Democratic Audit of Australia

Mr Daryl Melham MP
Chair, Joint Standing Committee on Electoral Matters
Parliament House
Canberra ACT
23 May 2011

Dear Mr Melham

Please find attached the **Democratic Audit of Australia's** revised submission to JSCEM's current inquiry into 'the funding of political parties and election campaigns', In making this submission, the Audit is keenly aware of the philosophical, constitutional and practical challenges involved in reforming the current regulations pertaining to campaign donations and expenditure.

In his preface to the 2008 *Electoral Reform Green Paper: Donations, Funding and Expenditure* then Special Minister of State, Senator John Faulkner, rightly observed that 'Restricting the flow of legitimate money into the political process from one direction may result in less transparent money flows in another. The issues surrounding regulation of political financing are ever evolving' (Faulkner 2008, p2). No good purpose will be served if in closing one apparent loophole two or three others are exposed for exploitation. Money, including political money, is indeed fungible.

The solutions to all funding and disclosure (FAD) problems are not self evident and we would not expect everyone who identifies with the Democratic Audit to

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agree with each and every recommendation listed below and we anticipate that many of our colleagues will make individual submissions.

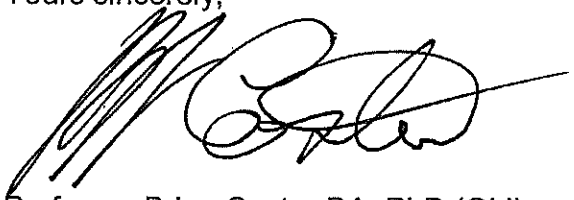
Complexity, however, is not an excuse for inaction in a field in which Australia lags behind world-best practice. The Audit contends that reform be guided by two, broad objectives: a) to achieve the maximum degree of transparency in donations and expenditure and b) to reduce the amount of money the political parties believe they need to raise and spend on election campaigns.

The Audit notes that the New South Wales *Election Funding and Disclosures Amendment Bill 2010* caps political donations and election expenditure—the first Australian jurisdiction to do so.

Swinburne University of Technology, which hosts the Democratic Audit, is in no way associated with the opinions contained in this submission.

The audit wishes the Committee well in its deliberations.

Yours sincerely,



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Democratic Audit of Australia

Submission to JSCEM Inquiry into the Funding of Political Parties and Election Campaigns.
23 May 2011

Introduction

The Democratic Audit of Australia welcomed the publication of the *Electoral Reform Green Paper: Donations, Funding and Expenditure*, in December 2008. Funding and disclosure (FAD) of political parties, associated entities and candidates contesting elections is one of the major issues confronting Australia's representative democracy in the 21st century. This country has fallen far below world's best practice in the area of regulating political money; the recent world financial crisis shows the consequences of poor regulatory regimes. Despite the existence of Part XX of the Commonwealth Electoral Act (CEA), the current system is little better than a 'free for all'. It is opaque rather than transparent, offends against the principle of political equality, permits the purchase of influence and access in regard to public officials and is not corruption-proof. Many comparable democracies such as Britain, the USA, Canada and New Zealand have recently witnessed funding scandals that have damaged their political systems and the time is now ripe to renovate Australia's FAD system to prevent any similar occurrence here.

The Audit and others have addressed this issue in many forums over many years, including in submissions to JSCEM, the Senate's Finance and Public Administration Committee, state Electoral Matters Committees, in the media, in reports such as Sally Young and Joo-Cheong Tham's *Political Finance in Australia: A Skewed and Secret System* (Democratic Audit of Australia, ANU, 2006), in academic law and political science journals and in books such as Colin A. Hughes & Brian Costar's *Limiting Democracy: The Erosion of Electoral Rights in Australia*, UNSW Press, 2006; Joo-Cheong Tham, *Political Money*, MUP, 2010; Graeme Orr, *The Law of Politics: Elections, parties and*

Money in Australia, Sydney, Federation Press,2010 and Joo-Cheong Tham, Brian Costar & Graeme Orr eds, *Electoral Democracy: Prospects for Australia,* MUP, 2011.

This submission highlights principles and possible reform measures rather than fine detail (the details can be found in a range of Reports and Discussion Papers at www.democraticaudit.org.au).

1. Public funding and support

- **1.1** The public funding scheme instituted in 1984 has not achieved the goals set for it as outlined in the Joint Standing Committee on Electoral Reform's *First Report* (Hughes & Costar 2006, pp 61–62).

- **1.2** The current funding rate is 234.196 cents per eligible vote. When the scheme was introduced in 1984 the rate was 61.2 cents per House vote and 30.6 per Senate vote. This represents a four fold increase, whereas had the rate kept pace only with inflation the increase would have been two and a half times. This suggests that the increasing cost of election campaigning is having a 'pull' effect on the funding rate, but is not having any restraining effect on the parties' pursuit of private donations—which was one of the original goals of the scheme.

- **1.3** Because it is based on a *post facto* 'dollars for votes' principle, it naturally favours big parties, which regard it as icing on the cake of private donations. Yet it has been part of the electoral architecture for 25 years and to do away with it entirely would impact negatively on the small parties.

- **1.4** Consideration could be given to transforming the scheme by adopting some features of the similar scheme operating in New Zealand, whereby

additional indicators of support – for example, party membership, number of parliamentary candidates, number of MPs and, for emerging parties, even opinion polls – contribute to determining the level of public funding. The Audit acknowledges that introducing factors other than votes won could prove problematic.

- **1.5** Given that public funding accounts for less than 20 per cent of the big parties' campaign expenditure, its abolition would have a negligible impact on overall campaign spending.

- **1.6** It is doubtful if the suggestion of total state funding of election campaigns would attract majority public support unless other measures were adopted to reduce the overall expenditure on campaigns.

2. Private funding

- **2.1** A complete ban on private donations (or 'gifts' as they are called in the CEA) may be struck down as an unreasonable breach of freedom of political communication, a principle some members of the High Court have been willing to develop out of the approach adopted in the 1992 *ACTV Case.* However, that 'freedom' is not absolute and 'reasonable' and 'proportionate' restrictions, if carefully drafted, would most likely be judged constitutionally valid.

- **2.2** Donations could be restricted to individual persons only, but there would need to be protection against 'smurfing' (the practice of splitting large donations among directors, members, employees etc). Organisations such as unions and public corporations should only be permitted to donate to political parties and their associated entities and third parties if they ballot their members or shareholders every three years and maintain a discrete political action fund.

- **2.3** Pragmatically, a ban or close restriction on donations from organizations such as businesses, unions, partnerships etc would most likely encourage them further into third party campaigning and this would need to be covered by a revised FAD system.

- **2.4** No class of person, such as 'property developers', should be prevented from making donations because of administrative complexities of trying to do so and the chance of legal challenges.

- **2.5** Income generated at party/candidate/associated entity 'fundraisers' should be treated as gifts above reasonable costs for venue hire, food and beverages etc.

- **2.6** 'Buying' access to public officials through donations and/or subscriptions to associated entities of political parties or third parties is a [mis]use of public office (minister of the crown) for private (political party/candidate) advantage and breaches the principle of equality of access. It should not be permitted, but its regulation is probably outside the scope of the CEA

- **2.7** Membership fees of political parties should not be treated as gifts.

- **2.8** Because it has been a feature of the structure of the Australian Labor Party for over a century and has been validated by the High Court in the *Hursey Cases,* the capitation fees currently paid by some trade unions to the party should be disclosed but not treated as donations. As the CEA currently stands, these fees could be argued to be 'subscription[s] paid to political parties' rather than 'gifts' (S 287).

- **2.9** Donations from individuals and organizations to political parties should be capped at $5 000 (indexed) per annum and $2 000 to individual candidates.

- **2.10** The current loophole whereby the federal, state and territory divisions of political parties are treated as separate legal identities for donation purposes should be closed.

- **2.11**There should be the highest degree of uniformity of FAD regimes across federal, state and territory jurisdictions.

- **2.12** Owners of television and radio licences should, as a condition of their licence, be required to grant free advertising time to political parties in proportion to their levels of support—perhaps again using New Zealand-like criteria.

- **2.13** An earlier attempt to ban all political advertising on television and radio was invalidated by the High Court. Many commentators have since pointed out this 1992 judgment does not preclude *any* regulation of such advertising. Despite the emergence of direct and on-line campaigning, TV advertisements remain the major consumers of political party and other organisations' campaign budgets—this is the 'arms race' at work.

  There is unlikely to be a 'silver bullet' solution to this problem other than setting an expenditure cap so low that it would price such advertisements beyond the reach of political parties and third parties. But would a low cap face a High Court challenge on the grounds that it constitutes an unacceptable restraint on political communication?

  A better and constitutionally safer approach might be through a suite of reforms which could include: 'free time' allocation as outlined in **2.12;** a

requirement that TV stations charge minimum rates for campaign ads; restricting the number of campaign ads that may be broadcast each hour; and requiring that single television and radio political advertisements should be not shorter than three minutes duration to remove the attraction of 'jingle' ads.

- **2.14** Anonymous donations in excess of $50 (indexed) should not be permitted.

- **2.15** There appears to be public support for not allowing non-citizens who are resident abroad to make campaign donations (as is the case in the USA), but it should be recognized that any such prohibition could be easily circumvented by the use of local agents. Consideration could be given, on sovereignity grounds, to banning donations from foreign 'state-owned' corporations, though problems of definition would need to be carefully addressed.

- **2.16** Responsibility for adhering to the FAD requirements should rest with clearly designated senior party officials, senior third party officers/members and candidates.

3. Donation disclosure

- **3.1** A National Campaign Authority, separate from but associated with the AEC, should be established to administer the FAD regime—preferably across the federal, state and territory jurisdictions.

- **3.2** So that disclosure can be made more transparent, we recommend that the CEA be amended so that the House of Representatives has a fixed election date—say the first Saturday in December of the third year of an electoral cycle. This does not require constitutional change, but would need to anticipate S 57 dissolutions, successful votes of no-confidence

and the Governor-General's reserve powers (though the use of these is very rare). Liaison with those states that already have fixed date elections would be required.

- **3.3** The acceptance of the previous recommendation will permit the declaration of an 'election period' long enough to better regulate disclosure of donations and political advertising. The current '*from the issue of the writs*' period is too short.

- **3.4** In order to achieve maximum transparency of the source of donations, the CEA should be amended to provide for an internet-based, in-time accounting system of disclosure similar to that used successfully by the NY City Campaign Finance Board (and some other US jurisdictions) for many years (www.nyccfb.info). Under the NY scheme the disclosure requirements become more frequent as election day draws nearer—hence the need for a fixed election date. Even if the idea of a fixed election date is not accepted, a version of the NY system could still be implemented.

  The principle behind this recommendation is that voters should have the right to know who is funding political parties and candidates *before* polling day, not many months later as is currently the case in Australia. We will not know the full extent of donations relevant to the 2010 federal election until February 2012.

- **3.5** All donations in excess of $1000 (indexed) should be declared—though a NY-style scheme would permit a lower threshold.

4. Expenditure

- **4.1** There is currently excessive expenditure on election campaigns—indeed it has become an 'arms race' between the big parties.

- **4.2** Capping expenditure appears as one solution as occurs in the comparable jurisdictions of the UK, NZ and Canada and, since 1 January 2011, NSW. The decision of the Canadian Supreme Court in *Harper v Canada (2000)* provides an important judicial precedent for the view that expenditure limits, including those of third parties, are necessary in the interests of political equality and preventing some voices drowning out others, even where there exists a guarantee of freedom of speech broader than that provided by the decision in the *ACTV Case*. But see the comment in **2.13** that if such a cap were too low it might be impugned in the High Court.

- **4.3** Members and Senators should not be permitted to use their postal and printing allowances to engage in direct mail political campaigning, including the provision of postal vote applications

5. Third parties

- **5.1** Little reform will result if, by restricting the flow of money to registered political parties, the problem is transferred to 'third party' expenditure.

- **5.2** Third parties should therefore be covered by the FAD regime.

- **5.3** Defining who or what is a third party would be made easier by the existence of an expert and well resourced National Campaign Authority.

- **5.4** Criteria could be developed that would allow the authority to 'declare' a person or an organization to be a third party and thereby bring them within the FAD regime.

- **5.5** Third parties, unlike at least the big parties, may have deliberately planned short lives to avoid close scrutiny of their activities and the 2004 'Swift Boat' problem in the USA needs to be anticipated.

References

John Faulkner, *Electoral Reform Green Paper,* Canberra, December 2008.

Colin A Hughes & Brian Costar, *Limiting Democracy: The Erosion of Electoral Rights in Australia*, UNSW Press, 2006.