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**Election Finance Law: Recent
Developments and Proposals for
Reform**

by

Gareth Griffith and Talina Drabsch

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Election Finance Law: Recent Developments and Proposals for Reform

by

Gareth Griffith and Talina Drabsch

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EXECUTIVE SUMMARY

Since 2001 the NSW Parliamentary Library has published two papers on election finance law- *Election Finance Law: Public Funding, Donations and Expenditure* by Rachel Callinan, Briefing Paper No 15/2001 and *Election Finance Law: An Update* by Talina Drabsch, Briefing Paper No 13/2005. This current publication seeks only to cover those developments and proposals for reform which have emerged since the earlier papers were released. For reference, however, a summary of the position in NSW is included. Comparative tables are also set out under the following headings:

- models of public funding for election campaigns;
- disclosure donation regimes;
- donor prohibitions;
- limits on campaign expenditure; and
- third party campaign expenditure prohibitions.

The debate in NSW: Issues relating to election finance were prominent in the lead up to the NSW general election in March 2007. Several questions were asked about the source of funding and its transparency. [2.1] The case for reform has been made on several occasions. The Greens have campaigned on this issue for many years. In the lead up to the 2007 general election they ‘called for all major parties to disclose the names of donors and amounts raised before the election, instead of waiting for Electoral Commission returns next year’. Bans on donations from developers are also called for by the Greens. In 2003 the Greens introduced the Developer Donations (Anti Corruption) Bill for this purpose. [2.2]

Following the 2007 NSW general election, two proposals for inquiries into election funding have been proposed, one by the Leader of the Opposition in the Legislative Assembly, the other by the Greens MLC Lee Rhiannon. In addition, the Premier has written to the Prime Minister, calling for ‘urgent national reform’. [2.3]

Election finance law 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. [3.1]

The scheme under the *Election Funding Act 1981* for the disclosure of electoral expenditure incurred and campaign donations received by political parties and others applies to local government elections. The major difference is that there is no public funding of registered political parties or for the electoral expenses of candidates at the local government level. [3.2]

Western Australia introduces public funding: In Western Australia the *Electoral Reform (Electoral Funding) Act 2006* came into effect on 27 October 2006. It introduces amendments into Part VI of the *Electoral Act 1907*, providing for electoral funding of

political parties and candidates. [4.1]

The Commonwealth raises the threshold for donations: At the Commonwealth level in Australia the Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006 covers a broad number of areas. In relation to election finance, the most notable reforms concern amending the Commonwealth Electoral Act (s 305A) to increase the declarable limit for disclosure of all political donations from \$1,500 to amounts 'above \$10,000'. This threshold is to be indexed to the consumer price index (CPI) (s 305A). [4.2]

Canada imposes further restrictions and prohibitions on donations: In Canada reforms were made to the donor prohibitions in December 2006, effectively introducing a limit of \$1,000 (down from \$5,000 previously) on the amount an individual may contribute to a party or candidate in a given year. Further, previously corporations and trade unions and associations could contribute to individual candidates or electoral district associations (but not to national political party organisations or candidates in the leadership contest for a party). Such contributions were subject to an annual limit of \$1,000. Since December 2006, however, contributions of this kind have been banned altogether. These reforms were introduced under Part One of the *Federal Accountability Act*, which was assented to on 12 December 2006, and which relevantly amends the *Canada Elections Act*. [4.3]

New Zealand: In New Zealand a uniform limit or cap on spending exists for individual candidates and political parties. For individual candidates, the cap is \$20,000. For political parties, it is \$1 million plus \$20,000 for each electorate contested by the party. Thus, a party contesting all 69 electorates may spend up to \$2.38 million on its 'election expenses'. While this system may be seen as something of a model for reform in Australia, it is the case that New Zealand's 2005 general election campaign was not without controversy. [5.1]

United Kingdom: Election funding has also been the subject of controversy in the UK, where two major inquiries have reported in recent months. Published in December 2006 was the report of the Select Committee on Constitutional Affairs, *Party Funding: first report of Session 2006-07*. The Phillips report, *Strengthening Democracy: Fair and Sustainable Funding of Political Parties*, was published on 15 March 2007. The three points of the analytical triangle discussed by Phillips were: (a) the declining membership of major political parties; (b) the long-term structural instability in the financing of political parties in the UK; and (c) the increasing pressure on those same parties to spend more on election campaigns, a demand that results in larger donations, which are themselves the cause of public mistrust. The Phillips report also advocated an increase in the amount of public funding for political parties. It recommended this should be by:

- a scheme where the amount of funding received by a political party is directly linked to the votes received. Phillips proposed eligible parties should receive 50p each year for every vote cast for them in the most recent general election, and 25p for every vote cast for them in the most recent elections for the devolved administrations in Scotland and Wales and for the European Parliament.
- a matched funding scheme where eligible parties would be invited to establish a registered subscriber scheme, primarily using the Internet, through which any voter could subscribe a minimum of £5 to support the party. Each subscription would be matched with £5 of public funding. [5.2]

1. INTRODUCTION

Since 2001 the NSW Parliamentary Library has published two papers on election finance law- *Election Finance Law: Public Funding, Donations and Expenditure* by Rachel Callinan, Briefing Paper No 15/2001 and *Election Finance Law: An Update* by Talina Drabsch, Briefing Paper No 13/2005. This current publication does not review the entire field of election finance law. Nor does it present a comprehensive account of the ‘ongoing debates’ as discussed in the 2005 Briefing Paper. It seeks only to cover those developments and proposals for reform which have emerged since the earlier papers were released. For reference, however, a summary of the position in NSW is included. Comparative tables are also set out under the following headings:

- models of public funding for election campaigns;
- disclosure donation regimes;
- donor prohibitions;
- limits on campaign expenditure; and
- third party campaign expenditure prohibitions.

2. NEW SOUTH WALES – DEBATE AND INQUIRY PROPOSALS

2.1 Issues in the debate

Issues relating to election finance were prominent in the lead up to the NSW general election in March 2007. Several questions were asked about the source of funding and its transparency. For example, there were claims that Labor was funding or offering to lend financial support to Independent candidates in certain key seats.¹ Comment was also made on the level of political donations received by either Labor and/or the Liberal Party from certain quarters, notably from property developers and the hotel industry.² Injecting a national dimension into the debate, the difficulties involved generally in tracking precisely who is making political donations, at the State or federal level, was commented on, when, for instance, companies can donate via subsidiaries of a corporate group and where there is no requirement for donors to indicate their field of corporate activity. It was said that companies

can donate to any of the state or federal party organisations or to any of the special fund-raising bodies, such as the Liberal Party’s Millennium Forum or Labor’s Progressive Business Association. The disclosure threshold is \$10,000 [under the Commonwealth Electoral Act]. It applies to each state body and each fund-raising vehicle. This means a company could give a total of, say \$99,000 to one political party but avoid disclosing it by splitting it into \$9,900 blocks and directing it via 10

¹ J Pearlman, ‘ALP banks on state of independents’. *SMH*, 10 March 2007, p 1.

² S Scott, ‘Parties dine out on connections’, *The Australian Financial Review*, 16 February 2007, p 29; A Mitchell, ‘Pokie scheme to earn Labor \$200m jackpot’, *The Sun-Herald*, 4 March 2007, p 5.

party organisations.³

An issue specific to the NSW general election was the sheer size of Labor's election campaign budget compared to that of the Coalition. With the Coalition struggling in the polls and with the prospect of a federal election looming, it was reported that the NSW Liberal Party was 'struggling to raise funds'. Labor was said to be 'offering intimate dinners with Mr Iemma in exclusive restaurants and private homes for \$10,000 a head'. Conversely, the going rate for dinners with Mr Debnam was said to 'a mere couple of hundred dollars'.⁴ One concern was that a lopsided election campaign would result, in which most, if not all, the financial advantages were on one side of the political divide.

After the election, comments continued in the same vein, with the *Sunday Telegraph* reporting that the 'total cost of the ALP campaign is estimated to have been around \$15 million with the funds accrued through donations and lavish \$10,000-a-table fundraisers'. It was reported that 'Sources within the media-monitoring industry estimate the ALP to have spent around \$5.7 million buying advertising space compared with \$1.7 million by the Coalition'.⁵ Writing in the *Bulletin* Laurie Oakes said:

The Labor Party massively out spent the Liberals in the NSW election. The Liberals estimate that, on some nights, Labor's TV advertising spend was up to a million dollars. It is claimed Labor was able to invest around \$300,000 on key marginal seat campaigns. The Liberals were so strapped for cash they hardly put a commercial to air until the last couple of weeks, and even then they were still blitzed.⁶

Likewise, an editorial in the *Sydney Morning Herald* commented that Labor

found itself with a record \$15 million in its war chest for the March election, which paid for much of a massive advertising campaign to re-elect [Mr Iemma]. The NSW Opposition, meanwhile, had a paltry \$4 million to spend.

Reflecting on the implications for representative democracy, the editorial continued:

³ E Sexton, 'Law has holes you could drive a truck through', *SMH*, 3 November 2006, p 2. Note that under s. 314AB of the Commonwealth Electoral Act, all registered political parties, as well their State and Territory branches, must file an annual return to the Australian Electoral Commission within 16 weeks of the end of each financial year. This means that a political party's annual receipts are not contained in a single return; rather, they are divided across the separate returns for the national secretariat and the State/Territory branches: S Miskin and G Baker, *Political finance disclosure under current and proposed thresholds*, Commonwealth Parliamentary Library Research Note No 27/2005-06 - <http://www.aph.gov.au/library/pubs/rn/2005-06/06rn27.htm>

⁴ S Scott, 'Debnam lacks pull in corporate world', *The Australian Financial Review*, 6 March 2007, p 11.

⁵ L Silmalis, 'Call to cap political ad campaigns', *The Sunday Telegraph*, 6 May 2007, p 22.

⁶ L Oakes, 'Unfair dismissal', *The Bulletin*, 3 April 2007, p 16.

Yet political donations raise suspicions of favouritism and undermine faith in the fairness of government; they warrant serious investigation and reform. Businesses, individuals and interest groups do not throw around money for the good of democracy. Property developers, clubs, hotels and trade unions are among Australia's most generous political donors. Just what advantage they may be buying is impossible for the public to know. Did a tender win because it was the best on the table, or because it had friends in high places?

As to the way forward, the same editorial commented:

No government genuinely interested in transparency will have any trouble establishing a system in which all donations can be tracked. Loopholes – such as splitting big sums into invisible smaller payments – can readily be closed if there is a will to close them.⁷

Perceived problems do not exist exclusively at the level of parliamentary elections therefore. In the context political donations by developers at the local government level, it is argued that 'these donations are undermining trust in democracy'. According to Michael Duffy:

Having said that, donations rarely buy a developer a decision, they just buy him consideration when a decision is being made. They are, if you like, an unofficial tax imposed by the NSW political class on the development industry.⁸

Catherine Munro writes,

Developers and other large companies funded the election campaign of seven independent councillors in the Shoalhaven to the tune of \$78,000 at the last local government elections...12 candidates standing as the Shoalhaven Independents Group received a total of \$91,017.60. Seven of the team won office.⁹

2.2 Arguments for reform

The case for reform has been made on several occasions. The Greens have campaigned on this issue for many years. In the lead up to the 2007 general election they 'called for all major parties to disclose the names of donors and amounts raised before the election, instead of waiting for Electoral Commission returns next year'.¹⁰ Bans on donations from

⁷ 'Show us the money', *SMH*, 10 May 2007, p 10.

⁸ M Duffy, 'Whatever a donation gets, it isn't trust from the electorate', *SMH*, 19 May 2007, p 35.

⁹ C Munro, 'Company donations fundamental independents' campaign', *SMH*, 23 May 2007, p 7.

¹⁰ S Scott, 'Parties dine out on connections', *The Australian Financial Review*, 16 February 2007, p 29.

developers are also called for by the Greens. In 2003 the Greens introduced the Developer Donations (Anti Corruption) Bill for this purpose.¹¹ The Bill only found support from the cross benches and on 11 March 2004 it was defeated at the Second Reading stage, 22 votes to 9.¹² Continuing this campaign, in a Media Release of 1 February 2007 the Greens claimed ‘There is an unhealthy relationship between the Labor and Liberal parties and the big developers’. The same Media Release included the following table showing the top twelve donor developers in 2005-6 gave \$1,019,050.¹³

Company	Labor NSW	Labor Federal	Liberal NSW	Liberal Federal
Westfield Capital Corporation	\$75,000	\$104,000	\$4,500	\$160,000
Johnson Property Corporation	\$74,250		\$37,000	
E. G. Property Group	\$2,500			
Terrace Tower Group	\$2,500		\$24,000	
Australand	\$42,250			\$25,000
Mirvac	\$83,000			
Meriton	\$50,000		\$60,000	
Stockland	\$19,250		\$11,000	
Walker Corporation	\$28,500		\$10,000	\$100,000
Leighton Holdings	\$33,000			
Austcorp	\$40,300			
Theiss	\$33,000			
Total	\$483,550	\$104,000	\$146,500	\$285,000

The Premier is reported to have said that he would only support a ban on donations specifically from developers ‘if there was a national ban’.¹⁴ A similarly ‘national’ stance was taken by Bob Carr in 2001, in response to Paul Keating’s call for a curb on political donations made by developers.¹⁵ When the idea was refloated in November 2006, the then

¹¹ For a commentary on the Bill see – T Drabsch, *Election Finance Law: An Update*, NSW Parliamentary Library Briefing Paper No 13.2005, p 55.

¹² NSWPD, 11 March 2004, p 7123. For further commentaries on this issue see – N Thompson and L Rhiannon, ‘Political donations – a corruption of the political process?’ *Australian Prospect*, Spring 2004 - <http://www.democracy4sale.org/about.php?pageName=Follow&Id=22>; L Rhiannon and N Thompson, ‘Hidden Money’, *Arena*, 2005 - <http://www.democracy4sale.org/about.php?pageName=Follow&Id=23>; L Rhiannon and N Thompson, ‘Tainted Money’, *New Matilda*, 2006 - <http://www.democracy4sale.org/about.php?pageName=Follow&Id=32>

¹³ The Greens, ‘Developers continue to buy influence’, *Media Release*, 1 February 2007 - <http://www.democracy4sale.org/about.php?pageName=Follow&Id=38>

¹⁴ J Pearlman, ‘Let Mps off leash and vote by heart’, *SMH*, 1 March 2007, p 8.

¹⁵ A Clennell, ‘lemma urges donation reform’, *SMH*, 9 May 2007, p 7. The Queensland Premier, Peter Beattie said he would not support a national ban – ‘Labor leaders split on

Liberal Leader, Peter Debnam, indicated his support for the status quo.¹⁶ On the other hand, his then Deputy, Barry O'Farrell, called for a review of political donation laws, stating

Twenty-five years after the original scheme, it ought to be reviewed, including whether certain classes of donations should be prohibited and even whether all donations should cease.¹⁷

In March 2007 the Independent Member for the Northern Tablelands, Richard Torbay, is reported to have said he 'would support a complete abolition of political donations where an allocation was made available by the state to the parties and candidates to fund their campaigns'.¹⁸

Australia's biggest developers have also added their voice to those calling for a complete ban on political donations. Terry Barnes, the chief executive of NSW Urban Taskforce, which represents development companies, stated 'We make the donations reluctantly because the system's there and that's how things are done'. He described the proposed ban as 'about freeing us of the perception- rightly or wrongly – from the community that we're getting preference in exchange for money'. Commenting on this proposal, the *Sydney Morning Herald* was not convinced, saying any ban on political donations by developers could 'readily be circumvented' by the use of third parties or other means. Nor did the idea of a general ban on political donations find favour with the editorial, which went on to say:

First, it envisages replacing private donations with taxpayer funding. Taxpayers might have other ideas. They already fund political parties and politicians according to the votes they get in federal elections - at a cost of \$42 million for the 2004 poll. And even if taxpayer funding was increased, political parties would always want more - and would find ways to get it. More importantly, talk of banning political donations misses the central issue: the community is entitled to expect its politicians to be honest. It is preposterous to suggest the community fund a ban on political donations because it cannot trust its politicians.¹⁹

ban', *The Australian Financial Review*, 3 November, p 29. Paul Keating renewed his call in 2006 – J Norris and A Davies, 'Cut the political cash flow', *SMH*, 2 November 2006, p 1; J Albrechtsen, 'Of course donors expect something in return', *The Australian*, 8 November 2006, p 10.

¹⁶ A Davies and J Pearlman, 'Developer cash keeps parties afloat', *SMH*, 1 November 2006, p 1.

¹⁷ A Davies and J Pearlman, 'Top Libs split in corporate donations', *SMH*, 3 November 2006, p 1.

¹⁸ J Pearlman, 'Let Mps off leash and vote by heart', *SMH*, 1 March 2007, p 8.

¹⁹ 'Cash for concrete', *SMH*, 3 November 2006, p 10.

2.3 Inquiry proposals

Following the 2007 NSW general election, two proposals for inquiries into election funding have been proposed, one by the Leader of the Opposition in the Legislative Assembly, the other by the Greens MLC Lee Rhiannon. In addition, the Premier has written to the Prime Minister, calling for ‘urgent national reform’.²⁰

2.3.1 Leader of the Opposition, Legislative Assembly: On 10 May 2007, Leader of the Opposition, Barry O’Farrell, moved that the Legislative Assembly reappoint the Joint Standing Committee on Electoral Matters, with the same powers and functions as it had had in the previous 53rd Parliament. He further moved that

the committee inquire into and report on the nature of political donations and campaign expenditure for State and local government elections in NSW and:

- (1) Take submissions from the public and consider reform options including:
 - restrictions on political donations;
 - caps on campaign expenditure;
 - improved reporting of third party donations to so-called Independent candidates;
 - banning soft money donations to local government campaigns from party head offices; and
 - more timely reporting of donations and campaign expenditure following State and local government elections
- (2) The review will apply to both the State and local government elections.
- (3) That the Committee report by February 2008.
- (4) That the Government table a draft exposure bill in response to the Committee’s report prior to the date of the local government elections due in 2008, and implement new measures by March 2009.

The Leader of the Opposition made the point that the motion was ‘in line with the election commitments of the Liberal Party and the Nationals to conduct an inquiry were we to win government on 24 March’. Addressing the motion, he said:

In politics perception is reality, and the perception across NSW is that something is crook with the electoral system, particularly for the past 12 years under this Government. The perception is that there is a link between political donations and decision making.²¹

Explaining the rationale behind the motion, Mr O’Farrell discussed the areas the proposed inquiry should consider:

²⁰ ‘Show us the money’, *SMH*, 10 May 2007, p 10.

²¹ *NSWPD (LA proof)*. 10 May 2007, p 5.

First and foremost should be whether any, or all, categories of donations should be banned. There is community disquiet about the connection between donations and decision making under this Labor Government. From time to time such disquiet exists in other jurisdictions as well. A review is long overdue. In 1981 this State led the way in introducing public funding for elections as well as, for the first time in any jurisdiction in Australia, disclosure requirements upon those who sought to make donations. From time to time in various quarters suggestions have been made about banning certain categories of donations.

Mr O'Farrell went on to say:

My view is that perhaps we should look at banning all donations and simply rely on public funding to run campaigns. They are the sorts of issues the inquiry should be able to examine and report back on.

His argument was that either donations could be regulated or a cap could be placed on campaign expenditure. Mr O'Farrell commented:

We argue that whether it relates to the disclosure of donations, sorts that may have arisen in relation to the disclosure of donations, the policing of the disclosure of donations and ensuring that all candidates properly declare and account for the donations they receive either in cash or in kind, or innovations as required in relation to caps on campaign expenditures, these things ought to be considered, and it is in the public interest that they be reviewed by such a committee. At the end of the day, that is all we are asking for.

In the event, the Leader of the Opposition's call for a parliamentary inquiry was defeated along party lines, 51 votes to 38. All those Independent Members present (other than the Speaker who is not able to exercise a deliberative vote) voted with the Opposition (Mr Draper, Mrs Fardell, Mr Oakeshott and Mr Piper).

2.3.2 *The Premier's letter to the Prime Minister:* Responding on behalf of the Government to Mr O'Farrell's motion, the Member for Kogarah, Cherie Burton, said the Government 'fully supports the national reform of political donations'. She added:

The Premier wrote to the Prime Minister about this yesterday... In that letter the Premier asked the Prime Minister's director-general to convene a meeting of the States and Territories so that this issue can be quickly progressed. Changes coordinated at the Commonwealth level would be the only practical and effective way to proceed in this matter. Political donations are not confined to one jurisdiction. Potential donors could escape any new State law by simply approaching other State or Federal political parties and seek to have their donations channelled back into New South Wales. Therefore the Government does not support the motion. The Prime Minister should introduce national legislation on this matter. There is a Federal election later this year; is that what the Opposition is afraid of?

To this the Leader of the Opposition responded, in part, ‘I state again that in 1981 we pioneered legislation in this Chamber. There is no reason why, in 2007, we should not pioneer changes in this area across the nation’.

An editorial in the *Sydney Morning Herald* on the same day described the Premier’s proposal for reform at the national level as ‘deeply cynical’, stating:

Mr Iemma has disingenuously called for urgent national reforms, as though he has suddenly suffered a crisis of conscience over the wads of money routinely pushed under the doors of political parties around election time... If Mr Iemma is indeed so suddenly and sincerely concerned, the answer is straightforward. Lead by example, and start the reforms in NSW.²²

2.3.3 Lee Rhiannon, Legislative Council: The defeat of Barry O’Farrell’s motion in the Assembly may not be the end of the matter. A notice of motion in the name of the Greens member Ms Rhiannon appeared on the Legislative Council Notice Paper for 10 May 2007. It proposes:

That a joint select committee be appointed to inquire into and report on funding of, and disclosure of donations to, political parties and candidates, and in particular:

- (a) all matters associated with electoral funding and disclosure,
- (b) the advantages and disadvantages of banning all donations from corporations, unions and organizations to parties and candidates,
- (c) the advantages and disadvantages of introducing limits upon expenditure in election campaigns,
- (d) the impact of political donations on the democratic process, and
- (e) any related matters.

²² ‘Show us the money’, *SMH*, 10 May 2007, p 10.

3. SUMMARY OF ELECTION FINANCE LAW IN NSW

3.1 State parliamentary elections

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.

3.2 Local government elections

The scheme under the *Election Funding Act 1981* for the disclosure of electoral expenditure incurred and campaign donations received by political parties and others applies to local government elections. The major difference is that there is no public funding of registered political parties or for the electoral expenses of candidates at the local government level.

The disclosure of donations received for local government elections is provided for by Part 8 of the *Local Government Act 1993*. Basically, it provides that the *Election Funding Act 1981* is to apply to the disclosure of donations in local government elections. The scheme for the manner in which a party, group or candidate is to vouch for political contributions received and electorate expenditure incurred also applies.²³

The main exception is that Part 5 of the *Election Funding Act 1981*, which deals with public funding of election campaigns, does not apply to local elections. Nor does Part 6A, which relates to the Political Education Fund, or the financial provisions in Part 7, which allow for appropriations to be made from the consolidated revenue fund for payments arising from Parts 5 and 6A.²⁴

3.3 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.

²³ Local Government (General) Regulation 2005, Sch 6, cl 4. By this clause Part 3 of the Election Funding Regulation 2004 is to apply to parties registered under the Local Government Act.

²⁴ *Local Government Act 1993*, s 328.

- 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).

3.4 Public funding of State parliamentary 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:

Party	% of eligible primary votes	Entitlement of party (\$)
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.

3.5 Political contributions

For State parliamentary and local government elections 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 31st day after the polling day for the previous general election and ending on the 30th 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.

3.6 Electoral expenditure

For State parliamentary and local government elections 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).

3.7 Political Education Fund for parties contesting State parliamentary elections

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).

4. LEGISLATIVE DEVELOPMENTS SINCE 2005

While reforms have been debated in several jurisdictions, since 2005 substantial relevant legislative changes have only eventuated in three places, in Western Australia, at the Commonwealth level in Australia and at the federal level in Canada.

4.1 Western Australia – public funding for election campaigns introduced

The *Electoral Reform (Electoral Funding) Act 2006* came into effect on 27 October 2006. It introduces amendments into Part VI of the *Electoral Act 1907*, providing for electoral funding of political parties and candidates. In the relevant Second Reading speech the Minister for Electoral Affairs, Hon J McGinty MLA, explained:

Political parties and individual candidates currently rely on private sources to raise funds for election campaigns. Corporate donors and interest groups are potentially inappropriate sources of funding, and donations from such sources can lead to suspicions about the motives of such funding. Hence, the current scheme requires the details of gifts and donations received by parties and candidates to be placed on a public register. However, this requirement for transparency in the receipt of donations may restrict the flow of funds due to the concerns about the requirements for certain donations to be publicly disclosed. In addition, smaller parties and independent candidates, who fill an important role in our democratic system, can find the financial burden of participating in elections and funding their campaigns a difficult one. To respond to these concerns and to ensure that election campaigns are sufficiently funded to enable electors to understand the policies and beliefs of candidates and to make reasoned choices about which candidates to support, other jurisdictions have adopted schemes that provide for the public funding of candidates.

He continued:

This proposal introduces public funding for electoral expenditure and reduces the threshold for return of the deposit to four per cent of first preference votes, as will be the case for other funding.

The model for public funding of Western Australian candidates was said to be based on that in operation in Queensland since 1994, under the Queensland *Electoral Act 1992*.

Payment is made on the production of details of electoral expenditure, and reimbursement is capped at the level of actual electoral expenditure or the amount payable based on the entitlement, whichever is the lesser. It is argued that this leads to greater accountability in the funding process by preventing candidates from claiming more than they incurred, or profiting from the funding arrangements.²⁵

²⁵ WAPD (Legislative Assembly), 23 August 2006 - <http://www.parliament.wa.gov.au/web/newwebparl.nsf/iframewebpages/Hansard+-+Daily+Transcripts>

The scheme for the reimbursement of electoral expenditure under the *Electoral Reform (Electoral Funding) Act 2006* (WA) is explained by the Western Australian Electoral Commission in the following terms:²⁶

- **Eligible candidates:** Any candidates at a State election or by-election can apply to be reimbursed for electoral expenditure incurred, subject to them receiving more than 4% of first preference votes. First preference votes do not include any informal votes. Payments for all candidates endorsed by a registered political party can be made if candidates collectively poll over 4% of the total number of eligible votes at the combined elections in each contested electorate. Candidates included in a Legislative Council group can receive payment if the group as a whole polls over 4%.
- **Amount to be reimbursed:** For each eligible candidate, the 'election funding reimbursement amount', calculated under section 175LC(2) of the *Electoral Act 1907*, is to be paid to that candidate for each valid first preference vote received in an election. This amount is \$1.45302 as at 1 July 2006, and is adjusted annually, in line with CPI. If actual eligible electoral expenditure incurred by that candidate or group is less than the amount that would be paid using the above calculation, then this lesser amount is the amount to be reimbursed.

Eligible 'electoral expenditure' is defined at section 175 of the *Electoral Act 1907*. The definition is in broad terms, meaning expenditure incurred (whether or not incurred during the election period) on:

- (a) the broadcasting, during the election period, of an advertisement relating to the election;
- (b) the publishing in a journal, during the election period, of an advertisement relating to the election;
- (c) the display, during the election period, at a theatre or other place of entertainment, of an advertisement relating to the election;
- (d) the production of an advertisement relating to the election, being an advertisement that is broadcast, published or displayed as mentioned in paragraph (a), (b) or (c);
- (e) the production of any material (not being material referred to in paragraph (a), (b) or (c)) that is required under section 187 to include the name and address of the person authorising the material and that is used during the election period;

²⁶

Western Australian Electoral Commission website -
<http://www.waec.wa.gov.au/frames.asp?section=financialDisclosure&content=factSheet10.htm>

(ea) the production and distribution of electoral matter that is addressed to particular persons or organisations and is distributed during the election period;

(f) consultant's or advertising agent's fees in respect of -

(i) services provided during the election period, being services relating to the election; or

(ii) material relating to the election that is used during the election period;

or

(g) the carrying out, during the election period, of an opinion poll, or other research, relating to the election;

4.2 Commonwealth of Australia – raising the threshold for donations

The Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006 covers a broad number of areas.²⁷ In relation to election finance, the most notable reforms concern:

- amending the Commonwealth Electoral Act (s 305A) to increase the declarable limit for disclosure of all political donations from \$1,500 to amounts 'above \$10,000'. This threshold is to be indexed to the consumer price index (CPI) (s 305A);
- requiring that third parties – people other than registered political parties, candidates, Senate groups and donors – must complete annual disclosure returns if they incurred expenditure for a political purpose or received gifts over the disclosure threshold which enabled them to incur expenditure for a political purpose during a financial year (ss 314AEB and 314AEC). In other words, under the amendment third parties are required to furnish annual returns (as distinct from the election returns they previously provided)²⁸ relating to gifts received and expenditure incurred in amounts 'more than \$10,000' and
- inserting new subdivision 30-DA into the *Income Tax Assessment Act 1997* (Cth) to increase the level of tax deductible contributions, whether from an individual or corporation, to political parties and independent candidates from \$100 to \$1500 for an income year.²⁹

²⁷ For a comment on the Bill and its practical implications see - S Miskin and G Baker, *Political finance disclosure under current and proposed thresholds*, Commonwealth Parliamentary Library Research Note No 27/2005-06 - <http://www.aph.gov.au/library/pubs/rn/2005-06/06rn27.htm>

²⁸ For a commentary see - Joint Standing Committee on Electoral Matters, *Funding and Disclosure: Inquiry into Disclosure of Donations to Political Parties and Candidates*, February 2006, pp 11-12.

²⁹ For a commentary see, Joint Standing Committee on Electoral Matters, n 28, p 13 (majority view) and page 18 (dissenting report by ALP Committee members).

Most controversial was the first of these reforms, that is, increasing the declarable limit for disclosure of all political donations from \$1,500 to amounts 'above \$10,000'. The relevant Commonwealth Parliamentary Library Bills Digest commented that the 'proposal has long been Liberal Party policy'. It was noted that the case put forward by Senator Abetz in favour of the proposal was that the threshold:

- was introduced 20 years ago at \$1000 and has been 'eroded by inflation.'
- was 'much too low when originally set.'
- 'adds nothing to Australia's democracy other than unnecessary red tape'.

The same Bills Digest went on to comment that:

An attempt to increase these thresholds from \$1500 to \$3000 failed in 2004. Senator John Faulkner, Michael Danby MP and Laurie Ferguson MP said of the proposal to increase the thresholds to \$3000 that it had 'no policy merit and will only diminish the transparency of the disclosure laws and allow further donations to parties and candidates to go undisclosed'.³⁰

Reviewing the history of such proposals, a Commonwealth Parliamentary Library Research Note stated:

Proposals to increase the disclosure thresholds are not new. In its majority reports into federal elections, the Joint Standing Committee on Electoral Matters has recommended that the thresholds increase to \$5000 (1996), \$3000 (1998) and 'amounts over \$10 000' (2004). The Liberal Party's submissions to these successive inquiries have argued for a \$10 000 threshold. However, these proposals have not gone unchallenged. The Australian Labor Party and Australian Democrats minority reports have opposed the increase. Bills raising the thresholds to \$5000 (1999) and \$3000 (2004) were passed in the House of Representatives, but not in the Senate.³¹

The Research Note further stated:

The Joint Standing Committee on Electoral Matters argues in its report into the 2004 federal election that a higher threshold would encourage more individuals and small businesses to make donations to all candidates and parties because it would:

- alleviate the burden of filling in a disclosure for relatively small donations
- ensure privacy for those who wanted to support the party of their choice, but who were afraid of repercussions if their support were made public.

³⁰ *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2005*, Commonwealth Parliamentary Library Bills Digest No 95/2005-06 - <http://www.aph.gov.au/library/pubs/bd/2005-06/06bd095.htm>

³¹ S Miskin and G Baker, n 27, p 1.

The committee also supported the proposition that a higher tax deduction would act as an incentive for more individuals and small businesses to make donations.³²

In February 2006 the Joint Standing Committee on Electoral Matters released a further report, *Funding and Disclosure: Inquiry into Disclosure of Donations to Political Parties and Candidates*. The majority of Coalition members supported the reforms then under consideration under the Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill.³³ Dissenting reports were made, however, by the four ALP Committee members and by the Australian Democrat, Senator Andrew Murray. The four ALP members said they were ‘firmly opposed to any change in the current disclosure regime, and reject the weak arguments presented by the Coalition Government for change’.³⁴ Senator Murray, in a dissenting report that considered such issues as donation splitting and overseas donations, recommended that a cap be placed on political donations, stating:

No entity or individual may donate more than \$100,000 per annum (in cash or kind) to political parties, independents or candidates, or to any person or entity on the understanding that it will be passed on to political parties, independents or candidates.³⁵

A critical commentary on these reforms is offered by Norm Kelly who argues that, in respect to effective disclosure regimes, ‘Australia appears to be increasingly out of step with the modern practices that are occurring in comparator countries’, most notably Canada.³⁶ On the issue of tax-deductible political donations, Kelly claimed the Coalition Government was seeking ‘passive financial support only’. According to Kelly:

There are legitimate arguments to use a tax subsidy to encourage participation in a society’s democratic processes; however, this only holds true for small donations, as a person’s involvement in politics should never be tied to a person’s ability to pay.³⁷

³² S Miskin and G Baker, n 27, p 6. The reference is to the Joint Standing Committee on Electoral Matters, *Report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto*, 2005, pp 47-49. For a critical commentary on these and other arguments see – S Young and J Tham, *Political finance in Australia: a skewed and secret system*, Australian National University, 2006, pp 112-118.

³³ Introduced in the House of Representatives on 8 December 2005.

³⁴ Joint Standing Committee on Electoral Matters, *Funding and Disclosure: Inquiry into Disclosure of Donations to Political Parties and Candidates*, February 2006, pp 16-17.

³⁵ Joint Standing Committee on Electoral Matters, *Funding and Disclosure: Inquiry into Disclosure of Donations to Political Parties and Candidates*, February 2006, p 33.

³⁶ N Kelly, ‘Australian electoral reforms – a threat to democratic principles?’ (2007) 43(1) *Representation* 35 at 40.

³⁷ Kelly, n 36, p 42.

On the same issue, Young and Tham wrote:

Tax subsidies can play a role in encouraging political participation through individual and small donations. In short, they can promote ‘grass-root’ financing. To do so, several conditions have to be met: tax deductibility must be confined to citizens; the amount of tax deductions must be set reasonably low and the regressive effects of tax subsidies must be addressed.

The changes enacted by the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth), however, fail to meet these conditions. It provides actors that have no legitimate claim to democratic representation, commercial corporations, with a public subsidy. It is set too high at \$1500 and no attempt has been made to temper the regressive effects of the subsidy.³⁸

The thrust of the reform of taxing arrangements for donations was in keeping with the sentiments expressed by the Joint Standing Committee on Electoral Matters in its 2004 report on the federal election. As the Coalition majority on the Committee explained in the later 2006 report, *Funding and Disclosure: Inquiry into Disclosure of Donations to Political Parties and Candidates*, this was ‘On the understanding that tax deductibility for political donations would encourage more donations from individuals and small businesses’.³⁹

4.3 Canada – further restrictions and prohibitions on donations

In Canada reforms were made to the donor prohibitions in December 2006, effectively introducing a limit of \$1,000 (down from \$5,000 previously) on the amount an individual may contribute to a party or candidate in a given year. Further, previously corporations and trade unions and associations could contribute to individual candidates or electoral district associations (but not to national political party organisations or candidates in the leadership contest for a party). Such contributions were subject to an annual limit of \$1,000. Since December 2006, however, contributions of this kind have been banned altogether. These reforms were introduced under Part One of the *Federal Accountability Act*, which was assented to on 12 December 2006, and which relevantly amends the *Canada Elections Act*.

In more detail, the reforms amend the *Canada Elections Act* to:

- reduce to \$1,000 the amount that an individual may contribute annually to a registered party, and create a distinct \$1,000 annual limit on contributions to the registered associations, the nomination contestants and the candidates of a registered party;
- reduce to \$1,000 the amount that an individual may contribute to an independent

³⁸ S Young and J Tham, *Political finance in Australia: a skewed and secret system*, Australian National University, 2006, pp 126-127.

³⁹ Joint Standing Committee on Electoral Matters, n 34, p 13.

- candidate or to a leadership contestant;
- reduce to \$1,000 the amount that a nomination contestant, a candidate or a leadership contestant may contribute to his or her own campaign in addition to the \$1,000 limit on individual contributions;
 - totally ban contributions by corporations, trade unions and associations by repealing the exception that allows them to make an annual contribution of \$1,000 to the registered associations, the candidates and the nomination contestants of a registered party and a contribution of \$1,000 to an independent candidate during an election period;
 - ban cash donations of more than \$20, and reduce to \$20 the amount that may be contributed before a receipt must be issued or, in the case of anonymous contributions following a general solicitation at a meeting, before certain record-keeping requirements must be met; and
 - increase to 5 years after the day on which the Commissioner of Canada Elections became aware of the facts giving rise to a prosecution, and to 10 years following the commission of an offence, the period within which a prosecution may be instituted.

Other amendments to the Canada Elections Act prohibit candidates from accepting gifts that could reasonably be seen to have been given to influence the candidate in the performance of his or her duties and functions as a member, if elected. The willful contravention of this prohibition is considered to be a corrupt practice. A new disclosure requirement is introduced to require candidates to report to the Chief Electoral Officer any gifts received with a total value exceeding \$500. Exceptions are provided for gifts received from relatives, as well as gifts of courtesy or of protocol. The amendments also prohibit registered parties and registered associations from transferring money to candidates directly from a trust fund.⁴⁰

⁴⁰ Government of Canada, *Federal Accountability Act – Text of Bill C-2* - http://www.faa-lfi.gc.ca/faa-lfi/faa-lfi00_e.asp

5. REFORM PROPOSALS IN OTHER JURISDICTIONS

5.1 New Zealand

In New Zealand a uniform limit or cap on spending exists for individual candidates and political parties. For individual candidates, the cap is \$20,000. For political parties, it is \$1 million plus \$20,000 for each electorate contested by the party. Thus, a party contesting all 69 electorates may spend up to \$2.38 million on its 'election expenses'.⁴¹

While this system may be seen as something of a model for reform in Australia, it is the case that New Zealand's 2005 general election campaign was not without controversy. As Andrew Geddis writes, the campaign 'was notable for a range of questionable behaviour by various electoral participants'.⁴² These were as follows:

- The Labour Party exceeded the statutory maximum on its election expenses by over \$400,000, primarily due to the costs associated with distributing a pledge card to voters shortly before polling day. Furthermore, the use of parliamentary funding to produce and distribute this campaign material prompted a post-election review by the Auditor-General, which concluded that a range of parties and individual MPs had misused this source of funds for campaign purposes.⁴³ The report found that a total of \$1.17 million of parliamentary funding had been improperly spent on electioneering, as follows:

Labour Party, \$768,000;
 New Zealand First, \$150,400;
 Green Party, \$80,900;
 United Future, \$63,800;
 ACT, \$17,800;
 National Party, \$11,300
 Maori Party, \$48⁴⁴

The Government's response was to pass the *Appropriation (Parliamentary*

⁴¹ A Geddis, *The funding of New Zealand's elections: Current problems and prospects for change*, Democratic Audit of Australia, Discussion Paper No 4/07, March 2007. The following account is based on Geddis. For an overview of New Zealand election finance law see - T Drabsch, *Election Finance Law : An Update*, NSW Parliamentary Library Briefing Paper No 13/2005, pp 26-29.

⁴² A Geddis, *The funding of New Zealand's elections: Current problems and prospects for change*, Democratic Audit of Australia, Discussion Paper No 4/07, March 2007.

⁴³ New Zealand Auditor General, *Advertising Expenditure Incurred by the Parliamentary Service in the Three Months Before the 2005 General Election*, October 2006 - http://www.elections.org.nz/uploads/crown_law_re_anonymous_donations_25_jan_07.pdf

⁴⁴ New Zealand Auditor General, n 43, pp 33-34. Figures in two tables are combined to produce a total. See also - '2005 New Zealand election funding controversy' - http://en.wikipedia.org/wiki/2005_New_Zealand_election_funding_controversy

Expenditure Validation) Act 2006, retrospectively validating all types of spending under the Parliamentary Service budget, including ‘funding entitlements’ for an MPs in performance of their role and functions and for recognised political parties in performance of their role and functions.⁴⁵

- The National Party’s failure to account for GST when booking its election broadcast time led to it screening some \$112,000 more in campaign advertising than the law allowed.
- Both National and Labour, and to a lesser degree some smaller parties, used anonymous donations and trusts to shield the identity of their major donors, allowing hundreds of thousands of dollars to flow into their campaign coffers from hidden sources. The issue was publicised in Nicky Hager’s *The Hollow Men: A Study in the Politics of Deception*, published in 2006. Hager alleged that a dozen or so big donors had supported the National Party in the 2005 electoral campaign but that their donations had gone to the Party via the legal channel of lawyers’ trust accounts and other special trusts that ensured secrecy. This summary is based on advice the New Zealand Electoral Commission received from the Crown Law Office.⁴⁶ The Crown Law Office advised that the arrangements in place were legal, noting that ‘the New Zealand Electoral Act does not proscribe the making of donations to political parties by trusts, or impose any additional reporting requirements on such donations beyond those applying to donations generally’. This conclusion, it was said, was supported by Andrew Geddis in a paper published in 2004, arguing that the 2002 Electoral Act amendment does nothing to prevent the making of ‘faceless donations’ to a political party through a conduit body (such as a trust). The paper stated:

In such case the law still requires that the party only list the conduit body as the source of the donation, even if the recipient fully knows that the trust has been used to pass along another person’s donation.⁴⁷

- An extensive leaflet campaign funded by members of the Exclusive Brethren Church and devoted to attacking the Labour and Green Parties was carried out with a (still disputed) degree of knowledge on the part of the National Party. On at least some occasions these leaflets breached the legal requirement that they identify the ‘true identity’ of the person publishing them. Again, Nicky Hager’s *The Hollow*

⁴⁵ For the text of the Act see - http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes The Act provided an interim meaning of ‘funding entitlements for parliamentary purposes’, which was to be amended later. For a commentary see – M McNichols, ‘Parliament passes law validating election misspend’, *National Business Review*, 18 October 2006.

⁴⁶ Crown Law Office, 25 January 2007 - http://www.elections.org.nz/uploads/crown_law_re_anonymous_donations_25_jan_07.pdf

⁴⁷ A Geddis, ‘Regulating the funding of election campaigns in New Zealand’ (2004) 10(4) *Otago Law Review* 575 at 592.

Men: A Study in the Politics of Deception was central to the controversy, claiming that the leaders of the National Party knew months ahead of the election that the Exclusive Brethren were campaigning on the Party's behalf.⁴⁸

- Other examples of third party advertising by various unions and the racing industry also appeared to contravene the rules requiring the authorisation of such messages and the identification of their source.

Commenting on the problems identified above, in a recent media release, the New Zealand Electoral Commission's chief executive, Dr Helena Catt, said:

The string of complaints and controversies surrounding the 2005 election campaign highlight the need for a public debate and possible review of electoral law, particularly concerning campaign financing, electioneering definitions and spending limits, and campaigning by non-political parties.⁴⁹

Likewise, Geddis, the leading academic commentator in this field,⁵⁰ stated in a paper published in March 2007:

Taken alone, any of these matters would be cause for concern. In combination, they reveal an urgent need for an extensive overhaul of the rules governing the funding of New Zealand's electoral campaigns. The Ministry for Justice has completed a review of the present law and the Labour-led Government has committed itself to enacting legislation dealing with the issue by the end of 2007. The National Party has also indicated it is prepared to provide bi-partisan support for at least some reform measures.⁵¹

He went on to analyse the shortcomings in New Zealand election finance laws under two headings, 'supply side problems' and 'demand side problems'. In respect to the first 'supply side', he said that 'Perhaps the most serious shortcoming in New Zealand's current regulatory regime is the general lack of transparency around the supply of money to electoral participants'. He explained that the *Electoral Act 1993* does require that political parties report annually the identity and address of donors giving \$10,000 or more. Further, donations of \$1,000 or more to an individual candidate must be disclosed to the Chief Electoral Officer following the election. Geddis made the following points:

- if a donor's identity is not 'known' to the party, their contribution is listed as

⁴⁸ '2005 New Zealand election funding controversy' - http://en.wikipedia.org/wiki/2005_New_Zealand_election_funding_controversy

⁴⁹ Elections New Zealand, Election complaints highlight need for law review - <http://www.elections.org.nz/news/ec-media-complaints-020207.html>

⁵⁰ A Geddis, *Electoral Law in New Zealand: Practice and Policy*, LexisNexis New Zealand Ltd 2007.

⁵¹ A Geddis n 41.

coming from an anonymous source. In 2005, the Labour Party received \$275,000 by way of such anonymous donations;

- where a contribution is received via a conduit organisation, such as a trust entity, the party's report need only list that conduit organisation as the donor. In 2005, the National Party received \$1,741,793 from such sources;
- the law also permits a single donation to be split amongst several 'straw donors', thereby causing each purported donor's share to fall beneath the threshold at which disclosure is required.

For Geddis, 'These loopholes mean the current public disclosure regime for political donations is all but voluntary in application'. His recommendations for reform included: requiring political parties and individual candidates to ascertain and publicly reveal the true identity of every donor who gives more than a nominal amount (say, \$300); prohibiting the splitting of donations among 'straw' donors; and requiring regular disclosure reports prior to the election. Also suggested were prohibiting donations from foreign sources, as well as from companies and trade unions. Donation limits of \$10,000 were another suggestion, thereby preventing the distortions that can result from 'reliance on large financial backers'.

On the 'demand side', it was pointed out that strict controls apply to the total 'election expenses' of parties and individual candidates alike in the three months leading up to an election. Strict controls also apply to the broadcasting of 'election programmes' through the pre-election allocation process carried out by the Electoral Commission. Election spending by 'third parties' is also subject to restriction. Any advertising paid for by third parties that 'is used or appears to be used *to promote or procure the election of a constituency candidate*', or 'encourages or persuades or appears *to encourage or persuade voters to vote for a party*', must be authorised in writing by the party or candidate concerned. Where such authorisation is given, the party or candidate must then count that spending as part of its own election expenses. The advertising must also carry the 'true name' and address of the person authorizing it. However, the legislation does not cover the situation where a third party engages in negative advocacy, as Hager contends occurred in the 2005 leaflet campaign funded by members of the Exclusive Brethren Church.

According to Geddis, 'The efficacy of each of these forms of demand side control may be questioned following the 2005 election'. One reflection was that the definition of 'electoral expenses needs to be broadened to prevent the development of an unhealthy arms race in election spending'. This followed the observation:

Because activities such as opinion polling, travel, consultant fees, etc do not count as election expenses, unlimited sums may be spent on them. In practice, then, the electoral contestants can (and do) spend vastly more on their campaigns than the apparently low limits provide.

Broadcasting Act 1989

The broadcasting of 'election programmes' (that is, campaign advertisements) is also strictly controlled in New Zealand, as discussed in Briefing Paper No 13/2005. The broadcasting of an election programme is prohibited by section 70 of the *Broadcasting Act*

1989. This ban is, however, subject to a number of exceptions. Specifically, a programme broadcast during time allocated to a 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. 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 that 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.⁵²

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 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.

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.⁵³ However, there have always been complaints of unfairness in relation to the allocation of broadcasting time by the Commission.⁵⁴ 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.⁵⁵ 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

⁵² A Geddis, 'Regulating the funding of election campaigns in New Zealand' (2004) 10(4) *Otago Law Review* 575 at p 588.

⁵³ A Geddis, 'Reforming New Zealand's election broadcasting regime', (2003) 14(3) *Public Law Review* 176.

⁵⁴ Geddis, n 53, p 167.

⁵⁵ Geddis, n 53, p 168.

participants who are most affected by it'.⁵⁶ Geddis returned to this issue in 2007, stating that the cap on spending on election broadcasting is 'problematic', with a disproportionate amount of the available money going to the major parties. In 2005, for example, Labour was entitled to five times more than either the ACT, Green, New Zealand First and United Future Parties (\$1.1 million compared to \$200,00 each respectively). For Geddis, 'It is not even clear why a separate limit is even required, given the overall limits on election expenses'.⁵⁷

5.2 United Kingdom

In the UK funding political parties has been a source of controversy for many years. Public funding is limited in nature. Under the *Political Parties, Elections and Referendums Act 2000* policy development grants schemes are subject to a statutory limit of £2 million per annum. By resolution, direct financial assistance from the public purse is also provided to support Opposition parties, called in the House of Commons 'Short money' after its originator Edward Short, and in the Lords 'Cranborne money' after the then Leader of the House when the scheme was introduced in the Upper House in 1996. Various forms of indirect funding are also available, notably in the form of publicly funded party political broadcasts, this in the context of a system which prohibits paid political advertising on radio and television.⁵⁸

It remains the case, however, that the bulk of funds for political parties come from non-public sources. Traditionally, the Labour Party has relied primarily on the trade unions for financial support, to which the Party has constitutional links. While figures differ, it is generally agreed that this source of donations is now in decline. The Conservative Party, on the other hand, has relied historically on fundraising at the local constituency association level and on donations from individuals and corporate backers.⁵⁹

In respect to donations, demands for transparency grew during the 1990s, as did concerns about a perceived growth in national campaign expenditure. This resulted in the passing of the *Political Parties, Elections and Referendums Act 2000*. The Act's main provisions were:

- registration of parties, so that parties had to supply details of income and expenditure;
- disclosure of donations made to national parties, individual candidates and campaign groups associated with parties;
- national expenditure limits,⁶⁰ supplementing constituency limits in force since the

⁵⁶ Geddis, n 53, p 169.

⁵⁷ Geddis, n 41.

⁵⁸ This account is based on O Gay, I White and R Kelly, *The Funding of Political Parties*, House of Commons Research Paper 07/34.

⁵⁹ O Gay, I White and R Kelly, n 58, p 23.

⁶⁰ Expenditure limits apply to all parties contesting a relevant election and are determined by

- 19th century; and
- creation of an Electoral Commission partly to reverse the new rules, but without powers of prosecution.

Problems remain, however. In March 2006 it became clear that further regulation of loans to parties was necessary, when details emerged of loans made during the 2005 general election which appeared to circumvent the relevant statutory requirements. The Government responded under the *Electoral Administration Act 2006* to ensure that loans to political parties were 'governed by a similar regime of transparency and permissibility to that set out for donations to parties in the *Political Parties, Elections and Referendums Act 2000*'. In particular, details of all loans to a political party of over £5,000 (and thereafter each additional £1,000 from the same lender) had to be reported to the Electoral Commission. Further, a party would only be permitted to take out loans from the same sources as are permitted to donate to a political party.⁶¹ In the meantime, a police investigation into whether offences have been committed under the *Honours (Prevention of Abuse) Act 1925* is ongoing, arising from allegations that in 2005 Labour offered honours in return for loans totaling £14 million from 12 businessmen.⁶²

In the wake of these developments, two major reports have been published in recent months. Published in December 2006 was the report of the Select Committee on Constitutional Affairs, *Party Funding: first report of Session 2006-07*. The Committee's report was based on a comparative review of funding arrangements in Canada, Germany and the US. Its basic finding was that the increased cost of campaigning had placed strain on political parties, which were suffering from a fall in membership. Large donors offered most in terms of easing the financial burden, but this only provoked public unease. Further, the increased transparency provided for under the *Political Parties, Elections and Referendums Act 2000* had not restored faith in the political system, but had instead fuelled public concern.⁶³ The Committee's conclusions and recommendations were summarised in a House of Commons Research Paper, as follows:

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.⁶⁰ Candidate expenditure is also subject to limits. However, these limits are separate to those that apply to political parties. For a summary of the law see - T Drabsch, *Election Finance Law : An Update*, NSW Parliamentary Library Briefing Paper No 13/2005, p 29-34..

⁶¹ O Gay, I White and R Kelly, n 58, pp 29-30.

⁶² 'PM may testify against allies', *SMH*, 4 June 2007, p 7.

⁶³ The 2000 Act: established the Electoral Commission, which is independent of Government and reports directly to Parliament; required political parties to register with the Electoral Commission; set down accounting requirements for political parties; introduced controls on donations to parties and their members; controlled campaign expenditure, both for parties and third parties in national election campaigns; amended rules on the donations received and expenses incurred in election campaigns; and required companies to obtain approval before making political donations - O Gay, I White and R Kelly, n 58, pp 7-8.

The Committee produced a unanimous report, but in some areas of detail it was non-specific; the report concluded that national expenditure limits should be reduced and that expenditure should be capped over a five year election period to take account of constant campaigning. It wrestled with the issue of a cap on donations, given the issue of trade union links to the Labour Party, concluding that a binding but voluntary limit should be agreed between the parties in the context of a discussion of alternative funding, including state funding. The Committee recommended that any extension of state funding would need to be accompanied by robust regulation and be focused towards the local level. The means by which it was distributed should encourage recruitment and be fair between existing parties and new-entrants. So there was a measure of support for a matched funding scheme.⁶⁴

In the context of a package of reforms that were to be introduced in two stages, the Committee recommended a stronger and more robust regulatory framework within which the changes to the system of party funding were to include:

an overall cap on spending, both at local and national level; greater transparency about the sources of all elements of party funding; a voluntary agreed binding framework for the limiting of all large donations leading to an increase in state funding for political parties.⁶⁵

Running alongside the Committee inquiry but arising directly from the 'loans for honours' affair was the review of the funding of political parties conducted by Sir Hayden Phillips. The review was announced by the Prime Minister on 16 March 2006 and established officially four days later. The Phillips report, *Strengthening Democracy: Fair and Sustainable Funding of Political Parties*, was published on 15 March 2007. Underlying the report's findings was the observation that

Our mass political parties, which sustained our democracy from most of the twentieth century, now seem to be in decline. Fifty years ago one in 11 of the electorate belonged to a political party. Today, that ratio is down to one in 88.⁶⁶

The Phillips report went on to note that declining trust in political parties, in the UK and beyond, is a major challenge for democracy, stating:

Our Parliamentary democracy cannot operate effectively without strong and healthy political parties. The debate about financing of our political parties is therefore a debate about the health of our democracy and how we can improve it.

⁶⁴ O Gay, I White and R Kelly, n 58, p 34. The Committee's report is at - <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmconst/163/16302.htm>

⁶⁵ Select Committee on Constitution Affairs, *Party Funding: first report of Session 2006-07*, December 2006, para 154.

⁶⁶ H Phillips, *Strengthening Democracy: Fair and Sustainable Funding of Political Parties*, March 2007, p 1 - http://www.partyfundingreview.gov.uk/files/strengthening_democracy.pdf

The three points of the analytical triangle discussed by Phillips were: (a) the declining membership of major political parties; (b) the long-term structural instability in the financing of political parties in the UK; and (c) the increasing pressure on those same parties to spend more on election campaigns, a demand that results in larger donations, which are themselves the cause of public mistrust.

A key proposal of the Phillips report was that donations should be capped at £50,000 from any one source, whether individual or organizational. After discussing the experience of the 2005 general election, where Labour and Conservative spent around £90 million in the 12 months leading up to the election, Phillips commented: 'Driven by a determination to gain a competitive advantage over their opponents, it is no surprise that the parties will seek large donations to fuel their spending'. He said he endorsed the argument put forward by the Select Committee on Constitution Affairs:

The UK currently limits expenditure but does not limit donations, while in the USA, donations are capped but spending is not. Both systems lead to significant problems. In Canada, both income and expenditure are comprehensively capped and regulated, and we were convinced by the strengths and benefits of this model.⁶⁷

It was recognised by Phillips that a cap on donations could create particular problems for the financial relationship between Labour and the unions. Phillips observed:

In seeking a possible solution, much will turn on the treatment of the decisions by individual trade union members to pay money to the party to which their union affiliates. In my view these payments may be regarded as individual donations for the purposes of the new limit if, and only if, the decisions reached are clearly transparent and it is possible to trace payments back to identifiable individuals.⁶⁸

The Phillips report also advocated an increase in the amount of public funding for political parties. It recommended this should be by:

- a scheme where the amount of funding received by a political party is directly linked to the votes received. Phillips proposed eligible parties should receive 50p each year for every vote cast for them in the most recent general election, and 25p for every vote cast for them in the most recent elections for the devolved administrations in Scotland and Wales and for the European Parliament.
- a matched funding scheme where eligible parties would be invited to establish a registered subscriber scheme, primarily using the Internet, through which any voter could subscribe a minimum of £5 to support the party. Each subscription would be matched with £5 of public funding.

Neither scheme would be introduced until three conditions had been met, as follows:

⁶⁷ Quoted in H Phillips, n 66, p 9; Select Committee on Constitution Affairs, n 65, para 152.

⁶⁸ H Phillips, n 66, p 10.

- that an increase in public funding is only granted if there is agreement on an overall reform package;
- that parties should be required to demonstrate that additional public funding has assisted in meeting desirable public objectives, such as policy research and development and better engagement with the electorate; and
- that the cost is limited (it is proposed to an overall cost of around £20-25 million a year).⁶⁹

Initial reactions to the Phillips report were canvassed in the House of Commons Research Paper where it was noted that both major parties seemed to support its key proposals. The Prime Minister issued a written ministerial statement saying there ‘was now the basis for a new agreement on the funding and expenditure of political parties...I have asked my Rt Hon Friend the Leader of the House of Commons to lead negotiations for the Labour Party’. The statement believed that the talks should conclude before the summer recess.⁷⁰ Whether actual reform along the lines suggested by Phillips eventuates remains to be seen.

⁶⁹ H Phillips, n 66, p 4.

⁷⁰ O Gay, I White and R Kelly, n 58, p 45.

6. COMPARATIVE TABLES

6.1 Models of public funding for election campaigns

Australia

Sally Young and Joo-Cheong Tham compiled the following table which sets out the various provisions regarding election funding in Australia.

Jurisdiction	Election funding	Introduced	Threshold	Entitlement	Amount paid per eligible vote	Paid
Federal	Yes	1984	4%	As of right	\$1.99	Post election
NSW	Yes	1981	4% (does not apply to a candidate that is elected)	Capped by actual expenditure	Determined by formula according to amounts in a predetermined central fund	Post election
Victoria	Yes	2002	4%	Capped by actual expenditure	\$1.26	Post election
Queensland	Yes	1994	4%	Capped by actual expenditure	\$1.36	Post election
ACT	Yes	1992	4%	As of right	\$1.34	Post election
NT	No					
WA	Yes	2006	4%	Capped by actual expenditure	\$1.39 ⁷¹	Post election
SA	No					
Tasmania	No					

Source: Young S and Tham J, *Political finance in Australia: a skewed and secret system*, Australian National University, 2006, p 39.

International

Available at http://www.idea.int/publications/funding_parties/upload/full.pdf is a table compiled by the International Institute for Democracy and Electoral Assistance comparing the public funding arrangements for various countries throughout the world.

The following table provides more detailed information on the public funding of elections in Canada, New Zealand, the United Kingdom and United States.

⁷¹ According to the Western Australian Electoral Commission, as at 1 July 2006 the amount was \$ 1.45.

Country	Public funding availability
Canada	<p>Political parties can receive quarterly allowances but in return must submit quarterly returns detailing the total amount of contributions, the number of contributors, and the amount and date of each contribution. Any member of the public may inspect these returns.</p> <p>Political parties may receive a refund of 50% of their election expenses provided they receive a minimum of 2% of the national vote or 5% of the votes cast in the electoral district in which they endorsed a candidate.</p> <p>Candidates who are either elected or receive a minimum of 10% of the votes cast in their riding may be refunded 60% of their election expenses.</p>
New Zealand	No direct public funding is provided to political parties or candidates. However, funds are provided for use in purchasing access to the broadcast media.
United Kingdom	Whilst political parties do not receive state funding, they do receive direct and indirect state assistance in the form of free mailings, free use of public rooms during an election, free airtime for political broadcasts and policy development grants.
United States	Public funding is available to presidential candidates. However, if they choose to accept public funds they must agree to meet expenditure limits.

Things to consider

Public funding of election campaigns, at one level or another, gives rise to several considerations. Inevitably, there are arguments for and against.

On the 'for' side of the ledger, it is argued that public funding can reduce financial inequalities between parties, giving those minor parties which cannot rely on large-scale corporate or trade union backing a greater chance to participate in the democratic process. If a reasonable level of public funding does not create a level playing field as such, it can at least help foster and maintain political parties that can claim to have more popular than financial support. In this respect, linking public funding to the number of votes received, as occurs at present in NSW, allows voters to directly influence the allocation of funds, thereby making a direct connection between the amount of public finance provided to a party and its level of democratic support. Problems of detail arise, however. On one side, requiring parties to receive a high proportion of votes before public funding is provided can privilege the position of established parties. Conversely, having a lower threshold for the provision of public funding increases the overall cost to the taxpayer.

Again on the 'for' side, there is the argument that public funding decreases reliance on large

donations which tend to fuel the perception that the electoral process may be subject to undue influence by powerful groups, organizations or individuals. However, without a cap on the overall level of campaign expenditure, the provision of public funding may only increase the total amount spent on election campaigns, as parties and candidates are free to spend more on other things such as advertising. As Carmen Lawrence argued in 2000, public funding of election was supposed to reduce the reliance of the major political parties on private, corporate and union donations, whereas in fact ‘All that has happened is a blow-out in both public and private funding as parties engage in an increasingly expensive bidding war’.⁷²

Public funding can therefore give rise to a number of difficulties, some general in nature, others more technical. A general argument against public funding is that money is limited and there are better ways to spend public finances. Likewise, why should the public be required to support, by taxation, parties that cannot obtain the voluntary financial support of individuals? An issue of a more technical kind is that it may be possible for a candidate or political party to make a profit if public funding is provided as of right and not limited to actual expenditure. Further, the existence of public funding can isolate political parties from their grassroots members. Parties can start to depend on public funding. Writing in a New Zealand context, Geddis states, ‘If parties are substantially able to fund their activities through direct grants from the state, then their leadership may become even more insulated from the influence of its grass-roots membership. Such an outcome would be of real concern in an era of already declining levels of party membership’.⁷³ The argument may apply with even greater force in Australia where mass party membership is reported to be in decline but where compulsory voting guarantees a high turnout at elections.⁷⁴ In these conditions, compulsory voting may result in an inflated or unreal perception of the level of actual popular support for any political party.

Picking up on this last issue, it has been argued that any increase in public funding should be limited to a recognised measure, or measures, of popular support, and should encourage greater democratic engagement. One suggestion proposed by Sir Hayden Phillips in his review of the funding of political parties in the UK was that political parties establish a registered subscriber scheme.⁷⁵ As part of the scheme any voter could subscribe a minimum amount such as £5 to support the party. Each subscription would be met by £5 of public funding and the level of funding received by the party would be a result of its ability to attract supporters. Sir Hayden Phillips believes such a scheme could be used to heighten public engagement in party political activity. With appropriate safeguards and requirements

⁷² M Grattan, ‘Carmen Lawrence savages money politics: Ban corporate donations, unhook unions from Labor’, *SMH*, 18 August 2000 p 3.

⁷³ A Geddis, n 41.

⁷⁴ For a commentary on the ALP’s dwindling membership see – R Cavalier, ‘Last-gasp Labor Party must start listening to its members – and fast’, *SMH*, 16 June 2003, p 13. Anecdotal evidence seems to point to a position that is not that different for the Liberal Party.

⁷⁵ Phillips H, *Strengthening Democracy: Fair and Sustainable Funding of Political Parties*, March 2007, pp 18-19.

in place, public funding of election campaigns can be viewed positively, as helping to relieve some of the burden of constant fundraising, thus allowing parties more time for policy development. It is argued in this context that there is a ‘need to direct public funding more effectively towards encouraging parties to perform their democratic functions’.⁷⁶

6.2 Donation disclosure requirements

Australia

Sally Young and Joo-Cheong Tham compiled the following table which sets out the various disclosure schemes that apply in Australia. There are no separate disclosure schemes in South Australia, Tasmania and Victoria. However, Victorian parties must comply with federal disclosure obligations.

	CTH	ACT	NT	NSW	QLD	WA
Registered parties	Annual return disclosing total amount received and details of amounts received from a person or organisation of \$10,000 or more in the financial year.	Annual returns disclosing total amounts received and details of amounts received from a person or organisation of \$1500 or more in a financial year.	Annual returns disclosing total amounts received and details of amounts received from a person or organisation of \$1500 or more in a financial year.	Post-election returns disclosing details of gifts received during period between elections totalling \$1500 or more with returns accompanied by auditor’s certificate.	Annual returns disclosing total amounts received and details of amounts received from a person or organisation of \$1500 or more in a financial year.	Annual return disclosing details of gifts received totalling \$1500 (indexed) or more in the financial year.
Associated entities	Annual return disclosing total amount received and details of amounts received from a person or organisation of \$10,000 or more in the financial year.	Annual returns disclosing total amounts received and details of amounts received from a person or organisation of \$1500 or more in a financial year.	Annual returns disclosing total amounts received and details of amounts received from a person or organisation of \$1500 or more in a financial year.	None.	Annual returns disclosing total amounts received and details of amounts received from a person or organisation of \$1500 or more in a financial year.	Annual return disclosing details of gifts received totalling \$1500 (indexed) or more in the financial year.

⁷⁶

Young and Tham, n 38, p 126.

Candidates	Post-election return disclosing details of gifts of \$10,000 or more received during period between elections.	Post-election return disclosing total of gifts received and details of gifts (or aggregate of gifts) of \$1500 or more received during period between elections.	Post-election return disclosing details of gifts (or aggregate of gifts) of \$200 or more received during period between elections.	Post-election return disclosing details of gifts (or aggregate of gifts) received during period between elections of \$200 or more, accompanied by auditor's certificate.	Post-election return disclosing details of gifts (or aggregate of gifts) of \$200 or more.	Post-election return disclosing details of gifts (or aggregate of gifts) of \$1500 (indexed) or more in the period between elections.
Groups of candidates	Post-election return disclosing details of gifts of \$10,000 or more received during period between elections.	Post-election return disclosing details of gifts (or aggregate of gifts) of \$200 or more received during period between elections.	None.	Post-election return disclosing details of gifts (or aggregate of gifts) received during election period of \$1000 or more accompanied by auditor's certificate.	None.	Post-election return disclosing details of gifts (or aggregate of gifts) of \$1500 (indexed) or more in the period between elections.
Donors	If gifts total more than \$10,000 must lodge a statement with the Australian Electoral Commission.	If gifts to a candidate or non-party group total \$1500 or more in period between elections then post-election return disclosing details of such gifts. If gifts to a political party in a financial year total \$1500 or more and receives amounts of	If gifts to a candidate total \$200 or more in period between elections then post-election return disclosing details of such gifts. If gifts to a party total \$1500 or more in a financial year and received gifts of \$1000 or more to make gift/s	None.	If gifts to a candidate total \$200 or more in period between elections then post-election return disclosing details of such gifts. If gifts to a party total \$1500 or more in a financial year and received gifts \$1000 or more to make gift/s to party then	None.

		\$1000 or more for such gifts then annual returns disclosing details of such gifts.	to party then annual return to disclose details of received gifts.		annual return to disclose details of receive gifts.	
Third parties	If spend more than \$10,000 in a financial year on electoral expenditure, then must disclose details of any gifts received over \$10,000.	If incurred \$1000 or more in electoral expenditure and receives gifts for such expenditure totalling \$1000 or more then post-election return disclosing details of such gifts.	If incurred \$1000 or more in electoral expenditure and receives gifts for such expenditure totalling \$1000 or more then post-election return disclosing details of such gifts.	If incurred \$1500 or more in electoral expenditure and receives gifts for such expenditure totalling \$1000 or more then post-election return disclosing details of such gifts.	If incurred \$1000 or more in electoral expenditure and receives gifts for such expenditure totalling \$1000 or more then post-election return disclosing details of such gifts.	If incurred \$1500 (indexed) or more in electoral expenditure and receives gifts for such expenditure totalling \$1500 or more then post-election return disclosing details of such gifts.

Source: Young S and Tham J, *Political finance in Australia: a skewed and secret system*, Australian National University, 2006, pp 12-13.

International

Available at http://www.idea.int/publications/funding_parties/upload/full.pdf is a table compiled by the International Institute for Democracy and Electoral Assistance comparing the donation disclosure requirements of various countries.

The following table compares the donation disclosure requirements in the United States, Canada, New Zealand and the United Kingdom.

United States	Canada	New Zealand	United Kingdom
<p>Disclosure is generally required monthly. However, during the election campaign, must report 12 days before and 20 days after election.</p> <p>Candidates are to disclose the details of any contributor who donates more than US\$200.</p>	<p>Quarterly reports are required as a condition of receiving quarterly allowances.</p> <p>Annual and post-election disclosure is also required.</p> <p>Candidates to report any gifts received with a total value exceeding \$500. Exceptions are provided for gifts received from relatives.</p> <p>Registered parties and registered associations prohibited from transferring money to candidates directly from a trust fund.</p>	<p>Annual returns are required.</p> <p>Parties must disclose the details of donors that contribute \$10,000 or more. May be listed as anonymous if the donor's identity is not known.</p> <p>Donors can avoid the disclosure laws as donations can lawfully be split into several smaller donations each under the disclosure threshold if made from different 'straw' donors.</p>	<p>Weekly donation reports during election period.</p> <p>Quarterly donations reports.</p> <p>Annual statements of accounts.</p>

Young S and Tham J, *Political finance in Australia: a skewed and secret system*, Australian National University, 2006, p 119; Geddis A, *The funding of New Zealand's elections: Current problems and prospects for change*, Democratic Audit of Australia, Discussion Paper No 4/07, March 2007; Mayer K, *Sunlight as the best disinfectant: Campaign finance in Australia*, Democratic Audit of Australia, Discussion Paper 31/06, October 2006.

Things to consider

The watchwords of modern administration, in the public and private spheres, are transparency and accountability. If political parties receive donations from private, corporate or trade union sources, especially where this is in addition to the receipt of substantial amounts of public funding for election campaigns, then the argument on behalf of an adequate system of disclosure would seem to be overwhelming. In effect, the public has a right to know who is seeking to influence the electoral process. Conversely, political parties in receipt of public funding should disclose all donations above a certain level.

What criteria should such a system of disclosure satisfy? At the very least, it must be:

- ***timely***, in that the relevant information is made available either prior to an election, or very shortly afterwards. Long delays in disclosure, however defined, are to be avoided. Inevitably, donation disclosure laws are limited in their effect if disclosure is not required until after an election.
- ***accessible***, in that the relevant information is not to be presented in such a convoluted or obscure form as to make it more or less impossible for anyone but an expert in corporate finance to interpret the data provided.

- **accurate**, in that the true level of donation from any one source is made clear, thus avoiding the present situation in Australia where the provision of separate disclosure thresholds for each branch of a party allows the major parties to benefit from nine thresholds. Other loopholes are identified in the analysis of political donations presented by Norman Thompson and Lee Rhiannon MLC, including those relevant to political parties' returns. They observe:

Only money over \$1,500 has to be reported to the AEC. Unlike the requirement for donors' forms, if a donor gives less than this prescribed amount many times over the year, the party does not have to report the donations. The total will be included in the parties' overall figure of money received, but the donor is never identified. If someone does give \$1,500 once and then many gifts of less than the prescribed amount, the party does not have to sum the amounts. Thus a company could give \$2,000 once and \$1,000 each week of the year. The party would report that the company gave \$2,000 and the remaining \$52,000 would be buried and unidentified within the party's returns.⁷⁷

Young and Tham comment:

A key problem is that disclosure schemes fail to provide adequate information of the type of contribution and especially in regard to the sale of political access. These failings can be rectified by adopting the AEC's (Australian Electoral Commission) recommendations that payments at fundraisers (and like events) be deemed to be 'gifts' and that 'gifts' be identified separately in annual returns.

They continue:

What, arguably, would be a preferable method to address these problems would be to adopt the UK system of donations reports. British political parties, while required to prepare annual statements of accounts, also have to submit donation reports that are confined only to transactions considered to be donations. In completing these reports, parties not only have to disclose the amount and date of such donations but also must identify the status of the donor as individual, trade union, company or other entity.⁷⁸

- **effectively enforced**, in that the value and perceived legitimacy of disclosure laws are determined by the rigour with which breaches are identified and, where appropriate, prosecuted.

⁷⁷ N Thompson and L Rhiannon, 'Political donations – a corruption of the political process?' *Australian Prospect*, Spring 2004 - <http://www.democracy4sale.org/about.php?pageName=Follow&Id=22>

⁷⁸ Young and Tham, n 38, p 118.

6.3 Donor prohibitions

Australia

CTH	NSW	QLD	VIC	WA	ACT	NT
Anonymous donations over \$10,000 are prohibited.	Anonymous donations of more than \$1500 to parties, \$1000 to groups and \$200 to candidates are prohibited.	Anonymous donations of more than \$1000 to parties and \$200 to candidates prohibited.	Casino and gambling licensees and related companies may not make political donations of more than \$50,000 a financial year to each political party.	Anonymous donations of \$1800 or more to parties, groups or candidates prohibited.	Anonymous donations of \$1500 or more to parties, groups, MLAs or candidates prohibited.	Anonymous donations of more than \$1000 to parties and \$200 to candidates prohibited.

International

Country	Restrictions
Canada	<p>Donations from foreign parties are banned. Only citizens or permanent residents may make donations.</p> <p>Total ban on donations by corporations, trade unions and associations.</p> <p>Individuals may contribute \$1,000 annually to a particular registered party. Individuals may contribute \$1,000 annually to registered associations, nomination candidates and candidates of a particular registered political party.</p> <p>Individuals may contribute \$1,000 to an independent candidate. Individuals may also contribute \$1,000 to the leadership contestants in a particular leadership contest.⁷⁹</p> <p>Candidates, nomination contestants and leadership contestants can contribute \$1,000 to their own campaign.</p>

⁷⁹

These \$1,000 limits are index linked and subject to review on 1 April every year.

New Zealand	There are no limits on the amount that may be donated in New Zealand. Contributors do not need to be citizens or residents of New Zealand. ⁸⁰
United Kingdom	<p>Donations from foreign parties are banned.</p> <p>Trade unions need to ballot their members every 10 years for authorization to promote their political agenda. Any political expenditure must be made from a separate political fund. Members have the right to not contribute to this fund.</p> <p>Companies must seek authorization from their shareholders every four years before they may make political donations or expenditure.</p>
United States	<p>Persons or corporations with contracts with the Federal Government may not make political donations.</p> <p>Donations from foreign parties are banned.</p> <p>Corporations and labour unions cannot directly contribute to candidates or parties.</p> <p>The limits on individual donations to candidates are as follows: US\$2100 to each candidate per election cycle; US\$40,000 to all candidates per election cycle; and US\$101,400 per election cycle for all contributions.</p> <p>The limits on individual donations to parties, etc are as follows: US\$26,700 to each national party committee per election cycle; US\$5000 to each political committee or state party committees per election cycle; US\$61,400 for political committees per election cycle; and US\$101,400 per election cycle for all contributions.</p>

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Geddis A, *The funding of New Zealand's elections: Current problems and prospects for change*, Democratic Audit of Australia, Discussion Paper No 4/07, March 2007.

Things to consider

Much of the recent debate about election finance law in NSW has centred on whether donations should be capped at a certain level, or even prohibited entirely from certain sources. In NSW, particular concern has been expressed about donations from property developers, summed up by the editorial 'Cash for concrete' that featured in the *Sydney Morning Herald* on 3 November 2006. Donations from other sources are also of particular concern. For example, should media outlets be permitted to donate to political parties or candidates? Some would argue that there is the potential for sympathetic coverage to be traded for political favours. More generally, it can be argued that, from a certain standpoint, all large-scale donations should be treated with suspicion, as potentially skewing political debate and the process of public decision-making. In Canada, there is now a total ban on donations by corporations and trade unions. Such issues were discussed in August 2000 by Carmen Lawrence who is reported to have said that substantial campaign donations to the major parties by corporations, trade unions and business foundations

foster the perception – and perhaps the reality – that it is possible to buy privileged access to MPs and ministers and that this influence is in proportion to the amount of money donated. We run the risk of becoming a 'corporate democracy' in which the number of shares you have purchased in your party of choice determines your effective voting power.⁸¹

Dr Lawrence proposed that individual private campaign donations should be limited to \$1,500 and those from corporations and large organizations should be proscribed. Similar views have been expressed by Liberal Party MPs Malcolm Turnbull and Christopher Pyne. In his submission to the inquiry of the Joint Standing Committee on Electoral Matters into 2004 Federal Election, Turnbull advocated a ban on corporate and trade union donation as a condition of election funding. In his submission to the same inquiry, Pyne called for a ban on such donations with an annual cap of \$10,000 for individual donations.⁸²

If donations from certain sources are banned, or if there is to be a cap on donations, one consideration is that limiting the amount that can be donated can increase the need for public funding. Would taxpayers support such a move? Even if they did, it is argued that political parties would always want more money and 'would find ways to get it'.⁸³ Capping donations may simply drive them underground.

A further issue relates to whether donations from foreign sources should be banned, as is the case in Canada and the United Kingdom. The case can be made that only Australian citizens or permanent residents should be permitted to make donations, on the basis that only those entitled to vote should be able to influence the political process in other ways.

⁸¹ M Grattan, 'Carmen Lawrence savages money politics: Ban corporate donations, unhook unions from Labor', *SMH*, 18 August 2000 p 3.

⁸² Discussed in Young and Tham, n 38, p 120.

⁸³ 'Cash for concrete', *SMH*, 3 November 2006, p 10.

6.4 Limits on campaign expenditure

Australia

There are no campaign expenditure limits in Australia apart from for the Tasmanian Legislative Council. Candidates for the Tasmanian Legislative Council were subject to an expenditure cap of \$10,000 in 2005 (the cap increases by \$500 a year).

International

Available at http://www.idea.int/publications/funding_parties/upload/full.pdf is a table compiled by the International Institute for Democracy and Electoral Assistance comparing the disclosure of and ceilings on expenditure for various countries.

The following table details some of the limits on campaign expenditure in the United States, Canada, New Zealand and the United Kingdom.

	United States	Canada	New Zealand	United Kingdom
Spending limits	‘Co-ordinated’ expenditure counted towards contribution limits. Condition of election funding for presidential primaries and elections.	Yes and calculated according to the number of listed electors in the contested electoral district.	Yes If contests party vote, limit of NZ\$1 million plus NZ\$20,000 for each electorate candidate nominated by the party. If does not contest the party vote, limit of \$NZ20,000 per nominated candidate.	Yes and calculated according to seats contested.
Other limitations			General ban on election broadcasts. However, there are exemptions for programs broadcast during time allocated to the political party and paid for with money allocated to the political party.	Paid electronic advertising is banned.

Young S and Tham J, *Political finance in Australia: a skewed and secret system*, Australian National University, 2006, p 134.

Things to consider

One point to make is that, with modern sophisticated media techniques, the party with the largest 'war chest' has a definite advantage thus distorting the democratic process and potentially producing inequitable outcomes. More generally, where no limits exist on campaign expenditure, there is the potential for the process to become subject to vastly escalating costs, in which the market place of political ideas becomes more and more the domain of rich and powerful parties. Just to compete effectively, very substantial financial resources are needed. In these circumstances, there is an incentive for parties to seek larger and larger donations, with all the attendant problems, real and perceived, this has for the integrity of the political process. The danger is that the electoral process itself may be transformed into a market place, not of ideas, but of deals and secret transactions, where everyone is thought to have his price and the price tag on influence is always on the rise.

To prevent an outcome of this kind, there are calls for the imposition of limits on campaign expenditure. The argument is that such limits can encourage a fairer process, as one party or candidate is prevented from unduly influencing the election by dramatically outspending competitors. For Young and Tham, there are two main arguments for election expenditure limits. One is that limits reduce the need for parties and candidates to seek larger donations, which carry the risk of corruption and undue influence. The other addresses the fear that 'large-scale spending means that elections can be bought'. They argue that 'fair electoral contests demand the imposition of constraints on campaigning costs through campaign expenditure limits'.⁸⁴

However, Young and Tham also confront the claims that expenditure limits are 'unenforceable' and 'unworkable'. Recent experience in both the United Kingdom and New Zealand might be said to indicate that parties will invariably find a way around expenditure limits, which carries the danger that the system is brought into disrepute by other means, especially where breaches are not actively and appropriately punished. Constructing a system that is both truly fair and enforceable is sure to be difficult. Consider, for example, the criticism made of the election broadcasting restrictions in New Zealand which, it is said, result in a discrepancy in the ability of large and small parties to access this medium.⁸⁵ The amount that may be spent on broadcasting is determined by the Electoral Commission and often allows one party a substantially greater period of time than its competitors.

A further consideration, one that is more specific to Australia, is that limiting campaign expenditure may be seen as an inappropriate restriction on the implied constitutional freedom of political communication. Young and Tham explain that, given that 'campaign expenditure limits impose, to a greater or lesser degree, a burden on the freedom of political communication, the critical question then is whether the instituted limit is reasonably appropriate and adapted to a legitimate aim'.⁸⁶

⁸⁴ S Young S and J Tham, *Political finance in Australia: a skewed and secret system*, Australian National University, 2006, pp 134-135.

⁸⁵ Geddis A, *The funding of New Zealand's elections: Current problems and prospects for change*, Democratic Audit of Australia, Discussion Paper No 4/07, March 2007.

⁸⁶ Young and Tham, n 41, p 137.

6.5 Third party campaign expenditure prohibitions

International

Countries	Third Party Campaign Expenditure Prohibitions
Canada	<p>Third parties must not spend more than \$150,000 during an election period on election advertising expenses.</p> <p>Third parties who incur electoral advertising expenses of \$500 or more must immediately register.</p>
New Zealand	<p>Those who are not candidates or parties may broadcast election advertising but must not name or directly advocate for or against a party or candidate.</p> <p>Third parties do not have to disclose how much they spend on election related advertising.</p>
United Kingdom	<p>Companies must obtain shareholder approval before they donate to a registered party or EU political organization. Shareholder authorization is not required for donations which do not exceed £5000 in the qualifying period.</p> <p>All political expenditure by companies must be authorized and the directors' report is to provide information on political donations and expenditure.</p> <p>Third parties must prepare a return at the end of the regulated period stating all payments made in relation to controlled expenditure, disputed claims, certain unpaid claims, and relevant donations.</p> <p>Controlled expenditure limits apply to third parties. For third parties who register with the Electoral Commission, the limits are £793,500 for England, £108,000 for Scotland, £60,000 for Wales and £27,000 for Northern Ireland. If they do not register, the relevant limits are £10,000 for England and £5000 for each of Scotland, Wales and Northern Ireland.</p> <p>Under the <i>Electoral Administration Act 2006</i> details of all loans to a political party of over £5000 (and thereafter each additional £1000 from the same lender) must be reported to the Electoral Commission.</p>

Things to consider

With the approach of the federal election in Australia in late 2007 the issue of third party campaigns expenditure is very much alive. The focal point is the Federal Government's workplace relations legislation, opposed by the trade unions and broadly supported by industry groups. This legislation is planned to be the subject of concerted advertising campaigns on both sides of the fence. Is there anything amiss with such campaigns in a representative democracy, the lifeblood of which is the open and vigorous advocacy of even the most controversial political ideas. Viewed from this perspective, would limiting third party expenditure be an inappropriate restriction on the implied constitutional freedom of political communication?

Third party campaign expenditure was also an issue in the 2005 New Zealand general election where, as discussed in a previous section of this paper [5.1], an extensive leaflet campaign funded by members of the Exclusive Brethren Church and devoted to attacking the Labour and Green Parties was carried out with a (still disputed) degree of knowledge on the part of the National Party. On at least some occasions these leaflets breached the legal requirement that they identify the 'true identity' of the person publishing them. It may be enough to say that, as long as the legal requirements for transparency are met, expenditure by third parties during and in the lead up to election campaigns should not be unduly fettered, financially or otherwise. Interest group activity is after all a defining feature of healthy pluralism. It can be argued that it is up to the electorate to inform itself about the merits or otherwise of the case any particular interest group is seeking to advocate. Too much state control of the democratic process, it might be said, is potentially as harmful as too little appropriate regulation and its sensible enforcement.

On the other hand, there will always be those who wish to create a more level playing field in all areas of political life. For them, limits on third party campaign expenditure is another way of fostering a more equal system in which certain voices cannot, as a result of their financial power, seek to dominate the political debate. From this standpoint, the question becomes one of appropriate limits that can operate within the bounds of constitutional validity.

7. CONCLUSION

Just as representative democracy cannot work effectively without political parties, political parties cannot operate without adequate funding. This is particularly true at election times when the contest for political ascendancy is at its most intense. Difficult questions arise at this point, however. How much funding is appropriate, and from what source or sources? Should corporations and trade unions be permitted to donate to political parties, or should there be a blanket prohibition on these sources of funding, as has occurred in Canada in recent months? How dependent should political parties be on public funding? Should public funding extend to local government elections?

A major issue is whether public funding serves to maintain and perpetuate the inequality between the established major parties and others? With the membership of the major political parties declining, it might also be asked whether greater reliance on public funding will tend to exacerbate any gulf that may exist between the 'political class' and the electorate at large? In the UK, the Phillips inquiry argued that any increase in public funding should be limited to a recognised measure, or measures, of popular support, and should encourage greater democratic engagement. Is the creation of a linkage between the amounts of funding received by a political party to the votes received, as exists at present in NSW, a sufficient gauge of democratic support for a political party? How, if at all, does compulsory voting impact on this debate?

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