

Democracy before Dollars: The Problems with Money in Australian Politics and How to Fix Them*

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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 a representative, not direct, democracy,² there is structured distance between ‘the people’ and those who exercise governmental power.

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 increased significantly since the 2000s, so much so that in 2017, more than 70 per cent of respondents agreed with the first statement and more than half with the second.³ And since 2016, there has been a nine per cent increase in perceptions that federal members of parliament are corrupt (85 per cent saying ‘some’ are corrupt, 18 per cent 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 banishing some, while to the remainder they give an equal share of freedom and

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¹ The United Nations, 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 ‘Griffith Research Shows Trust in Government Slides’, *Griffith News*, 20 August 2018, www.app.secure.griffith.edu.au/news/2018/08/20/griffith-research-shows-trust-in-government-slides/.

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 the 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 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 and 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. 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,

⁵ Quoted in Raymond Williams, *Keywords* (Britain: Croom Helm, 1976), 83.

⁶ Elizabeth Anderson, *Private Government: How Employers Rule Our Lives (And Why We Don't Talk About it)* (Princeton: Princeton University Press, 2017). See also Julian A. Sempill, 'The Lions and the Greatest Part: The Rule of Law and the Constitution of Employer Power', *Hague Journal on the Rule of Law* 9, no. 2 (2017): 283, 284–291 and 309–312.

⁷ John Stuart Mill, 'Chapters on Socialism' in John Stuart Mill (Stefan Collini, ed.), *On Liberty: With the Subjection of Women and Chapters on Socialism* (Cambridge: Cambridge University Press, 1989), 227.

⁸ Albert Einstein, 'Why Socialism', *Monthly Review* 50, no. 1 (1998) (1949): 1–7.

⁹ *Ibid.*

¹⁰ Charles. E Lindblom, *Politics and Markets: The World's Political-economic Systems* (New York: Basic Books, 1977), chapter 13. See also Julian Sempill, 'What Rendered Ancient Tyrants Detestable: The Rule of Law and the Constitution of Corporate Power', *Hague Journal on the Rule of Law* 10, no. 2 (2018): 219–253.

‘[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 with 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 party funding the favoured position.

As a result, Australia’s democracy has been seriously undermined in three major ways. The first is through secrecy in political funding. Under funding and disclosure laws, federal political parties are required to annually disclose their income, expenditure and debts, but rather than achieving transparency this 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, the major parties have avoided itemising over half their income because the high disclosure threshold (the level at which contributions need to be itemised with the name of the donor) makes it possible to split donations into smaller amounts, which are paid to different party branches, and do not need to be itemised.¹⁴

Such secrecy should not surprise us. Senator Eric Abetz, when sponsoring 2006 amendments that weakened the federal disclosure scheme, said he hoped for ‘a return to the good old days when people used to donate to the Liberal Party via lawyers’ trust accounts’.¹⁵

¹¹ Ibid., 175.

¹² Einstein, ‘Why Socialism’.

¹³ Jackson Gothe-Snape, ‘Foreign Money and Turnbull Millions: Discover the Donors that Helped the Liberals Win the Election’, *ABC News*, 1 February 2018, www.abc.net.au/news/2018-02-01/donations-political-turnbull-election-millions-foreign-donations/9380014.

¹⁴ Dr Belinda M. Edwards, ‘Dark Money: The Hidden Millions in Australia’s Political Finance system’, GetUp!, http://cdn.getup.org.au/1969-Dark_Money.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, www.theage.com.au/technology/are-our-politicians-for-sale-20060524-ge2dgv.html.

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 there is no cap on how much parties can receive. The result has been a corruption of the political process. Although it is not *quid pro quo* corruption (where money is directly exchanged for a favourable decision), which is the principal danger, the shroud of secrecy around political contributions 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 Xiang Mo, 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, or 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:

¹⁶ Joo-Cheong Tham, *Money and Politics: The Democracy We Can't Afford* (Sydney: University of New South Wales Press, 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* (Richmond, Victoria: Hardie Grant Books, 2018), chapter 4.

²⁰ *Ibid.*, 86.

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. For instance, in the 2019 New South Wales state elections, the New South Wales Liberal Party raised more than 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 electoral contests, with the political parties favoured by corporate sponsors enjoying a significant spending advantage. The very same absence of spending limits enabled Clive Palmer to pour more than \$55 million into the 2019 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 invariably is funded political activity; and both 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 and unfairness.²⁴ The Australian Government Lobbyists Register²⁵ makes a tepid gesture towards transparency. While it reveals some information about commercial lobbyists (lobbyists who act on behalf

²¹ Royce Millar, 'Brumby in Rethink on Fundraising', *The Age*, 8 December 2009, 1.

²² Nigel Gladstone, 'Liberal Donations from Events Triple Labor Ahead of NSW Election', *The Sydney Morning Herald*, 31 December 2018, www.smh.com.au/national/nsw/liberal-donations-from-events-triple-labor-ahead-of-nsw-election-20181227-p50odm.html.

²³ Max Koslowski, 'Palmer Set to Top Labor, Libs with \$50m Poll Spend', *The Age*, 18 January 2019, 4–5. For those doubtful about 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 clause 3 of the Australian Government's Lobbying Code of Conduct (2013), <https://lobbyists.ag.gov.au/about/code>.

²⁵ *Australian Government Register of Lobbyists*, <https://lobbyists.ag.gov.au/home>.

of third parties), it fails to fully disclose who is engaging in lobbying, particularly through its exclusion of in-house lobbyists (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 and timing of that lobbying. All this is exacerbated by lax enforcement by the Department of the Prime Minister and Cabinet. Not a single lobbyist has been suspended or had their registration removed 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 Australian Corruption and Crime Commission in relation to the lobbying activities of former Western Australian Premier, Brian Burke, make clear.²⁹ Far from it, there is a sense 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 Firstly, 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 as their prior (and possibly ongoing) association can compromise impartial decision-making.

The federal Lobbying Code of Conduct (the Code) does acknowledge the risks of post-separation employment. For instance, clause 7.1 states that former federal ministers and

²⁶ Lobbying Code of Conduct, clause 3.5.

²⁷ Australian National Audit Office, *Management of the Australian Government’s Register of Lobbyists*, Report No 27, 14 February 2018, www.anao.gov.au/work/performance-audit/management-australian-government-register-lobbyists.

²⁸ Stephen Easton, ‘PM&C Shrugs Off Audit of Toothless Federal Lobbying Rules’, *The Mandarin*, 15 February 2018, www.themandarin.com.au/88434-pmc-shrugs-off-audit-of-toothless-federal-lobbying-rules/.

²⁹ Western Australian Corruption and Crime Commission, *Report on the Investigation of Alleged Misconduct Concerning Dr Neale Fong, Director General of the Department of Health* (2008), 5; Western Australian Corruption and Crime Commission, *Report on the Investigation of Alleged Public Sector Misconduct Linked to the Smiths Beach Development at Yallingup* (2007), 6–7.

³⁰ See Wood and Griffiths, *Who’s in the Room?*, 20–22.

³¹ NSW ICAC, *Managing Post Separation Employment* (1997), 7.

³² *Ibid.*, 9–11.

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 former Trade Minister, Andrew Robb, 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 employment by a firm that would benefit from this agreement, 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 Lobbying Code of Conduct or its twin in the Statement of Ministerial Standards³⁴ effectively deals with this conflict. They apply only to ‘lobbying activities’ but not to lobbying related activities such as providing political intelligence, and are restricted to matters in which the former ministers have had ‘official dealings’, a restriction that excludes many matters that fell within Robb’s ministerial portfolio but about which he may not have had ‘official dealings’.

And then there is unfair access and influence stemming from the failure 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 integral to the power wielded by what has been labelled the ‘most powerful lobby group’—the Pharmacy Guild of Australia.³⁵ The influence wielded by the Pharmacy Guild, particularly through lobbying,³⁶ 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

³³ Nick McKenzie, Richard Baker and Chris Uhlmann, ‘Liberal Andrew Robb took \$880k China Job as Soon as He Left Parliament’, *The Sydney Morning Herald*, 6 June 2017, www.smh.com.au/national/liberal-andrew-robb-took-880k-china-job-as-soon-as-he-left-parliament-20170602-gwje3e.html.

³⁴ Australian Government, Statement of Ministerial Standards, Clause 2.25, August 2018, www.pmc.gov.au/sites/default/files/publications/statement-ministerial-standards_1.pdf.

³⁵ Matthew Knott, ‘The Pharmacy Guild: The Most Powerful Lobby Group You’ve Never Heard of’, *The Sydney Morning Herald*, 2 April 2015, www.smh.com.au/politics/federal/the-pharmacy-guild-the-most-powerful-lobby-group-youve-never-heard-of-20150401-1mckxl.html.

³⁶ Stephen Duckett and Peter Breadon, ‘Premium Policy? Getting Better Value from the PBS’, Grattan Institute, June 2015, <https://grattan.edu.au/wp-content/uploads/2015/06/823-Premium-Policy4.pdf>.

³⁷ Stephen Duckett, ‘Turnbull Backs Pharmacies over Consumers, Yet Again’, 8 May 2018, Grattan Institute, <https://grattan.edu.au/news/turnbull-government-backs-pharmacies-over-consumers-yet-again/>.

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), most disclosed meetings held by senior ministers are 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 politics in this country. 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.

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 Wood and Griffiths, *Who’s in the Room?*, 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* (London: Verso Books, 2018), 134.

⁴² David Ritter, ‘Beautiful Weather: The Social Politics of Global Warming’, *Australian Quarterly* 89, no. 4 (2018): 3 and 8.

⁴³ Quentin Beresford, *Adani and the War Over Coal* (Sydney: New South Wales Books, 2018), 5.

For example:

- These companies are amongst the largest contributors to the major parties⁴⁴
- 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
- It's 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 Coonan⁴⁶ and Ian Macfarlane⁴⁷
- Published ministerial diaries indicate that these companies enjoy disproportionate access to ministers in Queensland and New South Wales.⁴⁸

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—the 'greenhouse mafia'.⁴⁹ Mining company Adani secured significant policy concessions for its proposed Carmichael mine (including deferment of mining royalties and compulsory acquisition of land) after making political contributions to the Liberal National Party of Queensland and the Liberal Party of Australia, and engaging commercial lobbyists, including Damien Power, a former treasurer of the Queensland Labor Party, and former National Party Queensland Premier Rob Borbidge.⁵⁰ Perhaps the most singular fact is that fossil fuel companies have played an instrumental role in ousting two out of the five prime ministers Australia has had since 2007—Kevin Rudd⁵¹ and Malcolm Turnbull.⁵²

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* (Australian Institute, 2016), 7–8. See also 'Friends in High Places: Fossil Fuel Political Donations', Market Forces, February 2019, www.marketforces.org.au/politicaldonations2019/.

⁴⁵ Matthew Knott, 'The Man Who Killed Rudd's Mining Tax', *The Australian*, 15 July 2019, www.theaustralian.com.au/business/business-spectator/the-man-who-killed-rudds-mining-tax/news-story/851da8b4dc89dc8f1d34b236eba50737; Mark Davis, 'A Snip at \$22m to Get Rid of PM', *The Sydney Morning Herald*, 2 February 2011, www.smh.com.au/business/a-snip-at-22m-to-get-rid-of-pm-20110201-1acgj.html.

⁴⁶ Anne Davies, 'CSG Industry Hires Well-Connected Staffers', *The Sydney Morning Herald*, 25 May 2015 <https://www.smh.com.au/national/nsw/csg-industry-hires-wellconnected-staffers-20150515-gh2rg3.html>.

⁴⁷ Anna Henderson and Elly Bradfield, 'Former Resources Minister Ian Macfarlane Says New Mining Job Complies with Code of Conduct', 26 September 2016, www.abc.net.au/news/2016-09-26/ian-macfarlane-appointed-to-run-queensland-mining-lobby/7876942.

⁴⁸ Wood and Griffiths, *Who's in the Room?*, 18–19.

⁴⁹ Clive Hamilton, *Scorcher: The Dirty Politics of Climate Change* (Melbourne: Black Inc. Agenda, 2007), chapter 1.

⁵⁰ Aulby and Ogge, *Greasing the Wheels*, 24–29; Wood and Griffiths, *Who's in the Room?*, 23.

⁵¹ Mark Davis, 'A Snip at \$22m'.

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 with 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. covers 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. covers all political donations
 - ii. covers key political actors (including third parties)
- gradually phase in to set cap at \$2000 per annum and private funding at around 50 per cent 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 two per cent 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 per cent 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

⁵² Emma Alberici, ‘Alex Turnbull: Coal Miners Exerting ‘Undue Influence’ on Liberal Party, Says Son of Former PM Malcolm Turnbull’, *ABC News*, 28 August 2018, www.abc.net.au/news/2018-08-28/alex-turnbull-says-coal-miners-have-undue-influence-on-liberals/10170908.

- 5. Ban on donations sourced from overseas or 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 two years after previous election
- 7. Stricter regulation of parliamentary entitlements**
 - to deal with incumbency benefits through entitlements that can be used for electioneering
 - ban use of printing and communication allowance two 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 on referral of the Australian Electoral Commission (as currently provided in 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

Ten-point plan for democratic regulation 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, including the identities of who they meet and meaningful detail as to subject matter of meetings
- lobbyists on lobbyist register to make quarterly disclosure of contact with public officials, including the 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
- under the code, lobbyists will have a duty of legal compliance and truthfulness, and to avoid conflicts of interest and 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 for 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

- requirement for government to provide a statement of reasons and processes for significant executive decisions
- this statement should include:
 - a list of meetings required to be disclosed under the register of lobbyists and through publication of ministerial diaries
 - a summary of key arguments made by lobbyists
 - 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 from government to fair consultation processes (based on inclusion, meaningful participation and adequate responsiveness)
- guidelines to be developed to give effect to this commitment (similar to 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

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
- 4) Respecting political freedoms.⁵⁴

These principles are the anchor points for the two 10-point plans in this paper, 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 Constitution. While the High Court of Australia has struck down several measures for breaching this freedom,⁵⁶ it has equally made clear that preventing corruption and promoting fairness are legitimate objectives and that measures will not be in breach of this freedom if they are

⁵³ ‘Turnbull Calls for Donation Prohibition’, *SBS News*, 24 February 2015, www.sbs.com.au/news/turnbull-calls-for-donation-prohibition.

⁵⁴ Tham, *Money and Politics*, chapter 1.

⁵⁵ Yee-Fui Ng and Joo-Cheong Tham, ‘Enhancing the Democratic Role of Direct Lobbying in New South Wales: A Discussion Paper Prepared for the New South Wales Independent Commission Against Corruption’ (Sydney: New South Wales Independent Commission Against Corruption, 2019).

⁵⁶ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Unions NSW v NSW* (2013) 304 ALR 266; *Unions NSW v NSW* [2019] HCA 1.

justified by 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 that 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 public interest with the interest of the *community*.

And that is why, what Hugh Mackay, one of Australia’s sages, correctly recognised as our 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 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 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 fulfil 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

⁵⁷ *McCloy v NSW* (2015) 257 CLR 173; *Unions NSW v NSW* [2019] HCA 1.

⁵⁸ Alexis de Tocqueville, *Democracy in America* (7th edn, translated by Henry Reeve, 1874), 347.

⁵⁹ Hugh Mackay, *Australia Day Address 2019*, www.australiaday.com.au/events/australia-day-address/2019-speaker-hugh-mackay/.

⁶⁰ G A Cohen, *Why Not Socialism?* (Princeton, New Jersey: Princeton University Press, 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* (John Gray, ed.) (Oxford: Oxford University Press, 1991), 207–208.

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.⁶⁸ For Mackay, this ‘radical culture-shift in the direction of more compassion’⁶⁹ 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 (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.



⁶³ Ralph Miliband, *Socialism for a Sceptical Age* (London: Verso, 1994), 90.

⁶⁴ Hugh MacKay, *Australia Reimagined: Towards a More Compassionate, Less Anxious Society* (Sydney: Pan Macmillan Australia, 2018), 246.

⁶⁵ The Dalai Lama and Sofia Stril-Rever, *A Call for Revolution: An Appeal to the Young People of the World* (New York: Harper Collins, 2017), 28.

⁶⁶ *Ibid.*, 31.

⁶⁷ *Ibid.*, 244.

⁶⁸ Hugh Mackay, *Australia Reimagined*.

⁶⁹ Mackay, *Australia Day Address*.

⁷⁰ Mackay, *Australia Day Address*.