

# Democratic Audit of Australia

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Response to Electoral Reform Green Paper: Donations, Funding and Expenditure

20 February 2009

## **Introduction**

The Democratic Audit of Australia welcomes the publication of the *Electoral Reform Green Paper: Donations, Funding and Expenditure*, December 2008. Funding and disclosure (FAD) of political parties, associated entities and candidates contesting elections is the major issue confronting Australia's representative democracy in the 21<sup>st</sup> century. This country has fallen far below world's best practice in the area of regulating political money; the current world financial crisis shows the consequences of poor regulatory regimes. Despite the existence of Part XX of the Commonwealth Electoral Act (CEA), the current system is little better than a 'free for all'. It is opaque rather than transparent, offends against the principle of political equality, permits the purchase of influence and access in regard to public officials and is not corruption-proof. Many comparable democracies such as Britain, the USA, Canada and New Zealand have recently witnessed funding scandals that have damaged their political systems and the time is now ripe to renovate Australia's FAD system to prevent a similar occurrence here.

The Audit and others have addressed this issue in many forums over many years, including in submissions to JSCEM, the Senate's Finance and Public Administration Committee, state electoral matters committees, in the media, in reports such as Sally Young and Joo-Cheong Tham's *Political Finance in Australia: A Skewed and Secret System* (Democratic Audit of Australia, ANU, 2006), in academic law and political science journals and in books such as Colin A. Hughes & Brian Costar's *Limiting Democracy: The Erosion of Electoral Rights in Australia* (UNSW Press, 2006). Our response to the *Green Paper* highlights principles rather than fine detail (the details can be found in a range of Reports and Discussion Papers at [democratic.audit.anu.edu.au](http://democratic.audit.anu.edu.au)).

As the Green Paper observes, 'Restricting the flow of legitimate money into the political process from one direction may result in less transparent money flows in another. The issues surrounding regulation of political financing are ever evolving' (Faulkner 2008, p2). It also means that the solutions to all FAD problems are not self evident and we would not expect everyone who identifies with the Democratic Audit to agree with each and every recommendation listed below and we anticipate that many of our colleagues will make individual responses.

## **1. Public funding and support**

- The public funding scheme instituted in 1983 has not achieved the goals set for it as outlined in the Joint Standing Committee on Electoral Reform's *First Report* (Hughes & Costar 2006, pp 61–62).
- Because it is based on a 'dollars for votes' principle, it naturally favours big parties, which regard it as icing on the cake of private donations. Yet it has been part of the electoral architecture for 25 years and to do away with it entirely would impact negatively on the small parties.
- Consideration should be given to transforming the scheme by adopting features of the similar scheme operating in New Zealand, whereby additional indicators of support – for example, party membership, number of parliamentary candidates, number of MPs and, for emerging parties, even opinion polls – contribute to determining the level of public funding.
- Given that public funding accounts for less than 20 per cent of the big parties' campaign expenditure, its abolition would have a negligible impact on overall campaign spending.
- It is doubtful if the suggestion of total state funding of election campaigns would attract majority public support.

## **2. Private funding**

- A complete ban on private donations may be struck down as an unreasonable breach of freedom of association, a principle some members of the High Court have been willing to develop out of the approach adopted in the 1992 *ACTV Case*.
- Donations could be restricted to individual persons only, but there would need to be protection against 'smurfing' (the practice of splitting large donations among directors, members, employees etc). Organisations such as unions and corporations should only be permitted to donate to political parties and their

associated entities if they ballot their members or shareholders every three years and maintain a discrete political action fund.

- Pragmatically, a ban or close restriction on donations from organizations such as businesses, unions, partnerships etc would most likely encourage them further into third party campaigning and this would need to be covered by a revised FAD system.
- No class of person, such as 'property developers', should be prevented from making donations because of administrative complexities of trying to do so and the chance of legal challenges.
- Income generated at party/candidate/associated entity 'fundraisers' should be treated as donations above reasonable costs for venue hire, food and beverages etc.
- 'Buying' access to public officials through donations is a misuse of public office (minister of the crown) for private (political party/candidate) advantage and breaches the principle of equality of access. It should not be permitted.
- Membership fees of political parties should not be treated as donations.
- Because it has been a feature of the structure of the Australian Labor Party for over a century and has been validated by the High Court in the *Hursey Cases*, the capitation fees currently paid by some trade unions to the party should not be regulated under the CEA.
- Donations from individuals to political parties should be capped at \$1000 (indexed) per annum and \$1000 to individual candidates.
- That the current loophole whereby the federal, state and territory divisions of political parties are treated as separate legal identities for donation purposes should be closed.
- There should be the highest degree of uniformity of FAD regimes across federal, state and territory jurisdictions.
- Owners of television and radio licences should, as a condition of their licence, be required to grant free advertising time to political parties in proportion to their levels of support—perhaps again using New Zealand-like criteria.
- Individual television and radio political advertisements should be not shorter than three minutes duration.
- Anonymous donations in excess of \$50 (indexed) should not be permitted.
- There appears to be public support for not allowing non-citizens who are resident abroad to make campaign donations, but it should be recognized that any such prohibition could be circumvented by the use of local agents.

- Responsibility for adhering to the FAD requirements should rest with senior party officials, senior third party officers/members and candidates.

### **3. Donation disclosure**

- A National Campaign Authority, separate from the AEC, should be established to administer the FAD regime, including monitoring campaign advertising material.
- So that disclosure can be made more transparent, we recommend that the CEA be amended so that the House of Representatives has a fixed election date—say the first Saturday in December of the third year of an electoral cycle. This does not require constitutional change, but would need to anticipate S 57 dissolutions and the Governor General’s reserve powers (though the use of these is rare). Liaison with those states that already have fixed date elections will be required.
- The acceptance of the previous recommendation will permit the declaration of an ‘election period’ long enough to better regulate disclosure of donations and political advertising. The current ‘*from the issue of the writs*’ period is too short.
- In order to achieve maximum transparency of the source of donations, the CEA should be amended to provide for an internet-based, in-time accounting system of disclosure similar to that used successfully by the NY City Campaign Finance Board for many years ([www.nycffb.info](http://www.nycffb.info)). Under the NY scheme the disclosure requirements become more frequent as election day draws nearer—hence the need for a fixed election date. The principle behind this recommendation is that voters should have the right to know who is funding political parties and candidates *before* polling day.
- All donations in excess of \$1000 (indexed) should be declared—though a NY-style scheme would permit a lower threshold.

### **4. Expenditure**

- There is currently excessive expenditure on election campaigns—indeed it has become an ‘arms race’ between the big parties.
- Capping expenditure appears as one solution as occurs in the comparable jurisdictions of the UK, NZ and Canada. The decision of the Canadian Supreme Court in *Harper v Canada (2000)* provides an important judicial precedent for the view that expenditure limits, including those of third parties, are necessary in the interests of political equality and preventing some voices drowning out others, even where there exists a guarantee of freedom of speech.

- Members and Senators should not be permitted to use their postal and printing allowances to engage in direct mail political campaigning, including the provision of postal vote applications.
- ‘Political’ staff in ministers’, members’ and senators’ offices should move off the public payroll between the issue of the writ and polling day—as is the case in the UK.

## **5. Third parties**

- Little reform will result if, by restricting the flow of money to political parties, the problem is transferred to ‘third party’ expenditure.
- Third parties should therefore be covered by the FAD regime.
- Defining who or what is a third party would be made easier by the existence of an expert and well resourced National Campaign Authority.
- Criteria could be developed that would allow the authority to ‘declare’ a person or an organization to be a third party and thereby bring them within the FAD regime.
- Third parties, unlike at least the big parties, may have planned short lives and the 2004 ‘Swift Boat’ problem in the USA needs to be anticipated.

## **References**

John Faulkner, *Electoral Reform Green Paper*, Canberra, December 2008.

Colin A Hughes & Brian Costar, *Limiting Democracy: The Erosion of Electoral Rights in Australia*, UNSW Press, 2006.