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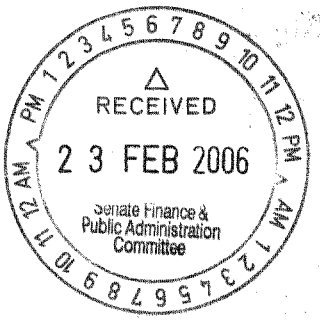

Alistair Sands
Committee Secretary
Senate Finance and Public Administration Legislation Committee
Parliament House
Canberra ACT 2600

23 February 2006

Dear Secretary

Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2005 (Cth)

Thank you for your invitation to make a submission to the Senate Finance and Public Administration Legislation Committee's ('the Committee') inquiry into the Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2005 (Cth) ('the Bill').

My submission is focussed on provisions of the Bill relating to the funding and disclosure scheme and the tax-deductibility of political donations.

I EXISTING PROBLEMS WITH THE DISCLOSURE SCHEME

Changes sought to be made by the Bill to the funding and disclosure scheme must be evaluated in the context of its existing problems. In our submission to the Joint Standing Committee on Electoral Matters' inquiry into the 2004 federal election, Dr Graeme Orr and I examined in some degree of detail the deficiencies of this scheme. That submission is highly relevant to the issues relating to the Bill and I submit it to the Committee's inquiry. Our main and supplementary submissions are available at http://www.aph.gov.au/house/committee/em/elect04/subs.htm
as Submission No 160. I also attach to this submission a copy of our main submission.

I draw the Committee's attention in particular to three problems with funding and disclosure scheme: a lack of transparency; the danger of undue influence and the undermining of political equality.

A *Lack of transparency*

While the federal disclosure scheme achieves some degree of transparency, it has serious limitations. It, firstly, fails to provide adequate information relating to political donations. Parties are not legally required to accurately categorise a receipt as a 'donation' or otherwise. As a consequence, the voluntary system of self-declaration 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.

Further, certain transactions that would commonly be presumed to be donations fail to be declared as such because they are not 'gifts'. Arguably, the most controversial transactions involve the purchase of political access. A party can sell political access in two ways: either directly or through an intermediary. Both methods can result in inadequate disclosure of political contributions. Examples of parties directly selling political access include dinner fund-raisers and fund-raising through organisations like the Victorian ALP's Progressive Business and the New South Wales Liberal Party's Millennium Forum. In such situations, while the amount received should be documented in the parties' annual returns, it is unlikely to be identified as a 'gift' because the contribution being made in exchange of value is not a 'gift' under electoral law.

The second scenario involves the sale of political access through an intermediary. For instance, the ALP has, on several occasions, engaged Markson Sparks, a professional fund-raising firm, to organise fund-raising dinners. In such situations, contributors make their payments to the intermediary who, in turn, hands over profits of the fund-raising as a whole to the party, which is then declared as a single amount coming from the fund-raising firm. Information as to the specific amounts of the individual transactions and the identities of the contributors is not, then, disclosed in the annual

return. Further, the obligations on donors to disclose 'gifts' are unlikely to apply where there is a purchase of political access. The effect of this lacuna is that selling political access through professional fund-raisers becomes a method 'to launder a donation to a political party'.[1] Paradoxically this occurs precisely with those payments where disclosure is vital because they raise concerns about undue influence. Further, the loopholes afforded to indirect sales of political access are likely to benefit more well off parties; parties that are in a stronger financial position to 'outsource' their fundraising activities or to provide donors with reassuring legal advice.

Another problem with the disclosure scheme concerns the timeliness of disclosure. Such timeliness is key to informed voter decisions. However, by requiring, at the most, annual disclosure, the scheme does not provide timely disclosure. The AEC has argued that '(t)his form of . . . reporting and release can result in delays that can discount the relevance of making the information public.'[2]

What is perhaps the most serious limitation of the disclosure scheme is the lack of compliance. There is good evidence that the parties are not treating their disclosure obligations seriously. The AEC has recently observed:

> 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.[3]

Much of the AEC's cause for complaint is based on its view that a culture of evasion existed 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.[4]

Its funding and disclosure report following upon the 1998 Federal election also stated that 'a major concern remains in that political parties in particular are not always according sufficient priority to the task of disclosure'.[5]

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[1] Australian Electoral Commission, 'Submission to the Joint Standing Committee on Electoral Matters Inquiry into Electoral Funding and Disclosure,' para. 8.5.
[2] Ibid, para. 2.10.
[3] Ibid, para. 2.9.
[4] Australian Electoral Commission, *Funding and Disclosure Report Following the Federal Election Held on 3 October 1998*, para. 2.
[5] Ibid, para. 6.8.

If true, these comments identify an extraordinary situation. Two decades after the disclosure scheme was introduced, and nearly ten years after annual returns were introduced, some Australian political parties are flouting their disclosure obligations under the federal scheme.

Arguably, evasion of disclosure obligations is facilitated by the enormous amount of monies being channeled through 'associated entities' of the major parties. Table 1 reveals in the aggregate the revenue of such entities as a proportion of the revenue received by the parties. While this proportion fluctuates according to the electoral cycle, the figures demonstrate the popular use of 'associated entities'. The lowest proportion, for the financial year 2001/2002, is still close to half of the parties' revenue.

Table 1: Revenue of parties 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/RPP x 100 (%)	43.19	87.91	78.97

Source: Australian Electoral Commission, 2005, *Funding and Disclosure Report: Election 2004*, p. 19.

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 of investing through an 'associated entity' might include the limited liability of such an entity, if incorporated, and the opportunity to have directors that have stronger investment expertise. Also, there may be a perception that donors are more willing to contribute to an organisation that is 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 compared to 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 perhaps instructive. In 1996, the foundation was assigned a loan of $4.45 million to the Liberal Party after 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 ‘associated entities’ returns of 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’ returns. Under protest, the foundation eventually lodged such returns in September 1999.

What the Greenfields Foundation episode demonstrates is that when an organisation resists its obligations as an ‘associated entity’, the AEC has to redouble its efforts and, in some situations, secure legislative amendment, before successfully enforcing the law against such an organisation.

It is clear then that the disclosure scheme is limited by the inadequate disclosure of the nature of contributions and delays in disclosure. There also seems to be a culture of non-compliance: the inevitable attempt by parties to exploit loopholes appears not to be sufficiently counteracted by robust enforcement and regulation. In short, the scheme is a leaky sieve that permits evasion of adequate disclosure.

B *The danger of undue influence*

In a democracy, undue influence occurs when contributions undermine the ability of citizens to have a fair opportunity to influence political outcomes. It results in part from the fact that contributions are being made by actors who do not have a claim to democratic representation in Australia. As stated by Chief Justice Mason, ‘the concept of representative government and representative democracy signifies government by

the *people* through their representatives'.[6] The *Commonwealth Constitution* also stipulates that members of the House of Representatives are 'chosen by the *people of the Commonwealth'*.[7] The fundamental point is that it is Australian citizens who are entitled to democratic representation in Australia.

Contributions from commercial corporations, corporations formed with the principal purpose of making profit, are, arguably, a form of undue influence. They do not have a direct claim to democratic representation, as they are not citizens—the ultimate bearers of political power in a representative democracy. More than this, these corporations do not even have a derivative claim to political representation. This is because they are inherently undemocratic in their decision-making structure. Shareholder control must necessarily mean that power in a business is parcelled out according to the criterion of wealth. The plutocratic nature of corporations can be clearly contrasted to organisations like trade unions which are legally required to have majoritarian decision-making.[8]

Several objections may be made to this argument. It may, firstly, be said that a legal requirement to have majoritarian decision-making does not necessarily mean that organisations are democratic. There is force to this point: there is more to democracy than majoritarian decision-making and the law may not translate into practice. For instance, some trade unions are not fully functioning democratic organisations. Nevertheless, all this does not detract from the fact that corporations, by virtue of share-holder control, are fundamentally undemocratic.

The argument implies that trade unions have a prima facie claim to democratic representation while denying commercial corporations any such right. Is this not counter to the principle of political equality especially when trade unions funds go overwhelmingly to a single party, the Labor Party? Such concern, however, seems to misconceive the principle of political equality. Resting upon equal concern and respect for *citizens,* it does not require that all political participants be treated as equals. It is citizens who must be treated as equals. From this perspective, it is quite

[6] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 137 (emphasis added).
[7] *Commonwealth Constitution* s 24 (emphasis added).

legitimate to distinguish between commercial corporations that treat citizens unequally by calibrating decision-making power according to units of capital and trade unions that are required by law to accord each member a single vote.

Also, it might be argued that even if commercial corporations are not entitled to democratic representation, it does not lead to a conclusion that their political contributions are necessarily undemocratic. It justifies denying them voting rights but nothing more. It might be said that commercial corporations like Publishing and Broadcasting Limited inevitably have influence over Australian politicians. If so, what then is the difference between such influence and that mediated through a political contribution?

Whatever the democratic merits of influence directly resulting from the nature of Australia's capitalist system, influence facilitated by a political contribution is *quantitatively* and *qualitatively* different from such influence. It is quantitatively different because the contribution is likely to increase the level of influence. It is qualitatively different because the contribution changes the character of the influence. The influence wielded by commercial corporations, when unmediated by political contributions, occurs because the parties apprehend their impact on Australian citizens. Put differently, it is the interests of Australian citizens that give rise to such influence. When political contributions enter the mix, the nature of the influence changes. In such situations, the financial interests of the party in receiving contributions come to the fore.

There are cogent reasons then for characterising contributions from commercial corporations as a form of undue influence. At the very least, it can be said that such contributions pose a serious danger of undue influence. How grave then is this danger?

The following table sets out the amounts of total, trade union and corporate funding received by the parties and their respective proportions for the financial year 2001/2002, a Federal election year (during which the parties received election funding).

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[8] Federally registered trade unions, for one, are *legally* required to have majoritarian structures:

Table 2: Corporate and trade union funding of parties

Party	Total funding ($)	Corporate funding ($)	Corporate funding (% of total funding)	Trade union funding ($)	Trade union funding (% of total funding)
ALP	47,848,146	14,098,827	29.47	5,671,348	11.85
Liberal Party	37,885,990	16,264,264	42.93	3,660	0.01
National Party	6,540,131	2,530,266	38.69	0	0
Australian Democrats	4,995,638	828,745	16.59	6,000	0.32
Greens	2,504,981	422,256	16.86	15,000	0.6

Source: Dean Jaensch, Peter Brent and Brett Bowden, 2004, *Australian Political Parties in the Spotlight: Democratic Audit of Australia Report No 4,* unpublished data.

This table shows there is a serious danger of undue influence due to the parties' reliance on corporate funding. This is most apparent with the Coalition parties. In the financial year 2001/2002, more than a third and, in the case of the Liberal Party, nearly half, of their funds, came from corporations. The Labor Party was not far behind with nearly thirty per cent of its funds coming from corporate sources. The minor parties, the Australian Democrats and Greens, are also reliant on corporate money albeit to a lesser degree.

Finally, it is clear that the reliance of the parties on corporate contributions has flourished in a regulatory context that adopts a laissez-faire attitude towards such contributions with no bans or amount limits. While ostensibly aimed at preventing undue influence, the disclosure scheme does nothing to combat such dependence. Indeed, by publicising the reliance of the major parties on corporate money, they may have perversely assisted the normalisation of corporate contributions.

C *Undermining political equality*

An important aspect of a democracy is fair rivalry amongst the parties. Table 3 attempts to determine whether private funding promotes such rivalry by gauging how

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Workplace Relations Act 1996 (Cth) Registration and Accountability of Organisations Schedule.

the amount of private funding received by a party compares with its electoral support. In essence, the amount of private funding received by a party was divided by the number of first preference votes the party received in the 2001 Federal election. Being derived on a vote-basis, these figures are not affected by the different levels of electoral support enjoyed by the parties and hence, give a much better picture as to their private fund-raising abilities.

Table 3: Private funding per vote of parties

Party	First preference votes in 2001 election	Private funding ($) per vote
ALP	4, 341, 419	22.14
Liberal Party	4, 291, 033	18.62
National Party	643, 924	28.64
Democrats	620, 248	6.12
Greens	569, 075	8.51

Source: Annual returns for financial years, 1999/2000-2001/2002 (as calculated in Joo-Cheong Tham and David Grove (2004) 'Public Funding and Expenditure Regulation of Australian Political Parties: Some Reflections' (2004) 32 *Federal Law Review* 387, 404).

This table reveals a dramatic funding inequality between the ALP, Liberal Party and National Party, on one hand, and the Democrats and the Greens, on the other. For example, 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. These figures underline how the private funding of parties presently undermines fair rivalry.

Table 2 points to a different kind of political inequality: inequality between important social interests. That table demonstrated how the main parties are reliant on corporate money. Even for the ALP, the party of 'labour', corporate funding, for the financial year 2001/2002, was nearly three times the amount of trade union funding. If funding roughly tracks influence, it is clear then that business has far greater influence over the parties than the labour movement.

This is another likely source of political inequality that favours established parties. It was argued earlier that the disclosure schemes are riddled with serious loopholes and

quite possibly face a culture of non-compliance. These circumstances benefit 'repeat players' that are familiar with exploiting the loopholes and have the resources to protract enforcement efforts. New or poorly resourced parties, on the other hand, are much less in a position to take advantage of these inadequacies.

II EVALUATING THE BILL'S CHANGES TO THE DISCLOSURE SCHEME

The Bill, firstly, seeks to reduce disclosure obligations. For instance, the Bill abolishes the provisions requiring broadcasters and publishers to lodge post-election returns detailing political advertisements.[9] Importantly, the Bill, if it becomes law, will increase and index the thresholds at which political participants will have to disclose details of receipts (see Table 4).[10]

Table 4: Increase in disclosure thresholds proposed by Bill

Return	Current disclosure threshold ($)	Proposed disclosure threshold ($)
Post-election returns by donors of gifts to candidates	200	More than 10,000
Post-election returns by donors of gifts to groups of candidates	1,000	More than 10,000
Post-election returns by candidates of gifts	200	More than 10,000
Post-election returns by groups of candidates of gifts	1,000	More than 10,000
Annual returns of advertising etc expenditure of Cth govt departments	1,500	More than 10,000
Annual returns by donors	1,500	More than 10,000
Annual returns by registered parties	1,500	More than 10,000
Annual returns by associated entities	1, 500	More than 10,000

The Bill will also increase the level at which parties and other political participants are allowed to receive anonymous donations and loans. Currently, there is a prohibition against receiving anonymous donations and loans with a value of $1,500 or more. The Bill, if it becomes law, will increase this amount to $10,000 and index this amount.

[9] The Bill, Schedule 1, item 82 (repealing ss 310-311 of *Commonwealth Electoral Act 1918* (Cth)).
[10] Ibid Schedule 2, item 27 (proposed section 321A of the *Commonwealth Electoral Act 1918* (Cth)).

There are three major arguments for these changes. The first states that the increases in disclosure thresholds merely adjust for inflation. To test this argument, Table 5 adjusts the disclosure thresholds by the changes in the Consumer Price Index since their introduction. The table demonstrates the implausibility of the inflation-argument. None of the adjusted figures come close to even a third of $10,000. The adjusted figure for the disclosure thresholds of the annual returns of parties and associated entities, for instance, is barely a fifth of $10,000.

Table 5: Adjusting disclosure thresholds for inflation[11]

Return	Disclosure threshold ($) upon introduction ('IN')	Threshold adjusted for inflation ($)
Introduced in 1984		IN x 149.8/68.1
Post-election returns by candidates of gifts	200	439.94
Post-election returns by groups of candidates of gifts	1,000	2199.71
Introduced in 1991		IN x 149.8/105.8
Annual returns of advertising etc expenditure of Cth govt departments	1,500	2123.81
Introduced in 1992		IN x 149.8/107.6
Post-election returns by donors of gifts to candidates	200	278.44
Post-election returns by donors of gifts to groups of candidates	1,000	1392.19
Annual returns by registered parties	1,500	2088.29
Annual returns by associated entities	1,500	2088.29
Introduced in 1995		IN x 149.8/114.7
Annual returns by donors	1,500	1959.02

[11] The calculations in this table were based on the following figures: the Consumer Price Index for the first quarters of 1985, 1991, 1992 and 1995 which were respectively 68.1, 105.8, 107.6 and 114.7 and the index for the third quarter of 2005 which was 149.8: Australian Bureau of Statistics, *Consumer Price Index, Australia* (Catalogue Number 6401, October 2005).

The second argument, in essence, contends that the increases will still result in adequate transparency. Citing evidence by Liberal Party federal director, Brian Loughnane, a majority of the Joint Standing Committee on Electoral Matters has argued that 88 per cent of all moneys received as donations to the ALP and Liberal Party will remain disclosed if $10,000 thresholds were introduced.[12]

With the current $1,500 thresholds, details of a small portion of ALP and Liberal Party funds are not disclosed. While this portion is relatively minor in terms of percentage, it is still in the order of hundreds of thousands of dollars (see Table 6).

Table 6: Undisclosed receipts and donations for federal ALP and Liberal Party

	Total receipts ($)	Undisclosed receipts ($)	Undisclosed receipts (% of total receipts)	Disclosed donations ($)	Disclosed donations (% of total receipts)
ALP	6,808,984	262,121	3.84	2,353,891	34.57
Liberal Party	3,999,687	117,749	2.94	2,621,079	65.53

Source: Annual returns, 2003/2004

Table 7 attempts to gauge the amounts that will be undisclosed if the thresholds were increased to $10,000. It shows that, if a $10,000 disclosure threshold applied in the 2003/2004 financial year, more than 90 per cent of the donations disclosed by the federal ALP and Liberal Party under the current $1,500 threshold would still be revealed. These figures are, however, not as significant as the portion of total receipts that will still be disclosed. Sums are labelled as 'donations' in annual returns through a voluntary system of identification and do not include contributions that can be reasonably considered political donations, for instance, the purchase of political access.

The figures relating to total receipts suggest that Loughnane's estimate holds in relation to the federal Liberal Party but not to the federal ALP. The last column of Table 7 shows that undisclosed sums come close to a million dollars for the federal ALP and is nearly half a million for the federal Liberal Party. It demonstrates that

[12] Joint Standing Committee on Electoral Matters, *Report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto* ('JSCEM 2004 Federal Election Report') para. 13.72.

increasing the disclosure thresholds to $10,000 will significantly increase the level of non-disclosure.

Moreover, these figures, being drawn from the annual returns of the federal ALP and Liberal Party, may understate the level of non-disclosure. It is possible that the level of non-disclosure for state branches may be even higher with an increase in the disclosure thresholds. For instance, the Greens have estimated that if the threshold were increased to $5,000, 56 per cent of the money received by the NSW branch of the Liberal Party—nearly $5 million dollars—would remain undisclosed.[13]

Table 7: Undisclosed receipts and donations > $10,000 for federal ALP and Liberal Party

	Total of disclosed donations > $10 000 ($)	Total of disclosed donations > $10 000 (% of disclosed donations)	Total of disclosed donations > $10 000 (% of total receipts)	Total of receipts > $10 000 ($)	Total of receipts > $10 000 (% of total receipts)	Total of receipts < $10,000 ($)
ALP	2,327,500	98.88	34.18	5,894,764	86.57	914 446
Liberal Party	2,436,620	93.03	60.92	3,520,226	88.01	479 562

Source: Annual returns, 2003/2004

There is another reason why these figures should be treated with some caution. While they give some indication of the level of non-disclosure if the thresholds were increased, they are probably under-estimates. 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 the 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 the nine branches has the cumulative benefit of nine thresholds. So it is, for example, that a company can presently donate $1,499 to each State and Territory branch of the Labor Party as well as its national branch—a total of $13,491—without the Labor Party having to reveal the identity of the donor.

[13] Lee Rhiannon and Norman Thompson, 2005, 'Hidden Money' *Arena* 70: 12-3.

Increasing the disclosure threshold to more than $10,000 will create such a gap in the disclosure scheme that describing this as a ‘loophole’ seems almost laughable. This proposal, if enacted, will mean that a donor can give a total of $90,000 to a major party without the party having to disclose the identity of the donor. Having such a high threshold in practice can only mean more secret donations.

The change that will perhaps most seriously compromise transparency is the increase in the permissible amounts of anonymous donations and loans. This change is less about public disclosure of donations and loans and rather about records kept by parties. It will mean that parties can legally accept larger sums without knowing 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 to the amount of $90,000. The company then gives an additional $9,000 that is publicly disclosed. Under the proposed changes, details of the entire $99,000 should be disclosed. The ability to legally accept $90,000 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 worse, it is a recipe for wholesale circumvention of the disclosure scheme.

The third major argument proposed for increasing the disclosure thresholds says that it is unlikely that ‘donations of less than the threshold . . . could be said to exert undue influence over recipients or to engender corruption’. This argument has also been buttressed by reference to the UK disclosure threshold of £10,000.[14]

The reference to the UK disclosure threshold is a weak and decontextualised argument. It fails to take into account other features of the UK disclosure scheme. For instance, there is no mention of the fact that, under the British scheme, parties are required to lodge quarterly returns with weekly returns during election campaigns;

these returns are accompanied by auditor's statements. This argument also pays insufficient attention to the already existing problems with achieving adequate transparency under the Australian scheme.

Further, arguments based on comparisons per se can cut both ways. Increasing Australia's disclosure threshold does put Australia more in line with New Zealand and the United Kingdom. But equally, it can be said to put it out of sync with the United States and Canada, countries that have much lower disclosure thresholds than that which currently applies in Australia (see Table 8).

Table 8: Current disclosure thresholds of various countries

	US	Canada	New Zealand	UK	Australia
Threshold for disclosure	Generally US$200 per annum During election campaign, gifts > US$1,000 reported within 48 hours	CAD$200	NZ$10,000	£5,000	A$1,500
Threshold in Australian dollars*	Generally $267 per annum During election campaign, gifts > $1,335 reported within 48 hours	$231	$9,071	$11,830	$1,500

* Currency conversions made as at 21 January 2006.

More importantly, the observation that a $10,000 sum does not carry risk of undue influence or corruption is implausible. It was donations of around $10,000 that sparked the 'Cash-for-visas' controversies implicating Philip Ruddock and Nick Bolkus. Political access and influence are also regularly being bought for $10,000 or less. For instance, $10,000 will easily purchase membership of Progressive Business or sponsorship of the Millennium Forum.

The argument also assumes that increases in the disclosure thresholds will merely allow sums of $10,000 or less to be kept secret. In fact, these increases, together with the increase in the permissible amounts of anonymous donations, will allow the clandestine receipt of donations of much more than that sum.

[14] JSCEM 2004 Federal Election Report, para. 13.73. See also para. 13.75.

The Bill also proposes to increase the disclosure obligations of some political participants. It seeks to repeal the current provisions requiring third parties that have incurred $1,000 or more in political expenditure to lodge *post-election* returns; returns that must provide details of gifts exceeding $1,000 that were received for the purpose of making such expenditure.[15] Replacing these provisions are ones requiring third parties that have spent more than $10,000 in a financial year on political expenditure to lodge *annual* returns. Such returns must disclose details of political expenditure[16] as well as details of gifts exceeding $10,000 that were received for the purpose of such expenditure.[17]

This change is said to place such third parties on the same footing as 'all entities involved in the political process and covered by the CEA' and promotes 'the interests of transparency and consistency'.[18] The argument based on transparency is cogent: if an entity is spending money to influence political outcomes, citizens are entitled to know who is financing their spending in order to make an informed decision. Annual returns of the kind being proposed are not too onerous in achieving such disclosure.

The argument based on consistency, however, rings hollow in one key respect. Parties, while required to disclose the *total amount of their spending*, are not required to disclose *the details of their political spending*. The result is that there is very little public information of party spending. If third parties are required to disclose details of their political spending, the same should apply to parties and their associated entities as a matter of political equality.

The Bill also proposes to broaden the definition of 'associated entity' to include entities that are financial members or that have voting rights in a registered party including those whose financial membership or voting rights are held on their behalf by others.

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[15] *Commonwealth Electoral Act 1918* (Cth) s 305.
[16] The Bill, Schedule 1, item 84 (proposed section 314AEB of the *Commonwealth Electoral Act 1918* (Cth)).
[17] Ibid Schedule 1, item 84 (proposed section 314AEC of the *Commonwealth Electoral Act 1918* (Cth)).
[18] Ibid para. 13.134.

The strongest argument for this change is perhaps one based on popular control over public decision-making. Such control requires informed voting which, in turn, implies that voters need to know who controls parties including their members and those who exercise voting rights. There are serious problems in this area. For instance, parties are not required to disclose the level of party membership and have generally shown no inclination to voluntarily disclose.[19]

The proposed change is, however, both over and under-inclusive. It is over-inclusive in that it imposes annual reporting obligations on organisations that do not have significant influence over the party's affairs. To overcome this flaw, a threshold of 'influence' should apply. For instance, an organisation could be considered an 'associated entity' when it provides 10 per cent of funds to the party or exercises 10 per cent of the party's voting rights.

It is under-inclusive because significant influence over a party's position is not confined to financial membership and voting rights. It can result from other forms of affiliation. For instance, sponsorship of the Millennium Forum entitles a company to regular access to key Liberal Party officials. This clearly allows it to influence the party's position.

The restricted scope of the proposed change highlights how it fails on the count of political equality. It discriminates against parties that have organisations as its members. The target of such discrimination is clear: of the main parties, only the ALP allows organisations to become members.[20]

It also discriminates against trade unions, organisations that politically participate through formal affiliation to the Labor Party. At the same time, it exempts corporate donors—entities that have no claim to democratic representation—which tend to wield influence through less formal means.

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[19] Jaensch, Brent and Bowden, *Australian Political Parties in the Spotlight: Democratic Audit of Australia Report No 4*, p. 52.

[20] *National Constitution of the ALP* clause 7 (cf *Australian Democrats: National Constitution and Regulations* clause 4.1; *The Charter and National Constitution of the Australian Greens (2004)* clause 8.1; *Liberal Party of Australia: Federal Constitution* clause 8).

Recommendation 1: Changes proposed by Bill seeking to reduce disclosure obligations should be rejected.

Recommendation 2: Changes proposed by the Bill requiring third parties to lodge annual returns should be accepted only if parties and associated entities are required to disclose details of political spending.

Recommendation 3: Changes proposed by the Bill broadening the definition of 'associated entity' should be changed to include less formal means of influencing party activities and restricted to entities wielding a significant level of influence.

III EVALUATING THE BILL'S CHANGES TO THE TAX-DEDUCTIBILTY OF POLITICAL DONATIONS

Individuals making political contributions to federally registered parties can now claim tax-deductions up to a maximum of $100. Tax relief can play a role in encouraging political participation through contributions. However, it can also have regressive effects and hence, undermine political equality. The present system of tax relief, for instance, favours the wealthy because, having more disposable income, they are more able to take advantage of the subsidy. Further, for the same amount of political donation, the wealthy, being subjected to higher income tax rates, receive a greater amount of public subsidy. At the same time, with tax-deductibility capped at one hundred dollars and confined to individual donors, such iniquity, while troubling, might not be too objectionable.

If tax relief is to promote 'grass-root' financing, it must meet several conditions: tax deductibility must be confined to citizens; the amount of tax deductions must be set reasonably low and the regressive effects of tax subsidies must be addressed.

The Bill, by increasing the tax-deductible amount to $1,500 and extending it to corporate contributions and donations received by parties registered under State and Territory laws as well as independent candidates and independent parliamentarians,[21] however, fails to meet these conditions. It provides actors that have no legitimate claim to democratic representation, commercial corporations, with a public subsidy. It

is set too high at $1,500 and no attempt has been made to temper the regressive effects of the subsidy. If enacted, the proposal will entrench a blatantly unfair subsidy in the tax system.

There is another issue for political equality. Democrats Senator Andrew Murray opposed lifting the tax deductibility threshold for political parties unless it was also lifted for all other relevant community organisations.[22] This was an interesting point given the 'public good' rationale that supporting a political party is contributing to civil society in the same way that donating to a charity is.

A better way forward is perhaps provided by the Canadian system of income tax credits.

Table 9: Canadian system of income tax credits

Amount of contribution	Tax credit
C$0 to C$400	75% of contribution, e.g. C$150 credit for C$200 contribution
C$401 to C$750	C$300 + 50% of amount of contribution exceeding C$400, e.g. C$400 credit for C$600 contribution
Over C$750	C$475 + 33 1/43% of amount of contribution over C$750 or C$650, whichever is the lesser amount, e.g. C$650 credit for C$1,000 contribution

Recommendation 4: Changes proposed by the Bill to increase and extend tax-deductibility for political donations should be rejected.

Recommendation 5: An income tax credits system like the Canadian system should be considered.

Thank you for reading my submission. If you have any queries, please do not hesitate to contact me.

Yours sincerely,

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[21] The Bill, Schedule 4.
[22] JSCEM 2004 Federal Election Report, para. 13.109.

(Joo-Cheong Tham, Lecturer, Law Faculty, University of Melbourne)

SUBMISSION TO THE JOINT STANDING COMMITTEE ON ELECTORAL MATTERS

INQUIRY INTO ELECTORAL FUNDING AND DISCLOSURE

BY JOO-CHEONG THAM AND GRAEME ORR

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- 'The Currency of Democracy: Campaign Finance Law in Australia' (2003) 26 *University of New South Wales Law Review* 1.
- *Australian Electoral Systems – How Well do they Serve Political Equality?* (2004) Democratic Audit of Australia, ANU **http://democratic.audit.anu.edu.au/orrdiscuss.pdf** See especially chapter on 'Money Politics and Incumbency Benefits'.
- *Realising Democracy: Electoral Law in Australia* (2003) Federation Press, co-edited with Bryan Mercurio and Professor George Williams.
- 'Dealing in Votes: Regulating Electoral Bribery' in *Realising Democracy*, above, 130-142.

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- 'Campaign Finance Reform in Australia: Some Reasons for Reform' in *Realising Democracy*, above, 114-29;

- 'Legal Regulation of Political Donations in Australia: Time for Change' in Glenn Patmore (ed), *Labor Essays 2002: The Big Makeover: A New Australian Constitution* (2001), Pluto Press, 72-86;
- 'Money politics: corporate contributions to political parties' (2003/2004) 13 *Dissent* 27-8;
- 'How political donations are undermining Australia's democracy', *Australian Policy Online* **http://www.apo.org.au**, posted on 11 February 2004;
- 'Abbott's Honest Politics Trust a Liberal Party front: Donor disclosure required', *Sydney Morning Herald: Web Diary,* Sydney, 19 September 2003;
- 'Enforcing disclosure: AEC can make Abbott give sworn evidence on slush fund', *Sydney Morning Herald: Web Diary,* Sydney, 4 September 2003;
- 'When litigation's just another way to play politics', *Sydney Morning Herald: Web Diary,* Sydney, 3 September 2003;
- 'The normalisation of corporate contributions to political parties', posted on **http://democratic.audit.anu.edu.au** in January 2003, 4 pp; and
- 'Opinion: Who really pays for political donations?', *The Age*, 14 June 2001, 17.

I INTRODUCTION

We refer to the Senate's resolution that the Joint Standing Committee on Electoral Matters ('the Committee') inquire and report by the last sitting day in June 2004 on:

> the matter relating to electoral funding and disclosure, which was adopted by the committee on 15 August 2000, and any amendments to the Commonwealth Electoral Act necessary to improve disclosure of donations to political parties and candidates and the true source of those donations.

In this submission, we adopt a broad view of the Committee's brief. This broad perspective stems from our concurrence with the Australian Electoral Commission's ('AEC') view that 'a comprehensive review of the legislation and the principles underpinning the legislation is required'.[1] Adopting such a perspective, we have found it necessary not only to examine the principles that inform funding and disclosure laws but also to canvass other regulatory methods that would better advance these principles.

First, our submission discusses the purposes that should underlie funding and disclosure laws. The next two sections examine issues relating to the disclosure laws and the funding of political parties. This is followed by a consideration of two other regulatory methods that might better achieve the aims of the funding and disclosure laws, namely, donation caps and expenditure limits. In the final section, we consider the questions of compliance costs and enforcement.

In summary, we recommend some particular amendments to strengthen disclosure law, particularly to ensure that contributions aimed at gaining political access are disclosed. We also recommend proper disclosure of campaign expenditure. At the same time, we stress that disclosure on its own is a weak regulatory mechanism, and probably merely 'normalises' corporate donations. We also recommend consideration of more tailored public funding. But most critical of all, we recommend consideration of both donation caps and expenditure limits. These are not radical measures. Indeed, as the table at the end of this paper shows, our key common law cousins, the UK, Canada and New Zealand have all recently adopted expenditure limits and in Canada's case, donation caps.

We note the short time afforded for providing submissions has meant that we have not been able to enliven the submission with as much data, concrete illustrations or comparative material as would be ideal. We are, however, happy to address any inquiries that the Committee might have in relation to our submission. We are also happy to provide oral evidence if that might assist the Committee.

II PURPOSES OF ELECTORAL FUNDING AND DISCLOSURE LAWS

In Australia, electoral funding and disclosure laws seek to:

- facilitate fair elections, including promoting political equality;
- provide transparency to promote informed voting decisions;
- provide transparency to discourage the actuality and perception of corruption or undue influence of political actors; and
- assist political parties in performing their legitimate functions.

A *Facilitating fair elections*

The principle of political equality lies at the heart of democracy. This core principle infuses Australia's constitutional and electoral institutions. The 'great underlying principle' of the Constitution, it has been said, is that citizens have 'each a share, and an equal share, in political power'.[2] Similarly, the key objective advanced by the original *Commonwealth Electoral Act* was that of 'equality of representation throughout the Commonwealth'.[3]

A funding and disclosure regime ought to contribute to the realisation of this political ideal in various ways. For one, it must facilitate fair elections through ensuring that 'different parties offering themselves for election have an equal opportunity to present their policies to the electorate'.[4] Such equal opportunity or 'fair rivalry'[5] between the

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[1] Australian Electoral Commission, *Submission to the Joint Standing Committee on Electoral Matters Inquiry into Electoral Funding and Disclosure* (2001) para 1.4.

[2] Harrison Moore, *The Constitution of the Commonwealth of Australia* (1902, 1st ed) 329. This statement was cited with approval in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (*ACTV*) at 139-40 per Mason CJ.

[3] Commonwealth, *Parliamentary Debates*, Senate, 30 January 1902, 9529 (Senator O'Connor, 2nd Reading Speech introducing Commonwealth Electoral Bill 1902).

[4] Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 1983, 2215 (Hon Kim Beazley, 2nd Reading Speech introducing Commonwealth Electoral Legislation Amendment Bill 1983).

parties is meant to be promoted by public funding, in that it aims to ensure that the electoral contest is open: 'worthy parties and candidates might not (otherwise) be able to afford the considerable sums necessary to make their policies known'.[6] Note that the aim is *not* equality of parliamentary outcomes, but of electoral *opportunity*, including *competitiveness* between a variety of political positions and entities representing the diversity of views and interests found in the electorate.

Nor does the regime aim for a flat equality of air-time or opportunity. Rather it seeks to calibrate the campaign funding of political parties and candidates to their electoral support. In doing so, the regime attempts to tailor the opportunity political parties and candidates have in presenting their messages to roughly reflect their level of popular support.

Secondly, fair elections and political equality are promoted by attempting to reduce candidates' and parties' reliance on private funding through the subsidies provided by public funding and the publicity resulting from the disclosure scheme. Reducing such reliance, it is hoped, should prevent 'serious imbalance in campaign funding'[7] of the political parties.[8]

Thirdly, fair elections and political equality are not just about a measure of equality of competition between parties and candidates. Elections and representative democracy are ultimately about *citizen equality* and not just party interests. A funding and disclosure regime ought to ensure that no citizen, let alone, corporation, has an undue voice in the electoral and political process because of their wealth.

B *Transparency for the purpose of informed voting decisions*

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[5] Keith Ewing, *The Funding of Political Parties in Britain* (1987) 182.

[6] Beazley, above n 4, 2215. This specific aim is long-standing. When introducing the original *Commonwealth Electoral Act*, Senator O'Connor justified the need for the limits on electoral expenditure in this fashion: '(i)f 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': Commonwealth, *Parliamentary Debates*, Senate, 30 January 1902, 9542 (Senator O'Connor, 2nd Reading Speech to Commonwealth Electoral Bill 1902).

[7] Beazley, above n 4, 2213.

[8] 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': Keith Ewing, *Money Politics and Law: A Study of Electoral Finance Reform in Canada* (1992) 18.

The disclosure regime aims to promote transparency. Kim Beazley, in introducing the amendments proposing the funding and disclosure regime, emphasised that:

> (t)he 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.[9]

In the same vein, the Joint Standing Committee on Electoral Matters has stated that:

> (t)he purpose of the disclosure provision is to serve the public interest by providing details of the funding sources of political parties.[10]

This statement naturally raises the question: '*what public interest* is served by disclosing the funding details of candidates and political parties?' Given that this information is being supplied publicly, via the AEC – the government agency responsible for elections - it is strongly arguable that such transparency is primarily to inform the electorate, amongst other things, to aid informed electoral opinions (the 'informed voter rationale').

C *Transparency for the purpose of preventing corruption and undue influence*

A key concern of the federal funding and disclosure regime is the prevention of corruption and undue influence (the 'anti-corruption rationale'). The introduction of annual returns, for one, was justified on the basis that:

> (t)he 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.[11]

This concern directly stems from a key aspect of the principle of political equality, equality of political representation (which encompasses not only equality of voting power but also equal ability to influence political representatives).[12] This was a point well recognised by the Hon. Kim Beazley in his Second Reading Speech to the Political Broadcasts and Political Disclosures Bill 1991. According to him:

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[9] Beazley, above n 4, 2215. 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) para 2.5.

[10] Joint Standing Committee on Electoral Matters, *Interim Report on the Inquiry into the Conduct of the 1993 Election and Matters Related Thereto: Financial Reporting by Political Parties* (1994) para 7.

[11] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1991, 3482 (Hon Kim Beazley, 2nd Reading Speech to Political Broadcasts and Political Disclosures Bill 1991). For similar sentiments, see Beazley, above n 4, 2213.

[12] See Ewing, above n 8, 22 and K D Ewing, 'The Legal Regulation of Electoral Campaign Financing in Australia: A Preliminary Study' (1992) 22 *Western Australian Law Review* 239, 241-4. 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) *The Sydney Papers* 58.

> 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.[13]

This statement also confirms that the funding and disclosure regime's concern is broadly drawn to encompass corruption *as well as* undue influence. The former, also known as graft, can be understood to embrace instances when money is exchanged for specific policy or executive decisions in the donor's favour, for instance, the granting of government contracts to the donor.[14]

On the other hand, the notion of undue influence, in this context, encompasses instances where the giving of money does not directly purchase a particular action, but is given to buy influence and access. Undue influence is thus a more subtle form of corruption of the policy and governmental processes, encompassing, for instance, cases where a donor to a political party gains influence over or access to the policy process of a party by virtue of the money it has paid to the party.[15]

Among other mechanisms, the funding and disclosure regime aimed to combat corruption and undue influence via public funding which, it was hoped, ought reduce reliance on private funding. The primary means, however, is the disclosure scheme which is supposed to make transparent the funding of political parties and candidates or, put differently, 'to let the sunshine in'.[16] So much is obvious from a recent statement by the Joint Standing Committee on Electoral Matters that 'transparency helps maintain public confidence and is a barrier to corruption of our political processes'.[17] In sum, transparency is viewed as a method of deterring corruption and

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[13] Beazley, above n 11, 3477.

[14] Allegations of such conduct were investigated by the Fitzgerald Inquiry in relation to Joh Bjelke-Petersen Queensland government (Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (chair: G E Fitzgerald), *Report of a Commission of Inquiry Pursuant to Orders in Council* (1989) 85-91) and the Royal Commission on WA Inc (Royal Commission (chair: Judge Kennedy), *Report of the Royal Commission into the Commercial Activities of Government and Other Matters* 1992) Pt. 1, Vol. 6, Chap. 26).

[15] Distinctions similar to corruption/graft and undue influence have been previously made: Denny Meadows, 'Open election funding or hide and seek?' (1988) 13(2) *Legal Service Bulletin* 65, 68 and Rolf Gerritsen, *Election Funding Disclosure and Australian Politics: Debunking Some Myths* (Parliamentary Research Service, Research Paper No 21 of 1994-5) 4. The difference between corruption/graft and policy corruption is, to some extent, a question of degree.

[16] Electoral and Administrative Review Commission, above n 9, 18.

[17] Joint Standing Committee on Electoral Matters, *Report on the Inquiry into the Conduct of the 1998 Federal Election and Matters Related Thereto* (2000) para 5.10. See also Joint Select Committee on

undue influence directly or, indirectly, by discouraging large amounts of private funding.[18]

D *Assisting political parties to perform their legitimate functions*

While much less prominent than the equality and transparency aims, an objective of funding and disclosure laws or, for that matter, political party regulation generally, must be to assist them to perform their legitimate functions. In this, the central place political parties occupy in Australia's representative democracy rests upon four key functions.

First, they play a *representative* function. A healthy party-system should represent the diverse strands of opinion existing in Australia. Such a system would offer genuine electoral choice in the sense that the party platforms cater to the different preferences of Australian voters.

Second, parties perform an *ideological* function in stimulating and generating ideas for Australian politics. The richness of ideas informing Australian politics will depend heavily on how vigorous the parties are in promoting new ideas and, in particular, the priority they place on policy development and research.

Third, parties perform a *participation* function in that they offer a vehicle for political participation through membership, meetings and promoting public discourse.

Lastly, parties perform a *governance* function. This function largely relates to parties who succeed in having elected representatives. The party elected to government clearly performs a governance function. The same applies to other parliamentary parties, which participate in governance through the legislative process, scrutiny of the executive government and general public debate.

Funding and disclosure laws must play a part in enhancing these functions. For instance, public funding is designed in part to resource parties after the spending

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Electoral Reform, *First Report* (1983) para 10.9 and Senator Andrew Murray and Marilyn Rock, 'The Dangerous Art of Giving' (2000) 72(3) *Australian Quarterly* 29, 33.

exhaustion of election campaigns so they can focus on policy development between elections instead of being preoccupied with fundraising.

Public funding is not intended, however, to completely supplant private and membership activity. Thus 'grass roots' fund-raising – a key form of participation - should not be marginalised by either public funding or reliance on large donations especially those by non-members. Indeed, excessive reliance on large donations is bound to distort *all* four functions of parties, as they risk coming to rely on and pander to a limited number of wealthy sources, rather than the views and interests of their individual supporters, the wider electorate, and a broader conception of the 'public' or 'national' interest.

III DISCLOSURE LAWS

A *Disclosure of funding*

We make two key arguments in relation to the disclosure of party funding. The first is that the present regulatory regime is a leaky sieve that permits evasion of adequate disclosure. The second, and more significant, point is that a funding disclosure scheme is inherently limited in its ability to prevent corruption and undue influence and plays no real role by itself in promoting equality.

1 *Improving the disclosure of party funding*

The integrity of the present funding disclosure scheme turns on whether it results in timely and accurate disclosure of the sources and categories of party income. In more concrete terms, the adequacy of the present scheme can be examined by considering:

- what is required to be disclosed?;
- who is required to disclose?; and
- when should disclosure be made?

(a) What is required to be disclosed?

(i) Transactions to be disclosed

The present scheme requires parties to provide information concerning their receipts and debts in their annual returns. Questions have been raised as to whether these

[18] Electoral and Administrative Review Commission, above n 9, 7 and Joint Select Committee on

obligations ensure that the sale of access to politicians is sufficiently transparent. At the base of these concerns is the rather compelling view that the selling of political access, even when involving substantial fees, may not involve 'gifts', because access to and influence on political power is consideration for the fees.[19]

In addressing these concerns, it is important to understand that a party can sell political access in two ways. It might sell such access directly or it might sell it through an intermediary. Examples of the former include the Victorian ALP's Progressive Business, which provides access to government ministers and federal ALP backbenchers in exchange for prescribed fees.[20] The New South Wales Liberal Party's Millennium Forum does the same, albeit at much higher rates.[21]

In such situations, each transaction involving the sale of political access should be recorded in the party's annual statement, with the identity of the contributor as well the amount of the contribution disclosed. The only effect of the view that such contributions are not considered 'gifts' is that parties will probably describe these contributions not as 'Donation' but as 'Other Receipt',[22] and that the payer may be confused as to whether it has to make disclosure, and may even be emboldened to claim such expenditure as a business tax deduction.[23]

The problem with such payments then is not so much with the adequacy of the disclosure of the identity of the contributor, it is with the description and understanding of the nature of the contribution. But this is not a problem confined to

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Electoral Reform, above n 17, 164.

[19] For a similar analysis, see Australian Electoral Commission, *Submission to the Joint Standing Committee on Electoral Matters Inquiry into Electoral Funding and Disclosure* (2000) para. 8.4.

[20] See <http:///www.vic.alp.org.au/action/progressive>.

[21] E Mychasuk and P Clark, 'Howard and his team rented by the hour', *Sydney Morning Herald,* 13 June 2001, 1.

[22] For a very clear exposition of the meaning of these various categories, se Sarah Mishkin, *Political finance disclosure: party and donor annual returns 2002-03* (Parliamentary Library Research Note No 49 of 2003-4).

[23] This would be clearly against public policy, since outright donations to parties by companies are not deductible – only individuals can claim such income tax deductions, and then, in the interests of equality between citizens, only to a maximum of $100pa: see *Income Tax Assessment Act 1997* (Cth) s 30-15 (Table, item 3). Such deductions by companies would also, in effect, generate a public subsidy towards the payment.

the sale of political access. As will be discussed below, it is a more general weakness of the present scheme; a weakness that needs to be addressed by broader changes.[24]

The second scenario involves the sale of political access through an intermediary. For instance, the ALP has on several occasions engaged Markson Sparks, a professional fund-raising firm, to organise fund-raising dinners. In such situations, contributors make their payments to the intermediary who, in turn, hands over profits of the fund-raising as a whole to the party, which is declared as a single amount from the fund-raising firm. Information as to the specific amounts of the individual transactions and the identities of the contributors is not, then, disclosed in the annual return.

Moreover, the present scheme fails to require the disclosure of such information through its other provisions. A professional fund-raiser will not be considered an 'associated entity' of the party concerned as it is a commercial entity transacting with the party at arms-length. That the test is whether the party controls the intermediary – ie it focuses on the intermediary's formal 'independence'. This misses the core issue, namely that disclosure law is meant to disclose equally all individual contributions to party coffers. Disclosure law is not at heart about political restrictions, and is a light form of regulation, so a test based on 'independence' from a party is neither here nor there.[25]

Further, the obligations on donors to disclose 'gifts' are unlikely to apply where the purchase of political access (eg a table at a fund-raising dinner, however extravagantly priced) is not a 'gift', because something unique or priceless is bought (the access, the privileged position at the event or meeting).[26] The effect of this lacuna is that selling political access through professional fund-raisers becomes a method 'to launder a donation to a political party'.[27] Paradoxically this occurs precisely with

[24] See text below nn 32-5.
[25] The Commonwealth Parliament's power to regulate federal elections includes the power to register parties set up to contest elections, and hence to regulate their finances. (The analogy is probably even closer than with the strict legislative controls on registration and accountability of industrial organisations, the constitutional authority for which flows indirectly from the conciliation and arbitration power).
[26] CEA s 287. More generally, the notion of 'inadequate consideration' found in the statutory definition of a 'gift' is only intelligible when what is 'bought' can be meaningfully and objectively be valued. Purchase of political access, however, is resistant to such valuation.
[27] AEC, above n 19, para 8.5.

payments whose disclosure is vital because they raise concerns about undue influence. Further, the loopholes afforded to indirect sales of political access are likely to benefit more well off parties; parties that are in a stronger financial position to 'outsource' their fundraising activities or to provide donors with reassuring legal advice.

In response to concerns surrounding the sale of political access, the AEC has recommended that payments at fundraisers be deemed to be 'gifts'.[28] There is nothing wrong in itself with such deeming. However, as a general solution, encompassing the problem of indirect sales of political access (that is, sales that occur through an intermediary), this recommendation suffers from a significant drawback: it places the obligations to disclose on the contributor and not on either the professional fund-raising body or the political party. If adopted, this recommendation will mean that individual donors will have to disclose details of these payments whereas the annual returns of the parties may still fail to record the details of the individual transactions.

Provisions in the *Political Parties, Elections and Referendums Act 2000* (UK) ('PPERA') point to an adjunct solution. Under this Act, individuals making donations on behalf of others are required to provide the recipient political party with details of the actual donors.[29] At the same time, political parties are required to take reasonable steps to verify these details.[30] If these provisions are to be properly adapted to the Australian situation, they should not be confined to 'gifts' and should embrace all contributions made to the political party. Confining the obligations to 'gifts' would mean political contributions that receive some *quid pro quo* would evade disclosure.

We, therefore, recommend that:

- a person/entity who is making a *contribution* to a political party on behalf of others be required to disclose to the political party the identities of the actual contributors and the amounts contributed; and

[28] Ibid para 8.7.
[29] PPERA s 54.
[30] This is the effect of ibid s 56.

- a political party which reasonably suspects that a person/entity is making a *contribution* on behalf of others to ascertain and verify the identities of the actual contributors and the amounts contributed.[31]

Such information should then be recorded in the parties' annual statements.

(ii) Details to be disclosed

The present scheme fails to provide adequate information relating to political donations. Parties are not legally required to accurately categorise a receipt as a 'donation' or otherwise. As a consequence, the voluntary system of self-declaration 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 learnt the hard way by academics, political researchers and activists seeking to distil such information.[32] Further, as noted above, certain transactions that would commonly be presumed to be donations fail to be declared as such because they are not 'gifts'. Payments at fundraisers are a key instance of such transactions.

The last failing can be rectified by adopting the AEC's recommendation that payments at fundraisers (and like events) be deemed to be 'gifts'[33] whereas the first failing can be addressed by adopting the AEC's recommendation that the Act require that gifts be identified separately in annual returns.[34] What, arguably, would be the preferable method to address the first two failings would be to adopt the British system of donations reports. Under this system, political parties, while required to prepare annual statements of accounts, also have to submit donation reports that, as their name suggests, are confined only to transactions considered to be donations. Parties in completing these reports not only have to disclose the amount and date of such donations but also to identify the status of the donor as individual, trade union, company or other entity.[35]

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[31] Such obligations would be analogous to those found in PPERA ss 54 & 56.
[32] Similar criticisms have been made by Ramsay et al, *Political Donations by Australian Companies* (2001, Melbourne University Research Report); 'Political Donations by Australian Companies' (2001) 29 *Federal Law Review* 177.
[33] AEC, above n 19, para 8.7.
[34] AEC, *Funding and Disclosure Report Following the Federal Election Held on 2 March 1996* (1997) paras 4.3-4.4 and Recommendation 5.
[35] PPERA Schedule 6.

Adapting these provisions to the Australian scheme, **we recommend that the CEA require that:**

- payments at fundraisers and like events be deemed 'gifts';
- parties and associated entities submit 'gift' reports containing details of gifts received by them;
- such 'gift' reports contain details of the status of the donor/s.

(b) *Who is required to disclose?*

In the first instance, the answer to this question is simple: the political parties and candidates. This question, however, becomes more complex with 'front organisations'. These are organisations that a party is able to control or significantly influence but which are legally separate from the party. The danger these 'front organisations' pose to the integrity of any disclosure scheme is that they become vehicles for the parties to evade their disclosure obligations either because these organisations escape the disclosure scheme or are subjected to a lesser standard of disclosure.

In the Australian context, the problem of 'front organisations' expresses itself through the continuing controversies surrounding 'associated entities'. A recent controversy concerns the 'Australian for Honest Politics' Trust ('AHP Trust'), a trust which was controlled by Howard government minister, Tony Abbott, and set up to mount litigation against the One Nation Party. Again the key regulatory question was whether AHP Trust is an 'associated entity'.[36]

Despite these controversies and the significance ascribed to them,[37] the funding disclosure scheme adopts a fairly robust approach towards such 'front organisations'. The definition of 'associated entity' is potentially broad and the scheme treats

[36] For an argument that AHP Trust is an 'associated entity', see Joo-Cheong Tham, 'Abbott's Honest Politics Trust a Liberal Party front: Donor Disclosure required', *Sydney Morning Herald: Web Diary*, 19 September 2003 (available at http://www.smh.com.au/articles/2003/09/19/1063625165672.html) For an alternative view, see 'Memo to the AEC: why not let the Courts decide Abbott slush fund secrets', *Sydney Morning Herald: Web Diary*, 16 September 2003 (available at http://www.smh.com.au/articles/2003/09/15/1063478123244.html).

'associated entities' as if they were registered political parties by subjecting both to identical obligations.[38]

The breadth of the 'associated entity' definition however has given rise to problems of application. It has prompted the AEC to complain of 'the imprecision in the . . . definition.'[39] More seriously, this perception appears to have inhibited the AEC's enforcement of the 'associated entity' provisions. For example, its restrained approach to the AHP Trust, arguably, stems from this perception.[40]

The challenge here, as the AEC has rightly pointed out, is to ensure that the relevant terms are 'clarified, but without limiting their general meaning.'[41] In this, the AEC has proposed that:

- the term 'controlled' be defined to include the right of the party to appoint a majority of directors or trustees;
- 'to a significant extent' to mean the receipt by a political party of more than 50% of the distributed funds, entitlements or benefits enjoyed and/or services provided by the associated entity in a financial year; and
- the term, 'benefit', to include the in/direct receipt by the party of favourable non-commercial terms.[42]

The first and third dot-points will be useful clarifications of the 'associated entity' definition. The second dot-point should, however, be rejected. It unduly narrows this definition by proposing an *exhaustive* definition of 'to a significant extent'. It would be better to adopt an inclusive definition. Moreover, the reference to 50% implies that 'benefit' is something quantifiable. If so, an exhaustive definition would wrongly exclude entities which provide less tangible benefits to political parties, for example,

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[37] The AEC, for instance, characterised the controversy surrounding the Greenfields Foundation as '(t)he primary public concern over the effectiveness of the Act's disclosure provisions since the 1996 report': AEC, *Funding and Disclosure Report - Election 1998* (2000) 15.
[38] 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, above n 17, 166.
[39] AEC, above n 37, para 4.6.
[40] For example, Kathy Mitchell, the Director of the AEC's Funding and Disclosure Section, has been quoted as saying that the 'associated entity' provisions made consideration of the AHP Trust episode 'incredibly complex': Mark Riley, 'Anti-rorting proposals ignored', *Sydney Morning Herald*, 4 September 2003.
[41] AEC, above n 37, 12.
[42] Ibid 13.

increased electoral support, or, as in the AHP case, legal or other impediments to competitors.

We, therefore, recommend, that the definition of 'associated entity' in the CEA be elaborated by specifying that:

- the term 'controlled' be defined to *include* the right of the party to appoint a majority of directors or trustees;
- 'to a significant extent' to *include* the receipt by a political party of more than 50% of the distributed funds, entitlements or benefits enjoyed and/or services provided by the associated entity in a financial year; and
- the term, 'benefit', to *include* the in/direct receipt by the party of favourable non-commercial terms.[43]

(c) *When should disclosure be made?*

This question concerns the timeliness of disclosure. Such timeliness is key to the effectiveness of a funding disclosure scheme preventing corruption and undue influence. Moreover, there needs to be timely disclosure so that citizens are equipped with the relevant information prior to casting their vote.

The Australian scheme does not, however, provide for timely disclosure. The AEC, in particular, has argued that '(t)his form of . . . reporting and release can result in delays that can discount the relevance of making the information public.'[44] Similarly, the dated nature of the returns means that voters do not have access to the relevant information when determining their voting choices. This is doubly problematic as the federal disclosure scheme by default acts as the disclosure scheme for many local government and some state electoral systems (at least as regards donations to federally registered parties: donations purely to an individual candidate in those systems can go undisclosed).

It is clear then that disclosure by Australian political parties needs to be improved by increasing the frequency of disclosure as well as the timeliness of disclosure. A good way forward would be to adopt the UK scheme of donation reports. Under this

[43] Ibid 13.

scheme, political parties are obliged to prepare and submit quarterly donation reports and weekly donation reports during election periods.[45] The latter requirement stems from the fact that disclosure of donations becomes all the more important at the time voters are about to cast their votes.

Timeliness of disclosure can also be improved by targeting donations that carry the strongest risk of corruption and undue influence, ie large donations, and requiring them to be disclosed shortly after they are received.[46] Consideration, of course, needs to be given as to the threshold at which a donation is subjected to such an obligation.

Another desirable reform would be to require parties, when performing their governance function, to disclose donations that have been received by individuals or entities that would be directly affected by their decisions. Such a requirement would, for example, oblige a party proposing or voting on a Bill directly affecting tobacco companies to disclose donations received from such companies *at the time of the debate*. Similarly, the governing party/ies, when making an executive decision directly affecting tobacco companies, would be required to disclose donations received from such companies. Such 'conflict of interest' disclosure declarations will serve the anti-corruption rationale by deterring corruption and undue influence. They would also promote the informed voter decisions rationale by alerting voters to the potential of such misconduct. They are no more than what informed citizens and ethical politicians would expect, and are analogous to the rules imposed on the broadcast media by the ABA.

We, therefore, recommend that parties, parliamentarians and candidates be required to:

- submit quarterly 'gift' reports;
- submit weekly 'gift' reports during election periods;
- automatically disclose large donations with further investigation into the threshold amount for such disclosure; and

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[44] AEC, above n 19, para 2.10.
[45] PPERA ss 62-3.
[46] As recommended by the Australian Democrats, see their submission to this inquiry (October 2000) 5, and Democrat Senator's Report, Joint Standing Committee on Electoral Matters, *The 1998 Federal Election*, recommendation 6.1

- make ‘conflict of interest’ statements, at least where giving Parliamentary and/or executive consideration to Bills or administrative decisions affecting industries or donors from whom they have received donations in the previous, say 3 years.

2 *Inherent limitations of funding disclosure schemes*

While we are in favour of improving the effectiveness of the present funding disclosure scheme in ensuring transparency of the parties’ finances, we stress that such schemes are inherently limited in their ability to prevent corruption and undue influence.

While such schemes expose details of the funding received by the parties, they do not cast light on the effect of such funding. It then becomes a matter of conjecture as to whether, in the case of graft or corruption, favourable treatment by a political party or its representative resulted from a donation. Similarly, in cases of undue influence, a bystander can only speculate as to whether political access or influence secured by a donor resulted from a donation. In other words, the effectiveness of funding disclosure schemes in preventing corruption and undue influence founders upon the problem of proving a causal link between preferential treatment and donations, which is always of course denied.[47]

Moreover, the Australian scheme has been abysmally ineffectual in preventing the entrenchment of what, arguably, is a form of undue influence: corporate political donations. The problematic nature of corporate political donations stems from the ambiguous status of commercial corporations in a capitalist democracy like Australia. On the one hand, the reality is that such corporations wield enormous economic power with their decisions affecting the livelihoods of most Australians. In such circumstances, they rightly have the ear of politicians. On the other hand, such corporations, from the democratic perspective, do not have a legitimate claim to representation. They do not have a direct claim to democratic representation, as they

[47] This problem of proof was, in fact, highlighted by the recent report by the Senate Select Committee on Ministerial Discretion on Migration Matters which investigated, among others, the ‘cash for visa’ allegations. After referring to its attempt to ‘explore any connection between Mr Karim Kisrwani’s political donations and the minister’s exercise of his discretion’, the Committee concluded that it ‘was unable to determine the extent of community or political bias in the exercise of the powers because there was no way it could check who or what influenced the minister’s decision to intervene’: Senate Select Committee on Ministerial Discretion in Migration Matters, *Report* (2004) xv-xvi.

are not citizens, the ultimate bearers of political power in a representative democracy. As stated by Chief Justice Mason:

> the concept of representative government and representative democracy signifies government by the *people* through their representatives.[48]

More than this, such corporations, unlike democratically structured entities (ie most parties, community organisations and trade unions)[49] do not even have a derivative claim to political representation. This is because they are inherently undemocratic in their decision-making structure. Shareholder control must necessarily mean that power in a business is parcelled out according to the criterion of wealth. In sum, democratic principles would seem to dictate that commercial corporations should not be able to directly translate their economic power into political power through the medium of political contributions. Of note is the fact that the largest and most robust capitalist democracy, the United States, has for more than a century restricted donations by corporations to parties and candidates, precisely on the grounds of undue influence and concerns with graft and corruption.

Political contributions by commercial corporations might be prevented or discouraged by disclosure laws but only if there were a strong current of opinion that such contributions were illegitimate. In Australia, however, the *reverse* situation pertains with the *normalisation* of corporate political donations.

While such normalisation is partly attitudinal in that it is constituted by a sanguine acceptance of corporate donations, such acceptance is rooted in the funding patterns of the parties. Political donations are dominated by corporate donations. For the financial years 1999/2000 to 2001/2002, such donations were the key source of donations for all parties except for the Greens.[50]

Further, the sharply increasing amount of corporate donations flowing to the parties means that such normalisation will become increasingly entrenched as time goes by. In 1992/1993 financial year, the amount of corporate donations going to the ALP, the

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[48] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 137 (emphasis added).
[49] Federally registered trade unions, for one, are *legally* required to have democratic structures: *Workplace Relations Act 1996* (Cth) Registration and Accountability of Organisations Schedule.
[50] These figures have been calculated from the annual returns for the financial years, 1999/2000-2001/2002

Coalition and the Democrats stood at $6.6 million.[51] For the financial years 1995/96-1997/98, the amount of corporate donations made to these parties as well as the Greens had increased to $29 million with an average of $9.7 million per year.[52] For the financial years 1999/2000-2001/2002, this amount had increased by more than 70% to $50.8 million with an average of $16.9 million per year.[53]

Apart from the problem of proof faced by the funding disclosure scheme and its failure to prevent the normalisation of corporate political donations, the scheme is also ineffectual in two other respects. It fails to effectively prevent the selling of political access because parties, which engage in such sale, clearly accept that such fund-raising practices are acceptable. This is despite the fact that such sales clearly involve the undue and unequal influence of politicians because access to and influence on political power is secured through the payment of money.

The funding disclosure scheme also does not discourage large donations – the very sort of donations that carry a heightened risk of corruption and undue influence. It could only discourage such donations if large donors and political parties fear, or are, at the very least, anxious to avoid disclosure, because such publicity would reflect adversely on them. All this is a pious hope given evidence that there is a normalisation of large donations. Such normalisation is, of course, intertwined with the normalisation of contribution from commercial corporations, who typically make such donations without reference to their shareholders. It is also fuelled by the practice of large corporate donors hedging their bets by donating to several parties. For example, for the financial years 1995/96-1997/98, nine of the ten top corporate donors gave to both the ALP and the Liberal Party with seven of them donating to both these parties and the National Party.[54]

Donors do this for two reasons: (1) to have some 'deniability' if accused of outright favouritism; and (2) to have 'two bob each-way', including not unduly upsetting either major party grouping. But far from dulling the perception of corruption, this reasoning merely illustrates the endemic nature of the purchase of access and

[51] Gerritsen, above n 15, 21.
[52] Ramsay et al, above n 32, 23.
[53] Figures calculated from annual returns for the financial years, 1999/2000 to 2001/2002.
[54] Ramsay et al, above n 32, 26.

favourable treatment. Ordinary electors rightly understand that corporate donations are not a form of political philanthropy. Ultimately it reinforces the perception, which has corroded faith in the political system for several decades, of an oligopoly between the parties of government and elite corporations, 'shutting out' alternative or new political ideas and entities.

These inherent limitations of the funding disclosure scheme must be taken seriously. These limitations are one of the key reasons for us considering other regulatory methods. They do not, however, mean that the funding disclosure scheme has no role in achieving the sort of transparency that can deter *some* corruption and undue influence. Rather, such schemes should not be invested with elixir-like qualities and expected, even if 'loophole free', to banish corruption and undue influence simply by virtue of making transparent the funding of parties.

A much more modest role should be reserved for funding disclosure schemes in the fight against corruption and undue influence.[55] Such a role, while attenuated, will still be significant. For example, funding disclosure schemes still serve to put the public, assuming a virile media, on notice of the risk of corruption and undue influence. If armed with such information, independent journalists (and indeed in a truly competitive electoral system, rival parties) will vigorously 'shine a bright light and poke around with a long stick',[56] then there will be a useful antidote against corruption and undue influence. In the context of lazy journalism and lax political morality, however, the information disclosed by the disclosure scheme will by and large be meaningless. Worse, as we have argued, the disclosure of the frequency and the amount of donations received by the parties may simply contribute to the perception that political parties are regularly trading away the public interest to monied interests. In such a situation, a funding disclosure scheme, far from shoring up the integrity of the electoral system, is corrosive of public trust in democracy.

Note that a funding disclosure scheme is still relevant in preventing corruption and undue influence because other regulatory devices will not work without it. For

[55] Such schemes clearly have a role beyond preventing corruption and undue influence. For one, they provide invaluable information relating to the funding of parties.

instance, caps on donations and expenditure limits will help prevent corruption and undue influence. Neither, however, could work without a funding disclosure scheme that ensures that party finances are sufficiently transparent.

B *Disclosure of expenditure*

Australian political parties' expenditure is largely unregulated, with parties only required to disclose the *total amount* of their expenditure in their annual returns.[57] There is no obligation to specify any of the transactions that make up this amount in the annual returns. Neither is there a separate obligation on parties to disclose the amounts of their campaign expenditure. While such disclosure was required as part of the original funding and disclosure scheme, this requirement was repealed in 1998.[58] Hence, parties did not have to disclose details of their campaign expenditure for the 1998 and 2001 federal elections.

The repeal of the requirement on parties to disclose their campaign expenditure stemmed from a recommendation made by the Joint Standing Committee on Electoral Matters' in its report on the 1996 election. This recommendation was made on the basis that annual returns and returns disclosing electoral expenditure involved 'unnecessary duplication'.[59]

Whatever the merit of the argument when made, it does not hold now because only the total amount of expenditure needs to be stated in annual returns with the requirement to disclose specific transactions repealed in 1998.[60] In other words, there is no way one could determine the amount a party has spent on campaign expenditure through perusing the disclosure returns.

The argument for the disclosure of such expenditure is not simply academic. One of the founding principles of the reforms of the 1980s was a shared concern with

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[56] Keith Ewing, *Trade Unions, the Labour Party and Political Funding: The next step: reform with restraint* (2002) 29.
[57] CEA s 314AB(2)(b).
[58] *Electoral and Referendum Amendment Act 1998* (Cth). This requirement was also removed for the 1993 election but reinstated for 1996 election, see respectively *Commonwealth Electoral Amendment Act 1992* (Cth) and *Commonwealth Electoral Amendment Act 1995* (Cth).
[59] Joint Standing Committee on Electoral Matters, *1996 Federal Election: Report of the Inquiry into the conduct of the 1996 Federal Election and matters related thereto* (1997) 102.
[60] *Electoral and Referendum Amendment Act 1998* (Cth).

inflation in electoral expenditure, and its tendency to corrode both electoral equality and to increase reliance on big donors. Further, as stated by the Harders inquiry into the disclosure of electoral expenditure, it is:

> in the public interest that electoral expenditure should be publicly disclosed . . . (because of) the interest of the people in being informed of the cost of elections.[61]

This public interest rests on various grounds. Party administration and campaign costs are being partly defrayed by the public purse through electoral funding and parliamentary entitlements. It is in the public's interest to know how such state assistance is being used. Also, if expenditure limits – which are central to comparable common law democracies (the UK, Canada and New Zealand) – are to be reinstated as we recommend below,[62] it is necessary to reinstate disclosure of campaign expenditure for the purpose of designing and then, of course, enforcing sensible expenditure limits.

We, therefore, recommend that the requirement that parties disclose the amount of their campaign expenditure be reinstated.

IV FUNDING

Australian political parties are funded by the State in two ways. The first is through a system of electoral funding. Under this system, parties and candidates polling at least 4% of the first preference votes cast in a constituency are entitled to a certain sum for each first preference vote cast in their favour.[63] Apart from proof of electoral support, this entitlement is unconditional.

Parties that enjoy parliamentary representation are also funded through parliamentarian entitlements.[64] The amount involved is very significant. In the 1999-2000 financial year, for instance, the cost of such entitlements amounted to $354 million dollars.[65] To get a sense of proportion, the parties' budgets for financial years

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[61] Commonwealth of Australia, *Inquiry into Disclosure of Electoral Expenditure* (1981) (Chair: C W Harders) ('Harders Report') 8-9.
[62] See text below nn 94-119.
[63] CEA ss 294, 297.
[64] For a brief discussion of these entitlements, see Sally Young, 'Killing competition: Restricting access to political communication channels in Australia' (2003) 75(3) *AQ: Journal of Contemporary Analysis* 9, 9-11.
[65] Australian National Audit Office, *Parliamentarian Entitlements: 1999-2000* (2001) paras 2-3.

1999/2000-2001/2002 was less than this amount and stood at approximately $248 million.[66]

This dual system of funding suffers from several vices. It:

- potentially inflates campaign expenditure;
- is ineffectual to reduce reliance on private political contributions;
- exacerbates political inequality; and
- is not properly linked to the legitimate functions of parties.

A *Inflating campaign expenditure?*

There is good reason to suspect that public funding of political parties has fuelled campaign expenditure. In the absence of expenditure limits, and with open slather television advertising, there is no necessary limit to campaign expenditure or, more generally, to the parties' expenditure. The only real limit is the size of the parties' budgets. Even their perception of campaign saturation is no longer a natural limitation, with the contemporary advent of 'permanent campaigning' included increased use of internal polling, direct mail, and computerised tracking of elector's views, particularly by the major parties. Thus, if the parties' budgets expand because of public funding, we should expect increases in campaign expenditure in the absence of other constraints like expenditure limits.[67] As has been cogently argued, electoral funding acts 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'.[68]

Furthermore, there is anecdotal evidence that broadcasters charge the parties an additional premium for political advertising.[69] If this were true, public funding

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[66] Calculated from Annual Returns 1999/2000-2001/2002. Further research is, however, required to determine the amounts that are received by the various parties because there is no readily accessible information indicating how much each party receives of parliamentary entitlements. Collecting such information is complicated by the fact that the use of such entitlements varies according to each parliamentarian: Australian National Audit Office, above n 65, para 39.

[67] 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.

[68] David Tucker and 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* (2001) 60, 67.

[69] Stephen Mills, *The New Machine Men: Polls and Persuasion in Australian Politics* (1986) 189-90.

without expenditure limits merely encourages the privately owned media to indirectly seek 'rent' from the public purse.

There are good grounds then for suspecting that public funding without other limitations inflates campaign expenditure. At the same time, it should be conceded that the above comments remain speculative. As it stands, the question of the effect of public funding on campaign expenditure is not one that yields a definitive answer with further investigation required.

B *Ineffectual to reduce reliance on private contributions*

Since the electoral funding scheme was introduced in 1983, there has been very little evidence that the amount of donations to political parties has decreased. On the contrary, the amount of corporate donations has sharply increased. This together with the parties' heavy reliance on corporate money means that corporate donations have been normalised.[70] More than this, the imbalance in funding that was to be remedied by electoral funding is very much intact as shown by the figures below.

Party	**First preference votes in 2001 election**	**Total funding ($) per vote**	**Private funding ($) per vote**	**Electoral 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: Annual returns for financial years 1999/2000-2001/2002[71]

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. To illustrate: for each dollar per vote received by Democrats, nearly three dollars was received by ALP. And for each dollar per vote received by the Greens, the Liberal Party received nearly two dollars.

This funding inequality is due largely to the different amounts of private money received by the parties. There is a clear correspondence between the pattern of private money received per vote and the pattern of total funding received per vote with both

[70] See text above nn 50-3.

[71] The figures relating to the number of first preference votes secured by the parties are available at <http://www.aec.gov.au/_content/when/past/2001/results/NATIONAL.htm>

revealing a sharp cleavage between the ALP, the Liberal Party and the National Party, on one side, and the Greens and the Democrats, on the other. For example, 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.

At the same time, it is impossible to know what effect public funding has had on graft and corruption. It is possible to speculate – but impossible to know – whether the relative lack of system-shattering revelations has been in part because reasonably generous public funding has at least eased some of the pressure on Australian political parties to put fund-raising above all else. Certainly we have not witnessed the large-scale corruption scandals that have affected European democracies,[72] nor the obscene 'arms-race' of money politics in the US.[73] But this can never be empirically known, and is confounded by variables such as differences in political and business culture between countries.

But as the data above shows, electoral funding has failed to significantly curtail the parties' reliance on private funding and, in particular, corporate donations. Further, lacking either donation or expenditure limits, it has only partially achieved equality of political opportunity – indeed, whilst public funding is an important component of the funding of parties outside the ALP and Coalition, the open slather approach to private donations, which inherently and empirically favours the 'parties of government' (revealing the central purpose of such donations – buying influence or access) helps to lock out competitors. This, however, should not come as a surprise. The fact that electoral funding in Australia is not tied to any conditions or obligations relating to the receipt of funding has always meant that the equality objective was largely rhetorical.[74]

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[72] Eg blatantly corrupt abuse of public office resources by incumbents have led to jailings in France and continue to haunt even President Chirac – these scandals date to a time before public funding. The UK, prior to public funding and expenditure limit reform in 2000, was bedevilled by 'sleaze' scandals from 'cash for questions' to donations seemingly linked to graft in government decision-making.

[73] Public funding is not a central feature of US elections. There is only limited public funding in the US – eg it is available for Presidential races, but even then it is set at unrealistic levels. Wealthy candidates or those with wealthy backers opt out of it.

[74] A notable, if minor exception, is the NSW state schemes reservation of some money tied to a 'Political Education Fund': see *Election Funding Act 1981* (NSW)

C *Exacerbating political inequality*

Public electoral funding does advance political equality by boosting the finances of serious minor parties such as the Democrats, the Greens and One Nation.[75] It also gives parties some guaranteed income, enabling stable party secretariats to be established, which is, in general, a good thing for the ideological and participatory functions of parties, as it allows some focus on policy development and membership development. Similarly, parliamentary entitlements assist parliamentary parties in performing their governance function.

But at the same time, it is clear that the present electoral funding rules, along with excessive parliamentary entitlements, exacerbates political inequality in several respects.

Contrary to its rationale of facilitating open electoral contests, electoral funding through the 4% threshold applied at the individual candidate level clearly discriminates against parties that enjoy significant electoral support but fail to cross the threshold in every seat. This threshold explains, in part, why the Greens receive $2.73 of electoral funding per first preference vote secured in the 2001 federal election whereas all the other major parties receive more than three dollars per vote.[76] In place of the 4% threshold, there should be either a lower threshold – eg 2% - [77] and/or a threshold based on the nationwide support secured by a party.

The latter proposal might raise fears of parties running candidates simply to boost their aggregate vote. But this is hardly a bad thing: why should voters in some districts not have a full breadth of choice? (In any case, the cost of lost deposits will still act as some deterrent). A bigger fear is allegations of bogus or sloganeering parties being registered. This exists regardless of public funding, because of the ability of parties to control preference flows in Senate elections. But if there is a

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[75] See table above n 71.

[76] See table above n 71. Federal electoral funding is provided for votes gained in the House of Representatives and Senate so this discrepancy would also be due to the fact that the Greens do not contest many House of Representative seats.

[77] For instance, a 2% threshold used to apply in relation to the ACT funding and disclosure regime. This threshold, however, has been increased to 4%: *Electoral Act 1992* (ACT) s 208.

genuine fear of parties profiteering from public funding, there is a simple answer: restore the requirement that payments be by way of reimbursement only.[78]

Moreover, electoral funding is calculated on the basis of past electoral support. While this is probably the most equitable basis for calculating such funding, it does inevitably mean that established parties – particularly those with supportive bankers willing to extend credit on the expectation of public funding - enjoy a financial advantage over newer parties.

Thirdly, and most seriously, parliamentary entitlements obviously confer an advantage to incumbent parliamentarians. Moreover, the larger parties, the ALP and the Liberal Party, reap a disproportionate benefit because in the absence of proportional representation, their parliamentary representation is disproportionately greater than their electoral support.

While it is quite right that parliamentarians be properly supported in the discharge of their functions, the structural inequality of parliamentary entitlements and the amount of money that is involved raise serious questions. As noted above, this amount far outstrips the parties' annual budgets.[79] All in all, it is questionable whether the amount spent on parliamentary entitlements is justifiable. More importantly, there are insufficient restrictions on its expenditure to ensure that incumbents do not gain radically unequal and hence unfair electoral advantage over challengers, as they clearly do by treating the allowance as a 'free kick', eg, through issuing PR material in the guise of 'communicating' with constituents.

These features of the present system of funding political parties, realise, to some extent, the fear that state 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

[78] Queensland for instance retains this requirement. It remains debatable whether the fear of 'profiteering' is significant enough to necessitate this change, which would have to be balanced against the administrative cost, especially to smaller parties.
[79] See text above nn 65-6.

unable to field candidates because they lacked the necessary funding.'[80] This is exacerbated by the lack of any system of free air-time on the major networks – in contrast to the UK – and an ad hoc approach to 'leadership' debates in the election campaign, where the ALP and Liberals agree to close out leaders of other parties.

D *Failure to be properly linked to the legitimate functions of parties*

What is obvious with electoral funding is that it is not explicitly linked to the legitimate functions of the parties. Parliamentary entitlements, on the other hand, are clearly aimed to assist parliamentary parties to perform their governance and representative functions. So it has been said of Australia's parliamentary entitlements that they 'enable (parliamentarians) to fulfil their parliamentary and electorate responsibilities'.[81]

Much more, however, needs to be done to ensure that the public funding of political parties is tied to their legitimate functions. Two key functions, in particular, are poorly served by public funding, their ideological and participation functions. To help parties re-focus on participation, for example, some public electoral funding could be shifted to a 'matching dollar' scheme, whereby donations from individual citizens up to a certain level could be matched by a public subsidy.[82]

E *Recommendations*

Several recommendations follow from the immediate discussion. **We recommend that:**

- in place of the 4% threshold for electoral funding, there should be a lower threshold and/or a threshold based on the nationwide electoral support secured by a party; and

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[80] United Kingdom Electoral Commission, *The Funding of Political Parties: Background Paper* (2003) 22. See also Committee on Standards in Public Life (Chair: Lord Neill of Bladen, QC), *Fifth Report: The Funding of Political Parties in the United Kingdom* (1998) ('Neill Committee Report')) 91-2. For similar sentiments, see Young, above n 64.

[81] Commonwealth, *Parliamentary Debates*, House of Representatives, 8 May 1990, 68 (Mr Beddall, Minister for Small Business and Customs, 2nd Reading Speech to Parliamentary Entitlements Bill 1990).

[82] The level should be low – on equality grounds well off donors should not skew the subsidy. An alternative would be to try to revivify the tax deduction regime (how many citizens know a party donation of up to $100pa is deductible?) The problem with tax deduction regimes are that they are disproportionately attractive to high-income earners who benefit most from deductibility and least of an incentive to pensioners etc.

- a review of electoral funding and parliamentary entitlements be conducted with the aim of ensuring that public funding effectively promotes political equality; prevents corruption and undue influence and assists parties in performing their legitimate functions.

V OTHER REGULATORY METHODS

We have so far considered disclosure laws and public funding and recommended various ways to improve the effectiveness of these regulatory methods. We argue that funding disclosure is inherently limited in its ability to combat corruption and undue influence, and public funding in an otherwise open slather system does little to advance real political equality. For these reasons, there needs to be consideration of other regulatory methods.

Indeed, it is our view that the problems afflicting the funding disclosure scheme have unduly monopolised the debate surrounding the regulation of party finance. To broaden this debate, we canvass the desirability of two other regulatory methods, caps on political donations and limits on campaign expenditure.

A *Caps on political donations*

The appeal of caps on political donations is obvious. They effectively prevent corruption and undue influence by removing the root of these evils, substantial political donations. This virtue is all the more salient given the inherent limitations of funding disclosure schemes.[83] Moreover, assuming that these measures are publicised, they also have the merit of achieving transparency in voting decisions. Citizens, not only when casting their votes, but also in looking on policy and executive decision making in everything from industry assistance to migration applications would be reassured that parties and candidates are less open to undue influence, because they have been prohibited from receiving large-scale political donations. Parties would be forced to re-focus on their ‘grass-roots’, relying again on individual members and citizens for extra resources for campaigns and ongoing administration. Lastly, a cap would temper the financial inequality between the parties and hence promote a more level-playing field by curbing a key source of such inequality, large donations.

[83] See text above nn 47-56.

Objections, however, have been mounted against such measures. First, it might be said these measures would result in political parties losing a crucial source of income; income which is used for electioneering.[84] The loser at the end of the day, it might be said, would be democracy because impoverished political parties cannot engage in effective electioneering or compete in the media 'marketplace' for attention. This objection has some validity insofar as it highlights the necessity of electioneering costs and, by implication, funding for such costs. Nevertheless, this can be addressed by ensuring that public funding of political parties is adequate to the reasonable costs of campaigning, and by augmenting it, for instance, with the provision of free television or print advertising, and caps on total electoral expenditure to ensure costs do not grow excessively.

Another objection to caps on political donations is that it infringes donors' freedom of political association or expression. The crux of the argument is that political donations are a form of political association or expression.[85] In a sense, this argument highlights a perennial tension in liberal democracies, between freedom and equality, which, in this situation is that between freedom of political association and political equality.[86] But the present dilemma should not be cast in such stark terms. In Australia, both these values have their force because they are derived from the concept of representative democracy,[87] 'government by the people through their representatives'.[88] Accepting that both these values have a common genesis, the existence of an irresolvable tension between these values should not be accepted so easily. Indeed, in the Australian tradition of democracy, political freedom and political equality are necessarily inter-related. As we have tried to show, equality of

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[84] A similar argument was put to the Fitzgerald Commission by the major parties against an obligation to disclose the identities of donors, see Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (chair: Fitzgerald, G.E.), *Report of a Commission of Inquiry Pursuant to Orders in Council* (1989) 18.

[85] So much was implied in the minority report by Coalition members in Joint Standing Committee on Electoral Matters, *Who pays the piper calls the tune: minimising the risks of funding political campaigns* (1989) 130.

[86] Ewing**,** above n 12, 241.

[87] In the constitutional context, similar type of reasoning was employed to derive an 'implied freedom of political communication' in ACTV, above n 2. For a minority of judges in *Kruger v Commonwealth* (1997) 190 CLR 1, 115 and 142 per Toohey, Gaudron and McHugh JJ, such reasoning was taken a step further in that the implied freedom of political communication was held to give rise to implied freedoms of association and movement.

[88] *ACTV*, above n 2, 137.

political opportunity and competition is fundamental to real political freedom: the freedom is not to buy influence, or to unduly dominate political and electoral debate, but to compete in the debate about political ideas and electoral visions, on equal footing with rival ideas and visions.

Their common genesis is also illuminating in another respect. The main bearers of the rights to freedom of political association and political equality are citizens. This is not to say that it might not be necessary to confer these rights on other entities to ensure that citizens' rights are meaningful. The point is that such a conferral would be necessary because it was incidental to the rights of citizens. For example, individuals presently engage in political association through organisations hence, certain rights need to be conferred on these organisations to make the citizen's right to freedom of political association meaningful. But such an argument loses much of its force with commercial corporations. These entities are not vehicles of political association. Accordingly, it is strongly arguable that a ban on political donations from commercial corporations does not give rise to any tension between freedom of political association and political equality. That such a ban is both legally and philosophically acceptable to even the most liberal democracy is clear from the fact that it has long been accepted in the United States.[89]

In any event, only a very small minority of citizens make significant political donations. For example, the annual return for the ALP for the financial year 2002/2003 only lists 58 natural persons as donors whereas the Liberal Party's annual return for the same financial year lists 149 natural persons as donors.[90]

While the fact that only a minority of citizens are in a position to effectively exercise the freedom to make sizeable political donations does not in itself demand a ceiling, it does reduce any concerns that a cap on donations infringes any fundamental freedom of political association. Donation caps would only affect a small minority's freedom of political association. Indeed, for other citizens, measures like ceilings and bans on

[89] Passing muster under US 'first amendment' doctrine, such caps or ceilings would pass muster under our much less restrictive doctrine in *ACTV* or *Kruger*.

[90] It should be noted that the annual returns only require disclosure of amounts received from a particular person/entity that total $1,500 or more. These figures were produced by running the AEC's annual locator service found at <http://search.aec.gov.au/>

political donations enhance their political freedoms including the freedom of political association. In this context, the push for political equality is at once a push for greater political freedom.

The final objection to examine is the question of unworkability. The AEC recently recommended against imposing limits on political donations. The main basis of its recommendation was that, in light of overseas experience and the culture of evasion that exists in relation to the federal disclosure regime, such limits were destined to be ineffectual because they were susceptible to abuse. The main instance it provided of such abuse was 'soft money' contributions, contributions donors made to third party organisations, which then engaged in political advocacy which fell just short of a direct advocacy of a vote for a particular candidate or political party. The critical difficulty, according to the AEC, was in determining whether such advocacy was made independent of a political party.[91]

The 'soft money' problem identified by the AEC in relation to caps on political donations is, in fact, a problem faced by *any* law regulating the finance of political parties, that is, the 'front organisation' problem. As noted above, this problem arises when a party sets up entities that are legally separate from the party but can still be controlled by the party.[92] Party 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.

If the 'front organisation' problem is one inherent to party finance laws, it should not then be used as an argument to *specifically* oppose caps on political donations. To accept this problem as a reason for opposing a regulatory measure is tantamount to giving up on the regulation of party finance. Moreover, there are tried and true ways to deal with the problem of 'front organisations', namely, through the 'associated entity' provisions.

Donation caps of course would still leave corporations and wealthy citizens to campaign as 'third-parties'. Related to the 'soft money' concern, some might fear a

[91] AEC, above n 19, paras 8.8-9 and 8.12.

'waterbed' effect. That is, money being channelled to sham or 'front organisations' for campaigning, where the identity of the campaigner is obscured and election campaigns lose, for want of a better word, some of their 'sincerity'. But we do not have an extensive tradition of 'third party' electioneering in Australia, primarily because we have a more modest electoral culture than, eg, the US. Representative bodies, such as some business and professional associations, unions and other lobby groups such as well-recognised environmental groups engage in a limited amount of electoral expenditure and campaigning. Sometimes they advocate support or opposition to particular parties – more often they raise issues. This is quite healthy for democracy. But Australians are generally wary, if not cynical, of extravagant attempts to shape political preferences.[93] Short of a significant erosion in this culture, which would take a considerable period, there is no reason to fear being swamped by any 'waterbed' effect.

There is, we believe, a powerful case for limitations on political donations. Such measures supply an effective antidote to graft and policy corruption. With some publicity, they also have the advantage of transparency. Further, they can also promote political equality. Moreover, objections raised to such measures are either overstated or can be accommodated. Without such measures, we will limp on with an impotent political finance system that fails to seriously address *any* of its goals.

We, in principle, recommend limitations on political donations, in the following forms:

- bans on corporate donations to political parties and candidates;
- organisation-specific ceilings for contributions from political associations (which could include trade unions) with the ceilings based on the number of natural person members in these associations;
- caps on the amount any individual could donate in a financial year to a particular party or candidate, including a total annual cap on the amount donated.

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[92] See text above nn 36-42.

[93] This is clearly a cultural legacy. We are closer to the UK electoral model, where, say, the millionaire Sir James Goldsmith's anti-Europe 'Referendum Party' flopped badly, than say the US where front-groups can more easily hide in a cacophony of 'free speech' and where wealthy, even billionaire candidates, appear to lose little of their electability.

B *Campaign expenditure limits*

For the larger part of the twentieth century, expenditure limits were a key part of Australia's electoral regulation.[94] We believe that there is a strong case for reinstating campaign expenditure limits for two reasons: the anti-corruption rationale and the equality/level-playing field rationale.

The anti-corruption rationale[95] argues that expenditure limits can perform a *prophylactic* function by *containing* increases in campaign expenditure and, therefore, the need for parties to seek larger donations; donations which carry the risk of corruption and undue influence.[96]

This prophylactic function 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 parties, in the absence of more generous public funding, to seek more and/or larger donations to meet such burgeoning costs. This pressure will increase the risk of corruption and undue influence that comes with such donations.

Besides a prophylactic function, expenditure limits can also perform a remedial function. For instance, if present spending levels were judged to be excessive and to carry an inordinate risk of corruption and undue influence, expenditure limits could be aimed at decreasing the amount of real spending and, in turn, the risk of corruption and undue influence.

The equality/level-playing field rationale[97] contends that fair electoral contests demands the imposition of constraints on campaigning costs through campaign expenditure limits.[98] In its more assertive forms, this rationale states that 'campaign expenditure buys votes'.[99] Such a straightforward relationship between expenditure and votes is, however, untenable. Citizens' voting decisions might be formed before

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[94] Deborah Cass and Sonia Burrows, 'Commonwealth Regulation of Campaign Finance: Public Funding, Disclosure and Expenditure Limits' (2000) 22 *Sydney Law Review* 447, 454-5.
[95] K D Ewing, 'Promoting Political Equality: Spending Limits in British Electoral Law' (2003) 2 *Election Law Journal* 499, 507.
[96] Neill Committee report, above n 80, 116-7.
[97] Ewing, above n 95, 499, 507.
[98] Neill Committee Report, above n 80, 116-7.

the campaigns and remain impervious to campaign tactics. Moreover, demographic and class factors will also shape a voter's decision. Not surprisingly then there is a complex relationship between campaign expenditure and voter support[100] or, put differently, between 'spending and electoral payoffs'.[101] In Australia, for instance, the biggest spender on political broadcasting for the federal elections running from 1974 to 1996 only won half of these contests.[102]

The complex relationship between campaign expenditure and voting decisions has given rise to the argument that campaign expenditure limits are unnecessary because money does not buy elections.[103] At first blush, this argument is appealing in that money does not buy elections in the sense that campaign expenditure is clearly not *decisive* in determining electoral outcomes. But it is a very different thing to say that campaign expenditure has no or little positive impact. So long as campaign expenditure has positive, albeit limited, electoral impact (something parties implicitly recognise – if campaign expenditure didn't work, why would they engage in it!) there is still a case for instituting such limits on the basis they *promote a level playing field*.[104] This case is all the stronger in light of the funding inequalities among the Australian political parties.[105]

There is a second, perhaps stronger, argument. Campaign expenditure may not definitively buy votes. But it does help to shape political agendas. One side or other of politics can use money to inordinately shape the landscape of political and electoral discourse. Whilst ideas need some airtime and hence money to breathe, it is unhealthy for representative democracy to allow open-slather electoral expenditure, because this can skew public policy debates.

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[99] Ibid 117.
[100] See Sally Young, 'Spot On: The Role of Political Advertising in Australia' (2002) 37 *Australian Journal of Political Science* 81, 89
[101] Justin Fisher, 'Next Step: State Funding for the Parties?' (2002) 73 *Political Quarterly* 392, 396.
[102] Young, above n 100, 91.
[103] Neill Committee Report, above n 80, 118.
[104] Note Ewing's comment that fairness in elections goes beyond the question of resources and embraces the content of messages: Ewing, above n 95, 499.
[105] See table above n 71.

It remains to consider various arguments against expenditure limits. There is the argument that expenditure limits are 'unenforceable'[106] or 'unworkable'; arguments usually taken to be proven by Australia's experience with expenditure limits.[107]

Arguments based on 'unenforceability' or 'unworkability', however, typically suffer from vagueness. In Australia, such arguments as they relate to campaign expenditure limits appear to be proxy for two specific arguments. It is said that '(a)ny limits set would quickly become obsolete.'[108] Moreover, these limits are seen to overly susceptible to non-compliance.[109]

The first argument can be quickly dispensed with. Any problem with obsolescence can be dealt with 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.

All laws are vulnerable to non-compliance. Party 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 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. As noted above, the effectiveness of party finance laws

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[106] Neill Committee Report, above n 80, 172.
[107] Harders Report, above n 61, 13.
[108] Neill Committee Report, above n 80, 172.
[109] Before they were repealed, the Australian expenditure limits were, in fact, subject to widespread non-compliance. For example, 433 out of 656 candidates for 1977 federal elections did not file returns disclosing their expenditure: Harders Report, above n 61, 18. But 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* (1981) 499-500.

invariably rubs up against the 'front organisation' problem. A separate issue faced by party finance laws lies with third parties, that is, political actors which are not parties or sufficiently related to the political parties. The challenge posed by third parties is not that it provides a vehicle for parties to evade their obligations simply because third parties are, by definition, not appendages of the parties. Party finance laws that do not deal adequately with the 'third party' problem risk not evasion but irrelevance. For instance, if there were substantial third-party electoral activity, a regulatory framework centred upon parties and their associated entities would, in many ways, miss the mark by failing to regulate key political actors.

The above circumstances demonstrate that party finance regulation will *always* face an enforcement gap. But to treat these circumstances as being fatal to any proposal to regulate party finance would be to give up on such regulation. By parity of reasoning, it should not be fatal to the proposal to impose expenditure limits that it is unenforceable to some extent because of these circumstances.

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.

Lastly, it is said that expenditure limits constitute an unjustified interference with freedom of speech.[110] This argument must taken seriously not only because it poses a question of principle but also because, in Australia, a statute which unjustifiably infringes freedom of political communication will be unconstitutional.[111]

As the discussion below will demonstrate, the question of principle can, in fact, be usefully approached by applying the test for constitutionality. In short, the question of principle and that of constitutional validity can be approached in the same breath.

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[110] Neill Committee Report, above n 80, 118.

[111] The vulnerability of expenditure limits to arguments based on political freedoms also exist in the UK, see discussion of *Bowman v United Kingdom* (1998) 26 EHRR 1 in Ewing, above n 95, 505-7.

The High Court has held that a legislative provision will be invalid if:

- it effectively burdens freedom of communication about government or political matters either in its terms, operation or effect?; and
- it is not reasonably appropriate and adapted to serve a legitimate end.[112]

With respect to the first criterion of invalidity, expenditure limits do not, on their face, burden freedom of political communication because their immediate impact is on the spending of money. Indirectly, however, these limits do impose a tangible burden on such a freedom.[113] This is because the lion share's of such expenditure is spent on communicating political matters whether it be promoting a policy or criticising parties. This is especially the case with political broadcasting which has been found by the High Court to come within the scope of the protected communication.[114]

It is important to note, however, that the weight of this burden will depend on the design of limits. The level at which the limit is pitched will be significant with the lower the level, the heavier its burden on the freedom of political communication. Clearly, following the *ACTV* case, such limits would have to be high enough to allow for a reasonable amount of broadcast advertising by the party or group concerned. (It might by noted that quite low expenditure limits apply across the board in Tasmanian Upper House elections.)[115]

Similarly, the burden will depend on whether the limit is instituted through a simple prohibition like in the UK or as a condition on public funding.[116] If the latter is adopted, the burden on freedom of political communication will be much less as parties can still choose not to receive public funding and hence, be exempt from campaign expenditure limits.

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[112] *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96, 112.
[113] For a somewhat heroic attempt to argue that campaign expenditure is not a constitutionally recognised form of political communication, see Cass and Burrows, above n 94, 488.
[114] See *ACTV*, above n 2.
[115] Approximately $9000 per Legislative Council candidature – this includes parties and supporters.
[116] If this method were adopted, other measures would have to be implemented to bring third parties, which do not receive public funding, within regulatory regime.

Given that campaign expenditure limits invariably impose, to some degree, a burden on the freedom of political communication, the critical question then is whether the instituted limit is reasonably appropriate and adapted to a legitimate aim.

At the outset, it can be categorically said that expenditure limits do not *necessarily* fail this test of proportionality.[117] There are clearly legitimate aims that can be invoked, namely, the anti-corruption[118] and the equality/level-playing field rationales. Whether an expenditure limit is an unjustifiable interference with freedom of political speech and/or unconstitutional cannot be answered in advance. The answers to these questions will depend on the design of the limits.

Of note is the fact that electoral expenditure limitations apply in our chief common law comparators: the UK, Canada and New Zealand: for a summary of these countries see the Schedule at the end of this submission. Each of those countries have not only strong traditions of liberal democracy, but constitutional and court jurisprudence based on rights including liberty rights (Canada in particular with its *Charter of Rights* and the UK as part of the European system of rights.) There is no reason to presume that similarly crafted expenditure limits for Australia elections would infringe our nascent 'implied freedom' doctrine.

Actually there is a third argument for expenditure limits, which every Australian who follows sport will understand. By analogy with the 'salary cap', expenditure limits on campaigns will, as we argue above in relation to the equality/level playing field rationale, help avoid unhealthy monopolisation of campaign advertising/marketing (helping ensure that ideas and policies – assuming a responsible media – are not drowned out). But also by dampening down inflation in campaigning, expenditure limits will help ensure the long-term stability of the parties and their branches themselves.

We, therefore, recommend that:

- campaign expenditure limits be supported in principle; and

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[117] See Cass and Burrows, above n 94, 489-90.
[118] This rationale was accepted in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

- the design of such limits be further investigated, particularly with reference to recent reforms in the UK, Canada and New Zealand.

VI COMPLIANCE AND ENFORCEMENT

The legislative provisions purporting to regulate the parties' finances will mean very little if there is inadequate compliance by the parties. Poor compliance by the parties probably represents one of the most serious challenges for Australia's party finance laws.

For example, there is good evidence that the parties are not treating their disclosure obligations seriously. In its funding and disclosure report following upon the 1996 federal election, the AEC stated that:

> many parties were unprepared for detailed disclosure . . . This lack of preparation was generally a result of one or more of the following factors: a lack of appropriate administrative skills; inadequate resources being devoted to the task; and a lack of control over party units (eg local branches, fundraising committees, campaign committees).[119]

More recently, the AEC's funding and disclosure report following upon the 1998 federal election stated that:

> a major concern remains in that political parties in particular are not always according sufficient priority to the task of disclosure.[120]

This lack of priority, according to the AEC, produces fairly serious consequences. For instance:

> individual party units may have receipts of tens of thousands of dollars which means that material disclosures are sometimes not being included in the returns lodged by the parties. The lack of priority can also sometimes mean that the party's own central accounts are not always accurately reflected in the disclosure return.[121]

If true, these comments identify an extraordinary situation: two decades years after the disclosure scheme was introduced and nearly ten years after annual returns were introduced, some Australian political parties are flouting their disclosure obligations.

This situation cannot be excused by a lack of resources. As has been noted by the AEC, the political parties, in particular the major parties, receive substantial public

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[119] AEC, above n 34, para 5.8.
[120] AEC, above n 37, para 6.8.
[121] Ibid para 6.8.

funding and, hence, the public is, at the very least, entitled to expect that they comply in complete good faith with their disclosure obligations.[122]

We believe that compliance by the parties will be enhanced by number of measures. The rigour of the legislative provisions needs to be enhanced. In doing so, three of the AEC's recommendations should be supported, namely:

- persons and parties who fail to make or maintain such records as to enable them to comply with the disclosure provisions be subject to the same penalty provisions as apply to those who fail to retain such records;[123]
- an arrangement entered into which has the effect of reducing or negating a disclosure obligation be deemed as if it had not been entered into.[124]
- failure to properly disclose a particular receipt or indebtedness should lead to forfeiture of that amount to Consolidated Revenue.[125]

There is also an anomalous gap between offences relating to omissions (either failure to lodge a return, or lodging an incomplete return) and false or misleading returns. In relation to omissions, the offences are strict liability, but the penalties are too low.[126]

In relation to false or misleading returns, the burden of proof is too high: how can the prosecution prove 'knowledge' of the material falsity? Trading companies and businesses generally face fines and commercial penalties for misleading consumers. If disclosure law is to be taken seriously, the same should apply to misleading returns of donations and expenditure. The offences in section 315(3) and (4) should be strict liability offences, subject to a defence that the agent of the political party took all reasonable steps to accurately perform the party's disclosure obligations.

Also, the level of penalties for failing to make adequate disclosure should be increased or tied to the amount that has been inadequately disclosed. Presently, the maximum penalty for a party is for knowingly provides false or misleading details in

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[122] Ibid para 6.11.
[123] Ibid para 4.4.
[124] AEC, above n 1, para 2.1.15.
[125] AEC, above n 1, recommendations 4 and 5.
[126] CEA ss 315(1)-(2A).

its annual returns stands at $10,000.[127] At this level, the penalty, especially given that the prosecution is not inevitable, is not an effective deterrent. It makes inadequate disclosure of large donations rather attractive from a cost/benefit point of view.

Some thought should also be given to more creative disincentives. One option worth considering is 'shaming' parties and persons who fail to properly comply with their obligations. For instance, a list of non-complying entities could be published on the AEC's website. Further, if such parties or persons stand for elections, information could be provided at polling booths cataloguing the non-compliance of such entities. Further, political penalties (disqualifications from party membership or candidature at public elections) should be available for all but offences of forgivable oversight.[128]

Apart from enhancing the rigour of the legislative provisions, it is imperative that the AEC be given sufficient resources to police these provisions. We note in this respect the AEC's comment that it will not be able to devote more resources to implementing the funding and disclosure scheme without detriment to its other responsibilities.[129] If true, the AEC must be provided more resources. On any objective measure, its Funding and Disclosure unit ('FAD unit') is under-staffed. Otherwise, a cash-starved AEC will mean that the legislative provisions, however well designed, will founder upon poor enforcement.

There also needs to be a more robust attitude towards prosecutions for breaches of the CEA. This is all the more important in light of evidence that there does not appear to have been any prosecutions for breach of disclosure obligations in recent times.[130] Moreover, it would appear that the AEC's earlier activity in relation to such prosecutions is overwhelmingly focussed on the non-lodgment of returns as distinct from the inaccuracy of returns lodged.[131] Such evidence suggests the need for a

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[127] CEA s 315(3).

[128] Post-Shepherdson, Queensland toughened penalties for electoral offences, including invoking political penalties. However it failed to make clear whether 'electoral' offences include party finance offences. There is no reason in principle that they should not, in suitable cases.

[129] AEC, above n 1, para 1.8.

[130] There is no reported decision concerning such prosecutions. Moreover, in contrast with the FAD reports for the 1984, 1987, 1990 and 1993 elections, the reports on the 1996 and 1998 elections make no reference to prosecutions.

[131] See AEC, *Funding and Disclosure Report Following the Federal Election Held in 1984,* 14-7; *Funding and Disclosure Report Following the Federal Election Held in 1987,* 31; *Funding and*

review of the enforcement strategy employed by the AEC in policing the CEA including, in particular, the role of prosecutions in such a strategy and the desirability of the FAD unit being clearly distinct from the main body of the AEC. The latter, quite rightly, sees its role as facilitating elections, and hence aims works in a close relationship of trust with all political actors, who in our electoral culture, have little interest in electoral fraud and self-regulate with remarkable propriety when it comes to polling days. But the FAD branch, if it is to meet its primary role as a policing agency, needs sufficient independence to be above and critical of a political culture that tends to see FAD laws as a nuisance. In the US, for instance, a free-standing agency, the Federal Elections Commission, does not run federal elections (whose rules differ from state to state anyway), but concentrates on administering the Federal campaign finance law.[132]

We, therefore, recommend that:

- persons and parties who fail to make or maintain such records as to enable them to comply with the disclosure provisions be subject to the same penalty provisions as apply to those who fail to retain such records;
- an arrangement entered into which has the effect of reducing or negating a disclosure obligation be deemed as if it had not been entered into;
- strict liability extend to false or misleading returns, subject to a defence that the agent or candidate who made the return took all reasonable steps to accurately perform the disclosure obligation;
- the level of penalties for breaching disclosure obligations be increased and/or tied to the amount that has been inadequately disclosed;
- consideration be given to other types of penalties like 'shaming' and political penalties;
- adequate resources be provided to the AEC to enable it to effectively enforce the disclosure obligations; and
- there be a review of the enforcement strategy employed by the AEC in policing the disclosure obligations and, in particular, the role of prosecutions in such a strategy.

Disclosure Report Following the Federal Election Held in 1990, 55-7 and *Funding and Disclosure Report Following the Federal Election Held in 1993,* 63.

[132] See www.fec.gov/pages/brochures/fecfeca.htm

VII LIST OF RECOMMENDATIONS

Disclosure of funding

We recommend that:

- a person/entity who is making a *contribution* to a political party on behalf of others be required to disclose to the political party the identities of the actual contributors and the amounts contributed; and
- a political party which reasonably suspects that a person/entity is making a *contribution* on behalf of others to ascertain and verify the identities of the actual contributors and the amounts contributed.[133]

Such information should then be recorded in the parties' annual statements.

- payments at fundraisers and like events be deemed 'gifts';
- parties and associated entities submit 'gift' reports containing details of gifts received by them;
- such 'gift' reports contain details of the status of the donor/s.
- the definition of 'associated entity' in the CEA be elaborated by specifying that:

- the term 'controlled' be defined to *include* the right of the party to appoint a majority of directors or trustees;

- 'to a significant extent' to *include* the receipt by a political party of more than 50% of the distributed funds, entitlements or benefits enjoyed and/or services provided by the associated entity in a financial year; and

- the term, 'benefit', to *include* the in/direct receipt by the party of favourable non-commercial terms;

- parties, parliamentarians and candidates be required to:

- submit quarterly 'gift' reports;

- submit weekly 'gift' reports during election periods;

- automatically disclose large donations with further investigation into the threshold amount for such disclosure; and

- make 'conflict of interest' statements, at least where giving Parliamentary and/or executive consideration to Bills or administrative decisions affecting industries or donors from whom they have received donations in the previous, say 3 years.

[133] Such obligations would be analogous to those found in PPERA ss 54 & 56.

Disclosure of expenditure

We recommend that the requirement that parties disclose the amount of their campaign expenditure be reinstated.

Public funding

We recommend that:

- in place of the 4% threshold for electoral funding, there should be a lower threshold and/or a threshold based on the nationwide electoral support secured by a party; and
- a review of electoral funding and parliamentary entitlements be conducted with the aim of ensuring that public funding effectively promotes political equality; prevents corruption and undue influence and assists parties in performing their legitimate functions.

Caps on political donations

We, in principle, recommend limitations on political donations, in the following forms:

- bans on corporate donations to political parties and candidates;
- organisation-specific ceilings for contributions from political associations (which could include trade unions) with the ceilings based on the number of natural person members in these associations;
- caps on the amount any individual could donate in a financial year to a particular party or candidate, including a total annual cap on the amount donated.

Campaign expenditure limits

We recommend that:

- campaign expenditure limits be supported in principle; and
- the design of such limits be further investigated, particularly with reference to recent reforms in the UK, Canada and New Zealand.

Compliance and Enforcement

We recommend that:

- persons and parties who fail to make or maintain such records as to enable them to comply with the disclosure provisions be subject to the same penalty provisions as apply to those who fail to retain such records;
- an arrangement entered into which has the effect of reducing or negating a disclosure obligation be deemed as if it had not been entered into;
- strict liability extend to false or misleading returns, subject to a defence that the agent or candidate who made the return took all reasonable steps to accurately perform the disclosure obligation;
- the level of penalties for breaching disclosure obligations be increased and/or tied to the amount that has been inadequately disclosed;
- consideration be given to other types of penalties like ‘shaming’ and political penalties;
- adequate resources be provided to the AEC to enable it to effectively enforce the adequate resources be provided to the AEC to enable it to effectively enforce the disclosure obligations;
- there be a review of the enforcement strategy employed by the AEC in policing the disclosure obligations and, in particular, the role of prosecutions in such a strategy.

Schedule: Controls on Campaign Finance by Commonwealth Country.

Source: Graeme Orr, *Australian Electoral Systems: How Well Do they Serve Political Equality?*, Report # 2, Democratic Audit of Australia, ANU (2004)
(nb monetary amounts in local currency)

Jurisdiction	***Acts***	***Max. amount for individual or corporate donation***	***Min. amount for disclosure by party or donor***	***Expenditure limits***	***Additional information***
Australia (Federal)	Commonwealth Electoral Act	No maximum amount	$1,500 threshold from each separate donor	No limit	Donors must declare aggregate donations to a single party where they total $1,500 or more including 'gifts-in-kind'.
New Zealand	Electoral Act	No maximum amount; no foreign donations	$1,000 for 'electorate donations' $10,000 for 'national organisation' donations	$1m for parties and $20,000 per seat	Amendments to the law in Feb 2002 replaced the requirement to disclose 'electorate' and 'national' donations with a requirement to disclose 'party' donations—one or more donations to a registered party in a calendar year totalling more than $10,000.
United Kingdom	Political Parties, Elections and Referendums Act	No maximum amount; no foreign donations	£5,000 for parties; £1,000 for local branches and individuals Individual donors must declare donations of £200 or more	£20m per national party; Under £10,000 for typical constituency campaign	Donations of £200 or less, including non-cash donations (eg. special paid leave, hospitality, free room hire), must be declared by donors where the aggregate of the donations is greater than £200.

Canada (Federal)	Canada Elections Act	$5,000 for individuals; $1,000 for corporations and trade unions; no foreign donations	$200: parties and candidates (and third parties that spend over $500) must disclose identity of all contributions over $200 from a single source	Pre-selection: 20% of election expenses in that district during the last general election; Candidates: sliding scale. $41 450 for 25 000 electors + $0.52 per additional elector. Parties: $0.70 per elector in constituencies contested Third parties: $150 000 including no more than $3000 in a particular constituency race	Reporting requirements for expenses and revenues apply to registered electoral district associations and to leadership contestants and nomination contestants of registered parties.

END OF SUBMISSION