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**Election Finance Law: An  
Update**

by

**Talina Drabsch**

**Briefing Paper No 13/05**

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# **Election Finance Law: An Update**

by

**Talina Drabsch**

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## EXECUTIVE SUMMARY

This paper is an update of *Election Finance Law: Public Funding, Donations and Expenditure* by Rachel Callinan, NSW Parliamentary Library Briefing Paper No 15/2001. It provides an overview of the funding and disclosure schemes that regulate election finance in NSW and at the federal level. The provision of funding and requiring disclosure of donations and expenditure are thought to strengthen Australia's democratic institutions, enhance the political process, and dampen the influence of money on politics. The extent to which the various regimes achieve these purposes is debateable, as are the changes considered necessary.

An overview of the funding and disclosure scheme in NSW is provided in section two (pp 2-6), with particular attention given to the relevant provisions of the *Election Funding Act 1981* (NSW). Candidates, groups and parties in NSW obtain public funding provided they receive at least 4% of the first preference votes in an election, or a member is elected to parliament. Regulation in NSW involves various requirements of disclosure in relation to donations and expenditure. The NSW Act introduced the first statutory scheme in Australia, shortly followed by the Commonwealth.

Part XX of the *Commonwealth Electoral Act 1918* (Cth) establishes the federal funding and disclosure scheme, the main features of which are discussed in section three (pp 7-15). Like NSW, candidates, groups and parties are eligible for public funding provided they receive at least 4% of first preference votes. There are numerous disclosure requirements applying to candidates, groups, political parties, third parties, associated entities, donors, publishers and broadcasters. The Australian Electoral Commission has repeatedly identified some of the difficulties with the current scheme, outlining its proposals for reform in a number of submissions to the Joint Standing Committee on Electoral Matters. Only some of these recommendations have been implemented.

A table comparing the main features of the relevant schemes in the states and territories in Australia and at the federal level is included in section four (pp 16-22). A number of jurisdictions have implemented various changes to their regime since 2001, and these alterations are identified in this section. The *Electoral Act 2002* (Vic) has entered into force, with public funding now available in Victoria. Certain gaming licensees in Victoria are restricted to a maximum annual donation of \$50,000. The *Electoral Act 2004* (NT) operates in the Northern Territory, with disclosure requirements now applying in that jurisdiction. A new statute, the *Electoral Act 2004* (Tas) has been enacted in Tasmania, but there do not appear to be any dramatic changes. An expenditure limit continues to apply to the Upper House of the Tasmanian Parliament. There is still little regulation of election finance in South Australia. However, a private member's bill has been introduced into the South Australian Parliament, which proposes to introduce various disclosure requirements for those who are not subject to the federal regime.

The funding and disclosure schemes that apply in Canada, New Zealand, the United Kingdom and the United States are discussed in section five (pp 23-39). Significant changes have been made to election finance law in Canada, the UK and US in the last few years. This section highlights some of the changes, and notes some of the initial repercussions and concerns associated with the alterations.

The regulation of election finance in Australia continues to be controversial. Some believe the system is too lax, whilst others see it as too heavily regulated. Section six (pp 40-63) provides an overview of the various debates surrounding the provision of public funding, the disclosure of donations, and electoral expenditure. Some of the issues specifically relating to independent candidates and members are also briefly highlighted.



## 1 INTRODUCTION

This paper provides an overview of the funding and disclosure schemes that regulate election finance in NSW and at the federal level. It updates *Election Finance Law: Public Funding, Donations and Expenditure* by Rachel Callinan, NSW Parliamentary Library Briefing Paper No 15/2001. The provision of funding for parties and candidates is said to facilitate the presentation of various policies and alternative views to the electorate. The aim of requiring donations to be disclosed is that it will lessen the influence of money on those in power, as well as the inference of such sway. The effectiveness of the various schemes in achieving such lofty ideals is contentious. A number of issues accordingly remain at the forefront of debate including: the capping of donations; increasing the threshold at which donations must be disclosed; raising the tax deductibility limit; banning or restricting corporate donations; whether the 4% threshold for public funding should be elevated or lowered; and whether there should be limits to the amount that can be spent on a campaign. Most of these issues are not new, and the earlier briefing paper addressed many of them. This paper concentrates on updating the progress of calls for reform, and identifies views of the current supporters and opponents of the various initiatives proposed.

However, some schemes have continued to evolve since 2001, with substantial changes made to the regulations that apply in the Northern Territory and Victoria. The *Electoral Act 2004* has entered into force in Tasmania – nonetheless, the regulation of election finance in that state remains similar to the previous regime. Significant reforms have occurred overseas. As well as changes in Australia, this paper considers the modification of the relevant laws for Canada, the United Kingdom and the United States, as well as outlining the position adopted by New Zealand. Whilst the schemes in some of these countries may not be directly comparable to those in Australia, consideration of these approaches may be useful in terms of illustrating an alternative way of dealing with similar issues.

The history of election finance law in Australia is not discussed in this paper, other than to highlight recent developments where relevant, as a history was provided in the previous paper. This paper also does not cover the regulation of local government elections.

## 2 FUNDING AND DISCLOSURE IN NSW

The conduct of elections and the regulation of election finance in NSW are governed by the *Constitution Act 1902*, the *Parliamentary Electorates and Elections Act 1912*, and the *Election Funding Act 1981*. However, the most relevant statute for the purposes of this paper is the *Election Funding Act 1981*, which introduced the first statutory scheme to regulate election finance in Australia. The Act provides for the public funding of Parliamentary election campaigns and requires the disclosure of certain political contributions and electoral expenditure.

### 2.1 Election Funding Authority

The Election Funding Authority is established under Part 2 of the Act and its responsibilities are set out in Part 3. The Authority oversees the funding and disclosure scheme in NSW and is to exercise its functions in a manner that is not unfairly biased against or in favour of any particular parties, groups, candidates or other persons, bodies or organisations (s 22). The particular functions of the Election Funding Authority include (s 23):

- Applications by groups and candidates for registration.
- Claims by parties, groups and candidates for payment of election campaign expenditure in respect of Parliamentary elections.
- Declarations by parties, groups, candidates and third parties of political contributions received and electoral expenditure incurred in respect of Parliamentary and Local Government elections.
- Claims by parties for payment from the Political Education Fund.

Members of the Election Funding Authority include the Electoral Commissioner for NSW (who also acts as the Chairperson of the Authority), a person appointed by the Governor on the nomination of the Premier, and a person appointed by the Governor on the nomination of the Opposition Leader (s 6).

### 2.2 Public funding of election campaigns

Part 5 of the *Election Funding Act* provides details of the public funding scheme for election campaigns. Parties, groups and candidates need to have registered to be eligible for funding. The distribution of funds for election campaigns is determined by a formula that takes into account the number of enrolled electors and the number of years in a parliamentary term. Eligibility for funding is determined by the receipt of enough votes for the return of the nomination deposit. Funding for the Legislative Council is paid from the Central Fund whilst the source for the Legislative Assembly is the Constituency Fund. The formula for determining the amounts to be credited to the Central and Constituency Funds is as follows:

$$A = E \times \frac{N}{12} \times \frac{M}{100}$$

**A** represents the aggregate dollar amount to be credited to the funds. **E** is the total number of electors enrolled for all electoral districts as at 6pm on the day of the issue of the writs for the general election. **N** represents the number of months between the day for the return of the writs for the general elections and the day for the return of the writs for the previous general election (both days inclusive), or 48, whichever is less. **M** is the amount in cents of the monetary unit.

Two-thirds of the available amount is paid into the Central Fund and one-third into the Constituency Fund.

### *Central Fund*

Section 59 of the Act sets out the entitlement of parties to payments from the Central Fund. A party must be registered, have endorsed a group for the Legislative Council election, and either one of the members of the group must be elected at the periodic Council election or the proportion of first preference votes received in the election must be at least 4%. The Central Fund is to be distributed as follows (s 62):

$$P = \frac{F \times PV}{TEV}$$

**P** represents the dollar amount payable to a party, group or candidate eligible to participate in the distribution of the Central Fund. **F** is the dollar amount standing to the credit of the Central Fund. **PV** represents the primary votes of the party, group or candidate. **TEV** is the total primary votes of all parties, groups and candidates eligible to participate in the distribution of the Central Fund. A party, group or candidate may not receive more than one half of the amount credited to the Central Fund.

The Central Fund was distributed in relation to the Legislative Council Election on 22 March 2003 as follows:

<b>Party</b>	<b>% of eligible primary votes</b>	<b>Entitlement of party (\$)</b>
Australian Labor Party (NSW Branch)	48.10	3,326,241
Country Labor Party		
Christian Democratic Party (Fred Nile Group)	3.35	231,711
Liberal Party of Australia – NSW Division	36.79	1,695,920
National Party of Australia – NSW		847,960
The Greens	9.50	656,978
The Shooters Party	2.26	156,300

Source: Election Funding Authority, *Report 2003-2004*, Schedule A.

Whilst some parties did not receive at least 4% of the vote, they were still eligible for funding as they were successful in their bid to have one of their members elected.

### *Constituency Fund*

Candidates nominated for election to the Assembly may be eligible for payments from the Constituency Fund (s 65) provided they are registered as a candidate and are either elected or receive at least 4% of the total number of first preference votes polled in the electoral district concerned.

The Constituency Fund is distributed in accordance with the following formula:

$$C = \frac{F \times CV}{TEV}$$

**C** represents the dollar amount payable to a candidate who has been nominated for election for an electoral district at the general election. **F** is the dollar amount available for distribution in respect of the electoral district. **CV** represents the primary votes of the candidate. **TEV** is the total primary votes of all candidates for election for the electoral district eligible to participate in the distribution of that amount.

A candidate may not receive more than one half of the amount available for distribution in the electoral district contested (s 68).

Schedule B of the Election Funding Authority Report for 2003-2004 details how the constituency fund was distributed following the 2003 NSW election.

### *By-elections*

Section 73 provides for a by-election constituency fund, with the amount credited to the fund determined by the following formula:

$$A = \frac{E \times M \times 3}{100}$$

**A** represents the total dollar amount to be credited to the fund. **E** is the total number of electors enrolled for the electoral district concerned as at 6pm on the day of the issue of the writ for the by-election, and **M** represents the amount in cents of the monetary unit.

## **2.3 Political contributions**

All parties, groups and candidates must lodge a declaration of contributions received. Section 83 requires the registered party agent of each party to lodge a declaration of political contributions received and electoral expenditure incurred within 120 days after the day for the return of the writs for a general election. Groups and candidates are also obliged to make disclosure (ss 84 and 85). The declaration is concerned with the period commencing on the 31<sup>st</sup> day after the polling day for the previous general election and ending on the 30<sup>th</sup> day after the polling day for the current election. A person (other than a party, candidate or member of a group) who during the current election period incurs electoral expenditure of more than \$1500 is also required to lodge a declaration of electoral expenditure incurred and political contributions received (s 85A). The person must set out

in that declaration, the identity of any person or organisation that gave at least \$1000, of which the whole or part was then used to incur the electoral expenditure or as reimbursement for it.

A 'gift' (as donations/contributions are referred to in the legislation) is defined in section 4 as:

any disposition of property made by a person to another person, otherwise than by will, being a disposition made without consideration in money or money's worth or with inadequate consideration, and includes the provision of a service (other than volunteer labour) for no consideration or for inadequate consideration.

Contributions of \$1500 or more to a party must be disclosed. The relevant amounts for groups and candidates are \$1000 and \$200 respectively. Anonymous donations of more than \$1500 in relation to parties, \$1000 for groups and \$200 for candidates are therefore prohibited and must be paid to the state (s 87A). Whilst the source of donations of less than the threshold does not need to be disclosed, the number and range of contributions does. An amount paid by a person as a contribution, entry fee or other payment to entitle a person to participate in or obtain any benefit from a fundraising venture or function must be disclosed. However, a gift to a candidate does not need to be disclosed if it was made in a private capacity for his or her personal use and the candidate has not used, and will not use, the gift solely or substantially for a purpose related to an election.

## **2.4 Electoral expenditure**

All parties, groups and candidates must lodge declarations of expenditure incurred. Electoral expenditure is defined in section 88 as money spent in the following ways:

- Advertisements in radio, television, cinemas, newspapers, periodicals, billboards, posters, brochures, how to vote cards and any other printed election material.
- The holding of election rallies.
- The distribution of election material.
- Travel and accommodation expenditure of a candidate.
- Research associated with election campaigns.
- Raising funds for an election.
- Stationery, telephones, messages, postage and telegrams.
- Committee rooms.
- Expenditure classified as electoral expenditure by the Authority.

It is an offence to fail to lodge a declaration (s 96) and to knowingly make a false or

misleading statement, or to not reasonably believe in its truth (s 97).

## 2.5 Political Education Fund

Section 97B establishes a Political Education Fund. A registered party is entitled to receive annual payments from the Fund for the purposes of political education which include the posting of written materials and information regardless of whether the information contains material only about the party concerned (s 97C). Payments are made as soon as practicable after 1 January in each year in respect of the last general election and are determined in accordance with the following formula (s 97E):

$$P = CS \times FPV$$

**P** represents the payment to the party from the Fund for the year concerned. **CS** is the cost of a postage stamp needed to post a standard postal article by ordinary course of post in Sydney to an address in Sydney. **FPV** represents the total number of first preference votes recorded at the last general election for the candidates endorsed by the party for election to the Legislative Assembly.

Payments from the Fund are made to the agent of the registered party (s 97G) and the party's agent must declare how the party spent any payment (s 97H).

## 2.6 Joint Standing Committee on Electoral Matters

The NSW Parliamentary Joint Standing Committee on Electoral Matters was established in 2004 to inquire into any aspect of the 2003 State election and the administration of electoral laws more generally. It published the report – *Inquiry into the Administration of the 2003 Election and Related Matters* – in September 2005. The Committee recommended, inter alia, that the *Parliamentary Electorates and Elections Act 1912* be thoroughly reviewed by the Government. It noted that despite the Act having been in place for more than 90 years it had not been comprehensively reviewed but had been amended substantially. A complex piece of legislation had accordingly eventuated.

### 3 FEDERAL SCHEME

The regulation of election spending and disclosure of donations and expenditure at the national level is important, as the federal scheme is the driver and arguably the most important source of inspiration in the field, providing the central platform for debate.<sup>1</sup> The impact of the federal legislation is far-reaching with the state and territory branches of federally registered parties also subject to aspects of the scheme.

Part XX of the *Commonwealth Electoral Act 1918* (Cth) regulates election funding and financial disclosure. The funding and disclosure scheme was established in 1983, implementing the recommendations of the Joint Select Committee on Electoral Reform in its 1983 report. It followed the introduction of a similar scheme in NSW in 1981. The *Commonwealth Electoral Act* details the obligations of various individuals and groups, including candidates, senate groups, political parties, donors, associated entities and third parties. There are ten types of disclosure returns (annual returns must be lodged by political parties, associated entities and donors; election returns are to be lodged by candidates, senate groups, third parties, and the media) and three disclosure thresholds.<sup>2</sup>

A number of changes have been made to the Act since the 2001 election including:<sup>3</sup>

- Political donations of \$1000 or more are to be returned to the donor should the donor company become insolvent within 12 months of making the donation.
- The AEC must review all political donations of \$25,000 or more.
- More comprehensive arrangements have been made for parties to enter into agreements for the transfer of electoral funding entitlements to other parties.
- The direct deposit of funding entitlement moneys to party bank accounts.

The Australian Electoral Commission (AEC) is required as soon as practicable after polling day to prepare a report for the Minister on the operation of Part XX in relation to the previous election (s17(2)). The most recent of these reports, the *Funding and Disclosure Report: Election 2004*, was published in October 2005. The following tables were attached as part of Appendix 1 to that report and provide a useful summary of the requirements under the federal disclosure scheme.

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<sup>1</sup> Orr G, 'The currency of democracy: campaign finance law in Australia', *University of New South Wales Law Journal*, 26(1) 2003, p 4.

<sup>2</sup> Australian Electoral Commission, *Funding and Disclosure Report: Election 2004*, 2005, p 12.

<sup>3</sup> *Ibid*, p 44.

### Annual returns

<b>Donors</b>	<b>Political Parties and Associated Entities</b>
<ul style="list-style-type: none"> <li>▪ Details of donations made to parties totalling \$1500 or more.</li> <li>▪ Details of donations received of \$1000 or more and applied to donations to parties totalling \$1500 or more.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Total receipts, payments and debts.</li> <li>▪ Details of amounts received of \$1500 or more.</li> <li>▪ Details of debts of \$1500 or more.</li> <li>▪ Details of capital contributions received by associated entities.</li> </ul>

### Election returns

<b>Donors and third parties</b>	<b>Candidates</b>	<b>Senate groups</b>	<b>Broadcasters and publishers</b>
<p>Details of donations totalling \$200 or more made to candidates.</p> <p>Details of donations totalling \$1000 or more to Gazetted bodies.</p> <p>Amounts of electoral expenditure.</p> <p>Donations received of \$1000 or more and applied to electoral expenditure of \$1000 or more.</p>	<p>Number and amount of donations received.</p> <p>Details of donations received of \$200 or more.</p> <p>Amounts of electoral expenditure.</p> <p>Details of loans of \$1500 or more.</p> <p>Endorsed candidates may report through party annual returns and party thresholds.</p>	<p>Number and amount of donations received.</p> <p>Details of donations received of \$1000 or more.</p> <p>Amounts of electoral expenditure.</p> <p>Endorsed groups (other than jointly endorsed groups) report through party annual returns and party thresholds.</p>	<p>Details of election advertisements over an election period.</p>

### Financial disclosure timetable

<b>Type of return</b>	<b>Lodgement date</b>	<b>Period covered</b>	<b>Public release</b>
<b>Annual returns</b>			
Political party	16 weeks after financial year	Financial year – 1 July to 30 June	First working day in February
Associated entity	16 weeks after financial year	Financial year – 1 July to 30 June	First working day in February
Donor and third party	20 weeks after financial year	Financial year – 1 July to 30 June	First working day in February
<b>Election returns</b>			
Donor and third party	15 weeks after election	Returns of donations made and donations received – 31 days after last election to 30 days after election day. Return of electoral expenditure – from the issue of the writ until election day	24 weeks after election
Candidates	15 weeks after election	31 days after the last election contested within 4 years (House of Reps)	24 weeks after election



		or 7 years (Senate), or from commencement of candidacy, to 30 days after election day	
Senate group	15 weeks after election	From request to AEC to be grouped until 30 days after election day	24 weeks after election
Broadcasters and publishers	8 weeks after election	Issue of writs to election day	24 weeks after election

### 3.1 Election funding

Section 294 sets out the general entitlement to funds. \$1.50 is payable for each first preference vote given for a candidate in a House of Representatives election and \$1.50 is payable for each first preference vote given for a candidate or group in a Senate election. This amount is adjusted every six months in keeping with the consumer price index. In the 2004 election, the rate was about \$1.94 per vote.<sup>4</sup> However, a payment is not be made unless a candidate or Senate group receives at least 4% or more of the formal first preference votes cast (s 297).

\$41.9 million in election funding was paid to parties and candidates in relation to the 2004 election.<sup>5</sup> The following table lists the election funding payments made to a selection of parties and independent candidates regarding the 2004 election. It reveals that the two major parties received a similar amount of funding, more than five times that collected by the Australian Greens and the National Party. Over 80% of the 2004 election funding payments were made to the Liberal and Labor Parties, with the Liberal Party receiving a little over 40%. The Greens and Nationals obtained 7.9% and 7.1% respectively. Funding for the Democrats dramatically decreased following the 2004 election when they received only 0.02% of the total compared to 6% for the 2001 election.<sup>6</sup>

#### 2004 Election Funding Payments

Name	Amount \$
Liberal Party of Australia	17,956,326.48
Australian Labor Party	16,710,043.43
Australian Greens	3,316,702.48
National Party of Australia	2,966,531.27
Australian Democrats	8,491.26
Christian Democratic Party (Fred Nile Group)	6,572.56
Tony Windsor	89,562.59
Peter Andren	79,413.12

Source: AEC, *Funding and Disclosure Report: Election 2004*, 2005, p 4.

<sup>4</sup> Ibid, p 3.

<sup>5</sup> Ibid, p 2.

<sup>6</sup> Ibid, p 5.

Funding is paid in two stages. 95% of the entitlement is paid in the fourth week after polling day with the remainder paid when the count is finalised and the full entitlement can be calculated (s 299(5D)).

The NSW model of public funding differs from the federal model in a number of ways:<sup>7</sup>

1. In NSW, funding is split between the Central Fund and the Constituency Fund. Entitlements are capped so that a party or candidate cannot receive more than half of a fund.
2. Registered parties may claim partial payments prior to the poll.
3. The 4% threshold does not apply to a candidate who is elected.
4. Extra payments are made under the Political Education Fund.
5. The NSW funding and disclosure regime is administered by a specialist Election Funding Authority not the State Electoral Office. However, as the Electoral Commissioner for New South Wales is the chairperson of the Election Funding Authority, the two bodies do intersect.

### **3.2 Disclosure of donations**

The *Commonwealth Electoral Act 1918* uses the term ‘gift’ to describe donations. A ‘gift’ is defined in section 287 as:

any disposition of property made by a person to another person, otherwise than by will, being a disposition made without consideration in money or money’s worth or with inadequate consideration, and includes the provision of a service (other than volunteer labour) for no consideration or for inadequate consideration, but does not include: (a) a payment under Division 3; or (b) an annual subscription paid to a political party, to a State branch of a political party or to a division of a State branch of political party by a person in respect of the person’s membership of the party, branch or division.

Section 304 requires the agent of each candidate and group in an election or by-election to furnish a return setting out the total amount or value of gifts, the number of persons who made gifts, and the relevant details of each gift, received by the person and group during the disclosure period. The form must be provided to the AEC within 15 weeks after the polling day.

Third parties<sup>8</sup> who incur expenditure for a political purpose during the disclosure period for

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<sup>7</sup> Orr, above n 1, pp 8-9.

<sup>8</sup> The Australian Electoral Commission defines ‘third party’ as ‘a generic term used to describe a person or organisation other than a registered political party, candidate, Senate group, associated entity, broadcaster or publisher who is under an obligation to lodge a disclosure return’: Australian Electoral Commission, *Funding and Disclosure Handbook for*

an election must forward a return to the AEC within 15 weeks of polling day (s 305). The return must include the relevant details of all gifts received of \$1000 or more of which at least part was used to enable the person to incur expenditure for a political purpose or to reimburse the person for incurring expenditure for a political purpose. Such expenditure may relate to: the publication by any means of electoral matter; publicly expressing views on an issue in the election; making a gift to a political party or candidate; or making a gift to a person on the understanding that it will be used for a political purpose.

A person who makes a gift to a candidate or member of a group must forward a return to the AEC within 15 weeks of polling day setting out the details of all gifts made during the disclosure period (s 305A). A return does not need to be made if the total amount or value of gifts to a candidate or member of a group was less than the prescribed amount or \$200; or in the case of gifts to a person or body specified by the AEC, less than the prescribed amount or \$1000.

A person who makes gifts totalling \$1500 or more in a financial year to the same registered political party or the same State branch of a registered political party must furnish a return to the AEC within 20 weeks of the end of the financial year (s 305B). The return must set out the amount of the gift and the date on which it was made. The return must also include details of any gifts of \$1000 or more received by the person that were subsequently used to make gifts totalling \$1500 or more to the same registered political party or the same State branch of a registered political party.

Anonymous gifts of \$1000 or more to a political party or State branch are not permitted (s 306). The relevant amounts in the case of anonymous gifts to candidates and groups are \$200 and \$1000 respectively. Loans of \$1500 or more are unlawful unless they are recorded in the manner required by section 306A(3), for example, information must be kept on the terms and conditions of the loan. Otherwise the Commonwealth may seek to recover a similar amount. The AEC has suggested that in order for these sections to be effective, the amount that the Commonwealth can recover should be doubled.<sup>9</sup> Currently, those who break the law are simply left in the position they were in prior to the flouting of the law. The AEC argues that there is a subsequent lack of punishment involved.

The AEC examines candidate returns and media reports for possible donors and third parties.<sup>10</sup> Those identified are subsequently contacted by a letter requesting that a return be lodged. The AEC has highlighted how it is often impossible to determine whether two or more donations have come from the same source when the name and address of the donor is unknown.<sup>11</sup> This led the AEC to recommend ‘that the cumulative thresholds outlawing

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*Third Parties*, [www.aec.gov.au](http://www.aec.gov.au) Accessed 25/10/05.

<sup>9</sup> Australian Electoral Commission, *Submission*, Joint Standing Committee on Electoral Matters – Inquiry into Disclosure of Donations to Political Parties and Candidates, 26 April 2004, Recommendation 17.

<sup>10</sup> Australian Electoral Commission, above n 2, p 25.

<sup>11</sup> Australian Electoral Commission, above n 9, p 24.

the acceptance of anonymous donations apply irrespective of the source of the gift'. The AEC also recommended that the threshold for disclosure of donations to candidates be raised from \$200 to \$1000, as the \$200 threshold has not changed since 1984. Some 'minor' donations still need to be disclosed as a result.

Section 306B allows a liquidator to recover from a political party, candidate or member of a group, a gift of at least \$1000 made by a corporation that was wound up within 12 months of making the gift. The AEC highlighted some of the possible problems with this section in its submission to the Joint Standing Committee on Electoral Matters. It noted that certain aspects of this section may be found to be constitutionally invalid because it in effect imposes a tax and is thus in contravention of section 55 of the Constitution, which states:

Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect. Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only.

### **3.3 Disclosure of electoral expenditure**

Electoral expenditure is defined in section 308 as expenditure incurred in relation to an election on:

- The broadcasting, during the election period, of an advertisement relating to the election.
- The publishing in a journal during the election period of an advertisement relating to the election.
- The display during the election period at a theatre or other place of entertainment of an advertisement relating to the election.
- The production of any of the above advertisements.
- The production of material that is required to include the name and address of the author of the material or of the person authorising the material and that is used during the election period.
- The production and distribution of electoral matter that is addressed to particular persons or organisations and is distributed during the election period.
- The carrying out during the election period of an opinion poll or other research relating to the election.

Section 309 requires the agent of a candidate or group in an election to furnish a return to the Electoral Commission within 15 weeks of polling day setting out details of all electoral expenditure. Broadcasters and publishers are also required (ss 310 and 311) within eight

weeks of polling day to deliver a return to the Electoral Commission if they broadcast or published during the election period an advertisement relating to the election with the authority of a participant in the election. The AEC recommends that this requirement be abolished as the returns are rarely inspected and yet impose an administrative and financial burden on broadcasters and publishers.<sup>12</sup>

According to the media returns received by the AEC in relation to the 2004 election, parties spent a total of \$37.4 million on election advertising.<sup>13</sup> The following parties spent more than \$1 million:

- Liberal Party of Australia - \$16.3 million
- Australian Labor Party - \$15.4 million
- National Party of Australia - \$1.7 million
- Family First Party - \$1.3 million
- Australian Greens - \$1 million.

### **3.4 Annual returns by registered political parties and associated entities**

Section 314AB requires the agent of each registered political party and each State branch of each registered political party to deliver a return to the Electoral Commission within 16 weeks of the end of the financial year. The return must set out the total amount received by the party, the total amount paid by the party, and the total outstanding amount of all debts. If the party receives from a person or organisation a total amount of \$1500 or more throughout the financial year, particulars of the sum must be included, ie the amount and the name and address of the donor (s 314AC). However, amounts of less than \$1500 do not need to be counted when calculating that sum. Where the sum of all outstanding debts totals \$1500 or more, the particulars of the sum must be included in the return (s 314AE). In 2004-05, 80 original annual returns were received from political parties, and 31 amended returns subsequently arrived.<sup>14</sup>

Associated entities, defined in section 287 as ‘an entity that: is controlled by one or more registered political parties; or operates wholly or to a significant extent for the benefit of one or more registered political parties’ must also forward a return to the Electoral Commission within 16 weeks of the end of the financial year (s 314AEA). The return must include the total amount received, the total amount paid and the total outstanding amount of all debts incurred by the entity.

According to the AEC, the lodgement and processing of the 2003-04 annual returns led to a

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<sup>12</sup> Ibid, Recommendation 29.

<sup>13</sup> Australian Electoral Commission, above n 2, p 28.

<sup>14</sup> Ibid, p 17.

number of issues being raised by parties, associated entities, donors and the AEC itself. These issues included:<sup>15</sup>

- The inconsistent disclosure threshold basis for donors (amounts totalling) when compared to political parties and associated entities (donations of), and the inconsistency in threshold basis and the amounts on the donor return.
- The AEC uses information from party returns to contact possible donors seeking lodgement of donor annual returns. If the party return is late, this contact may occur at or after the required lodgement date for donor returns. The legislation does not require parties and associated entities to advise donors of their disclosure obligations.
- Parties are asked to, but are not required to, separately identify ‘donations’ and ‘other receipts’ on their return forms. The failure by some parties to do this means that the AEC unnecessarily contacts people and organisations (who provide ‘other revenue’ to the party) enquiring about the need to lodge donor returns.
- The utility of receiving donation information from both parties and donors is questionable, particularly given that it can be difficult if not impossible to reconcile the two because of the differing legislative requirements.

### **3.5 Offences**

It is an offence to fail to furnish a return as required (s 315). The maximum penalty in the case of a political party is \$5000 and \$1000 for any other cases. It is also an offence to furnish an incomplete return, or to knowingly lodge a false or misleading return. The penalties are higher should an agent or person knowingly lodge a false or misleading return – a maximum of \$10,000 in the case of a political party, and \$5000 in other situations. Orr has stressed that the consequences of a breach of the law are far from draconian and an election cannot be made void as a result.<sup>16</sup>

### **3.6 Investigation**

Section 316 sets out the investigatory powers of the AEC. Section 316(2D) was inserted by the *Commonwealth Electoral Amendment Act (No 1) 2002* (Cth). It states:

Where a body corporate, unincorporated body or individual has made a gift or disposition of property of \$25,000 or more to a registered political party or candidate, an authorised officer must conduct an investigation of that gift or disposition in accordance with this section.

The practical outcome of this section has been problematic for the AEC who claim that it

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<sup>15</sup> Ibid, p 20.

<sup>16</sup> Orr, above n 1, p 13.

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gives rise to a number of issues including:<sup>17</sup>

- It is not clear why such gifts should be investigated if they have been disclosed by both parties to the transaction.
- While the requirement to investigate all gifts or dispositions is mandatory, the AEC has no authority under its investigations powers to investigate candidates unless it is in relation to a possible contravention of the Act.
- The AEC has no way of satisfying itself that it is aware of transactions that are not specifically identified as a gift or that are not reported at all.
- Due to definitional issues, candidates and donors are required to report gifts as defined that are received or made but not dispositions of property, yet the AEC must investigate both gifts and dispositions of property.

The AEC has argued for the removal of ‘in accordance with this section’ as it currently requires the AEC to investigate all receipts of \$25,000 or more regardless of whether they have already been disclosed under Part XX.

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<sup>17</sup> Australian Electoral Commission, above n 2, p 36.

## 4 AUSTRALIAN JURISDICTIONS

### 4.1 Comparative table

The following table provides a summary of the main provisions in each of the Australian jurisdictions.

Jurisdiction	Electoral legislation	Public funding	Disclosure	Expenditure limits
Cth	Commonwealth Electoral Act 1918  Referendum (Machinery Provisions) Act 1984	Post-election, as of right, 4% threshold.	Post-election by candidates and donors. Annual returns by parties and associated entities.	None.
NSW	Parliamentary Electorates and Elections Act 1912  Constitution Act 1902	Post-election, capped by actual expenditure, 4% threshold (unless elected).	Post-election by parties, candidates.	None.
Qld	Electoral Act 1992  Referendums Act 1997	Post-election, capped by actual expenditure. 4% threshold.	Post-election by candidates, broadcasters, publishers, third parties who incur electoral expenditure of \$200 or more, and persons who donate \$200 or more to a candidate. Annual returns by parties, associated entities and donors of \$1500 or more.	None.
SA	Electoral Act 1985	None.	None.	None.
Tas	Constitution Act 1934  Electoral Act 2004	None.	None.	Legislative Council only: candidates limited to \$10,000 in 2005 (to increase by \$500 a year). Party or even third party expenditure prohibited.
Vic	Electoral Act 2002  Constitution Act 1975	Post-election, capped by actual expenditure. 4% threshold (unless elected).	None.	None.
WA	Electoral Act 1907  Constitution Acts Amendment Act 1899	None.	Post-election by candidates. Annual returns by parties and associated entities.	None.



ACT	Electoral Act 1992  Referendum (Machinery Provisions) Act 1994  Australian Capital Territory (Self Government) Act 1988	Post-election, as of right. 4% threshold.	Post-election by candidates, parties, non-party groups, donors, broadcasters and publishers, and political participants. Annual returns by parties, MLAs, associated entities and donors.	None.
NT	Northern Territory Self Government Act 1978  The Electoral Act 2004	None.	Post-election by candidates, certain donors, publishers and broadcasters. Annual returns by parties (may provide copy of return for AEC) and associated entities.	None.

Source: Orr G, *Australian Electoral Systems – How Well Do They Serve Political Equality?*, Democratic Audit of Australia, 2004, p 64; Electoral Council of Australia, ‘Electoral Systems’, [www.eca.gov.au](http://www.eca.gov.au) Accessed 28/9/05; Websites for the various electoral commissions.

## 4.2 What has changed since 2001?

### 4.2.1 Queensland

The *Electoral and Other Acts Amendment Act 2002* (Qld) amended the *Electoral Act 1992*. Then Attorney-General, Hon Rod Welford MP, claimed in his second reading speech that the Act would ‘deliver an electoral system that is the strongest and most transparent in the country’.<sup>18</sup> Parties and candidates in Queensland are now required to record the particulars of loans provided by non-financial institutions (schedule, s 304A). This is to ensure that gifts are not disguised as loans from third parties.

### 4.2.2 South Australia

There is still little regulation of election finance in South Australia. There is no provision of funding and candidates and members of parties who are not registered at the federal level, and who only contest state elections, are currently not subject to any disclosure requirements. However, a private member’s bill, the *Electoral (Campaign Donations) Amendment Bill 2005* was tabled by Ms Vickie Chapman MP of the Liberal Party in the South Australian House of Assembly on 19 October 2005. The bill is modelled on the *Commonwealth Electoral Act 1918* (Cth) and proposes to insert part 13A into the *Electoral Act 1985* (SA) to require the disclosure of campaign donations. If passed, candidates and groups would be required to provide the Electoral Commissioner with a campaign donations return within 15 weeks of polling day for an election. Persons incurring political expenditure would also need to provide such a return if their expenditure totalled at least \$1000. Donors would need to complete a campaign donations return if they contributed at

<sup>18</sup> Welford R, *QPD*, 6/3/02, p 376.

least \$5000 to a political party or \$500 in the case of a candidate. Anonymous gifts of \$1000 or more would not be lawful (\$200 in relation to a candidate), and loans of at least \$1500 would need to comply with certain conditions. Registered political parties and associated entities would need to complete annual financial returns, disclosing donations and loans over \$1500. However, the bill exempts from its requirements persons or parties who are already subject to the disclosure requirements of the *Commonwealth Electoral Act*.

It is not certain at this stage whether the bill will be successful. A similar bill, the Electoral (Miscellaneous) Amendment Bill, was introduced in the Legislative Council in 2001 which, after amendment, proposed that a part 13A (a donation disclosure scheme) be inserted into the *Electoral Act 1985*. The disclosure requirements were supported by the then Liberal Government and passed the Legislative Council. However, it did not pass the House of Assembly before the 2001 South Australian election resulted in a Labor Government led by Mike Rann.

#### **4.2.3 Tasmania**

The *Electoral Act 2004* (Tas) has replaced the *Electoral Act 1985*. It was enacted in response to a perceived need to: utilise contemporary legislative drafting; adopt modern electoral practice; and remove detailed procedures and forms.<sup>19</sup> Whilst the Act established an independent Tasmanian Electoral Commission, it was not seen as an opportunity to introduce funding and disclosure requirements. An election expenditure limit still applies to the Legislative Council, specified as \$10,000 in 2005 (to increase by \$500 each year).<sup>20</sup> Candidates for a Council election must subsequently lodge an election expenditure return with the Electoral Commission.

#### **4.2.4 Victoria**

The *Electoral Act 2002* (Vic) was passed by the Victorian Parliament in 2002. Electoral legislation was previously found in the *Constitution Act Amendment Act 1958*, which was seen as a confusing location. Other deficiencies of the earlier law were identified by the Attorney-General, Hon Rob Hulls MP:<sup>21</sup>

- It was extremely prescriptive in some areas and lacking in detail in others.
- It was written in difficult language and poorly organised.
- It did not provide for modern election management practices.
- In some cases, it was out of step with current electoral practice and community expectations.

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<sup>19</sup> Jackson J, *TPD(HA)*, 26/10/04.

<sup>20</sup> Section 160.

<sup>21</sup> Hulls R, *VPD(LA)*, 21/3/02, p 419.

‘Electoral expenditure’ is defined in section 206 as expenditure incurred within the 12 months before election day in relation to:

- The broadcasting, publishing or display at a theatre or place of entertainment and the cost of production of an advertisement relating to the election.
- Production of any material in relation to the election that is required to include the name and address of the author of the material or the person authorising it.
- The production and distribution of electoral matter addressed to particular persons or organisations.
- Fees or salaries paid to consultants or advertising agents for services provided or material relating to the election.
- The carrying out of an opinion poll, or other research, relating to the election.

Registered political parties and candidates not endorsed by a registered political party must lodge a statement of expenditure with the Commission within 20 weeks of election day (s 208). The certificate of an auditor must be lodged with the statement (s 209). The Commission may request the auditor to provide further information within 14 days if the Commission believes on reasonable grounds that the information in either the statement or certificate is materially incorrect.

One of the major changes instituted by the Act was the introduction of public funding in Victoria. According to Hulls, the aim of public funding was to reduce the dependence on corporate money and improve the equality of parties.<sup>22</sup> \$1.20 is now payable for each first preference vote given to a candidate in an election provided that the total number of first preference votes for the candidate are at least 4% of the total number of first preference votes given in the election (s 211). Funding received by parties and candidates is not to be more than they have spent.

A ‘gift’ is also defined in section 206 to mean:

any disposition of property otherwise than by will made by a person to another person without consideration in money or money’s worth or with inadequate consideration, including – (a) the provision of a service (other than volunteer labour); and (b) the payment of an amount in respect of a guarantee; and (c) the making of a payment or contribution at a fundraising function – but excluding – (a) a payment under this Part; and (b) an annual subscription paid to a political party by a person in respect of the person’s membership of the party.

‘Political donation’ is separately defined to mean a gift to a registered political party.

One of the only restrictions on the amount that can be donated to candidates or political

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<sup>22</sup> *Ibid*, p 422.

parties applies in Victoria. The holder of a licence under section 13 of the *Casino Control Act 1991* or sections 3.4.29 or 4.3.8 of the *Gambling Regulation Act 2003* may not make political donations to a registered political party of more than a total of \$50,000 a year (s 216).

Parties and candidates are not subject to requirements of financial disclosure under Victorian electoral law.

#### **4.2.5 Western Australia**

Gifts above a certain threshold in Western Australia are required to include the name and address of the donor. The threshold was changed from \$1600 to \$1800 from 1 July 2005.<sup>23</sup> No major changes to the disclosure scheme have occurred in Western Australia.

#### **4.2.6 Australian Capital Territory**

The *Electoral Amendment Act 2004* (ACT) brought all the thresholds for disclosure of political donations and expenditure to \$1500. This was to remove any inconsistencies in the disclosure scheme in the ACT.<sup>24</sup>

#### **4.2.7 Northern Territory**

Another jurisdiction to have recently made substantial changes to the applicable regime is the Northern Territory, following passage of the *Electoral Act 2004* (NT). The Act established an independent Electoral Commission for the Northern Territory and provided for the registration of political parties in the Northern Territory.

#### *Disclosure of donations*

A 'gift' is defined in section 176 as:

any disposition of property made by a person to someone else, being a disposition made without consideration in money or money's worth or with inadequate consideration, and includes providing a service (other than volunteer labour) for no consideration or for inadequate consideration, but does not include – (a) a disposition of property by will; or (b) an annual subscription paid to a registered party by a person for the person's membership of the party.

The reporting agent of a candidate must provide the Commission with a return within 15 weeks of polling day setting out the total amount of all gifts received and the number of persons who made gifts (s 191). The date, amount and defined details of each gift must also be included if the amount of the gift and sum of all other gifts made by the person to the candidate is \$200 or more. A person who makes a total of gifts of \$200 or more to the same

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<sup>23</sup> Western Australian Electoral Commission, *Political Finance Annual Report 2003/04*, p 1.

<sup>24</sup> Australian Capital Territory Electoral Commission, 'Legislation', [www.elections.act.gov.au](http://www.elections.act.gov.au) Accessed 3/11/05.

candidate or \$1000 or more to the same entity must submit a return within 15 weeks of polling day setting out the amount of the gift, the date it was made, and the defined details (s 193). If a person makes gifts totalling \$1500 or more to the same registered party, a return must be lodged within 20 weeks of polling day (s 194). A return must also be lodged if a person receives gifts totalling \$1000 or more and uses all or part of it to make gifts of \$1500 or more to a registered party. In contrast to other jurisdictions, a registered party is obliged to inform a person from whom they received gifts totalling \$1500 or more of his or her requirement to submit a return.

A person who incurs expenditure for a political purpose during the disclosure period for an election and receives gifts of \$1000 or more from another person which is used in relation to the political expenditure must submit a return within 15 weeks of polling day (s 192). Such expenditure could be in relation to publishing or broadcasting electoral matter, otherwise publishing a view on an issue in an election, making a gift to a registered party, making a gift to a candidate, or making a gift to a person on the understanding that the person will use the whole or part of the gift for political expenditure.

The receiver of a loan of \$1500 or more from a person or entity that is not an authorised deposit-taking institution must record particular details in relation to the loan including its terms, and the name and address of the lender/members of the executive committee of the lender/trustees (s 190).

#### *Disclosure of electoral expenditure*

Electoral expenditure is defined in section 199 to refer to:

- The publication, broadcasting or display at a theatre or other place of entertainment of an electoral advertisement during the election period, including the cost of its production.
- The production of certain printed electoral matter.
- The production and distribution of electoral matter that is addressed to particular persons or organisations and is distributed during the election period.
- The conduct of an opinion poll or other research about the election during the election period.

Section 200 requires the reporting agent of each candidate to submit a return to the Commission within 15 weeks of polling day setting out the details of all electoral expenditure.

Those who published or broadcast an electoral advertisement during the election period with the authority of a participant in the election must also provide a return within eight weeks of polling day (s 202).

*Annual returns by registered parties and associated entities*

The reporting agent of a registered party must provide the Commission with its annual return within 16 weeks of the end of the financial year (s 205). The return must state the total receipts together with the required particulars, the amount paid by the party, and the outstanding amount of any debts. However, a party registered as a political party under the Commonwealth Act is exempt from section 205 if the Commission is provided with a copy of the return prepared for the AEC (s 207). Associated entities are required to submit an annual return stating the amount received, paid, and the outstanding amount of any debts, unless a copy of the return prepared for the AEC is given to the Commission (ss 208 and 209). Returns must specify the details of amounts received from an entity if it totals \$1500 or more in a financial year (s 210). However, amounts of less than \$1500 do not have to be counted when calculating the sum.

## 5 WHAT IS HAPPENING OVERSEAS?

This section provides an overview of election finance law in Canada, New Zealand, the United Kingdom and the United States. Whilst all of the applicable electoral systems may not be directly comparable to that of Australia, the various schemes described can provide examples of alternative approaches to election finance as well as highlighting current international trends. Canada, the United States and United Kingdom have reviewed their funding and disclosure schemes since 2000. According to research conducted by the AEC, the present disclosure scheme in Australia is behind international practice as seen in these countries.<sup>25</sup>

The following table offers a brief comparison of the major features of the funding and disclosure arrangements in Canada, the United Kingdom, the United States and New Zealand.

**Public funding and disclosure provisions**

Country	Direct public funding	Donor disclosure thresholds	Political party disclosure thresholds
United Kingdom	Yes	Over £5000	Over £5000
Canada	Yes	-	All contributions received
New Zealand	No	-	Over NZ\$10,000
United States	No (except for presidential elections)	-	Over US\$200

Source: Joint Standing Committee on Electoral Matters, *The 2004 Federal Election: report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto*, 2005, p 323.

Both Canada and the US limit the amount that may be donated to political parties and candidates. Expenditure limits apply in Canada, New Zealand and the United Kingdom. These countries also regulate the use of broadcast media, with some free access provided.

### 5.1 Canada

#### *Canada Election Act 2000*

Election finance law in Canada was overhauled when Bill C-24, An Act to Amend the Canada Elections Act and the Income Tax Act (Political Financing), received assent and subsequently came into force in January 2004. The reforms were in response to a number of scandals that suggested that contributors to the Liberal Party were receiving beneficial contracts in return for their donations.<sup>26</sup> The legislation, described as ‘ushering in the most significant changes to campaign finance that the country has seen in decades’, introduced a number of new electoral finance requirements.<sup>27</sup> According to Robertson, the new

<sup>25</sup> Australian Electoral Commission, above n 2, p 30.

<sup>26</sup> Young L, ‘Regulating campaign finance in Canada: strengths and weaknesses’, *Election Law Journal*, 3(3) 2004, p 456.

<sup>27</sup> *Ibid*, p 444.

components included:<sup>28</sup>

- A ban (with minor exceptions) on political donations by corporations and unions.
- A limitation on individual contributions.
- The registration of constituency associations, with reporting requirements.
- The extension of regulation to nomination and leadership campaigns.
- Enhanced public financing of the political system – this was partly to compensate for the loss of corporate and union donations. The *Income Tax Act* was also amended to increase the amount of an individual's political donation eligible for each bracket of the tax credit (the maximum tax credit that can be obtained is \$650 for donations of at least \$1275).

The 2003 Act set new limits on contributions. Only individuals who are citizens or permanent residents may contribute to a registered party, registered association, candidate, leadership contestant or a nomination contestant (s 404). Individuals may contribute up to: \$5000 a year to a particular registered party and its registered associations, nomination contestants and candidates; \$5000 in total to a candidate for a particular election who is not the candidate of a registered party; and \$5000 in total to the leadership contestants in a particular leadership contest (s 405). A candidate, nomination contestant or leadership contestant can contribute \$10,000 to his or her own campaign.

Corporations or trade unions may contribute a maximum of \$1000 per year to the registered associations, nomination contestants and candidates of a particular registered party, and \$1000 to a candidate for a particular election who is not the candidate of a registered party (s 404.1).<sup>29</sup> The virtual ban on union and corporate donations is based on the principle that those who cannot vote should not be able to influence the outcome of elections in other ways.<sup>30</sup>

Section 335 of the *Canada Election Act 2000* requires every broadcaster to make 6.5 hours of prime time broadcasting available for purchase between the issue of the writs for a general election and the eve of polling day. Registered parties may purchase this time for the transmission of political announcements and other programming. The Broadcasting Arbitrator when allocating broadcasting time gives weight, subject to considerations of fairness and the public interest, to the proportion of seats a registered party holds in the

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<sup>28</sup> Robertson J, *The Canadian Electoral System*, Parliament of Canada, Parliamentary Information and Research Service Background Paper BP-437E, May 2004, p 12.

<sup>29</sup> However, Crown corporations and corporations that receive at least half of their funding from the federal government may not make any contributions, nor may corporations and trade unions that do not carry on business or hold bargaining rights in Canada: Elections Canada, *Limits on contributions by corporations and trade unions*, Information Sheet 3, pp 3-4.

<sup>30</sup> Young, above n 26, p 458.



House of Commons and the percentage of the popular vote they received at the previous general election (s 338). However, no party is to be allocated more than half of the available broadcasting time. New parties are also entitled to broadcasting time (s 339). Network operators are to make available free broadcasting time between the issue of the writs for a general election and the day before polling day for the transmission of political announcements and other programming in accordance with section 345. Young has concluded:

As a mode of providing public support for political parties, provision of free broadcast time can be judged a success. Its cost to the public purse is relatively small (as private broadcasters must assume the costs of revenue foregone), and it allows parties to deliver their message to voters, often in formats longer than a 30-second advertisement. This encourages parties to develop more thoughtful messages than those crafted for traditional television advertisements.<sup>31</sup>

Third parties are not to spend more than \$150,000 during an election period on election advertising expenses (s 350). Third parties who incur electoral advertising expenses of \$500 or more are required to immediately register (s 353). The third party spending restrictions have been challenged in the Canadian courts, but the Supreme Court of Canada upheld the provisions in May 2004.<sup>32</sup>

The amount that can be spent on election expenses is limited in Canada (s 422). A registered party can spend no more than \$0.70 multiplied by either the number of names on the preliminary lists of electors for electoral districts in which the registered party has endorsed a candidate, or the number of names on the revised lists of electors for those electoral districts, whichever is greater. The amount is adjusted for inflation. Registered parties and third parties are prohibited from colluding for the purpose of circumventing the limit (s 423). The chief agent of a registered party must submit a financial transactions return to the Chief Electoral Officer each fiscal period, together with the auditor's report and the chief agent's declaration as to the financial transactions (s 424). The return is to set out various details including: the total contributions received and the number of contributors; the name and address of those who contributed more than a total of \$200 and the amount and date of each contribution; details of those who made directed contributions; the party's assets and liabilities; revenues and expenses; and the commercial value of goods or services provided and funds transferred by the registered party to a candidate or the electoral district association (s 424).

Where \$50 or more expense is incurred by or on behalf of a registered party, registered association, candidate, leadership contestant or nomination contestant, section 410 requires the agent or other person who paid the expense to keep a copy of the invoice, as well as proof that it was paid. If the amount is less than \$50, the person who made the payment must keep a record of the nature of the expense as well as proof that it was paid.

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<sup>31</sup> Ibid, p 453.

<sup>32</sup> Robertson , above n 28, p 18.

Parties are entitled to a 50% refund on their election expenses provided they receive at least 2% of the national vote or 5% of the votes cast in the electoral districts in which they have endorsed a candidate (s 435). Candidates who are either elected or receive at least 10% of the votes cast in the relevant riding may be reimbursed for 60% of their election expenses (s 464).

A number of criticisms have been made of the recent Canadian reforms:<sup>33</sup>

1. The anti-avoidance measures designed to prevent collusion are difficult to enforce and rely upon 'whistle-blowers'.
2. The restrictions on third party sponsorship of political advertising limit the ability of public awareness and advocacy groups to provide the public with non-partisan information during an election campaign.
3. The \$10,000 per annum limit on donations by individuals provides an advantage to the wealthy.
4. The increase in public subsidies effectively compels the public to support political parties through the tax system as opposed to being able to do so in accordance with personal belief.

However, Sayers and Young believe that the reforms are too recent for their full impact to be assessed.<sup>34</sup> Nonetheless, they note that there has been a large increase in the funding available to parties despite the limitations on individual, corporate and union donations. Young believes that the combination of spending limits, public funds and free broadcast time limit the demand for funds and thus provide little motivation for finding ways around the law.<sup>35</sup> Nevertheless, she warns that, when public funds are the largest source of income, parties can lose their grass roots connections, effectively becoming agents of the state.<sup>36</sup>

## 5.2 New Zealand<sup>37</sup>

The Electoral Commission in New Zealand is an independent Crown entity that collects the annual returns of donations and election expenses from registered parties. It also allocates election broadcasting time and funds to those eligible. The functions of the Electoral Commission are specified in section 5 of the *Electoral Act 1993* (NZ):

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<sup>33</sup> Hon Don Harwin MLC in the second reading debate for the Developer Donations (Anti-Corruption) Bill, *NSWPD*, 25/2/04, p 6489.

<sup>34</sup> Sayers A and Young L, 'Election campaign and party financing in Canada', *Democratic Audit of Australia*, September 2004, p 2.

<sup>35</sup> Young, above n 26, p 458.

<sup>36</sup> *Ibid*, p 459.

<sup>37</sup> The source of much of the information in this section is the website for Elections New Zealand [www.elections.org.nz](http://www.elections.org.nz)

- To carry out certain duties in relation to the registration of political parties and their logos.
- To supervise political parties' compliance with the financial disclosure requirements.
- To carry out certain prescribed duties in relation to Parliamentary election programmes.
- To supervise political parties' compliance with the requirements of the *Electoral Act* relating to the filing of returns of election expenses.
- To promote public awareness of electoral matters by means of the conduct of education and information programmes or by other means.
- To consider and report to the Minister or to the House of Representatives on electoral matters referred to the Electoral Commission by the Minister or the House of Representatives.

Section 210 requires every constituency candidate within 70 working days of polling day to submit a return setting out: his or her election expenses; the name and address of each person who made a donation over \$1000 and the amount; and the amount of each anonymous donation received over \$1000 (the legality of anonymous donations is seen as one of the major flaws of the New Zealand scheme).<sup>38</sup> According to section 213, the total election expenses of a candidate are not to exceed \$20,000 (\$40,000 in the case of a by-election). Consequently, spending by candidates has generally been restrained.<sup>39</sup> Bills and receipts must be kept for all election expenses of at least \$50.

Section 214G requires parties to file a return each year that sets out the amount of each party donation as well as the details of the person who made it, and the amount of each anonymous donation. However, section 214F defines 'party donation' as an amount that on its own or in aggregate with other donations made by the same person in that year exceeds \$10,000. Section 214B limits the amount that can be spent by a registered political party to \$1,000,000 plus \$20,000 for each constituency contested. If the party is not listed in the party vote, its expenses are not to exceed \$20,000 for each constituency contested.

During the 2002 general election, political parties and individual candidates spent a total of approximately \$10.1 million.<sup>40</sup> This is a relatively small amount compared to other countries. The restraint shown in this area is thought to be due to a number of factors, including the restrictions on accessing broadcast advertising, which is often the most expensive aspect of a campaign. However, the national expenditure of a political party has

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<sup>38</sup> Geddis A, 'Regulating the funding of election campaigns in New Zealand: a critical overview', *Otago Law Review*, 10(4) 2004, p 590.

<sup>39</sup> *Ibid*, p 584.

<sup>40</sup> *Ibid*, p 575.

not always been limited, with controls only introduced in the mid 1990s.<sup>41</sup> A party has yet to spend the maximum allowed.<sup>42</sup> According to Geddis, the major concern in recent times has centred on how election funds are obtained as opposed to their use.<sup>43</sup>

### *Broadcasting Act 1989*

The broadcasting of an election programme is prohibited by section 70 of the *Broadcasting Act 1989*, subject to a number of exceptions. An 'election programme' is defined in section 69 as a programme that:

encourages or persuades or appears to encourage or persuade voters to vote for a political party or the election of any person at an election; or encourages or persuades or appears to encourage or persuade voters not to vote for a political party or the election of any person at an election; or advocates support for a candidate or for a political party; or opposes a candidate or a political party; or notifies meetings held or to be held in connection with an election.

A programme broadcast during time allocated to that political party is exempt from the ban as are election programmes paid for with money allocated to the political party. Registered parties are restricted to the use of funds allocated by the Electoral Commission and any free time when advertising for the party vote. Section 71 requires Television New Zealand and Radio New Zealand to broadcast the opening and closing addresses of political parties for free. The Electoral Commission determines the time allocated to political parties (s 73). The amount of money available to parties is the same as the previous election unless changed by parliament. Prior to 2005, the amount was \$2.08 million. However, \$3.212 million was available for the 2005 general election. When determining the allocation of time and money, the Electoral Commission is to consider: the number of persons who voted for the party and its candidates at the previous election; the number of persons who voted for the party at any subsequent by-election; the number of members of Parliament; any relationships between the political party and another party; any indications of public support; and the need to provide a fair opportunity for each political party (s 75). Candidates may purchase advertising from their campaign expenses limit and their party may fund it from any party allocation. Parties who are not allocated funds may advertise through their electorate candidates' campaigns. Individual candidates may purchase broadcasting time for election programmes. However, as this is classified as an election expense, the maximum that can be spent is \$20,000, thus limiting such purchases to a few spots on local radio.<sup>44</sup>

Those who are not candidates or parties may broadcast election advertising but may not name or directly advocate for or against a party or candidate. Electorate candidate

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<sup>41</sup> Ibid, p 580.

<sup>42</sup> Ibid, p 581.

<sup>43</sup> Ibid, p 589.

<sup>44</sup> Ibid, p 588.

advertising is limited to promoting the electorate vote (parties and policies may be mentioned) and cannot contain negative advertising. It may not be shared with other candidates unless it is paid for from a party allocation. In contrast, registered party advertising may advocate either for or against a candidate. The allocation from the Electoral Commission must be used to pay for the advertising. Registered parties are able to apply to the Electoral Commission for an allocation of funds for the purchase of broadcast advertising as well as free time for campaign addresses.

Broadcasters must submit a return after each election detailing the election programmes broadcast during the three-month period prior to polling day (s 79C). There are fines of up to \$100,000 should a broadcaster fail to either lodge a return or file an inaccurate one.

According to Geddis, the purposes of the restrictions on broadcast advertising are to ensure fairness, avoid corruption, and prevent voters withdrawing from the electoral process.<sup>45</sup> However, there have always been complaints of unfairness in relation to the allocation of broadcasting time by the Commission.<sup>46</sup> Smaller and new parties argue that the system favours the large established parties, not least because the large parties are involved in the decision making process.<sup>47</sup> Geddis is critical of the restrictions, arguing that the legislation ‘tries to be all things to all people’ and ‘the net result is that the present election broadcasting regime is the subject of near universal condemnation by those electoral participants who are most affected by it’.<sup>48</sup>

### 5.3 United Kingdom<sup>49</sup>

The *Political Parties, Elections and Referendums Act 2000* (PPERA) took effect from February 2001 and significantly changed campaign finance in the UK. The Act implemented almost all of the recommendations made by the Committee on Standards in Public Life in its 1998 report – *The Funding of Political Parties in the United Kingdom*. The Act established the Electoral Commission and implemented a national regulation framework in the UK for the first time.<sup>50</sup> Prior to the Act, national spending by political parties and political donations were not regulated, although there were limits on the election expenses of candidates. According to Rowbottom, the Act recognised the constitutional importance of political parties and sought to restore public confidence in the

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<sup>45</sup> Geddis A, ‘Reforming New Zealand’s election broadcasting regime’, *Public Law Review*, 14(3) September 2003, p 176.

<sup>46</sup> *Ibid*, p 167.

<sup>47</sup> *Ibid*, p 168.

<sup>48</sup> *Ibid*, p 169.

<sup>49</sup> The source of much information in this section, unless otherwise stated, is the United Kingdom Electoral Commission website [www.electoralcommission.gov.uk](http://www.electoralcommission.gov.uk)

<sup>50</sup> Grant A, ‘The reform of party funding in Britain’, *The Political Quarterly*, 76(3) July-September 2005, p 381.

political process.<sup>51</sup> However, the *Political Parties, Elections and Referendums Act 2000* has not solved all of the problems associated with campaign finance in the UK, with the Electoral Commission acknowledging in 2004 that further reforms were necessary.<sup>52</sup>

Almost £68 million was reported as being donated to political parties between 2001 and 2003.<sup>53</sup> About 18% of that amount was in the form of donations of at least £1 million and 58% of the total donation amount consisted of donations of more than £100,000. Registered political parties may only accept donations of more than £200 from permissible donors, defined in section 54 as:

- An individual registered in an electoral register
- A registered company which carries on business in the UK
- A registered party
- A registered trade union
- A registered building society
- A registered limited liability partnership
- A registered friendly society
- Any unincorporated association of two or more persons which does not fall within any of the above categories but which carries on business or other activities wholly or mainly in the UK and whose main office is there.

Donations of more than £50 to candidates are also only acceptable from permissible donors. A record should be kept of all accepted donations of over £50, any impermissible donations received, and any donations received from unidentifiable sources.

Registered parties are generally required to prepare quarterly donations reports (s 62), except during election periods when reports are to be made on a weekly basis (s 63). Donations of more than £5000 (as a single or aggregate amount) must be recorded, as must donations of more than £1000 accepted by a party accounting unit, any impermissible donations of more than £200 received by the party, and any donations of more than £200 from unidentifiable sources.<sup>54</sup>

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<sup>51</sup> Rowbottom J, 'Political donations and the democratic process: rationales for reform', *Public Law*, Winter 2002, p 758.

<sup>52</sup> UK Electoral Commission, *The funding of political parties: report and recommendations*, December 2004.

<sup>53</sup> *Ibid*, p 77.

<sup>54</sup> UK Electoral Commission, 'Donations to political parties', [www.electoralcommission.gov.uk](http://www.electoralcommission.gov.uk) Accessed 6 October 2005.

In accordance with section 68, a donor who makes small donations (£200 or less) to a registered party whose aggregate value is more than £5000 in a year must submit a report to the Electoral Commission detailing the aggregate value of the donations, the name of the registered party to whom they were made, and the name and address of the donor. Donations with an aggregate value of at least £1000 to the local branches of parties and individuals must also be reported. If the donation exceeds £200, the recipient of the donation is responsible for reporting this sum to the Electoral Commission.

The *Political Parties, Elections and Referendums Act 2000* amended the *Companies Act 1985* to require companies to obtain shareholder approval before they may donate to any registered party or EU political organisation. However, shareholder authorisation is not required for donations which do not exceed a total of £5000 in the qualifying period. However, all political expenditure must be authorised. The directors' report of a company must provide information relating to political donations and expenditure.

According to Rowbottom, the funding of political parties remains controversial due to a gap in the legislation that fails to limit political donations and direct state assistance to political parties.<sup>55</sup> Whilst the Act has increased the importance of donations from individuals, Rowbottom warns that the influence of a small number of extremely wealthy donors can dramatically rise as a result, as they form an even larger proportion of overall funding.<sup>56</sup> The 2004 Electoral Commission review identified that public concern still existed in relation to the size of some donations and their influence over policy and access to decision makers. As a result some businesses and individuals were less willing to make donations. This, coupled with decreasing party membership, was causing an escalation of the pressure on parties to seek large donations. Research conducted on behalf of the Electoral Commission found that whilst 79% of those surveyed believed that people should have the right to donate to parties, 70% of people believed that funding parties by voluntary donations was unfair as it risked wealthy individuals, businesses and trade unions having the ability to buy influence over parties.<sup>57</sup> However, research also found that the public rarely regarded donations from trade unions as problematic.<sup>58</sup> A donation cap would have to be set at £10,000 per individual donor per year for the public to be persuaded of the likely elimination of corporate, trade union, or individual influence. However, the Commission highlighted that the imposition of a cap on donations would itself raise issues such as: the impact on the funding of parties; whether public funding is acceptable; the rights of individuals to spend their money as they see fit; and the independence of parties from the state. Accordingly, whilst it was not opposed to a cap in principle, it concluded that its introduction could not be justified at present.

Another issue in the UK has been the low voter turnout in recent elections. Turnout at the 2005 general election was 61.4%, a slight increase from the 2001 turnout of 59.4%.

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<sup>55</sup> Rowbottom, above n 51, p 758.

<sup>56</sup> Ibid, p 750.

<sup>57</sup> UK Electoral Commission, above n 52, p 15.

<sup>58</sup> Ibid, p 19.

Rowbottom argues that the issue of donations needs to be considered in this broader context, as political donations ‘can turn individuals away from political debate and participation in the political process, reinforcing the culture of cynicism that was blamed for the low turnout in the last general election’.<sup>59</sup>

Expenditure limits apply to all parties contesting a relevant election and are determined by the number of constituencies contested. The limit on campaign expenditure in a parliamentary general election is £30,000 multiplied by the number of constituencies, or, if greater, £810,000 in relation to England, £120,000 in relation to Scotland, and £60,000 in relation to Wales.<sup>60</sup> Candidate expenditure is also subject to limits. However, these limits are separate to those that apply to political parties. Campaign expenditure includes:<sup>61</sup>

- Party political broadcasts
- Advertising of any nature
- Unsolicited material addressed to electors
- Any manifesto or other document setting out the party’s policies.
- Market research or canvassing conducted for the purpose of ascertaining polling intentions.
- The provision of any services or facilities in connection with press conferences or other dealings with the media.
- Transport of persons to any place or places with a view to obtaining publicity in connection with an election campaign.
- Rallies and other events, including public meetings organised so as to obtain publicity in connection with an election campaign or for other purposes connected with an election campaign.

Campaign expenditure also includes notional expenditure, that is, the receipt of benefits in kind.

Section 80 requires parties to submit a return at the end of the campaign period that includes a statement of all payments made, all disputed claims, and all unpaid claims. An Auditor’s report on the return must be prepared if a registered party’s campaign expenditure exceeded £250,000 in the relevant part of the UK (s 81).

The UK Electoral Commission recently conducted a review of the funding of political

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<sup>59</sup> Rowbottom, above n 51, p 763.

<sup>60</sup> Schedule 9.

<sup>61</sup> Section 72 and Schedule 8, Part 1.



parties, publishing its report in December 2004.<sup>62</sup> The Electoral Commission stressed that limits on political party campaign expenditure were in the public interest. It also suggested that the national spending limit be reduced to £15 million as analysis had shown that parties were comfortably within the limit. However, candidate spending limits would simultaneously increase (effectively almost doubling), but only if accompanied by greater transparency. The Commission emphasised that research had consistently shown that voters are more responsive to local communications and campaigning compared to advertising at the national level.

Section 96 requires a third party to prepare a return at the end of the regulated period that contains a statement of all payments made in respect of controlled expenditure, all disputed claims, certain unpaid claims, and relevant donations (if the third party is not a registered party or is a minor party). ‘Controlled expenditure’ is defined in section 85 as ‘expenses incurred by or on behalf of the third party in connection with the production or publication of election material which is made available to the public at large or any section of the public’. ‘Election material’ is defined as:

material which can reasonably be regarded as intended to (a) promote or procure electoral success at any relevant election for (i) one or more particular registered parties, (ii) one or more registered parties who advocate (or do not advocate) particular policies or who otherwise fall within a particular category of such parties, or (iii) candidates who hold (or do not hold) particular opinions or who advocate (or do not advocate) particular policies or who otherwise fall within a particular category of candidates, or (b) otherwise enhance the standing (i) of any such party or parties, or (ii) of any such candidates, with the electorate in connection with future relevant elections (whether imminent or otherwise); and any such material is election material even though it can reasonably be regarded as intended to achieve any other purpose as well.

Controlled expenditure includes notional expenditure. Third parties who register with the Electoral Commission may incur higher levels of controlled expenditure. Schedule 10 lists the controlled expenditure limits as £793,500 in relation to England, £108,000 in relation to Scotland, £60,000 in relation to Wales, and £27,000 in relation to Northern Ireland. Recognised third parties must not accept a donation from a person who is not a permissible donor (schedule 11). Anonymous donations are also not to be accepted.

An issue that remains is whether political parties should receive state funding. According to Rowbottom, ‘State funding was not included in the PPERA for fear that it would compromise the independence of political parties and incorporate them into the fabric of the state’.<sup>63</sup> However, political parties currently receive state assistance both directly and indirectly. It includes such things as:

- Free mailings.

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<sup>62</sup> UK Electoral Commission, above n 52.

<sup>63</sup> Rowbottom, above n 51, p 779.

- Free use of public rooms at elections.
- Larger parties get free airtime for political broadcasts (whilst the purchase of media airtime for political advertising is prohibited, the BBC and certain independent television and radio broadcasters provide free airtime to qualifying parties at the time of elections).
- Opposition parties receive ‘Short money’ to assist with the performance of their parliamentary duties.<sup>64</sup>
- ‘Cranborne money’ is available in the House of Lords.<sup>65</sup>
- Policy development grants to parties sitting at Westminster – the scheme allows the Electoral Commission to allocate up to £2 million each year to registered parties with at least two MPs in the House of Commons who have sworn the oath of allegiance. The grant is to assist with the costs of developing policies.

Over three-quarters of those surveyed believed that it was better for parties to be financed by their own fundraising than a taxpayer subsidy.<sup>66</sup> The Commission identified some ways that public funding could be increased and recommended that income tax relief be introduced for donations of up to £200. However, it concluded that any significant increase in public funding should be contingent on the introduction of a donation cap.

#### 5.4 United States of America<sup>67</sup>

The regulation of campaign finance in the US and the issues surrounding it differ from other countries in a number of ways. According to Grant, debate on aspects of campaign finance reform in the US centre on such First Amendment freedoms as speech, association and the press and how these are to be balanced with electoral integrity.<sup>68</sup> The cost of US elections is notorious. Candidates spent \$936 million on congressional races in 2001-02.<sup>69</sup> Various explanations for this expense refer to the geographical size of the US, and the lack of access to such things as free broadcast advertising. Candidates in the US rely less on

<sup>64</sup> “‘Short’ money is the common name given to the annual payment to Opposition parties in the House of Commons to help them with their costs’: United Kingdom Parliament, ‘Glossary’, [www.parliament.uk](http://www.parliament.uk)

<sup>65</sup> ‘Cranborne’ money is the equivalent of ‘Short money’ in the House of Lords.

<sup>66</sup> UK Electoral Commission, above n 52, p 15.

<sup>67</sup> Much of the information in this section was obtained from US Federal Election Commission, [www.fec.gov](http://www.fec.gov)

<sup>68</sup> Grant A, ‘Reforming American election campaign finance’, *Political Quarterly*, April-June 2004, p 132.

<sup>69</sup> *Ibid*, p 133.

party finance and are required to raise money for their individual campaigns.<sup>70</sup> However, the majority of seats in the House of Congress are reasonably safe, as 95% of incumbents are re-elected.<sup>71</sup>

In the US, the Federal Election Commission, an independent regulatory agency, administers and enforces the *Federal Election Campaign Act*. The Act 'limits the sources and amounts of the contributions used to finance federal elections, requires public disclosure of campaign finance information and – in tandem with the Primary Matching Payment Act and the Presidential Election Campaign Fund Act – provides for the public funding of Presidential elections'.<sup>72</sup>

In the US, there are limits to the amount that individuals and groups may contribute to candidates and parties. These limits are set out in the following table.

**Contribution limits for 2005-06**

Donors	Recipients				Special Limits
	Candidate Committee	PAC	State, District and Local Party Committee	National Party Committee	
<b>Individual</b>	\$2100* per election	\$5000 per year	\$10,000 per year combined limit	\$26,700* per year	Biennial limit of \$101,400 (\$40,000 to all candidates and \$61,400 to all PACs and parties)
<b>State, District and Local Party Committee</b>	\$5000 per election combined limit	\$5000 per year combined limit	Unlimited transfers to other party committees.		
<b>National Party Committee</b>	\$5000 per election	\$5000 per year	Unlimited transfers to other party committees.		\$37,300 to Senate candidate per campaign
<b>PAC Multicandidate</b>	\$5000 per election	\$5000 per year	\$5000 per year combined limit	\$15,000 per year	
<b>PAC Not Multicandidate</b>	\$2100* per election	\$5000 per year	\$10,000 per year combined limit	\$26,700* per year.	

\* Indexed for inflation in odd-numbered years.

<sup>70</sup> Ibid, p 132.

<sup>71</sup> Ibid, p 134.

<sup>72</sup> US, Federal Election Commission, [www.fec.gov](http://www.fec.gov) Accessed 5/10/05.

Source: US Federal Election Commission, [www.fec.gov.au](http://www.fec.gov.au) Accessed 5/10/05.

However, individuals may also contribute by: volunteering their services; making independent expenditures in support or opposition to a candidate; or financing electioneering communications. Foreign nationals (excluding green card holders) are prohibited from contributing to US elections or incurring electoral expenditure. Nonetheless, there are exceptions. The 'Millionaires' Amendment' allows a Senate candidate to accept increased individual contributions when an opponent spends personal funds in excess of the threshold amount. In some situations, the state and national party committees are permitted to make unlimited coordinated party expenditures on behalf of the candidate. The threshold amount varies in accordance with the size of the voting age population of the state the candidate seeks to represent.

Political action committees are comprised of separate segregated funds and non-connected committees that are registered with the Federal Election Commission. Separate segregated funds are political committees that are established and administered by corporations, labour unions, membership organisations or trade associations. Contributions may only be solicited from individuals associated with a connected or sponsoring organisation. Non-connected committees are not sponsored by or connected to any of the above entities and may solicit contributions from the general public. Political action committees must regularly file reports (either monthly or quarterly) disclosing receipts and disbursements.

National and state party committees are required to register with the Federal Election Commission once they make contributions or expenditures in excess of \$1000 per annum in relation to federal elections. Local party committees are required to register if they: make contributions or expenditures in connection with federal elections of more than \$1000 per annum; spend more than \$5000 a year on 'exempt activities'; or raise more than \$5000 a year in funds designated for use in federal elections.

The public funding program was designed to reduce the role of large private contributions in Presidential elections. Public money is thus used to:

- Match the first \$250 of each individual contribution that an eligible Presidential candidate receives during the primary campaign.
- Finance the major parties' national nominating conventions (and help finance eligible minor parties' conventions).
- Fund the major party nominees' general election campaigns (and assist eligible minor party nominees).

Eligibility for public funding is determined by a Presidential candidate or a party convention committee agreeing to:

- Spend public funds only for campaign-related expenses or, in the case of a party convention, for convention-related expenses;
- Limit spending to amounts specified by the campaign finance law.

- Keep records and supply evidence of qualified expenses if requested.
- Cooperate with an audit of campaign or convention expenses.
- Repay public funds if necessary.
- Pay any civil penalties imposed by the Federal Election Commission.

Primary candidates must also have raised more than \$5000 in each of 20 states.

Eligible candidates receive matching payments during the primaries for the first \$250 of each individual contribution raised. However, total receipts of public funds are not to exceed half of the national spending limit for the primary campaign. Major parties are entitled to \$4 million plus cost-of-living adjustment to finance the national Presidential nominating conventions and major party nominees may be eligible for \$20 million plus cost-of-living adjustment for campaigning in the general election.<sup>73</sup> However, Presidential candidates are subject to certain spending limits as a condition of public funding. In 2004, the general election limit was \$74.62 million and the overall primary limit was \$37.31 million. Most candidates until 2000 accepted public money and the associated limits. However, George W Bush refused to accept public money in the nomination process in 2000, as did Howard Dean and John Kerry in 2003.<sup>74</sup>

A controversial issue in the US has been the use of 'soft money'. 'Soft money' involves the 'solicitation and use of non-federal funds by parties, candidates and officeholders'.<sup>75</sup> Grant describes how 'soft money' was not subject to 'hard money' limits.<sup>76</sup> Whilst it was supposed to pay for activities not directly related to federal candidates, it was increasingly used to influence federal elections, with much of it being spent on issue advocacy commercials. Issue advocacy commercials communicate views or information on policy matters or candidates' stands on issues and were not subject to federal disclosure requirements or contribution limits. In 2000, \$509 million was spent in this way. Grant concludes that issue advocacy commercials 'were being used as a way of spending vast sums of *de facto* campaign contributions to gain the gratitude and secure the obligation of parties and candidates'.<sup>77</sup>

The pursuit of campaign finance reform in the US took place over many years. Senators John McCain (a Republican) and Russell Feingold (a Democrat) spearheaded the

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<sup>73</sup> Each major party received \$15 million in public funds for their conventions and the general election nominees were eligible to receive \$75 million in public funds in 2004.

<sup>74</sup> Grant, above n 68, p 134.

<sup>75</sup> United States of America, Federal Election Commission, 'Bipartisan Campaign Reform Act of 2002', [www.fec.gov](http://www.fec.gov) Accessed 5/10/05.

<sup>76</sup> Grant, above n 68, p135.

<sup>77</sup> Ibid.

*Bipartisan Campaign Reform Act of 2002*.<sup>78</sup> They were supported in the House of Representatives by Christopher Shays (a Republican) and Martin Meehan (a Democrat). In 1997, to increase the likelihood of securing its passage, they focused their bill on banning 'soft money' donations to parties and the regulation of issue advocacy commercials prior to an election. On 2 April 2001, the Senate voted 59-41 in favour of the bill. Passage of the Shays-Meehan bill through the House of Representatives was assisted by the Enron scandal in 2002 (the collapse of Enron revealed widespread campaign contributions to legislators and political parties). The Act was signed into law by President Bush on 27 March 2002.

The *Bipartisan Campaign Reform Act* overhauled campaign finance legislation. It prohibited national party committees, their officers and federal officers from either raising or spending soft money. However, to compensate for this, the limit on hard money contributions was raised, and the 'millionaires' amendment' allowing increased contributions in certain circumstances was passed. The Act did not seek to reform the public financing system for presidential elections. The main provisions of the Act, as identified by Grant, were:<sup>79</sup>

- National political party committees, their officers and federal officeholders cannot raise or spend soft money.
- State and local party committees cannot spend soft money on federal election activities, although they may spend limited amounts raised in contributions of up to \$10,000 on voter mobilisation and similar activities in federal elections as long as they do not mention individual candidates by name.
- Trade unions, corporations and other pressure groups may not directly fund from their treasuries broadcast advertising which refers to a federal candidate, reaches at least 50,000 people within a candidate's electorate, and airs within 60 days of a general election or 30 days of a primary election.
- A candidate must pledge not to refer directly to opponents in commercials or must personally endorse those that do to be eligible for lowest cost airtime on television or radio.
- A new full disclosure rule means that a candidate or sponsor of the ad must state explicitly during the ad that they have approved of the ad and its contents.
- The limit for individual donations of hard money to candidates was raised from \$1000 to \$2000 and will be index-linked for inflation. The total amount a donor can give in a year was also raised.
- The limits on regulated hard money contributions to House and Senate candidates

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<sup>78</sup> Ibid, p 136ff.

<sup>79</sup> Grant A, 'Election campaign funding reform and judicial review in the United States', *Public Law*, Autumn 2004, p 505.

were raised for those who are facing a wealthy self-financed opponent.

- Foreign nationals may not contribute to campaigns.

The constitutionality of the *Bipartisan Campaign Reform Act* was contested in the Supreme Court in 2003 in *McConnell v FEC* (2003) 000 US 002-1674. The case was particularly concerned with the extent to which First Amendment rights were impeded by the Act. However, in December 2003, the Supreme Court in a 5:4 decision held that all of the main provisions, except for two, were constitutional.<sup>80</sup> Grant has concluded:

Whether it is interpreted as supporting the closure of loopholes in the existing law and giving Americans greater confidence in the integrity of their political system or as a dangerous threat to First Amendments freedom that will weaken political parties, reduce political participation and electoral turnout while increasing the influence of pressure groups, *McConnell v FEC* will undoubtedly have far-reaching implications for the conduct of American elections for many years to come. We can speculate that the Republicans will, at least in the short to medium term, enjoy an advantage in fundraising over their Democrat opponents, that wealthy donors will spend more to support special interest backed advertising, that the number of PACs will increase to finance issue-based campaigns in election periods, and that new fundraising committees will be established to try and bypass the rules.<sup>81</sup>

In 2004, Senators Feingold and McCain introduced legislation to reform the presidential public funding system by eliminating the state by state spending limits and increasing the overall limit.<sup>82</sup> Candidates who receive public funding would also be required to participate in the primary public funding system. The Senators have also introduced a bill to replace the Federal Election Commission with a new agency which continues the current reporting and disclosure tasks, but with different enforcement functions. In addition, Senators Feingold and McCain have introduced a bill with Senator Durbin to require broadcast stations to devote a reasonable amount of airtime to election programming. A system would subsequently be created in which candidates and parties receive vouchers to be used for paid radio or TV advertising time financed by a broadcast spectrum usage fee. Senator Feingold has also introduced a bill to require electronic versions of campaign finance reports to be made available to the public within 48 hours of filing.

For further information on the progress of their campaign see the following websites:

Senator Russ Feingold <http://feingold.senate.gov>

Senator John McCain <http://mccain.senate.gov>

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<sup>80</sup> One of these provisions banned minors aged 17 or under from contributing to campaigns. The other provision struck down was the requirement that parties chose between coordinated or independent expenditures in support of their candidates in the period after nomination and before the general election: *Ibid*, p 510.

<sup>81</sup> Grant, above n 68, p 140.

<sup>82</sup> Russ Feingold, 'The future of reform' <http://feingold.senate.gov> Accessed 5/10/05.

## 6 ONGOING DEBATES

The regulation of election finance raises a myriad of issues such as free speech, political equality, access to information, and the integrity of public representation. The major purpose of the funding and disclosure rules is to avoid corruption and/or its imputation. However, despite the existence of funding and disclosure regimes in NSW and at the federal level for more than twenty years, many commentators and stakeholders still believe aspects of the system are flawed and/or limited in their ability to achieve the purpose for which they were designed. Accordingly, proposals for reform are continually raised. The reform of the regulation of election finance has also been on the agenda overseas, with aspects of the schemes in Canada, the United Kingdom and the United States being substantially reformed in recent years.

Young has identified four factors that she believes are necessary for a regulatory regime to be effective:<sup>83</sup>

1. **Accountability** – parties and candidates need to be held responsible for their actions and subject to penalties for improper conduct.
2. **Transparency** – the source of money for election campaigns and the amount spent needs to be completely disclosed.
3. **Integrity** – the potential for undue influence must be limited.
4. **Equity** – all parties and candidates should be treated in a similar manner in the relevant legislation.

Young also argues that political parties need to be strengthened, believing them to be an essential part of political life as they provide alternatives, organise the electoral process, and facilitate participation in the political system.

Political parties generally receive income from three major sources:<sup>84</sup>

1. Internal funding – membership fees and the like.
2. External funding – donations and gifts.
3. Public funding.

Political parties have also developed a number of other methods of raising funds including: rent from investments; leasing out property at high rates to government departments; loans

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<sup>83</sup> Young, above n 26, p 444.

<sup>84</sup> Tham J, 'Legal regulation of political donations in Australia: time for change', in Patmore G (ed) *The Big Makeover: A New Australian Constitution*, Pluto Press Australia, Annandale, 2001, p 72.



made on favourable terms; and the non-enforcement of loans.<sup>85</sup>

The proportion of total income attributable to the various sources differs between the parties. The following table compares the funding, revenue and expenditure of the major parties for 2003-04. The table highlights the disparity between election funding received and other revenue. For example, the Australian Labor Party (ALP) received \$16.7 million in election funding, about one-third of the amount obtained from other sources.

**Funding, revenue and expenditure of parties**

Party	2004	2003-04	
	Election funding \$m	Revenue \$m	Expenditure \$m
ALP	16.7	47.1	40.5
Democrats	0.01	0.6	0.7
Greens	3.3	3.1	2.2
Liberals	18.0	29.5	23.0
Nationals	3.0	7.8	7.1

Source: AEC, *Funding and Disclosure Report: Election 2004*, 2005, p 10.

At the federal level, public funding constituted less than 20% of total receipts for the ALP and the Liberal and National parties between 2000 and 2003, whereas it represented about one-third of receipts for the Australian Democrats and Greens.<sup>86</sup> Sayers and Young have compared the regulation of election finance in Canada and Australia and found that whilst public funding provides less than 20% of the income of the major Australian parties, about 80% of the income of parties in Canada is attributable to public funding.<sup>87</sup> They believe that the impact of public funding is less in Australia due to the lack of restrictions on contributions.

The Joint Standing Committee on Electoral Matters is currently conducting an inquiry into the disclosure of donations to political parties and candidates.<sup>88</sup> In its submission to the inquiry, the AEC suggested that the twentieth anniversary of the introduction of the

<sup>85</sup> Cass D and Burrows S, 'Commonwealth regulation of campaign finance – public funding disclosure and expenditure limits', *Sydney Law Review*, 22(4) December 2000, p 41.

<sup>86</sup> Sawyer M, 'Election 2004: How democratic are Australia's elections?', *Australian Review of Public Affairs*, 3 September 2004.

<sup>87</sup> Sayers and Young, above n 34.

<sup>88</sup> The Joint Standing Committee had been given the inquiry in March 2004 (after its inquiry into electoral funding and disclosure had lapsed at the 2001 federal election) but it lapsed with the dissolution of Parliament prior to the 2004 federal election. The inquiry was subsequently re-referred to the Committee in November 2004. On 4 March 2004, the following matters had been referred to the Committee for inquiry and report: 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; and any submissions and evidence received by the committee in relation to that inquiry of 15 August 2000.

funding and disclosure scheme might be a good time for a comprehensive review of both the purpose of the scheme and the extent to which that objective is met by the legislation.<sup>89</sup> The AEC described the pattern of the last 20 years as ‘ad hoc’ with amendments addressing individual deficiencies.

## 6.1 Public funding

NSW was the first Australian jurisdiction to establish a system of public funding for election campaigns, which it did in 1981. The Commonwealth followed shortly after, with public funding a feature of the amendments that were introduced by the *Commonwealth Electoral Legislation Amendment Act 1983*. The rationale for the introduction of the election funding scheme has been described by the AEC as:

to provide financial assistance to parties, reduce the opportunities for attempts to corrupt politicians, to avoid excessive reliance upon special interest and institutional sources of finance, to equalise opportunities between parties and to stimulate political education and research.<sup>90</sup>

The majority of the Joint Select Committee on Electoral Reform in its September 1983 report recognised the vital role of political parties in democratic government and voiced its belief that the reasons in favour of public funding outweighed the arguments against.<sup>91</sup> The Committee noted that:

- Public funding could be used to ‘remove the necessity or temptation to seek funds that may come with conditions imposed or implied’.
- Given the experience of the first election following the introduction of public funding in NSW, public funding allows new parties or interest groups to compete effectively in elections, and can be ‘simply, cheaply and efficiently administered’.
- Most democracies had adopted public funding schemes without dire consequences.
- It relieves all parties ‘from the constant round of fund raising’ thus allowing them ‘to concentrate on discussion of issues of local or national concern and development of policy responses to these problems’.

The Committee also articulated what they believed should be the basic principles of public funding:<sup>92</sup>

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<sup>89</sup> Australian Electoral Commission, above n 9.

<sup>90</sup> Australian Electoral Commission, above n 2, p 8.

<sup>91</sup> Parliament of Australia, Joint Select Committee on Electoral Reform, *First Report*, September 1983, pp 153-155.

<sup>92</sup> *Ibid*, p 156.

- Aid should be given only to those parties which have demonstrated in general elections that they can command a significant level of support.
- The subsidies are to be calculated and allocated according to fixed rules in order to rule out the possibility of preferential treatment.
- The amount of support should be related to the relative electoral strengths of the parties.
- There should be no public control over the ways in which the parties use the support but the funds received must not exceed election related expenditure.

There continues to be support for the provision of public funding. The majority of the Joint Standing Committee on Electoral Matters recently published its report on the 2004 federal election. It noted that there is a general level of satisfaction with the public funding scheme, and the Committee believed that the arrangement continues to meet its original objectives.<sup>93</sup> The Australian Greens Party also supports the availability of public funding. One of its policies is to 'pursue the model of publicly funded elections at all levels of government' as such elections 'promote more equitable access for potential candidates and reduce the risk of corruption through donations in election campaigns'.<sup>94</sup>

Nonetheless, there are still some concerns with aspects of the scheme. The AEC identified the following as some of the issues in relation to the current scheme of public funding:<sup>95</sup>

- Public election funding is substantially less than the additional costs incurred by the major parties over the election period.
- Candidates and parties may incur electoral expenditure in the hope of public funding that does not materialise. For example, the Australian Democrats in the 2004 election.
- Parties and candidates may receive more funding than anticipated.
- Parties and candidates must make decisions on budgets and finances in a context of uncertain electoral support and subsequently unknown levels of public funding.
- 50% of candidates receive the required votes and are thus eligible for public funding.

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<sup>93</sup> Joint Standing Committee on Electoral Matters, *The 2004 Federal Election: report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto*, 2005, p 325.

<sup>94</sup> Australian Greens, 'Policies: Donations to the Australian Greens', Goal 1.1. Available from [www.greens.org.au](http://www.greens.org.au)

<sup>95</sup> Australian Electoral Commission, above n 2, pp 8-9.

Despite the many perceived advantages of public funding, Tucker and Young believe that its benefits are limited in Australia due to it being based on past performance and the lack of any restrictions on the expenditure of private money.<sup>96</sup> Whilst they believe that the current system has worked well, as the major parties have received a similar amount, they conclude:

although we may need to provide more public funding to ensure that all challengers are sufficiently resourced, the amount of support given to the competing parties must be based on a different formula or linked within a different regulative framework so that it better serves the goals we have listed as fundamental for effective democracy.<sup>97</sup>

Some, whilst supportive of public funding in principle, are critical of the lack of any links between the availability of public funds and the use of private money in elections. A number of commentators believe that some obligations or conditions should be imposed on the use of private money. One suggestion is that private funding thresholds (determined in relation to the level of electoral support) should be imposed so that the amount of public funding received decreases in proportion to the amount by which private funding exceeds the threshold.<sup>98</sup> Other suggestions include the imposition of expenditure limits, as when public funds are adequate it can dampen the need for private donations. Orr strongly supports the notion of greater public funding in return for strict spending limits. He argues that electoral expenditure is generally of a more public nature than donations, thus it enables other candidates and parties to monitor it to a greater extent.<sup>99</sup>

Williams and Mercurio argue that political parties who receive public money should be required to have democratic and transparent internal mechanisms. They also suggest that parties that receive public funding should not be able to engage in electronic advertising. They believe that this may not be unconstitutional provided the scheme does not unfairly benefit the established parties and does not exclude the contributions of third parties.<sup>100</sup> See section 6.3 for a discussion of some of the constitutional issues concerning a prohibition of broadcast advertising.

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<sup>96</sup> Tucker D and Young S, 'Public financing of election campaigns in Australia – a solution or a problem?', in Patmore G (ed) *The Big Makeover: A New Australian Constitution*, Pluto Press Australia, Annandale, 2001, p 61.

<sup>97</sup> Ibid, p 62.

<sup>98</sup> Tham J, 'Campaign finance reform in Australia: Some reasons for reform', in Orr G, Mercurio B and Williams G (eds) *Realising Democracy: Electoral Law in Australia*, Federation Press, Sydney, 2003, p 120.

<sup>99</sup> Orr, above n 1, p 23.

<sup>100</sup> Williams G and Mercurio B, *Submission*, Joint Standing Committee on Electoral Matters – Inquiry into Disclosure of Donations to Political Parties and Candidates, 5 April 2004.

### **6.1.1 *Has the scheme achieved its purpose?***

One of the perceived advantages of public funding is that it can relieve politicians of the burden of fundraising. It may subsequently reduce reliance on private funding and assist in the prevention of corruption, as there is no reason for politicians to feel any obligation to a particular individual or group. However, in many instances, public funding appears to serve as an additional amount for parties to spend and therefore its success in limiting reliance on private funding is limited. The proportion of the various sources of a party's income was discussed earlier in section six, and the relatively minor role of public funding as a source of income for major parties was highlighted. According to the AEC, party returns reveal that the scheme has not reduced reliance on funds from other sources nor has it equalised the opportunities between parties.<sup>101</sup>

A common concern voiced in relation to the public funding of political parties is that it can increase the distance between parties and their grassroots support, as they do not need to rely on them to the same extent for funding. The provision of public money can also encourage growth of the amount spent on electoral campaigns, as it enables parties and candidates to spend more on such things as advertising.<sup>102</sup> According to Orr:

The problem with public funding is that, in the absence of enforceable limits on donations, or limits on expenditure, it can amount to pouring money into a bottomless pit. According to its detractors, it can create dependence – parties become addicted to the guaranteed flow of money, and become less reliant on their grassroots.<sup>103</sup>

Tham and Orr are critical of the current funding system, arguing that 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'.<sup>104</sup> Tucker and Young contend that the provision of public funds has not solved the problem of possible corruption, as public funding does not meet all the costs of a party. Parties subsequently rely on the receipt of donations and loans from private sources, as well as its fundraising endeavours.<sup>105</sup>

### **6.1.2 *Does the current structure disadvantage new parties?***

Some of the problems associated with public funding are due to the structure of the system. Parties generally receive funding after an election.<sup>106</sup> The structure of the NSW and federal

<sup>101</sup> Australian Electoral Commission, above n 9, p 11.

<sup>102</sup> Tucker and Young, above n 96, p 67.

<sup>103</sup> Orr G, *Australian Electoral Systems – How Well Do They Serve Political Equality?*, Australian National University, Canberra, 2004, p 67.

<sup>104</sup> Tham J and Orr G, *Submission*, Joint Standing Committee on Electoral Matters – Inquiry into Disclosure of Donations to Political Parties and Candidates, p 25.

<sup>105</sup> Tucker and Young, above n 94, p 66.

<sup>106</sup> Section 69 of the *Election Funding Act 1981* (NSW) enables parties, subject to certain

schemes therefore disadvantages any new parties and further entrenches the status quo.

A number of commentators have also criticised the imposition of a 4% threshold before parties receive funding, suggesting that it should either be removed or at least reduced.<sup>107</sup> Whilst it ensures that public money is only directed to those thought to have sufficient electoral support, it does so at the expense of every vote being considered equal. In relation to the 2004 federal election, 44% of the House of Representatives candidates and 23% of the Senate groups qualified to receive election funding.<sup>108</sup>

### 6.1.3 *Should public funding be a reimbursement scheme or as of right?*

Prior to the *Commonwealth Electoral Amendment Act 1995*, public funding operated as a reimbursement scheme and parties were required to provide proof of their expenditure.<sup>109</sup> However, funding is now as of right. Whilst parties generally spend more than the amount of public money received, a party may potentially profit on the campaign. For example, the ALP was critical of the fact that Pauline Hanson received \$200,000 in relation to the 2004 federal election, yet only spent a little over \$35,000.<sup>110</sup> Accordingly, some commentators support a return to the old scheme.

One of the concerns that led to the *Commonwealth Electoral Amendment Act 1995* was the delay between campaign expenditure being incurred and the receipt of funds.<sup>111</sup> The delay was due to the strain on resources as parties prepared detailed claims, which then needed to be processed by the AEC. The AEC believes that the current scheme avoids some of the timing and administrative issues that previously arose.<sup>112</sup>

The Joint Standing Committee on Electoral Matters has noted the concerns that some participants may profit from the process, but it believes:

changing the scheme to require a proven balance between a candidate's public funding entitlement and a candidate's campaign expenditure is fraught with difficulty, not least of which is undermining the level playing field between independent candidates and party-endorsed candidates that the scheme aims to

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conditions, to receive an advance payment, equal to 10% of the amount to which they were entitled for the previous general election, for each of the first three complete years after the day for the return of the writs for the previous general election. However, parties have not taken advantage of these provisions in recent years: NSW, State Electoral Office, *personal communication*, 27/10/05.

<sup>107</sup> Orr, above n 103, p 67; Tham, above n 98, p 120; Orr, above n 1, p 25.

<sup>108</sup> Australian Electoral Commission, above n 2, p 6.

<sup>109</sup> Tham, above n 98, p 116.

<sup>110</sup> Joint Standing Committee on Electoral Matters, above n 93, p 326.

<sup>111</sup> Hon F J Walker MP, *CPD(HR)*, 9/3/95, p 1949.

<sup>112</sup> Australian Electoral Commission, above n 2, p 3.

promote.<sup>113</sup>

Nonetheless, the Committee believes that a candidate should have to account for a minimum threshold of expenditure before being eligible for public funding. It suggests that a potential solution might be to raise the threshold for public funding from 4% to 5%.

## 6.2 Donations

Tham believes that the external funding of parties through donations and gifts presents three major risks to democracy:<sup>114</sup>

1. Graft – where external funding is exchanged for actions in favour of the donor, for example, the granting of government contracts.
2. Policy corruption – where the policies of members and politicians are improperly influenced.
3. Lack of transparency – citizens are unaware of the identity of donors and the size of donations.

The Joint Select Committee on Electoral Reform noted in its 1983 report that the majority of the Committee accepted the view that:

the receipt of significant donations provides the potential to influence a candidate or party and that to preserve the integrity of the system the public need to be aware of the major sources of party and candidate funds and of any possible influence.<sup>115</sup>

Requiring the disclosure of donations to political parties and candidates is thought to achieve a number of objects.<sup>116</sup> It informs the electorate of possible links between political parties and their donors. It may also encourage smaller donations so inferences of corruption and influence are avoided.

A recent report of the AEC illustrates the ongoing relevance of the debate on the regulation of donations. The report identified a number of issues that were raised in the media following the public release of the annual returns in February 2005.<sup>117</sup> These issues include:

- The proportion of donations made through trusts, foundations or other entities that

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<sup>113</sup> Joint Standing Committee on Electoral Matters, above n 93, p 327.

<sup>114</sup> Tham, above n 84, p 73.

<sup>115</sup> Joint Select Committee on Electoral Reform, above n 91, p 164.

<sup>116</sup> Orr, above n 103, p 63.

<sup>117</sup> Australian Electoral Commission, above n 2, p 14.

may mask the identity of an ultimate donor.

- The apparent success of the Australian Labor Party in attracting revenue through its Queensland branch.
- The proportion of donations from sectors of the economy with business concerns upon which aspects of official policy may impinge.
- Criticism of political parties for receiving money from companies involved in certain business such as the tobacco industry.<sup>118</sup>
- The potential tension between political donations by companies and the interests of shareholders, or between political donations by trade unions and the interests of members.
- The alleged shortcomings of the disclosure scheme.

The Australian Democrats stress the importance of such issues, as reflected in their policy on political donations:

The public demand for transparent and fully reported political party funding and disclosure must be heeded. Public disquiet concerning perceived overt and covert links between donations to political parties, and their resulting policies and actions, continues to be very high. The Australian Democrats believe that political parties should be legally required to provide explicit details of the true sources of their donations and the destinations of their expenditure.<sup>119</sup>

The Democrats believe that a comprehensive disclosure regime would: prevent or discourage corrupt or improper conduct; reduce the influence, or the perception of influence, of wealthy and powerful individuals and groups; and protect politicians from pressure from 'secret' donors.

Other than prohibiting the receipt of anonymous gifts, donations are not regulated to any great extent in Australia. However, some jurisdictions go further than others. For example, Victoria forbids donations of more than \$50,000 from certain gaming licensees. A number of concerns have been raised in relation to the current regime, particularly what some deem to be its laxity in regulating the disclosure of donations. Some consider the disclosure

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<sup>118</sup> A search of the 2003/04 annual returns of political parties on the AEC website reveals that: NSW Labor received \$24,250 from British American Tobacco (listed as other receipts); the NSW Liberal Party received \$56,600 from British American Tobacco (\$50,100 listed as an other receipt and \$6500 as a donation) and \$10,000 from Philip Morris (listed as a donation); the Federal Liberal Party received \$51,500 from British American Tobacco (listed as a donation); and the Federal National Party received \$14,400 from British American Tobacco (\$10,000 listed as a donation and \$4400 listed as an other receipt) and \$2200 from Philip Morris (listed as other receipt). Please note that these amounts may differ to that specified in the donor returns.

<sup>119</sup> Australian Democrats, 'Political donations', [www.democrats.org.au](http://www.democrats.org.au) Accessed 14/9/05.



thresholds to be too low, whilst others argue that they need to be elevated significantly. Still others have called for a cap on the amount that can be donated, as applies in a number of other countries. There have been further requests for the tax deductibility of political donations to be increased from the current maximum of \$100. Various controversial fundraising practices have also received attention from the media, especially the use of front organisations to disguise the source of large donations. This section explores some of the concerns with the current system, and outlines a number of proposals for reform.

### **6.2.1 Who donates to political parties?**

The traditional source of donations for the ALP and Liberal Party are corporations and trade unions respectively. Whilst both the ALP and the Liberal Party receive donations from corporations, business generally supports the Liberals to a greater extent. In 2002-03, the Liberal Party received more than \$3 million from corporate and private sources constituting 85% of its total income, whereas the ALP received a little less than \$1.5 million (38% of its total income).<sup>120</sup> The source of the majority of money received by the ALP from corporations was public companies, whereas both private and public companies were significant donors to the Liberal Party.<sup>121</sup> The banking and finance sector generally donated the most out of the various industry groups.

Many corporations donate to a number of political parties. Ramsay et al found that of the top 10 ASX-listed company donors, two made donations to four major parties (Liberals, ALP, Nationals and Democrats), five made donations to three parties (Liberals, ALP and Nationals), two made donations to two parties (Liberals and ALP) and one made a donation to only one party (the Liberals).<sup>122</sup> Incumbency or the likelihood of winning office can influence the size and number of donations. An individual or organisation may donate to more than one party to ensure they supported the party that eventually gains power. Multiple donations may also be made so as not to appear too closely linked to one party, with the media scrutiny this may provoke.

Various organisations within the media have also been the source of significant donations. The ALP received more than \$710,000 from media organisations between 1998 and 2003, and the Liberal Party collected more than \$620,000.<sup>123</sup> Whilst Network Ten, the Nine Network and PBL have donated to both major parties, Foxtel and News Ltd have generally directed their donations to the Liberal Party. Tennant-Wood has questioned the nature of some of the links between media organisations and political parties:

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<sup>120</sup> Does not include amounts received under \$1500: Tennant-Wood R, 'The role of the media in the public disclosure of electoral funding', *Democratic Audit of Australia*, December 2004, p 3.

<sup>121</sup> Ramsay I, Stapledon G and Vernon J, 'Political donations by Australian companies', *Federal Law Review*, 29(2) 2001, p 199.

<sup>122</sup> *Ibid*, p 201.

<sup>123</sup> Tennant-Wood, above n 120, p 6.

are the Australian media simply reproducing political party ‘spin’ in return for political favours, or are they restricted by political party patronage in the extent to which party funding can be reported? Alternatively, are editorial assumptions being made that the readership isn’t interested in political issues beyond what can be presented as a consumer item?<sup>124</sup>

Senator Andrew Murray in his supplementary remarks to the recent report of the Joint Standing Committee on Electoral Matters recommended that ‘no media company or related entity or individual acting in the interests of a media company may donate in cash or kind to the electoral or campaign funding of a political party’.<sup>125</sup> This would prevent the perception of political influence over the media and vice versa.

Tennant-Wood has also highlighted the intricacies of the relationship between political parties, the media and business – many of the donations received by political parties are from companies that advertise in the media. Therefore, ‘it could be argued that the mass media have a financial incentive not to run headline stories on the political donations of companies that buy advertising space from them’.<sup>126</sup> Accordingly, the concern with potential influential relationships between the media and political parties should also extend to business.

### ***6.2.2 Does disclosure prevent corruption or undue influence?***

Allowing donations to candidates and political parties raises a number of issues in terms of the possibility of such donations providing the donor with influence over the policies and decisions of parties and members of parliament. According to Orr, ‘the single greatest issue confronting elections in the developed world is the influence of private money on electoral politics and, more broadly, on legislative and executive behaviour’.<sup>127</sup>

One of the rationales of requiring the disclosure of donations is that it may encourage smaller donations, thus chances of political influence are minimised. However, there is some doubt as to whether disclosure achieves this purpose or if it actually has the opposite effect by normalising the existence of large donations. Tham and Orr in their submission to the inquiry of the Joint Standing Committee on Electoral Matters into electoral funding and disclosure described the current regulation of disclosure as ‘a leaky sieve that permits evasion of adequate disclosure’.<sup>128</sup> They believe that the current disclosure scheme has only served to normalise corporate political donations, stressing that such laws are only effective when there is strong opinion against such donations.<sup>129</sup> Orr believes the disclosure laws are

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<sup>124</sup> Ibid, p 9.

<sup>125</sup> Joint Standing Committee on Electoral Matters, above n 93, p 413.

<sup>126</sup> Tennant-Wood, above n 120, p 10.

<sup>127</sup> Orr, above n 103, p 62.

<sup>128</sup> Tham and Orr, above n 104, p 10.

<sup>129</sup> Ibid, p 20.

flawed in their attempt to keep the electorate informed: the obligations do not arise until after the election; the information is not widely publicised; and large-scale political donations can be normalised with time as a result of disclosure.<sup>130</sup>

Tucker and Young believe that Australian members of parliament are not as susceptible to influence as those overseas, as donations are generally given to political parties rather than individuals.<sup>131</sup> However, Tham believes that the current system still fails to prevent corruption and undue influence for two reasons.<sup>132</sup> One is the lack of compliance with its requirements. The second is the separate disclosure thresholds for each branch of a party that allow the major parties to benefit from nine thresholds (one for each state and territory branch and one nationally). The existence of these thresholds is particularly relevant to the issue of whether disclosure thresholds should be increased (see section 6.2.8).

Williams and Mercurio suggest that limitations on individual contributions to political parties should be introduced. They argue that ‘the campaign expenditure disclosure scheme is not sufficient and should be broadened as in other nations to require disclosure of the transactions themselves, not simply of the total expenditure amount’, as ‘current disclosure laws on both individuals and parties have not proved sufficient to restricting the scope for undue influence and the potential for corruption’.<sup>133</sup>

Cass and Burrows conclude that:

The question of the influence of campaign contributions upon political outcomes is really unanswerable... To this extent then, the question of proof of influence is irrelevant. However, what is not irrelevant is the *perception* that the possibility that money can influence politics is enough to cause a different sort of problem for democracy, and that is the problem of a general disillusionment with the political process.<sup>134</sup>

### 6.2.3 *Does the current regime lack ‘teeth’?*

Williams and Mercurio in their submission to the Joint Standing Committee on Electoral Matters in April 2004 suggested that the current funding and disclosure scheme suffered from a number of problems including ‘its enforceability, scope and capacity to deal with systematic problems in the political and electoral process (such as the potential for corruption and undue influence)’.<sup>135</sup> The AEC, in its submission, argued that, at present, it

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<sup>130</sup> Orr, above n 103, p 65.

<sup>131</sup> Tucker and Young, above n 96, p 63.

<sup>132</sup> Tham J, ‘Political donation changes favour the rich and increase the risk of corruption’, *Democratic Audit of Australia*, May 2005, p 2.

<sup>133</sup> Williams and Mercurio, above n 100.

<sup>134</sup> Cass and Burrows, above n 85, p 480.

<sup>135</sup> Williams and Mercurio, above n 100.

can only deal with clearly deliberate failures in disclosure, thus opening up ‘a number of significant opportunities to effectively avoid full public disclosure, whether deliberately or inadvertently’.<sup>136</sup> A donation may be omitted from the original return with a correction requested some weeks after its public release. This may result in the donation never being extensively reported. Aspects of the scheme can also be avoided by breaking down a single donation into smaller parts so that each comes under the disclosure threshold. The difficulties of the current situation were stressed by the Electoral Commission: ‘Even if deliberate, the AEC could have a most difficult time proving that such action was not the result of a genuine mistake’.<sup>137</sup>

There are some concerns that individuals and political parties are able to flout various requirements of the funding and disclosure schemes with little consequence. Hindess has highlighted the laxity with which political finance is regulated in Australia, pointing to the lack of any recent prosecutions for breaches of disclosure obligations.<sup>138</sup> However, the AEC has emphasised the limitations that restrict its capacity to investigate breaches. For example, the AEC must have reasonable grounds to believe that an entity is an associated entity, not mere suspicion or assertion, before it can utilise the compulsory processes available to confirm its status.<sup>139</sup> An ‘associated entity’ is defined in section 287 as ‘an entity that: is controlled by one or more registered political parties; or operates wholly or to a significant extent for the benefit of one or more registered political parties’. A recent controversy involving associated entities was the Australians for Honest Politics Trust set up by Tony Abbott allegedly in relation to the fraudulent registration of One Nation. The AEC investigated the trust fund in 2003 before concluding that it was not an associated entity as defined by the *Commonwealth Electoral Act*. To avoid some of the difficulties faced in determining whether or not a body is an associated entity, Tham and Orr have recommended that its definition be made clearer by the insertion of more specific information. They propose that an associated entity would be an entity that:

is controlled (including a party’s right to appoint a majority of directors or trustees) by one or more registered political parties; or operates wholly or to a significant extent (this includes the receipt by a political party of more than half of the distributed funds, entitlements or benefits and/or services provided by the entity in a financial year) for the benefit (including the indirect or direct receipt by the party of favourable non-commercial terms) of one or more registered political parties.<sup>140</sup>

Some of the factors considered by the AEC when deciding whether or not to conduct an

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<sup>136</sup> Australian Electoral Commission, above n 9, p 18.

<sup>137</sup> Ibid, p 18.

<sup>138</sup> Hindess B, *Corruption and Democracy in Australia*, Australian National University, Canberra, 2004, p 18.

<sup>139</sup> Australian Electoral Commission, above n 2, p 33.

<sup>140</sup> Tham and Orr, above n 104, p 17. See also Australian Electoral Commission, *Funding and Disclosure Report – Election 1998*, Recommendation six.

investigation into various matters include:<sup>141</sup>

- Elapsed time, which may affect the prospect of any successful prosecution.
- Availability of supporting or corroborative information.
- Materiality of the issue raised.
- Prima facie merits of the matter.
- Relevance of the matter to the disclosure scheme established by the Act.
- Availability of resources.

As donations are not disclosed until after the election, the potential influence and effectiveness of the disclosure requirements may be diluted. Voters remain unaware of the extent of links between certain individuals/groups and candidates/parties at the time of the poll. Many returns are not received on time – 179 of the total of 371 donor and third party returns received by the AEC were received after the due date.<sup>142</sup> If one of the purposes of the federal funding and disclosure scheme is to ensure the transparency of the system, it is argued that voters need to be able to access such information throughout the election period. Tham and Orr have suggested that parties normally be required to submit quarterly donation reports, with weekly reports being made in the lead up to an election, as is the case in the UK.<sup>143</sup> They also recommended that large donations be automatically disclosed, so the public and opposition are immediately aware of the potential for influence. Senator Andrew Murray has similarly recommended that donations of more than \$10,000 to a political party be disclosed at least quarterly, with the Electoral Commission to publish it on their website rather than waiting for the receipt of an annual return.<sup>144</sup>

An associated problem is the lack of publicity that may accompany the public release of the details found in donor returns, particularly as it occurs after the event as such. This possibly indicates a lack of interest on the part of the public. Accordingly, the purpose of disclosure laws may be hindered, as people remain unaware of the size, number and source of donations to candidates and political parties. The NSW Greens have attempted to remedy this by setting up a website [www.democracy4sale.org](http://www.democracy4sale.org) to 'inform the public of the relationships between political parties and their donors'. One of their aims is to present the information that is contained on the AEC website in a more useful and user-friendly format. The Greens site provides details of the amount and source of corporate donations received by political parties. The site provides information on such categories as 'top 10 developer donations', 'top 10 hotel and club donations' and 'top 10 industries'.

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<sup>141</sup> Australian Electoral Commission, above n 2, p 35.

<sup>142</sup> Ibid, p 25.

<sup>143</sup> Tham and Orr, above n 104, p 18.

<sup>144</sup> Joint Standing Committee on Electoral Matters, above n 93, p 416.

There are some weaknesses inherent in the structure of the scheme. For example, the AEC has pointed to the lack of any obligation on parties and candidates to advise donors and third parties of disclosure obligations. Inspection of the submissions made by the AEC to the various inquiries conducted by the Joint Standing Committee on Electoral Matters over the years, reveals its numerous suggestions for change. Hindess believes that many of the Commission's recommendations are simply ignored 'for fear that they would restrict fund-raising'.<sup>145</sup>

#### **6.2.4 What are some of the issues associated with corporate donations?**

The difficulties raised by corporate donations are well recognised. 23 democracies have responded to the complications of corporate donations by imposing a ban on them.<sup>146</sup> Former NSW Liberal Minister, Michael Yabsley, reportedly stated that all donations from trade unions and corporations should be banned as 'real or perceived, large political donations and their linkage with public-policy outcomes create a certain grubbiness'.<sup>147</sup> He believes that donations should be restricted to individuals and limited to \$10,000 per annum. Senator Bob Brown of the Australian Greens has made a similar statement.<sup>148</sup> Whilst the Greens currently accept corporate and union donations, such donations are subject to the scrutiny of a national committee who determines whether the policies of the company or union are in keeping with the principles of the Greens Party.<sup>149</sup>

Another idea that has been touted is the introduction of a condition that corporations obtain shareholder approval prior to making a donation to a political party, as is required in the UK. Ramsay et al believe that shareholder approval of the donation policies of public companies should be mandatory as: the donation does not come from the directors' own funds but rather the company; the decision is materially different from other business decisions; and it is likely that some management self-interest may accompany the donation and shareholders of large companies have few options in relation to checks and balances.<sup>150</sup> The Democrats have also argued for the disclosure of donations in annual reports.<sup>151</sup>

#### **6.2.5 What are some of the issues associated with developer donations?**

Various concerns about the influence of developers on planning decisions have led to calls

<sup>145</sup> Hindess, above n 138, p 18.

<sup>146</sup> Ibid, p 18; Sawer, above n 86.

<sup>147</sup> 'Coalition to lure donors with secrecy and bigger refund', *Australian Financial Review*, 20/5/05, p 1.

<sup>148</sup> Brown B, 'End corporate donations say Greens', *Media Release*, 23/9/04.

<sup>149</sup> Thompson N and Rhiannon L, 'Political donations – a corruption of the political process?', *Australian Prospect*, vol 2, Spring 2004, p 9.

<sup>150</sup> Ramsay et al, above n 121, p 205.

<sup>151</sup> Australian Democrats, 'Political donations', [www.democrats.org.au](http://www.democrats.org.au) Accessed 14/9/05.

in recent years for developers to be banned from making donations to political parties and candidates. It has been reported that the former Prime Minister Paul Keating supports such a prohibition.<sup>152</sup>

Ms Lee Rhiannon MLC of the NSW Greens introduced the Developer Donations (Anti-Corruption) Bill into the Legislative Council of NSW in 2003. The object of the bill was to amend the *Election Funding Act 1981* to:

- (a) prohibit major developers and persons found guilty of offences involving bribery or corruption from making political contributions;
- (b) enhance the current provisions of that Act relating to the disclosure of political contributions by establishing ongoing requirements for parties, candidates, groups of candidates, independent members of Parliament and persons acting on behalf of them to receive and lodge donors' forms when accepting certain political contributions; and
- (c) enhance the current provisions relating to the disclosure of political contributions by candidates for election which operate in connection with certain periods that end after the return of the writs for an election by requiring certain disclosures to be made and published before the polling day for an election.

The bill proposed to make it an offence to accept political contributions of more than \$1000 a year from any person or organisation unless accompanied by a donors' form. In her second reading speech, Ms Rhiannon claimed that over the previous four years the NSW branch of the ALP had received donations from at least 80 companies involved in the property industry.<sup>153</sup> She claimed that prior to the 2003 election, five of the top 10 donors to the ALP were developers as were four of the top 10 donors to the Liberal Party.<sup>154</sup> Developers were the only industry apart from hotels and clubs to donate more than \$1 million per annum to political parties.

The Legislation Review Committee identified some concerns with the bill, namely that preventing major developers from making political donations indirectly restricts freedom of speech. Freedom of communication about government or political matters is impeded as: less funding limits political communications; and the donation of money to political parties could be seen as a non-verbal act that is political communication by the persons or organisations seeking to make the political contribution.<sup>155</sup>

The Developer Donations (Anti-Corruption) Bill failed to pass with nine votes in favour

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<sup>152</sup> 'Developers call for ban on donations', *Sydney Morning Herald*, 19/8/05, p 3.

<sup>153</sup> Rhiannon L, *NSWPD*, 13/11/03, p 4919.

<sup>154</sup> Rhiannon L, *NSWPD*, 11/3/04, p 7121.

<sup>155</sup> NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 7, 1 December 2003, p 52.

and 22 against.<sup>156</sup>

### **6.2.6 What are some of the more controversial fundraising practices?**

Some consider the ethics of a number of the fundraising practices of political parties to be questionable. Examples of controversies that have arisen in this area include the ALP's use of fundraising firm Markson Sparks and the relationship between the Greenfields Foundation Trust and the Liberal Party. Van Onselen and Errington have criticised the use of fundraising dinners that are promoted as purchasing time with a minister.<sup>157</sup> As this time may be seen as personal voluntary time, disclosure can be avoided. Van Onselen and Errington argue that 'the use of an office of the crown to raise funds for campaigning is a disturbing practice that should be limited if not outlawed altogether'.<sup>158</sup> They also condemn fundraising practices that involve the auctioning of time with Ministers, such as the chance to accompany them on their daily walks or jogs. Van Onselen and Errington conclude:

The purchasing of an auction item, including time with a minister, is a grey area that currently does not require disclosure. Is it legal? Technically. Is it ethical and proper? Absolutely not.<sup>159</sup>

An example of the opportunities available to those able to afford it is the Millennium Forum. The Forum was launched by the Liberal Party in 1999 and is promoted as 'a premier political and current affairs forum' that 'provides companies with significant sponsorship opportunities attracting a range of entitlements including attendance by company representatives at Forum events, as well as securing valuable exposure to corporate and political leaders through company recognition of event-related material and at venues'.<sup>160</sup> The Forum is seen as providing opportunities for business and political networking.

### **6.2.7 Should donations be capped?**

In contrast to a number of other western democracies, there are currently no limits on the amount that an individual or organisation can donate to a candidate or political party. One of the potential repercussions is the possible influence of a large donor on political decision makers. It has often been suggested that problems may be avoided by limiting the amount that can be donated by an individual or organisation to a candidate or political party. An

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<sup>156</sup> The Greens, Christian Democrats, Democrats, Unity, the Hon Peter Breen MLC and the Hon David Oldfield MLC voted in support of the bill.

<sup>157</sup> Van Onselen P and Errington W, 'Political donations and party fundraising: buying time with a minister?', *AQ: Journal of Contemporary Analysis*, 76(6) November-December 2004, pp 4-6. For an example of such events see: 'PM charges \$11,000 for dinner', *Australian Financial Review*, 23/7/04, p 1.

<sup>158</sup> *Ibid*, p 4.

<sup>159</sup> *Ibid*, p 6.

<sup>160</sup> Liberal Party of Australia, NSW Division, 'Millennium Forum', [www.nsw.liberal.org.au](http://www.nsw.liberal.org.au)



offshoot of this may be the curbing of campaign expenditure. Tham is in favour of a ceiling or ban on political donations as they pave ‘the way to ensuring that the regulatory regimes on political donations live up to their promises of preventing graft and policy corruption and ensuring transparency in the political process’.<sup>161</sup> However, support for the introduction of caps is far from widespread. For example, the majority of the Joint Standing Committee on Electoral Matters recently expressed its doubt that caps on donations were a feasible option.<sup>162</sup>

One of the problems associated with capping either the amount that can be donated to a political party or the amount that can be donated before disclosure is required is that it can drive donations further underground. Cass and Burrows believe there is anecdotal evidence that parties exploit various methods to disguise the source of donations and their receipt.<sup>163</sup> For example, donors may split their donations so that each comes under the disclosure threshold. The capping of donations can result in further exploitation of the various loopholes that exist.

Orr has suggested that one remedy may be the introduction of a prohibition on the acceptance of donations from international sources, other than Australian citizens living overseas.<sup>164</sup> The AEC believes that foreign donations are ‘an obvious and easily exploitable vehicle for hiding the identity of donors through arrangements that narrowly observe the letter of the Australian law with a view to avoiding the intention of full public disclosure’.<sup>165</sup> The AEC has suggested imposing a blanket prohibition on funds from an overseas entity, an option it sees as having a negligible impact on donation receipts. It would reduce the potential for foreign donations to be exploited. Alternatively, the AEC notes that the retention of overseas donations could be made conditional upon full disclosure.

### ***6.2.8 Should there be an increase in the disclosure threshold?***

At the federal level, political parties are currently required to disclose the identity of those who donate \$1500 or more to the party. In 2003-04, 47% of the donations revealed in donor returns were less than \$1500, constituting 4% of the \$18.72 million reported in donor returns.<sup>166</sup> Therefore, whilst smaller donations constitute almost half of all donations, they represent only a small proportion in terms of the total amount received by political parties.

There have been suggestions that the disclosure limit should be increased from \$1500 to either \$5000 or \$10,000. If the disclosure threshold was increased to \$5000, 72% of

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<sup>161</sup> Tham, above n 84, p 76.

<sup>162</sup> Joint Standing Committee on Electoral Matters, above n 93, p 336.

<sup>163</sup> Cass and Burrows, above n 85, p 481.

<sup>164</sup> Orr, above n 103, p 66.

<sup>165</sup> Australian Electoral Commission, above n 9, p 25.

<sup>166</sup> Australian Electoral Commission, above n 2, p 21.

donations reported in the 2003-04 donor returns would not need to be disclosed, equivalent to 15% of the total amount reported in donor returns.<sup>167</sup> It has been reported that Special Minister of State, Senator Abetz will present to Cabinet a number of suggested changes to the *Commonwealth Electoral Act*, including the proposal that the disclosure threshold be increased to \$10,000.<sup>168</sup> Senator Abetz has criticised the current threshold, arguing that it has been ‘eroded by inflation, and was much too low when originally set’ and that ‘it adds nothing to Australia’s democracy other than unnecessary red tape’.<sup>169</sup> Senator Abetz has argued that an increase in the threshold would reduce the administrative burden as well as protect the right to privacy. The Liberal Party in a submission to the Joint Standing Committee on Electoral Matters argued that the threshold should be raised to \$10,000, as it did not believe that donations under this amount could raise any question of influence.<sup>170</sup>

The majority of the Joint Standing Committee on Electoral Matters in its report on the 2004 federal election stressed their belief that the current disclosure thresholds are too low and need to be increased.<sup>171</sup> It is their belief that a higher threshold would still allow for transparency. The Committee therefore recommended that:

the disclosure threshold for political donations to candidates, political parties and associated entities be raised to amounts over \$10,000 for donors, candidates, political parties, and associated entities.<sup>172</sup>

It was also recommended that the threshold should be indexed to the Consumer Price Index. The Committee indicated that a \$10,000 threshold is comparable internationally and argued that raising the threshold levels would encourage more individuals and small businesses to make donations due to the assurance of privacy and the removal of the administrative burden of completing a disclosure.<sup>173</sup> This they felt would be of benefit to the democratic process.

However, others are firmly against any increase in the disclosure threshold. Opposition members of the Joint Standing Committee on Electoral Matters released a minority report in which they detailed their concern with the ‘extreme’ measure of increasing the donation disclosure threshold to \$10,000. They argued that the ‘object of these recommendations is to make it easier for corporate donors to give money to the Liberal Party without having to

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<sup>167</sup> Ibid, p 21.

<sup>168</sup> ‘Howard rejects calls to end compulsory voting’, *Sydney Morning Herald*, 5/10/05, p 9.

<sup>169</sup> Abetz E, *Electoral Reform: Making Our Democracy Fairer For All*, Address to the Sydney Institute, 4/10/05. A copy of the speech is available from [www.dofa.gov.au](http://www.dofa.gov.au)

<sup>170</sup> Joint Standing Committee on Electoral Matters, above n 93, p 329.

<sup>171</sup> Ibid, p 330.

<sup>172</sup> Ibid, recommendation 49.

<sup>173</sup> Ibid, pp 331-332.

disclose it'.<sup>174</sup>

The Democrats also oppose the recommendation that the donation disclosure threshold be increased to \$10,000. Senator Andrew Murray of the Australian Democrats, in his supplementary remarks to the report of the Joint Committee, expressed his hesitation with some aspects of the final report. He outlined the recommendations of the Democrats as they relate to funding and disclosure:<sup>175</sup>

- Electoral and campaign funding to be subject to a financial cap.
- Individuals and entities cannot donate more than \$100,000 a year.
- An end to the loophole that enables nine separate cheques to be written to the various divisions (federal, state and territory) of the same political party for an amount just below the disclosure level. If the disclosure threshold was increased to \$10,000, almost \$90,000 could be donated anonymously to a party by contributing an amount just under the threshold to each of the eight state and territory branches and one to the national office.

The Australian Democrats believe that donations of \$1500 or more should eventually be prohibited. They have argued elsewhere that:<sup>176</sup>

- Donations of more than \$10,000 to a party should be immediately disclosed to the Electoral Commission and made public.
- There should be a specific prohibition of donations with 'strings attached'.

### **6.2.9 *Should the tax deductibility of donations increase?***

Political donations to registered parties are currently tax deductible up to \$100. This does not apply to companies. There have been some calls of late to significantly increase the tax deductibility threshold. The Joint Standing Committee on Electoral Matters recently expressed its view that the amount for which a tax deduction can be claimed should be increased from \$100 to \$2000, whether from an individual or corporation, and be adjusted for inflation.<sup>177</sup> It was thought that one of the consequences would be more people participating in the democratic process. The Committee also recommended that donations to an independent candidate be tax deductible.<sup>178</sup> Senator Eric Abetz, the Special Minister

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<sup>174</sup> Ibid, p 377.

<sup>175</sup> Ibid, p 385.

<sup>176</sup> Australian Democrats, 'Political donations', [www.democrats.org.au](http://www.democrats.org.au) Accessed 14/9/05.

<sup>177</sup> Joint Standing Committee on Electoral Matters, above n 93, recommendation 51.

<sup>178</sup> Ibid, recommendation 52.

of State, has proposed that the tax deductible amount be raised from \$100 to \$5000.<sup>179</sup> He believes that the current structure of tax deductibility favours members of trade unions, and donors to such groups as the Wilderness Groups, which he sees as quasi-political.<sup>180</sup> He argues that these groups are able to run political campaigns and offer greater tax deductions to their members.

In contrast to the Liberal approach, the ALP National Platform states that Labor will abolish the tax deductibility of political donations. Tham is also critical of the tax deductibility of donations, seeing them as favouring the wealthy – they generally have a greater disposable income, and a larger amount is effectively subsidised as they are subject to higher income tax rates.<sup>181</sup> Therefore it is his view that increasing the tax deductible amount ‘would only serve to entrench a blatantly unfair subsidy in the tax system’.<sup>182</sup> Ramsay, Stapledon and Vernon fail to see any need to increase the deduction limits, as ‘the absence of a significant deductibility regime appears not to have been an impediment to corporate political philanthropy’.<sup>183</sup>

### 6.3 Expenditure

Campaign expenditure has attracted media interest at various points. For example, the amount spent by Malcolm Turnbull in the 2004 campaign for the federal seat of Wentworth sparked discussion following the public release of election returns in late March 2005.<sup>184</sup> Campaign expenditure is virtually unlimited in Australia. Tucker and Young believe that a fundamental problem with the current system is the lack of a limit on the amount that can be spent on broadcast advertising and the absence of an incentive to cap spending.<sup>185</sup> Sawyer contrasts the position in Australia, where there is no restriction on the amount of electronic advertising purchased, with the United Kingdom, where paid electronic broadcasting is prohibited as it seen as providing an advantage to wealthier parties or candidates.<sup>186</sup>

Caps on what can be spent on campaigns are not unknown in Australian history, with upper limits featuring in the *Commonwealth Electoral Act* between 1902 and 1980.<sup>187</sup> However,

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<sup>179</sup> ‘Coalition to lure donors with secrecy and bigger refund’, *Australian Financial Review*, 20/5/05, p 1.

<sup>180</sup> Ibid.

<sup>181</sup> Tham, above n 132, p 5.

<sup>182</sup> Ibid.

<sup>183</sup> Ramsay et al, above n 121, p 183.

<sup>184</sup> Australian Electoral Commission, above n 2, p 15; ‘The debate: should campaign spending be capped after Malcolm Turnbull’s \$600,000 Wentworth win?’, *Daily Telegraph*, 31/3/\*05, p 24.

<sup>185</sup> Tucker and Young, above n 96, p 64.

<sup>186</sup> Sawyer, above n 86.

<sup>187</sup> Jupp J and Sawyer M, ‘Political parties, partisanship and electoral governance’, in Sawyer M

Jupp and Sawyer stress that this kind of regulation was ‘widely disregarded and appeared virtually unenforceable’.<sup>188</sup> The expenditure limits that applied in Tasmania were at the core of a number of controversies that arose in Tasmania in the late 1970s and early 1980s when the Democrats challenged the expenditure of the major parties in the 1979 state election and forced a re-election in one of the seats. The Supreme Court of Tasmania in 1982 forced most parties to cancel television advertising so as to comply with the limits. One of the repercussions of the judgment was a decision to remove the upper limit on campaign expenditure for the House of Assembly in Tasmania. The federal expenditure limits were also repealed in 1980 to avoid a repeat of the events in Tasmania, and were closely followed by the introduction of a public funding and disclosure regime at the federal level. The Tasmanian Upper House is the only jurisdiction in Australia that is still subject to expenditure limits (they have not applied in Victoria since 2002).

The Joint Standing Committee on Electoral Matters in its 1989 report, *Who Pays the Piper Calls the Tune*, examined the possibility of television and radio stations providing free time for political broadcasts.<sup>189</sup> It noted that the provision of free broadcasting was a common feature of many western democracies, and that up to one minute per hour could be provided during election periods without any loss of revenue to the broadcasters. Nor would an increase in public funding be required. The Committee saw the provision of free time as a means of allowing parties to advertise their policies without relying on large corporate donations. It accordingly recommended that: ‘The *Broadcasting Act 1942* be amended so as to provide for a system of allocating free time for political broadcasting on television and radio for elections in Australia’.<sup>190</sup>

One of the measures subsequently introduced to curb political expenditure was a prohibition on broadcast advertising. The *Political Broadcasts and Political Disclosures Act 1991* (Cth) inserted Part IIID into the *Broadcasting Act 1942* (Cth), which prohibited the broadcasting of political advertisements during an election period. However, broadcasters were also required to make time available for election broadcasts at no charge to the political party, person or group. The amount of free time was to be allocated in accordance with the proportion of formal first preference votes received in the previous election. Part IIID came before the High Court in *Australian Capital Television v Commonwealth* (1992) 177 CLR 106. The majority of the court (Mason CJ, Deane, Toohey and Gaudron JJ) held that Part IIID was unconstitutional as it infringed the right to freedom of communication on matters relevant to political discussion implied in the system of representative government as provided by the Constitution.

Despite the prohibition of a blanket ban on broadcast advertising, Orr believes there is nothing to inhibit the introduction of reasonable spending limits for candidates, parties and

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(ed) *Elections Full Free and Fair*, Federation Press, Sydney, 2001, p 226.

<sup>188</sup> Ibid.

<sup>189</sup> Parliament of Australia, Joint Standing Committee on Electoral Matters, *Who Pays the Piper Calls the Tune*, 1989, p 93ff.

<sup>190</sup> Ibid, recommendation 8.

lobby groups.<sup>191</sup> Tham and Orr have argued for the reintroduction of campaign expenditure limits due to what they see as its role in the avoidance of corruption and ensuring equality between participants.<sup>192</sup> However, the amount at which the limit should be set is debateable. Independent MP Peter Andren believes that campaign spending should be capped at \$50,000 for each candidate, as:<sup>193</sup>

it can ensure the greatest possible transparency and achieve the most level campaign field for all aspiring representatives. If you cap the spending, you automatically cap the need for excessive donations.

He concludes:

As things stand, election donations and spending are now out of control and favour the rich and financially well-connected over those with far less financial resources but arguably far more to offer our parliaments.

Cass and Burrows have also explored some of the issues associated with the introduction of spending caps. They point to the historical precedent of expenditure limits:

the (re)introduction of expenditure limits as a form of campaign finance regulation is not a new development in Australian politics; that they were a feature of the Australian constitutional landscape for 80 years; and accordingly that arguments based on the novelty, or incompatibility of such regulation with the practice of representative democracy, need to be treated with caution.<sup>194</sup>

They believe that such restrictions are not affected by constitutional developments since their repeal.<sup>195</sup> It is their opinion that for expenditure limits to be considered unconstitutional, it would need to be demonstrated that unlimited election expenditure is a necessary part of a representative democracy.<sup>196</sup>

## 6.4 Miscellaneous

### 6.4.1 *Ways independent candidates are disadvantaged*

Whilst political parties tend to dominate the political landscape in Australia, there are more non-party Independent members of parliament in Australia than in other relevant Western

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<sup>191</sup> Orr, above n 103, p 71.

<sup>192</sup> Tham and Orr, above n 104, p 36.

<sup>193</sup> Andren P, 'Increased political donations – recipe for corruption', *Democratic Audit of Australia*, June 2005.

<sup>194</sup> Cass and Burrows, above n 85, p 484.

<sup>195</sup> *Ibid*, p 478.

<sup>196</sup> *Ibid*, p 488.

parliaments.<sup>197</sup> Curtin believes that Independent candidates and members of parliament are disadvantaged in the following ways:<sup>198</sup>

- Donations made to party candidates are tax deductible whereas those to Independents are not.
- The threshold for anonymous donations to Independents is generally much lower than it is for parties. For example, in NSW, candidates are required to declare all donations over \$200 whereas the amount is \$1500 for parties.
- Independents in NSW do not have access to the Political Education Fund. \$12.5 million was allocated to the ALP, and the Liberal and National Parties between 1994 and 2003.

Nonetheless, Curtin acknowledges that Independents are not completely lacking in benefits. For example, Independent MPs in NSW are given an extra staff member to act as a research officer.

#### ***6.4.2 Influence of lobby groups can vary according to wealth***

Dr Carmen Lawrence MP has highlighted the disparity between the influence of various individuals and groups in the community due to the difference in the resources they are able to devote to the task of lobbying the government and other politicians. She draws a contrast with Canada where lobbying is subject to a code of conduct, complaints procedure and registration requirements:

In Australia, by comparison, we're in the dark. We don't know who is being paid to lobby the government, on which issues, and what departments and agencies they are contacting. Unless the amount is sufficient to trigger disclosure by an MP, we don't know how much is being spent to inform, persuade and cajole our decision makers.<sup>199</sup>

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<sup>197</sup> Curtin J, 'Getting elected as an Independent: electoral laws and party favouritism', *Democratic Audit of Australia*, May 2005, p 1.

<sup>198</sup> *Ibid*, pp 1-4.

<sup>199</sup> Lawrence C, 'Behind the MP, the hidden persuaders', *Sydney Morning Herald*, 4/11/04, p 13.

## 7 CONCLUSION

The intricacies of the various funding and disclosure schemes continue to raise important issues that are crucial to a democracy and its associated institutions. However, there is still a lack of consensus as to what aspects of the regime are essential for preventing corruption and ensuring that various alternatives are presented to the electorate at the time of the polls. The effectiveness of some aspects of the schemes is also a matter of debate. Orr has concluded, ‘Does disclosure contribute to political equality? It may, but probably no more than being whipped with a feather amounts to punishment’.<sup>200</sup>

Different approaches have been adopted within Australia. South Australia does not provide funding, nor are parties and candidates subject to state disclosure requirements. In contrast, funding is provided to parties, groups and candidates in NSW that receive at least 4% of the first preference vote or are elected to parliament. Disclosure of donations and expenditure is also required in NSW. Tasmania remains the only jurisdiction to limit expenditure – but it only applies to the upper house. Limits on particular types of donations apply in Victoria. Major changes have recently been made to the schemes in Victoria and the Northern Territory, with some smaller alterations implemented in other jurisdictions.

The regulation of election finance in Canada, the United Kingdom, and United States has recently been reformed, with initial observations on the impact starting to emerge. In some aspects, the Australian schemes are seen to be trailing these international developments. The AEC has made a number of recommendations for reform on various occasions. However, only some have been implemented. In many ways, the current scheme favours a major party dominated system. Accordingly, there may be little incentive to alter the status quo. With the Coalition Government now in control of both houses of the federal parliament, it will be interesting to see whether alterations to the current regime occur.

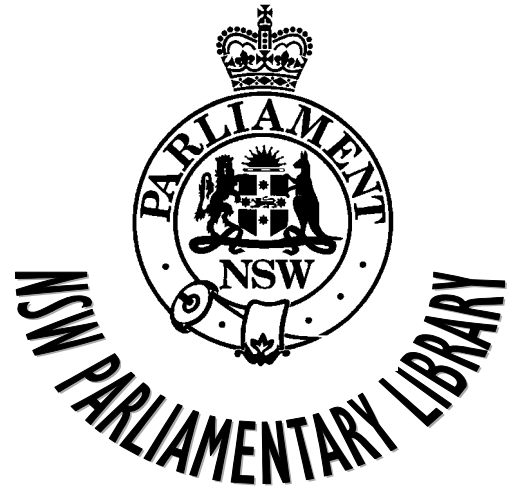
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<sup>200</sup>

Orr, above n 103, p 63.



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