outcomes as detailed as possible; requiring agencies to include in their annual reports the outcomes of their funding; and instigating a systematic process of evaluating results against targets that will be undertaken by the Department of Finance and Deregulation subject to a performance audit by the Australian National Audit Office.[516]

---

[511] Andrew Murray, *Review of Operation Sunlight: Overhauling Budgetary Transparency* (June 2008) 86.
[512] Ibid 86.
[513] Australian Government, *Operation Sunlight: Enhancing Budget Transparency* (2008).
[514] Ibid 4.
[515] Ibid.
[516] Ibid 5–6.

If implemented effectively – what perhaps is the key challenge for these changes[517] – these measures will enhance financial accountability in relation to federal government expenditure including spending on federal government advertising. They do not, however, necessarily provide for specific scrutiny of such advertising. More detailed budget outcomes do not mean and will not result in specific itemisation of such advertising. When it comes to government advertising there are clear limits to the prospective financial accountability that can be secured through the appropriations process.

These limitations do not equally apply when parliaments hold the executive accountable for its spending on advertising after such spending has been incurred. There are various mechanisms to secure such retrospective accountability. Notably, parliaments in all jurisdictions have public accounts committees that could scrutinise such spending.[518] The effectiveness of such committees in scrutinising the spending involved in government advertising will depend on a complex range of factors: the willingness and vigour with which members of these committees seek to hold the executive accountable, their knowledge and expertise, and the resources provided to the committees.

Importantly, the effectiveness of these committees (and public scrutiny more generally) will depend upon the information these committees have at their disposal and, in particular, whether detailed information relating to government advertising is publicly disclosed. Drawing upon the practices of the Canadian Government, the Senate Finance and Public Administration Committee has produced an extremely useful set of recommendations that detail what it considers to be an adequate disclosure regime in relation to government advertising. The central elements are contained in Table 28.

---

[517] Andrew Murray, above n 511, 87.
[518] They are the Commonwealth Joint Committee of Public Accounts and Audit; NSW Public Accounts Committee; Queensland Public Accounts Committee; SA Economic and Finance Committee; Tasmanian Parliamentary Public Accounts Committee; Victorian Public Accounts and Estimates Committee; WA Legislative Assembly Public Accounts Committee; WA Legislative Council Estimates and Financial Operations Committee; ACT Standing Committee on Public Accounts; NT Public Accounts Committee.

Table 28: Key Recommendations Made by the Senate Finance and Public Administration Committee

Recommendation 10	• An annual report should be published by the Department of Prime Minister and Cabinet providing : ○ a total figure for government expenditure on advertising activities; ○ total figures, listed by agency, for expenditure on advertising activities; ○ figures for expenditure on media placement by type; ○ figures for expenditure on media placement by month; and ○ detailed information about major campaigns, including a statement of the objectives of the campaign, the target audience, a detailed breakdown of media placement, evaluation of the campaign including information about the methodology used and the measurable results, and a breakdown of the costs into 'production', 'media placement' and 'evaluative research'.
Recommendation 11	• Annual reports of each government agency to provide: ○ a total figure for the agency's advertising expenditure; and ○ a consolidated figure for the cost for each campaign managed by that agency.
Recommendation 12	• Annual reports of each government agency to provide: ○ a total figure for departmental expenditure on public opinion research; ○ a breakdown of the type of research, including the expenditure on research for advertising as a percentage of total research costs; ○ highlights of key research projects; and ○ a listing of research firms used by business volume.

Source: Senate Finance and Public Administration References Committee, Parliament of Australia, *Government Advertising and Accountability* (2005)[7.94]–[7.96].

The Commonwealth arrangements relating to government advertising do fare well against these recommendations in key respects. For some time, Commonwealth Government departments have been required to attach information to their annual reports detailing the amounts they paid to advertising agencies, market research organisations, polling organisations, direct mail organisations and media advertising organisations for amounts exceeding an indexed threshold.[519] In 2009–2010, the

[519] *Commonwealth Electoral Act 1918* (Cth) s 311A.

indexed threshold stood at $11 200.[520] In 2009, the Commonwealth Government significantly supplemented this reporting obligation by releasing biannual reports on advertising campaigns. The reports that have been released thus far provide the total amount of Commonwealth Government advertising, identify campaigns costing more than $250 000, detail the expenditure involved in these campaigns for media placement, market research, advertising production and public relations, and provide brief explanations of the objectives of the campaigns.[521]

These reports clearly enhance transparency in relation to Commonwealth Government advertising. Specifically, they go a long way towards implementing Recommendation 10 of the Senate Finance and Public Administration Committee's report on government advertising. They nevertheless fail to implement the Committee's recommendations in important respects. Recommendation 12 is only implemented to the extent that the total amount spent on public opinion research is documented. Even the stipulation that there be detailed information about major campaigns (Recommendation 10) has only been partially implemented. In particular, the reports do not provide full information on the campaign's target audience and fail to include an evaluation of the campaign including information about the methodology used and the measurable results (see further Table 28 above).

> *Recommendation 17*: Recommendations 10 and 12 of the Senate Finance and Public Administration Committee in relation to the disclosure of information concerning government advertising should be fully adopted.

---

[520] Ibid s 321A.

[521] Asset Management Group, Commonwealth Department of Finance and Deregulation, *Campaign Advertising by Australian Government Departments and Agencies Half Year Report 1 July to 31 December 2008* (March 2009) <http://www finance.gov.au/advertising/campaign_advertising_2008–09 html>; Asset Management Group, Commonwealth Department of Finance and Deregulation, *Campaign Advertising by Australian Government Departments and Agencies: Full Report 2008–2009* (September 2009) <http://www finance.gov.au/advertising/campaign_advertising_2008–09 html>.

2 *Accountability Through Statutory Rules and Guidelines*

We can see now that parliamentary scrutiny, in both its prospective and retrospective forms, *can* play a crucial role in addressing the risk of party-political government advertising. There are, however, serious limitations to these processes. With prospective parliamentary scrutiny through the appropriation process, government advertising is not specifically itemised in Appropriation Bills, preventing focussed scrutiny into such advertising. With retrospective parliamentary scrutiny, the lack of specific information on government advertising clearly does not bode well for meaningful scrutiny. Further, both forms of parliamentary accountability are unable to deal with the content of government advertising *prior* to such advertising being undertaken. This brings us to the importance of accountability through rules and guidelines on government advertising.

Guidelines currently exist at the federal level as an executive document, *Guidelines on Information and Advertising Campaigns by Australian Government Departments and Agencies*.[522] These guidelines should take legislative form like those found in the *Government Agencies (Campaign Advertising) Act 2009* (ACT)[523] (and those proposed by the Preventing the Misuse of Government Advertising Bill 2010 (Cth)).

> *Recommendation 18:* Federal government advertising guidelines and rules should be in a legislative form.

Another set of questions concerning these guidelines relates to their content. Such content can be evaluated according to five principles. The first three, drawn from various reports of parliamentary committees and Auditors-General on the topic of government advertising, concern the material presented through government advertising. They are as follows:

---

[522] Asset Management Group, Department of Finance and Regulation, *Guidelines on Information and Advertising Campaigns by Australian Government Departments and Agencies* (March 2010) <http://www finance.gov.au/advertising/docs/Guidelines-on-Information-and-Advertising-Campaigns-by-Australian-Government-Depertments-and-Agencies-March-2010.pdf>.

[523] See, in particular, *Government Agencies (Campaign Advertising) Act 2009* (ACT) s 17.

Principle One: Material should be relevant to government responsibilities;

- Principle Two: Material should be presented in an objective, fair, and accessible manner; and
- Principle Three: Material should not be directed at promoting party political interests.

The fourth principle (which is also sourced from the reports above) states that material in government advertising should be produced and distributed in an efficient, effective and relevant manner with due regard to accountability.[524] The final principle is that of regular independent scrutiny. This is essential if these guidelines are to be effectively implemented. Leaving the implementation of the guidelines to the government departments alone is unlikely to provide a secure basis for effective implementation.

Table 29 provides a summary evaluation of the federal government advertising guidelines.

[524] Australian National Audit Office, *Performance Audit*, above n 258, 57–60; Joint Committee of Public Accounts and Audit, *Report 377*, above n 490, 4–7; Victorian Auditor-General, *Report on Public Sector Agencies*, above n 495, 314–315; Senate Finance and Public Administration References Committee, *Government advertising and Accountability*, above n 252, 123–26; The Audit Office of New South Wales, *Performance Audit*, above n 497, 36–37.

Table 29: Government Advertising Guidelines

Material relevant to government responsibilities	
General	✓
Identified information need	✓
Target recipients clearly identified	✓
Require legislation or Cabinet decision for program being advertised	✓
Fair and objective presentation	
General	✓
Distinguishing fact from opinion	✓
Content to be substantiated	✓
Prohibition of party-political advertisements	
General	✓
Specific prohibition on mentioning party in government by name etc	✓
Prohibition on pre-election advertising	×
Cost-effective and efficient	
General	✓
Independent scrutiny	
General	✓

Source: Department of Finance and Deregulation, Australian Government, *Guidelines on Campaign Advertising by Australian Government Departments and Agencies* (March 2010) [18], [8-35] (incl. Principles 1-5).

It can be seen from this table that the federal government advertising guidelines largely meet these principles. It is, however, deficient in fully implementing Principle Three (material should not be directed at promoting party political interests) by failing to provide for a prohibition on (certain) pre-election advertising. In four jurisdictions, the government advertising guidelines do provide for such a prohibition. The

Victorian and Western Australian guidelines state that government advertising is generally prohibited when the government is in caretaker mode while the ACT, New South Wales and Queensland guidelines provide for a longer ban by respectively prohibiting government advertising 37 days, two months and six months prior to a territory/state election.[525] A ban similar to the Queensland ban of six months (which also corresponds with the period to which election spending limits should apply) should be adopted.

> *Recommendation 19:* There should be a general ban on government advertising during the period that election spending limits apply.

One final matter concerns the ability of federal government to unilaterally exempt advertising from compliance with the guidelines. Paragraph 5 of the current guidelines provides that:

> The Cabinet Secretary can exempt a campaign from compliance with these Guidelines on the basis of a national emergency, extreme urgency or other compelling reason. Where an exemption is approved, the Independent Communications Committee will be informed of the exemption, and the decision will be formally recorded and reported to the Parliament.

The current version of this exemption clause was adopted in March 2010. The previous version restricted exemptions on the basis of 'extraordinary reasons' whilst the current version allows for exemptions based on 'compelling' reasons.[526] It was this avenue of exemption that the ALP federal government relied upon in exempting the 'mining tax' government advertising from compliance with the guidelines.

The fundamental question here is: should be there be an exemption clause in the first place? One can approach this question in this way. Even in a situation involving a national emergency – take, for instance, the recent Queensland floods – should government advertising be:

---

[525] See Joo-Cheong Tham, *Money and Politics: The Democracy We Can't Afford* (2010) 178-179.
[526] See Joint Committee of Public Accounts and Audit, *Reference: Role of the Auditor-General in scrutinising government advertising* (17 June 2010) PA 3.

- irrelevant to government responsibilities (non-compliance with Principle One);
- presented in a biased, unfair and inaccessible manner (non-compliance with Principle Two);
- directed at promoting party political interests (non-compliance with Principle Three);
- produced and distributed in an inefficient, ineffective and irrelevant manner with little regard to accountability (non-compliance with Principle 4); and
- free from regular independent scrutiny (non-compliance with Principle 5)?

The answer is obviously 'no'. There is then no defensible basis for the exemption clause.

Recommendation 20: Paragraph 5 of the *Guidelines on Campaign Advertising by Australian Government Departments and Agencies* which allows for exemption by Cabinet Secretary should be deleted.

VI CONCLUSION

This year presents a crucial opportunity to address the malaise brought about money in federal politics: there is support across the political spectrum for 'root and branch' reform and there is now a comprehensive regulatory model in the form of the *EFDA*. It is imperative that this opportunity be seized, not squandered.