

Supplemental Submission to the Victorian Electoral Review

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Thank you for the opportunity to provide a supplemental 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 what minimum party administration requirements should apply to major political parties to qualify for public funding.

PARTY ADMINISTRATION REQUIREMENTS

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.¹

I would therefore recommend that the Victorian Electoral Commission be empowered to audit and enforce compliance with political parties' standards of party governance and internal control. This form of regulation does not currently exist in any Australian jurisdiction. I would also recommend that public funding via the Administrative Fund be subject to acceptable standards of internal party governance and control.

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

- accounting for, receipting and banking donations

¹ 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>>.

- 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 breaches; in doing so, it requires parties receiving public funding to deal internally with issues relating to compliance'.²

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.

In making this recommendation, I will consider:

- the governance of political parties,
- public funding of political parties, and

² Ibid.

- the appropriateness of linking governance standards to public funding.

The Governance of Political Parties

It is undeniable that the Australian political landscape is dominated by political parties. As Jaensch noted: 'There can be no argument about the ubiquity, pervasiveness and centrality of party in Australia ... Government is party government ... Politics in Australia, almost entirely, is party politics'.³

Political parties are recognised in the Australian *Constitution*,⁴ which is an indication of their importance in the political system. Since the 1980s, political parties have been legislatively recognised through electoral laws, including the *Victorian Electoral Act 2002* (Vic).

Yet the legal status of political parties in Australia is unclear. There is a question about whether political parties should be regarded as:

- 'voluntary associations', akin to a sports club, and thus immune from external scrutiny by regulators or the courts; or
- whether the public nature of political parties should be recognised, due to public funding and recognition in electoral law, and a higher level of regulation should thus apply.

Despite the centrality and importance of political parties, their legal status remains contested:

- In 1934, the High Court found that internal party rules were unenforceable by the courts, unless property rights are involved. As voluntary associations, political parties are essentially private entities.⁵
- In 1993, a Queensland Court found that internal party rules were enforceable, due to the legal recognition of parties through statutory registration in electoral laws, and the fact that these voluntary associations fulfil substantial public functions in our society.⁶
- In 2022, New South Wales and Victorian Courts held that internal party rules are rarely enforceable, unless property rights are involved, or the question closely intersects with electoral acts.⁷

As the governance of political donations by political parties closely intersects with electoral acts, there is a strong argument that the internal governance of parties in that area should be subject to external scrutiny.

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

³ Dean Jaensch, *Power Politics* (Allen & Unwin, 1994) 1–2.

⁴ Political parties received federal constitutional recognition in 1977 following the Whitlam dismissal, where section 15 of the Constitution, relating to casual Senate vacancies, was amended to ensure so far as is practicable that a casual vacancy in the Senate is filled by a person of the same political party as the Senator chosen by the people and for the balance of their term. See Anika Gauja, 'From Hogan to Hanson: The Regulation and Changing Legal Status of Australian Political Parties' (2006) 17 *Public Law Review* 282.

⁵ *Cameron v Hogan* (1934) 51 CLR 358.

⁶ *Baldwin v Everingham* [1993] 1 Qd R 10.

⁷ *Setka v Carroll* [2019] VSC 571; *Asmar v Albanese* [2022] VSCA 19, [211]–[213]; *Camenzuli v Morrison* [2022] NSWCA 51. See Graeme Orr, 'It's My Party: The Enforceability of Political Party Rules' (2022) 47(4) *Alternative Law Journal* 248.

political campaigns.⁸ 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. Money from the public fisc comes from everyone and, thus, from no one in particular.⁹

(a) Campaign Funding

All Australian jurisdictions, apart from Tasmania and the NT, provide public campaign funding for elections.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.

	NSW (2019 Election)	Cth (2019 Election)	VIC (2022 Election)	QLD (2020 Election)	SA (2018 By Election)	WA (2017 Election)	Tas
Campaign funding	\$29,430,700 .94	\$69,622,617 .44	\$28,678,4 50.90	\$15,922,00 0	\$94,765	\$4,497,58 6.58	N/A

Table 1: Level of Campaign Funding by Jurisdiction¹²

(b) Administrative and Policy Funding

⁸ 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.

⁹ Richard Briffault, 'Public Funding and Democratic Elections' (1999) 148 *University of Pennsylvania Law Review* 563, 577–8.

¹⁰ Yee-Fui Ng, 'Regulating Money in Democracy: Australia's Political Finance Laws across the Federation' Report for Electoral Regulation Research Network (2021) <<https://law.unimelb.edu.au/centres/errn/research/research-projects/regulating-money-in-democracy>>.

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 Data chosen based on most recent general election where full data has been released. New South Wales Electoral Commission, *Annual Report 2019-20* <[https://elections.nsw.gov.au/NSWEC/media/NSWEC/Reports/Annual%20reports/NSW-Electoral-Commission-Annual-Report-2019-20-\(PDF-4-1MB\).pdf](https://elections.nsw.gov.au/NSWEC/media/NSWEC/Reports/Annual%20reports/NSW-Electoral-Commission-Annual-Report-2019-20-(PDF-4-1MB).pdf)>; Australian Electoral Commission, *Election Funding and Disclosure Report: Federal Election 2019* <https://www.aec.gov.au/parties_and_representatives/financial_disclosure/files/reports/funding-disclosure-2019.pdf>; Victorian Electoral Commission, *Funding Register* <<https://www.vec.vic.gov.au/candidates-and-parties/funding/funding-register>>; Queensland Electoral Commission, *Annual Report 2020-21* <https://www.ecq.qld.gov.au/_data/assets/pdf_file/0030/28776/2020-21-ECQ-Annual-Report_v2.1Interactive.pdf>; Western Australian Electoral Commission, *Political Finance Annual Report: Report on the operation of Part VI of the Electoral Act 1907 for the period ended 30 June 2017* <https://www.elections.wa.gov.au/sites/default/files/political_funding/2016-17%20Political%20Finance%20Report/2016_2017_WAEC_Political_Finance_Report_Online.pdf>; South Australian Electoral Commission, *Year in Review 2018-19* <<https://www.ecsa.sa.gov.au/annual-reports-and-other-corporate-publications>> (Note: data not provided in annual reports for 2018 SA general election).

Annual funding for parties through an Administration and/or Policy Development Fund is comparatively rare, with only NSW, Victoria, Queensland and South Australia providing such funding.

Type of Funding (2021)	NSW	VIC	QLD	SA
Administrative/ Special Assistance Fund Payments	\$13,674,249.88	\$6,605,090.19	N/A	\$421,222
Policy /New Parties Fund Payments	\$344,143.24	\$32,152.37	\$3,000,000	N/A
Total	\$14,018,393.12	\$6,637,242.56	\$3,000,000	\$421,222

Table 2: Level of Administrative/Policy Funding by Jurisdiction¹³

The purpose of the Administration Fund is to reimburse eligible political parties and independent members of parliament for administrative and operating expenditure incurred. This includes the cost of meeting the party's funding and disclosure obligations.

Auditing and Reporting Requirements

Given the generous annual level of funding of administrative costs of parties in Victoria, there is a strong argument for imposing reciprocal obligations on parties for the receipt of this funding, which is in addition to campaign funds for their elections.

The governance standards of political parties fall below those of corporations and charities. The senior officeholders in the major parties are not subject to the statutory duties required of company or not-for-profit directors. These include the duty to:

- act in good faith and for a proper purpose,
- act with reasonable care and diligence,
- prevent an improper use of position,
- avoid all misuse of information, and
- prevent conflicts of interest.¹⁴

¹³ NSW Electoral Commission, *2021 Administration Fund Entitlements and Payments* <<https://elections.nsw.gov.au/about-us/reports/funding,-disclosure-and-compliance-reports-and-sta/2021-administration-fund-entitlements-and-payments>>; NSW Electoral Commission, *2021 New Parties Fund Entitlements and Payments* <<https://elections.nsw.gov.au/about-us/reports/funding,-disclosure-and-compliance-reports-and-sta/2021-new-parties-fund-entitlements-and-payments>>; Victorian Electoral Commission, *Annual Report 2021-22* <<https://www.vec.vic.gov.au/about-us/publications/annual-reports>>; Electoral Commission of Queensland, *Annual Report 2021-22* <https://www.ecq.qld.gov.au/_data/assets/pdf_file/0025/57553/2021-22-ECQ-Annual-report.pdf>; South Australian Electoral Commission, *Special Assistance Funding* <<https://www.ecsa.sa.gov.au/parties-and-candidates/funding-and-disclosure-state-elections/special-assistance-funding>>.

¹⁴ *Corporations Act 2001* (Cth), s 180-3.

It is appropriate to have a regulator oversee the internal governance standards for political parties for financial and auditing matters. Such standards exist for comparable bodies such as charities. Like political parties, charities are set up for public purposes, rely on volunteer labour, and are bodies with a variety of legal structures, sizes and level of sophistication in governance. The minimum governance standards of charities are regulated by the Australian Charities and Not-for-profits Commission (ACNC). Charities must meet the ACNC's Governance Standards to be registered and remain registered with the ACNC.¹⁵

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.

Linking Governance Standards to Public Funding

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,
- Victorian political parties receive a generous amount of public funding, including a comparatively high level of administration funding to enable them to comply with legislative requirements on political donations and electoral expenditure,¹⁶
- 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

¹⁵ *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 45-1. Australian Charities and Not-for-profits Commission, *ACNC's Governance Standards* <<https://www.acnc.gov.au/for-charities/manage-your-charity/governance-hub/governance-standards>>.

¹⁶ Joo-Cheong Tham, *Establishing A Sustainable Framework for Election Funding and Spending Laws in New South Wales: A Report Prepared for the New South Wales Electoral Commission* (2012) 202.

breaches; in doing so, it requires parties receiving public funding to deal internally with issues relating to compliance'.¹⁷

Conclusion

Political parties receive a substantial amount of public funding, and the level of public funding (both campaign and administration funds) is generous in Victoria, being the second highest funding rate of Australian jurisdictions. 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 in the Administration Fund 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:

The author is an Associate Professor at Monash University Faculty of Law, and the Deputy Director of the Australian Centre for Justice Innovation at Monash University.

¹⁷ Ibid.