Submission No 23

INQUIRY INTO PUBLIC FUNDING OF ELECTION CAMPAIGNS

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Submission by Graeme Orr

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Aims and Principles

The underlying values at stake are well summarised in Electoral Commissioner Barry's evidence, drawing on Dr Tham's submission. These are said to be four: (1) integrity/anti-corruption, (2) fairness/political equality, (3) liberty/political freedom and (4) the resource needs of political parties/candidates. Balancing such generic principles is obviously difficult.

Australia's laissez-faire system has tended, by default and inertia, to prioritise a rather bald form of political freedom to the neglect of the other values. In contrast, our most obvious comparators, the UK, NZ and Canada all have much more developed regulatory systems.

Rather than reiterate debate about those four principles, I ask the Committee to also consider the issue at a more pragmatic level. What does it seek to achieve in reform in this field? The obvious possibilities are:

(a) Reducing the *amount of money* in politics. (Has the 'money-go-round' come to detract from substance and focus; are electors tired of large-scale campaigns?)

(b) Re-routing the *style of electioneering*. (Has broadcast advertising come to eclipse more engaging types of campaigning?)

(c) Encouraging *greater participation*. (Do parties need incentives to reach out more?)

(d) Mitigating *incumbency benefits*. (Are governing parties and MPs unduly advantaged?

(e) Shoring up *public confidence*. (Have recent scandals meant that major action, for its own sake, is needed to improve faith in electoral democracy?)

Restricting Expenditure

The recommendation, which I have advocated since 2003, is to focus attention on limiting expenditure, ie on the demand side.[1] This has the benefit of relative transparency and enforceability, since most political expenditures are inherently public.[2] Rival parties will to a significant extent monitor and police each other.

To encourage less reliance on influence-peddling donations, there should be an increase in the amount of public funding. The amount of this increase will depend on the degree to which donations are restricted, if at all.

New South Wales' fixed terms make a system of restricted expenditure easier to manage than if electoral dates were unknowable, since the period of restricted expenditure can be known in advance. The simplest system would be set a cap for each of the first three years of a parliamentary term, with a higher cap for the final, election year.

Depending on the cap set on parties and their collective candidates, lower caps should be set for the same expenditures by 'third party' lobby groups.

The major downside of capping expenditure is the potential for proliferation of front-groups. Rules need to be drawn preventing co-ordination of expenditures between parties/candidates and non-associated entities. Third parties could still co-ordinate amongst themselves.

There is always the 'Swift Boat Veterans' spectre, of an excess of negative advertising by third-parties. The only real bulwark we have against that is cultural. Such advertising is of course open in Australia at present (witness some of the Brethren advertising). That we have not imported it holus bolus from America yet is not a factor of our legal arrangements, but of a more statist cultural tradition, that accepts advertising by well-established groups like the ACTU and industry bodies but is less open to a cacophony of third-party advertising.

Government Advertising

This is not so much the elephant in corner, but the elephant criss-crossing the room. As both the WorkChoices imbroglio and the recent NSW Auditor-General report indicate,[3] the elephant remains real at all levels, and is ridden by all hues of government.

For some years I have advocated a straightforward annual capping of government campaign advertising.[4] This is ultimately an issue of parliament reclaiming some budgetary control over the executive.

Assuming this proposal is a step too far for the executive, the fall-back position is, as suggested by Professor Twomey, to limit government advertising in the lead-up to an election. Professor Twomey advocates a clean ban on all government campaign

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[1] See eg 'The Currency of Democracy: Campaign Finance Law in Australia' (2003) 26 *UNSW Law Journal* 1 at 23-25.

[2] I note this approach (which is largely the British model) was endorsed by the UK expert, Professor Ewing during his 2009 visit to Australia.

[3] NSW Auditor-General's Report, Performance Audit, *Government Advertising* (Dec 2009).

[4] Eg, 'Government Advertising: Parliament and Political Equality' (2006) 46 *Papers on Parliament* 1.

advertising for a period leading up to each election. Not dissimilarly, but more modestly, the recent *Government Agencies (Campaign Advertising) Act 2009* (ACT) legislates a ban, but only during the 37 days of their election campaign and then subject to Ministerial override in cases of emergency.[5]

If such limitations are favoured, why not legislate to extend and enforce the current convention that campaign advertising is subject to the caretaker convention? For example, legislate that any campaign advertising run in the 6 months prior to the fixed election date be subject to approval by the Opposition Leader. This ought to ensure that ads in that time are limited to public health/welfare messages with bipartisan support.

Donation Limits

A ban on all donations (or one set at a risible level) would probably be unconstitutional, for the simple reason that small donations are not corrupting but are a simple form of political expression and association.

Outside this, there is no constitutional impediment to:

(1) Capping donations, provided the limit is at a reasonable level, such as A$1000 pa or above.

(2) Restricting donations to political parties to those eligible to vote. Despite its strong 'free speech' guarantees, the US has long provided that corporate, union and foreign donations directly to parties are impermissible. There is, however, no justification for banning non-citizen residents from donating on the same basis as citizens/registered electors.

(3) Limiting or banning contributions from particular sources, such as property developers. Other submissions (eg Professors Williams and Twomey) suggest otherwise. I disagree. First, there is no constitutional principle of political equality. Rather there is a principle of freedom of expression. Donations are only indirectly a form of expression. Second, and more significantly, there is evidence that corruption and undue influence (and its perception) is chiefly sourced in donations from a couple of industries. *It is precisely that kind of evidence that a Court will look for in deciding whether any restriction on political freedom is justified. Justification here means tailored or 'proportionate' to the problem at hand. If anything, specific legislative surgery is easier to justify than a more general, swingeing ban.*

Public Funding

In NSW since 1981, electoral funding has flowed, effectively to parties, on the basis of primary votes won. (Unlike the Commonwealth however there has been a capping of

[5] Sections 18, see also s 9 (definition of 'government campaign' and Electoral Act 1992 (ACT) dictionary (definition of 'pre-election period').

entitlements, scope for pre-payment of some monies, a waiving of the threshold for elected MLCs, and an extra tier of payments in the guise of a 'Political Education Fund').

A second type of funding comes in the form of parliamentary and constituency resources and staffing for MPs and parties.

Increasing funding will confront arguments about taxpayer fatigue and cynicism. Funding has also been alleged to soften parties and further centralise them away from their activist bases: yet such developments have also occurred in systems without public funding. Parties can always spend more money on non-electoral affairs, such as internal expenses, conferences or policy development, so it is not clear that public funding per se, any more than reliance on big donors, is a cause of grass-roots atrophy.

In theory, public funding can be tailored to encourage greater connection by parties with their grass roots. Matching payments for party memberships or small scale donations are options that are often been touted. However such proposals present three practical difficulties: (1) auditing against fraud, (2) privacy of donors/members and (3) perverse incentives (eg to branch-stacking).

It would be simpler to tie some public funding to specific, desirable forms of campaigning. For instance, tie some payments to the distribution by parties of formal policy statements, and allocate some monies to the production and airing of televised debates.

Uniformity

The ideal regime would be uniform throughout Australia, with the only variations being in the size of expenditure limits.

As Professor Twomey has pointed out, one practical and constitutional sticking point is that political parties in Australia have federalised structures. Campaigning and candidate selection are conducted by state divisions of parties, who do not maintain internal structures respecting the legal nicety that state law tends to govern state elections and federal law federal elections.[6]

This challenge is reinforced by the fact that political issues in Australia tend to bleed between jurisdictions. This is increasingly true as federal power broadens in fundamental areas such as the economy, education and the environment .

A go-it-alone NSW law, restricting say political expenditure, would have to be limited to expenditure directed at the election of candidates or promotion of parties at a state election, or directed at issues in contention in state political and parliamentary debate or likely to affect electors in their state electoral choices. Such formulations have fuzzy boundaries, especially outside the formal campaign period.

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[6] The legal distinction is not so simple either: federal power over broadcasting permits federal law to regulate, eg, electoral advertising, provided the laws do not impinge on the existence of states as political entities.

However, this caveat aside, there is no reason for NSW or any other jurisdiction to wait years for the Commonwealth to act. Experimentation is a strength of federalism: indeed it was NSW that led the way in 1981 with public funding and disclosure laws. Further, even if uniformity were achievable in 2010, it will likely unravel in future years as governments of different hue come to power at different levels and as regulators in different jurisdictions react to different experiences.

For practical reasons, one aspect of uniformity that would be ideal would be in enforcement. There is much to be said for a single, central political finance agency well-resourced financially and in terms of legal and auditing expertise. This however would require specific legislation or referral of power.

Whatever form any new regulation takes, it must not expect perfection. As overseas experience and the experience of corporate regulation show, regulating in fields involving money is a cat and mouse game. There will be unintended consequences and a need to revisit regulations.

Further, whilst legislators should bear in mind the potential constitutional issues, they should not be spooked by them. The Australian courts have a history of deference to parliamentary expertise and sovereignty when it comes to electoral law. The implied immunity between one level of government unduly interfering with the political essentials of another is certainly a constraint to be borne in mind. The other constraint is the implied freedom of political communication; however that constraint should not be overstated. It reached its high-watermark in 1992. Conservative courts have tended to retreat from it since. In any event, it is far from an absolute freedom, but merely a potential check on laws that are not reasonably justifiable. Justification can come in the form of principle and empirical basis. The more there is bipartisan agreement on the rationales for reform, the less likely a court will be to leap in.

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