

Submission to the Victorian Electoral Review

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Thank you for the opportunity to provide a submission to this review.

I am an Associate Professor and Deputy Director at the Australian Centre for Justice Innovation at Monash University. I am also the Victorian Convenor of the Electoral Regulation Research Network, and have written commissioned reports on political finance for the Electoral Commissions and New South Wales Joint Standing Committee on Electoral Matters, and delivered training on political finance to electoral commission staff.

My submission will focus on recommendations relating to the operation of the political finance provisions, expenditure caps, enforcement of the political finance scheme, the interaction between Victoria's political donations scheme with other Australian jurisdictions, public funding, bans on donations from specific industries, and minimum party administration requirements for major political parties.

OPERATION OF POLITICAL FINANCE PROVISIONS

Victoria has made commendable reforms to tighten their political finance laws in 2018 by introducing:

- a cap on donations by individuals, unions and corporations of \$4,000 over a four-year parliamentary term;
- public disclosure of donations above \$1,000;
- a ban on foreign donations; and
- disclosure of donations within 28 days.

These are commendable reforms that enhance the operation of the political finance system.

However, certain other reforms are needed to further improve Victoria's political finance regulation. As Victorian Independent Broad-based Anti-Corruption Commission (IBAC) suggested, this tighter regulation of political finance should also be extended to local government, including the imposition of donation caps for those running for local

government and the disclosure by donors and third party campaigners of donations at the local government level.

Further, expenditure caps and minimum governance requirements for political parties should be considered. Bans on donations from certain sectors should also be considered.

These points will be discussed further below.

EXPENDITURE CAPS

I would recommend that Victoria introduce expenditure caps, that is, limiting the amount that each political party can spend in their election campaigns.

As I discuss in detail in my commissioned report for the Electoral Regulation Research Network, caps on expenditure exist in NSW, Queensland, South Australia, Tasmania, NT, and the ACT.¹

This is a form of regulatory response that entrenches equity between the political players is to impose caps on expenditure. A crucial question about funding political parties is how to regulate their election spending, with concerns about a 'cost explosion' in electoral spending leading to what has been described as an 'arms race' between the major parties in fundraising to finance increasingly expensive and sophisticated election campaigns.² As the established political parties have a stronger presence, broader institutional knowledge and organisational resources, they have an enhanced ability to raise and money to promote their political platforms and agendas, compared to minor parties and independents without similar resources and media presence, who are thus comparatively disadvantaged.³

In this regard, caps on expenditure level the playing field between political parties, by removing the ability of parties to mount expensive electoral campaigns.⁴ By disassociating the amount of funds raised by parties from the ability to spend these funds to pursue political campaigns, expenditure caps ensure that minor parties and independents are not disproportionately disadvantaged in their ability to promote their political agenda.

Further, the capping of electoral expenditure will also reduce the pressure on parties to spend a disproportionate amount of time and resources on fundraising, which may thus reduce the susceptibility of parties to accepting donations that may lead to corruption or unfair influence. As Senator Faulkner noted, the 'arms race' by major parties has

¹ Yee-Fui Ng, Report for Electoral Regulation Research Network, 'Regulating Money in Democracy: Australia's Political Finance Laws across the Federation (2021) <<https://law.unimelb.edu.au/centres/ernn/research/research-projects/regulating-money-in-democracy>>.

² Malcolm Anderson and Joo-Cheong Tham, 'Dynamics of Electoral Expenditure and the 'Arms Race' Thesis: The Case of New South Wales' (2014) 49(1) *Australian Journal of Political Science* 85.

³ Jennifer Rayner, 'More Regulated, More Level? Assessing the Impact of Spending and Donation Caps on Australian State Elections' in Anika Gauja and Marian Sawyer, *Party Rules: Dilemmas of Political Party Regulation in Australia* (ANU Press, 2016) 147, 147-9, 155, 162.

⁴ A study showed that 'the introduction of caps has somewhat narrowed the financial gulf between the two major parties and their minor counterparts' on the spending side. See Jennifer Rayner, 'More Regulated, More Level? Assessing the Impact of Spending and Donation Caps on Australian State Elections' in Anika Gauja and Marian Sawyer, *Party Rules: Dilemmas of Political Party Regulation in Australia* (ANU Press, 2016) 147, 147-9, 155, 162.

'heighten[ed] the danger that fundraising pressures on political parties and candidates will open the door to donations that might attempt to buy access and influence'.⁵

ENFORCEMENT

Having an elaborate set of rules is insufficient. This must be coupled with effective enforcement by the Australian Electoral Commission.

For example, the New South Wales Electoral Commission penalised the state Liberal Party for breaching electoral rules. The party used the Free Enterprise Foundation to [disguise donations](#) from donors banned in the state, such as property developers. Thus, the commission [withheld \\$4.4 million in public funding](#) from the party.

Thus, it is incumbent on the Victorian Electoral Commission to vigilantly monitor compliance with the rules and prosecute any breaches.

INTERACTION OF POLITICAL FINANCE LAWS BETWEEN JURISDICTIONS

My commissioned report for the Electoral Regulation Research Network shows that there is a distinct lack of uniformity in the regulation of political finance in Australian jurisdictions at the Commonwealth, State and local government levels in all nine regulatory dimensions: disclosure requirements (donations and expenditure), caps on donations, caps on expenditure, indexation, bans on donations from certain sectors, foreign donations bans, political funding streams and funding rates, and enforcement.⁶

The regulation of money in politics in Australia thus remains a messy patchwork of disparate regulation across the federation.

This means that money can be channelled through jurisdictions with weak donations laws, such as the federal law, to effectively circumvent stricter State laws.

Therefore, to ensure the effectiveness of political finance regulation, there should be harmonisation across jurisdictions.

PUBLIC FUNDING

There are several reasons to publicly fund political parties. The first is to ensure parties are adequately resourced in an era of declining party membership and increasingly expensive political campaigns.⁷

⁵ Australian Government, *Electoral Reform Green Paper: Donation, Funding and Expenditure* (Australian Government Publishing Service, 2008) 1.

⁶ Yee-Fui Ng, Report for Electoral Regulation Research Network, 'Regulating Money in Democracy: Australia's Political Finance Laws across the Federation (2021) <<https://law.unimelb.edu.au/centres/ern/research/research-projects/regulating-money-in-democracy>>.

⁷ Graeme Orr, 'Putting the Cartel before the House? Public Funding of Parties in Queensland' in Anika Gauja and Marian Sawyer (eds), *Party Rules?: Dilemmas of Political Party Regulation in Australia* (ANU Press, 2016) 123.

Another reason to publicly fund political parties is to enhance political integrity and equality. As Briffault stated:

Public funding is necessary to bring our campaign finance system more in line with our central value of political equality ... Public funding can break the tie between private wealth and electoral influence while simultaneously supplementing campaign resources.⁸

All jurisdictions apart from Tasmania and the NT provide public funding at the Commonwealth and State level for elections.⁹

Ideally, public funding, particularly if accompanied by spending limits, will reduce party dependence on rich donors.¹⁰

The total level of public funding of election campaigns varies considerably across jurisdictions, with about half of election campaign costs covered at the Commonwealth level, while in the ACT, NSW and Queensland, the level of public funding has approached full funding of election campaigns.¹¹

Public funding for election campaigns for most jurisdictions in Australia is available on a 'dollars per vote' basis, i.e. a fixed-dollar amount for every first preference vote received subject to a minimum vote share. In Victoria, for candidates who achieve at least 4% of total first preference votes, \$6 is payable for each first preference vote given for a candidate for election to the Assembly in an election held after 24 November 2018, while \$3 is payable for each first preference vote given for a candidate for election to the Council.¹²

However, South Australia has adopted a more progressive approach, by paying a higher fixed-dollar amount for the first tranche of the vote a party attracts, than for the rest of the vote share it wins. This is a preferable approach as it weights public funding towards minor parties. **Thus, consideration should be given towards adopting the progressive model of paying a higher fixed-dollar amount for the first tranche of the vote a party attracts, than for the rest of the vote share it wins.**

On top of this, Victoria, NSW, and Queensland also provide annual funding for parties, through an administration fund or policy development fund. In Victoria, an eligible registered political party is entitled to an annual payment of policy development funding equal to the

⁸ Richard Briffault, 'Public Funding and Democratic Elections' (1999) 148 *University of Pennsylvania Law Review* 563, 577–8.

⁹ Yee-Fui Ng, Report for Electoral Regulation Research Network, 'Regulating Money in Democracy: Australia's Political Finance Laws across the Federation (2021) <<https://law.unimelb.edu.au/centres/errn/research/research-projects/regulating-money-in-democracy>>.

¹⁰ Queensland Electoral and Administrative Review Committee, *Investigation of Public Registration of Political Donations* (1992) paras 4.9, 4.15.

¹¹ Graeme Orr, 'Full Public Funding: Cleaning up Parties or Parties Cleaning Up?' in Jonathan Mendilow and Edward Eric Phélippeau (eds), *Handbook of Political Party Funding* (Edward Elgar Publishing, 2018) 84, 124-5.

¹² *Electoral Act 2002* (Vic), s 211.

greater of the sum of \$1.00 for each first preference vote given for a candidate who was endorsed by the registered political party at the previous general election or \$25,000.¹³

This annual funding for parties, including new parties, should be encouraged to ensure that parties are adequately funded to promote their policy platforms.

BANS ON DONATIONS FROM SPECIFIC INDUSTRIES

Sector donations bans may be justified if there are certain sectors that are perceived to represent a higher risk of corruption or undue influence. In certain Australian jurisdictions, there have been bans of donations from property developers, or the gambling, liquor or tobacco industries. These are higher risk industries as the commercial interests of these industries are directly affected by the exercise of public power, which gives these industries a strong incentive to influence government in their self-interest.

Sector donations bans are rare and only exist in NSW and Queensland, and the ACT.

The NSW property developer ban has been ruled as lawful and consistent with the constitutional implied freedom of political communication by the High Court in *McCloy v NSW*.¹⁴ A High Court majority held that the degree of dependence of property developers on decisions of government about the zoning of land and development approvals distinguishes them from actors in other sectors of the economy.¹⁵ Noting that the NSW Independent Commission Against Corruption (“ICAC”) and other bodies have published eight adverse reports between 1990 to 2015 concerning land development applications,¹⁶ the High Court remarked that:

Given the difficulties associated with uncovering and prosecuting corruption of this kind, the production of eight adverse reports in this time brings to light the reality of the risk of corruption and the loss of public confidence which accompanies the exposure of acts of corruption.¹⁷

Therefore, the significant commercial incentives for property developers to influence government decisions and the history of corruption relating to that industry provides justification for specifically regulating property developers as a higher risk industry. The same arguments can be advanced for those in the gambling, liquor and tobacco industries.

Sector donation bans are less necessary if general yearly donation caps at a low threshold apply to that jurisdiction.

¹³ *Electoral Act 2002* (Vic), s 215A.

¹⁴ *McCloy v New South Wales* (2015) 257 CLR 178, [49]-[50].

¹⁵ *Ibid* [49]-[50].

¹⁶ *Ibid* [51].

¹⁷ *Ibid*.

MINIMUM PARTY ADMINISTRATION REQUIREMENTS FOR MAJOR POLITICAL PARTIES

As I argue in my briefing paper for the New South Wales Joint Standing Committee on Electoral Matters, Briefing Paper on Inquiry into Recommendations made by the ICAC Report Entitled 'Investigation into Political Donations Facilitated by Chinese Friends of Labor in 2015', it is appropriate to have a regulator oversee the internal governance standards for political parties for financial and auditing matters.¹⁸

Relevant internal governance standards for political parties identified by the ICAC include:

- accounting for, receipting and banking donations
- the organisation of fundraising events
- identifying prohibited donors and donations that exceed statutory caps
- the roles and responsibilities of staff, including volunteers
- risk management and internal audit
- whistleblowing and complaint-handling
- management of gifts and conflicts of interest
- compliance and ethical obligations of senior party officials.

It is reasonable to expect political parties to have proper processes for these matters relating to the financial management of political donations, including the identification of unlawful donations and proper accounting for fundraising events, the roles and responsibilities of staff, and dealing with conflicts of interests. These are all matters of probity that will enable compliance with the requirements of political finance legislation.

There is strong justification for linking public funding to appropriate party governance and compliance practices. This is because:

- Political parties carry out essential public functions, regardless of their legal structure,
- Parties are required to comply with electoral laws, including the management of political donations, and their internal governance is crucial towards meeting these obligations, and
- Linking public funding to acceptable governance standards will provide a strong financial incentive for parties to improve their internal governance arrangements and will thus promote compliance by political parties to electoral law requirements.

This proposal has significant advantages. It promotes pro-active compliance by focusing on the 'systems required for broader compliance rather than measures dealing with specific

¹⁸ Yee-Fui Ng, *Briefing Paper for New South Wales Joint Standing Committee on Electoral Matters: Inquiry into Recommendations made by the Independent Commission Against Corruption's (ICAC) Report Entitled 'Investigation Into Political Donations Facilitated By Chinese Friends Of Labor In 2015'* (2023)
<<https://www.parliament.nsw.gov.au/ladocs/other/18217/Issues%20paper%20prepared%20by%20Associate%20Professor%20Yee-Fui%20Ng.pdf>>.

breaches; in doing so, it requires parties receiving public funding to deal internally with issues relating to compliance'.¹⁹

Political parties receive a substantial amount of public funding. The internal governance of political parties is fundamental to enabling parties to meet their obligations under the electoral legislation.

Making the receipt of public funding to political parties subject to acceptable standards of party governance and internal control will provide a strong financial incentive for parties to enhance their standards of internal governance and improve compliance with political finance laws.

FINAL REMARKS

It is commendable that the Victorian government and Parliament are considering holistic reform to the political donations system.

I am happy to provide further details or evidence on any of the points made.

EXPERTISE:

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¹⁹ Ibid.