

# E – BRIEF



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# Political Donations and Electoral Finance

by Jason Arditi

## 1 Introduction

The issue of political donations and campaign finance has been the subject of recent public discussion.

At the NSW State Labor Party conference in November 2009, former Premier Nathan Rees announced his Government's intention to prohibit the receipt of political donations by property developers.<sup>1</sup> This announcement came on the back of longstanding community concern about the making of political donations by powerful lobby groups and its perceived impact on the integrity of Government. Relevant legislation subsequently passed through both Houses on 3 December 2009 in the form of the [Election Funding and Disclosures Amendment \(Property Developers Prohibition\) Act 2009 \(NSW\)](#).

On 4 December 2009, newly sworn-in Premier, Kristina Kenneally, publicly reaffirmed her Government's commitment to maintaining the ban on donations by property developers, as well as indicating the Government's support for the full public funding of election campaigns.<sup>2</sup>

In 2008, the Legislative Council Select Committee on Electoral Matters released its [Report into Electoral and Political Party Funding in NSW](#). This, together with the Commonwealth Government's current [Electoral Reform Green Paper](#), provide

comprehensive reviews of election donation procedures at both the State and Commonwealth level, with the Select Committee report recommending changes to the NSW scheme.

This E-Brief reviews the current state of play in NSW with respect to the public and private funding of political parties, examines the possibility of instituting bans or caps on political donations and/or campaign expenditure and builds on the issues considered in the 2008 E-Brief, [Political Donations Law Update](#).

## 2 Public Funding

Most Australian States have a system for the public funding of political parties that go some way to reducing the costs of conducting an election campaign incurred by political parties and candidates.

Although there has been considerable discussion about the desirability and effectiveness of public funding in the past three decades, the shift in Australian jurisdictions has been away from total reliance on private funding toward a mixed public and privately funded process.

Proponents of public funding argue that it maximises the integrity of the electoral process by:

- reducing the dependence by political parties on the receipt of

funds from private sources, thereby removing any imposed or implied requirement contingent on receiving such funding;<sup>3</sup>

- reducing the risk successful candidates are encumbered by undue influence;
- 'levelling the playing field' by ameliorating the disparity of financial resources available to parties and candidates and enabling the participation of new and minor political players, without significant financial detriment; and
- removing the time pressures fundraising entails, enabling political parties and candidates to focus on policy development and constituent issues, more central to the public interest.<sup>4</sup>

Critics of public funding argue that it:

- undermines the independence of parties by making them reliant on the State;
- rewards the major parties as funding is based on past electoral support, discouraging new entrants and promoting parties already more likely to have a viable cash flow. Public funding, it is argued, has the potential to ossify the system;<sup>5</sup> and
- is broadly unpopular as the public may deem it as either self-indulgent and/or a 'rort'.<sup>6</sup>

Public funding for political parties and candidates has been a fixture of NSW politics since 1981 when the *Election Finance Act 1981* came into force, the

first of its kind in Australia. In his second reading speech to Parliament, then Premier Neville Wran said that funding:

removes the risk of parties selling favours and declares to the world that the great political parties of New South Wales are not up for sale<sup>7</sup>.

Today, five of the six States, the ACT and the Commonwealth publicly fund political parties. South Australia and Northern Territory do not currently provide for the public funding of elections.

Broadly speaking, funding in each of the participating jurisdictions is determined using a formula based on the performance of a candidate or party at the previous election. Candidates that receive more than 4% of the primary vote are entitled to receive a stipulated dollar amount for each vote they received. In all jurisdictions except NSW, the funding allocation is determined by setting a fixed dollar amount first then multiplying it with the number of votes the candidate received.

NSW uses a reverse formula, allocating a predetermined pool of funds per electorate that is then divided according to the number of primary votes each candidate in that electorate receives. Once again, to receive funding, a candidate must either be elected or receive at least 4% of the primary vote. However, the maximum amount a candidate can receive is capped at 50% of the value of the total fund. Therefore candidates who receive 57% of the primary vote are only entitled to 50% of the proceeds of the fund.

The funding ranges from a low of \$1.37 per vote in Victoria, to a high of

\$2.69 in NSW.<sup>8</sup> Generally speaking, funding for an election is only available to eligible claimants retrospectively and only up to the amount of the candidate's verified electoral expenditure. These measures are designed to ensure that candidates cannot profit from their nomination.

In NSW, the allocation of funds is determined by a formula that takes into account the number of enrolled electors, the number of years in a parliamentary term and indexation under [section 57](#) of the *Election Funding and Disclosures Act 1981* (NSW).

Two funds are established by the Election Funding Authority for the payment of monies to eligible recipients, the Constituency Fund and the Central Fund, with two thirds of all determined funds to be placed in the Central Fund and with all residual funds placed in the Constituency Fund.

The [Constituency Fund](#) provides for the payment of funds to candidates who nominate for election to the Legislative Assembly. The [Central Fund](#) provides for the payment of funds to candidates who nominate for election to the Legislative Council.

Following the 2007 NSW Election, parties and candidates were, in total, eligible to a maximum entitlement of \$11.8 million.<sup>9</sup>

The Legislative Council Select Committee on Electoral Matters strongly supported the continued public funding of parties but was of the view that the scheme requires finetuning to ensure that the distribution of funds is 'fair and equitable'.<sup>10</sup>

### 3 Private Funding

Despite the existence of a public funding scheme, the increased expense associated with conducting election campaigns has, over time, required political parties to rely more heavily on private donations. It is estimated that private donations account for between 60–75% of all political donations,<sup>11</sup> and up to 80% if one includes traditional membership and affiliation fees from party members.<sup>12</sup> The balance is derived from public funds.

The need for successful political parties to be financially viable, with an adequate cash flow, is imperative. Modern methods of campaigning, including communicating with constituents, are a costly exercise and the sustainability of a pluralistic democracy depends on the financial wellbeing of a diverse array of political parties.

In the four years leading up to the 2007 State Election, total donations to political parties by private sources amounted to \$65 million<sup>13</sup>, underlining the importance they currently play in funding political parties.

There are both advantages and disadvantages in allowing private political donations.

The advantages of private funding can be summarised as follows:

- it is a legitimate form of democratic expression that enables citizens to financially support their parties or causes of choice and creates important avenues for individuals to participate in the political process;<sup>14</sup>

- it reduces the burden on the public purse and ameliorates the cost of electoral funding; and
- it forces political parties to be actively engaged in grassroots activities, promoting dialogue between party heads and party members.

However, enabling parties to raise funds from private sources has its critics. The criticisms can be summarised as follows:

- donations can be perceived as a way to purchase unequal access to decision-makers, and are therefore seen as a way of currying favour and peddling influence;
- unregulated private donations can create an 'arms race' between parties as they compete to raise the most funds to either gain a competitive advantage or, at least, even out the playing field; and
- unregulated private funding displaces the supposed focus of political parties on developing policy and representing constituents by encouraging, in its place, the constant solicitation of funds and ongoing networking.

As indicated by current NSW Government policy, there is support for the further regulation of private donations. The present debate centres on the detail and scope of such regulation. Key discussion points are: (a) whether there should be a ban or cap on private donations, or (b) whether there should be targeted

restrictions on certain sectors from donating.

#### **4 Bans or Caps on Political Donations**

At present, in NSW, there is no limit on the amount a private organisation can contribute to a registered political party. There are, however, laws in place designed to maximise the transparency of political donations. In particular, political donations made and electoral expenditure incurred over \$1,000 in every six-month period must be reported to the Election Funding Authority.<sup>15</sup> This information must be made publicly available on the Authority's website, enabling members of the public to identify which political parties are receiving donations from which donors.<sup>16</sup>

The Legislative Council Select Committee Report on Electoral and Political Party Funding concluded that the current regulations on political donations did not go far enough. Instead of merely tightening the disclosure laws, the Select Committee found that there was broad support from all major political parties and independent groups for prohibiting the receipt of political donations altogether, with the one exception for small donations from individuals.

In its submission to the Select Committee, the Labor Party of NSW stated:

...NSW Labor advocates a ban on all private donations to political parties in favour of a system of full public funding.<sup>17</sup>

The Liberal Party of NSW gave its in-principle support to prohibition, with the exception of donations from individuals:

There is a strong philosophical argument that, in a democracy, only those who have the right to participate as voting citizens should be able to influence elections with their political donations. Non-citizen residents, organisations, trade union and corporations do not have votes, so they should not be able to influence the democratic process through donations.<sup>18</sup>

The NSW Greens submitted similar views, adding that a ban on large, corporate donors would make parties more responsive to the needs and interests of their constituents.<sup>19</sup>

For its part, the Select Committee recommended a ban on all but small political donations by individuals, to be capped at \$1,000 per political party per year, and \$1,000 per independent candidate per electoral cycle.<sup>20</sup>

The same issues were canvassed in the Commonwealth Green Paper on political donations, funding and expenditure. It cautioned that while a low cap might help expand grassroots participation, it might also divert the efforts and energies of political parties into continuous fundraising. However, it also noted that a higher cap might not be sufficient to allay the public's concern that donations are mere conduits for the purchasing of influence.<sup>21</sup> The Green Paper is still seeking public input on the question of an appropriate and effective cap on donations.

## **5 Referral to Joint Standing Committee on Electoral Matters**

Then Premier Nathan Rees wrote on 3 December 2009 to the Joint Standing Committee on Electoral Matters, indicating his Government's support for banning all but small donations by

individuals. He also recognised that such changes would not be feasible except in conjunction with significant increases in public funding. Mr Rees requested the Committee consider these issues and devise an appropriate scheme and formula for funding increases to address these concerns.<sup>22</sup> The Joint Standing Committee on Electoral Matters is due to report back with its findings in March 2010.

## **6 Constitutional Issues**

Both the Legislative Council Select Committee Report and the Commonwealth's Electoral Reform Green Paper highlighted possible constitutional issues that need to be addressed and areas in which lawmakers must tread with caution if drafting limits to political donations.

In the case of *Australian Capital Television Pty Ltd v Commonwealth*, the High Court found that legislation that prohibited political advertising during election campaigns violated the implied freedom of communication provided for in the Constitution.<sup>23</sup> In *Lange v Australian Broadcasting Corporation*, the Court found that the implied freedom of communication on matters relating to Government and politics was an 'indispensable incident' of Australian constitutionalism.<sup>24</sup> In a paper commissioned by the NSW Government on political donation law, Dr Twomey explains the effect of the High Court decisions, noting that:

any law that adversely affects the implied freedom of political communication could only be valid if it is reasonable and appropriately adapted to serving the legitimate ends in a manner than is consistent with the system of representative and responsible government

prescribed by the Australian Constitution.<sup>25</sup>

In Dr Twomey's opinion:

an outright ban on political donations is likely to be struck down as constitutionally invalid on the ground that it is not 'reasonably appropriate and adapted' to serving the legitimate end of reducing the risk of corruption and undue influence.<sup>26</sup>

Instead, caps on political donations are more likely to be constitutionally acceptable than an outright ban. However, this is still dependent on the nature of the cap and its likely effect on the electoral process. The High Court will ask if it is reasonable and appropriately adapted to serving a legitimate end.

Having regard to Dr Twomey's paper, then Premier Rees requested the Joint Standing Committee to consider 'the compatibility of any proposed measures with the freedom of political communication that is implied under the Commonwealth Constitution'.<sup>27</sup>

The Joint Standing Committee is currently accepting submissions from the public with respect to these, and other, issues.

## **7 Limits on Campaign Expenditure**

Election spending has increased dramatically since the first publicly funded schemes were introduced in 1981. The 'arms race' in political fundraising has allowed parties to campaign more extensively and more aggressively through media outlets and, more recently, across the internet.

During the 2007 State election, campaign expenditure by parties and candidates amounted to \$36.4 million,

approximately 73% of which was spent on advertising.<sup>28</sup> In 2008 the Legislative Council Select Committee noted its concern about the 'escalating spending levels', noting that such an escalation is neither 'healthy nor sustainable'.<sup>29</sup>

The Select Committee reported that 'the desirability of limiting political advertising was supported by Mr Barry O'Farrell, Leader of the NSW Opposition'<sup>30</sup>. It was further reported that 'The ALP NSW were opposed to spending caps on the grounds that they would be overly complex to administer and impossible to enforce'<sup>31</sup>.

The academic literature in favour of capping campaign expenditure includes the arguments that:

- spending caps are seen as another way of reducing the appetite for donations by imposing demand-side restrictions. Simply put, if a party is unable to spend the money, then there's little point in raising it. To this end, it compliments restrictions on donations to provide a more holistic regulation of electoral finance;
- caps on political donations are not sufficient in levelling the playing field as candidates could still spend money not raised through political fundraising, such as accessing personal wealth. Caps on expenditure apply to those candidates who have unrivalled access to a greater source of funding not captured by bans on political donations; and

- by reducing the level of election finance required to mount a credible campaign, the barriers to participation by new entrants are lowered, resulting in more candidates and furthering democratic plurality and choice. Major parties cannot simply crush their minor party opponents with the weight of paid advertising.<sup>32</sup>

The literature cites the following reasons why caps should not be imposed:

- the difficulty associated with enforcing compliance. Most notably, it would be difficult to regulate in-kind expenditure, such as volunteering or the loaning of goods, and third party expenditure;
- caps may prevent parties from properly informing the electorate of their policies if campaign limits are set too low, thereby eroding the capacity of the electorate to make an informed choice; and
- the argument that candidates should be free to campaign in a manner they deem fit, and a free and fair democracy should not be setting arbitrary controls on how candidates choose to campaign. For the most part, 'contributing to the debate' is a costly exercise and it would appear counter-intuitive to the proper functioning of a democracy to impose restrictions that ultimately curtail such debate, especially during an election campaign.<sup>33</sup>

Constitutional law considerations also apply to the limiting of campaign

expenditure. The regulation of campaign expenditure carries a real and immediate risk that it would be detrimental to the freedom of political communication. As noted, the vast bulk of 'political communication' takes place through paid advertising and any curtailment of that may infringe implied constitutional rights.

Dr Twomey has also argued that for a cap to be effective, similar limits would have to be imposed on third party campaigning to prevent political parties circumventing regulation by establishing outside bodies or 'fronts' to communicate their views.<sup>34</sup> Many organisations participate in a partisan fashion during election campaigns, such as unions, environmental lobbies and business groups and the placing of limits on such participation may be constitutionally unacceptable.

## **8 Targeted Bans on Political Funding**

The Legislative Council Select Committee canvassed the possibility of prohibiting the receipt of donations from certain sectors, basically as a compromise option if there was insufficient support for complete prohibition. Of particular note were 'serious concerns'<sup>35</sup> about the impact of developer donations in the planning process.

Further to this, relevant legislation was in fact passed in the form of the [\*Election Funding and Disclosures Amendment \(Property Developers Prohibition\) Act 2009 \(NSW\)\*](#).

The object of the amendments, in force since late 2009, is to prohibit donations by property developers. Three separate offences are created, namely:



- it is unlawful for a property developer or someone on behalf of a property developer to make a political donation;
- it is unlawful for a person to accept a political donation that is made by or on behalf of a property developer; and
- it is unlawful for a property developer or someone on behalf of a property developer to solicit another individual to make a political donation.

The amendments broadly define a property developer as a corporation that regularly involves the making of relevant planning applications for which the ultimate purpose is the sale or lease of the land for profit.

The [\*Election Funding and Disclosures Amendment \(Property Developers Prohibition\) Act 2009 \(NSW\)\*](#) was presented as the first instalment in the reform of election finance laws. Then Premier, Nathan Rees told Parliament:

...consistent national reform will take time. In the interim New South Wales will continue to lead on this issue and continue to strengthen its own rules governing political donations and expenditure.<sup>36</sup>

Although largely uncontroversial since its enactment, the specific prohibition placed on property developers could be seen to unfairly target that industry, leaving other influential sectors, such as gaming and liquor, free to operate as before. However, the entire playing field may change if a ban on all corporate donations is established subsequent to the report of the Joint Standing Committee on Electoral Matters.

## 9 Conclusion

With the Joint Standing Committee on Electoral Matters due to report in March 2010 and legislation foreshadowed to be introduced shortly afterwards, electoral finance laws in NSW appear set for radical reshaping. Although specific details are yet to be developed, and constitutional hurdles yet to be overcome, the next instalment of reform, anticipated to take place in concert with reforms implemented at a Commonwealth level,<sup>37</sup> promises to generate much interest and debate.

<sup>1</sup> Nick Ralston, *Rees gets power to pick NSW front bench*, Sydney Morning Herald, 14 November 2009

<sup>2</sup> Stateline NSW Transcript at <http://www.abc.net.au/stateline>, 4 December 2009.

<sup>3</sup> Legislative Council, *Electoral and Political Party Funding in NSW*, June 2008 at pp 46 – 48.

<sup>4</sup> Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008 at pp 34 – 35.

<sup>5</sup> Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008 at pp 34 – 35.

<sup>6</sup> Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008 at p 35.

<sup>7</sup> NSWPD (*Legislative Assembly*) 15 April 1981 at p 5944.

<sup>8</sup> Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008 at p 33.

<sup>9</sup> Legislative Council, *Electoral and Political Party Funding in NSW*, June 2008 at p 49.

<sup>10</sup> Legislative Council, *Electoral and Political Party Funding in NSW*, June 2008 at p 46.

<sup>11</sup> Standing Committee, ALP submission at p 86.

<sup>12</sup> Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008 at p 41.

<sup>13</sup> Legislative Council, *Electoral and Political Party Funding in NSW*, June 2008 at p 80.

<sup>14</sup> Legislative Council, *Electoral and Political Party Funding in NSW*, June 2008 at p 80.

<sup>15</sup> *Election Funding and Disclosures Act 1981 (NSW)*, ss 88 – 89.



- <sup>16</sup> *Election Funding and Disclosures Act 1981* (NSW), s 91.
- <sup>17</sup> Submission 107a in Legislative Council, *Electoral and Political Party Funding in NSW*, June 2008 at p 89.
- <sup>18</sup> Submission 140 Legislative Council, *Electoral and Political Party Funding in NSW*, June 2008 at p 89.
- <sup>19</sup> Legislative Council, *Electoral and Political Party Funding in NSW*, June 2008 at p 91.
- <sup>20</sup> Legislative Council, *Electoral and Political Party Funding in NSW*, June 2008 at p 105.
- <sup>21</sup> Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008 at p 58.
- <sup>22</sup> The Hon. Nathan Rees, [Letter Referring Inquiry](#), Joint Select Committee on Electoral Matters, 3 December 2009.
- <sup>23</sup> *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106
- <sup>24</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520
- <sup>25</sup> Dr Anne Twomey, *The reform of political donations, expenditure and funding*, November 2008 at p 6.
- <sup>26</sup> Dr Anne Twomey, *The reform of political donations, expenditure and funding*, November 2008 at pp 1 – 2.
- <sup>27</sup> The Hon. Nathan Rees, *Letter Referring Inquiry*, Joint Select Committee on Electoral Matters, 3 December 2009.
- <sup>28</sup> Legislative Council, *Electoral and Political Party Funding in NSW*, June 2008 at pp 120 – 121.
- <sup>29</sup> Legislative Council, *Electoral and Political Party Funding in NSW*, June 2008 at p 123.
- <sup>30</sup> Legislative Council, *Electoral and Political Party Funding in NSW*, June 2008 at p 125.
- <sup>31</sup> Legislative Council, *Electoral and Political Party Funding in NSW*, June 2008 at p 125.
- <sup>32</sup> Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008 at p 64.
- <sup>33</sup> Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008 at p 64.
- <sup>34</sup> Dr Anne Twomey, *The reform of political donations, expenditure and funding*, November 2008 at pp 32.
- <sup>35</sup> Legislative Council, *Electoral and Political Party Funding in NSW*, June 2008 at p 95.
- <sup>36</sup> NSWPD (*Legislative Assembly*) 25 November 2009 at p19917.
- <sup>37</sup> Stateline NSW Transcript at <http://www.abc.net.au/stateline>, 4 December 2009.

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