

INQUIRY INTO PUBLIC FUNDING OF ELECTION CAMPAIGNS

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Submission to the NSW Joint Standing Committee on Electoral Matters

by Anne Twomey*

Introduction

This submission is largely a summary of issues that I have previously raised in greater detail in a report to the NSW Government on political donations and expenditure. A copy of that report can be found at: http://www.dpc.nsw.gov.au/publications/news/stories/election_campaign_finance_reform

or at: <http://ssrn.com/abstract=1299331>.

Piecemeal approaches and jurisdictional problems

Piecemeal approaches to political funding and expenditure, such as banning fundraising dinners with Ministers or banning political donations from developers, are problematic. First, they are generally ineffective. The money and influence will simply be peddled another way. Secondly, their selectiveness means that they are more likely to be vulnerable to constitutional challenge. It is more difficult to establish that a law that applies only to developers and their spouses is reasonably appropriate and adapted to achieve a legitimate end in a manner that is compatible with the system of representative government (the High Court's *Lange* test). A more comprehensive approach is therefore advisable for both legal and practical reasons.

Equally, action by one State alone is unlikely to be effective. This is because political parties in Australia have a federal structure. The State branch of a party raises money that is used to fund electoral campaigns and candidates at the national, State and local government levels.

The difficulty facing the Committee is that on the one hand it needs to make sure that its proposed law is not vulnerable to being struck down because it affects Commonwealth electoral campaigns, while on the other hand it must try to prevent any exceptions that it includes for constitutional reasons being exploited as loopholes that undermine the effectiveness of the law.

In Canada, where there are different political parties at the provincial and federal level, the same problems have not arisen, but they have in the United States where the same political parties operate across all levels of government. In the United States, attempts at the federal level to regulate political donations and expenditure with respect to federal elections only, has led to massive avoidance and the use of what is known as 'soft money' through State party structures.

The most effective way to achieve regulation of political donations and campaign expenditure, is to reach bipartisan agreement and implement reform across the country at both the national and state levels. In the United States, with 50 separate States to negotiate with, this is a daunting task. In Australia, with only 6 States and the Commonwealth, it is at least feasible.

The Committee needs to consider its place in this process. Is it proposing a stand-alone law for New South Wales that is intended to apply regardless of what other jurisdictions do, or is it seeking to

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provide a lead model for other jurisdictions that might eventually be adopted Australia-wide? If the latter approach is preferred, then consultation with the Commonwealth and other jurisdictions should take place with an eye to putting in place a law which is potentially compatible with other systems and could be the catalyst for change across the country.

What type of reforms do we need?

What reforms should take place? There is no simple solution. Banning all political donations outright would probably be unconstitutional to the extent that it deprived political parties of the capacity to communicate their policies and advocate the election of their candidates. It would also be likely to exacerbate the problems it was intended to resolve. It would simply shift money to third party single-issue lobby groups who would dominate electoral campaign advertising, leaving parties beholden to their demands.

The more realistic options that need to be considered are:

1. Capping political donations; and
2. Limiting expenditure on political campaigns, particularly in relation to political advertising.

Depending upon how this is done, some level of additional public funding for elections will be required. This submission does not address public funding issues in detail, but I refer the Committee to the points made about public funding in my report for the NSW Government, mentioned above.

Capping political donations

Capping and banning Rather than banning all political donations, some types could be banned and others capped to limit any potential influence on the part of the donor. For example, donations by corporation, unions, partnerships and associations could be banned, on the basis that none of them have a right to vote in elections, while donations by individuals, who are enrolled as voters, could be capped at a figure such as \$1000. This is the approach that has been taken in Canada.

Burden on taxpayers Before adopting this idea, the Committee ought to give consideration to the fact that the lower the cap and the fewer eligible donors, the higher the amount of public funding that will be needed to supplement the loss of donations to political parties to allow them to continue to function and communicate their policies to voters during election campaigns. The public interest in avoiding the risk or perception of corruption must therefore be balanced against the cost to the public purse and the priorities for the use of public funds. Another option might be to allow non-voters, such as corporations and unions to make political donations, but to cap them at a higher level, such as \$20,000, so the donation from a large corporation or property developer is no more valuable to government than the donation of smaller corporations, associations or interest-groups.

Disadvantage to parties with poor supporters? Some have argued that a system of capped donations may be disadvantageous to parties that have poorer supporters. There are a number of responses to this charge. First, it is still fairer than the current system that puts no limits on donations. Secondly, parties with inspiring candidates and policies or enthusiastic and committed supporters can raise large amounts of money through small donations by a much wider proportion of the population, as Barack Obama did in the United States. He attracted four times as many donations under \$200 as John McCain and profited significantly from having a much wider base of supporters. One of the effects of capping donations is to force political parties to connect with voters and attract broad grass roots support rather

than concentrating on rich corporate donors.

Thirdly, one must ask whether the rationale of reform is to avoid the risk and perception of corruption or to attempt to manipulate the political system to make all parties somehow 'equal' regardless of the level of support they receive from the public. The US Supreme Court has rightly described it as a 'dangerous business' to use electoral laws to try and level out the political opportunities of parties in an attempt to influence voters' choices.

Practical difficulties – related entities If NSW was to cap political donations, a number of difficult practical issues would arise. First, if non-individuals could make donations, there is the question of whether entities are deemed to be separate or part of the one body for the purposes of complying with the cap. For example:

- Could subsidiaries or related corporations all give donations up to the relevant cap?
- What about different branches of trade unions, including those from other States or national offices?
- Would this system encourage the creation of a plethora of front organisations to channel donations under the cap to a party?
- What about transfers from one branch of a political party to another? Would they be permitted?

Defining donations Secondly, there is the problem of defining political donations:

- Does it include party membership fees?
- Does it include loans that may be given at a generous interest rate or the forgiving or paying off of a party's debts?
- Does it include commercial transactions, such as paid advertisements in party publications at inflated prices?
- Does it include the use of property, such as offices, equipment or vehicles, free of charge or at low rates?
- Does it include the provision of legal services or financial advice at less than market rates, or the secondment of corporate employees as 'volunteers' for a party during an election campaign?
- When a person pays to attend a party conference or budget dinner, to what extent is he or she paying to obtain information, as at any other sort of conference, and to what extent is he or she making a political donation?

There are some very fine lines that would need to be identified.

Dangers of indirect donations On the one hand, it would be pointless to shift direct political donations, which are relatively transparent, into indirect political donations which may both be less transparent and give rise to higher potential for corruption and influence peddling. For example, if a major corporation pays the salaries of its staff who it then seconds to work as 'volunteers' for a political party, that corporation may have far more influence upon the party than a cash donation would ever achieve. The same may be the case if a candidate is given free use of an office and facilities during an election campaign within a corporation's building, allowing the corporation much greater access to and influence upon the candidate and his or her staff.

Burdensome compliance On the other hand regulating all aspects of the operation of political parties might result in governments being too closely involved in the running of political parties tying them up

in such red tape that there would be enormous compliance costs in meeting all the relevant restrictions. In the United States, compliance costs are so great that Presidential nominees who accept public funding and are as a consequence denied access to private donations, are still permitted to raise donations solely for the purpose of meeting compliance costs.

So any system of capping political donations should take into account the need for a simple, transparent and easy to administer compliance system, as well as the need to try and eliminate loopholes that could be exploited and the need to reduce reliance on taxpayers' money. Getting this balance right is not going to be easy.

Third parties The biggest problem, however, lies in dealing with third parties. Bodies that are not political parties, such as unions, business groups and environmental groups have, in the past, campaigned actively during election campaigns. It is perfectly proper for them to campaign concerning issues that are relevant to their core purposes. However, if non-individuals were banned from donating to political parties, or their donations were capped, it is likely that much of the money that would previously have been used for political donations would be funnelled into such lobby groups who could then run campaigns that could potentially swamp those of political parties.

The risk is that political parties would then become even more beholden to such bodies to run their campaigns for them or push their agenda. This has the potential to defeat the whole purpose of banning political donations, as it would result in even less transparency and give greater influence and political power to corporations, unions and other lobby groups.

Banning third parties from advertising or campaigning during election campaigns is not appropriate and would probably be unconstitutional, as it would be an unreasonable burden on the implied freedom of political communication. The best that could be done is to impose some kind of expenditure limit on third parties which balances their right to put their view across against the need to maintain integrity in the political process.

Expenditure limits

This raises the difficult area of expenditure limits generally for election campaigns. Political parties would not need to raise enormous amounts through political donations or public funding if it were not for the escalating costs of election campaigns and the perceived need to out-advertise the other side. If there were a maximum amount that each party or candidate could spend, then both the need for, and the relative value of, political donations would diminish.

Political advertising As most electoral expenditure occurs on political advertising, limits on expenditure will have the effect of restricting the quantity and diversity of political advertising, affecting the ability of parties and candidates to convey their policies to voters. Expenditure limits are therefore different in nature to caps on political donations. A party facing caps on the political donations it can receive may still campaign more broadly at the grass-roots level and increase the number of its donors and the resulting amount of funding it receives. Expenditure limits, however, place an absolute limit on the amount that can be spent in getting the party or candidate's message across to voters. They are therefore limits on political communication. Hence any limits on expenditure, and in particular political advertising, must be very carefully assessed to ensure that they are not held unconstitutional.

In 1992 the High Court struck down an earlier attempt to ban electronic political advertising during

election campaigns and allocate free advertising to parties according to their existing representation in the Parliament. The problems with this law included the fact that it banned non-political parties, such as environmental groups, business groups and unions from undertaking political advertising during the election period and it also favoured incumbents in the distribution of free political advertising. The High Court concluded that the law burdened freedom of political communication. It would have still upheld the validity of the law if it was reasonably appropriate and adapted to serving the legitimate end of preventing corruption in a manner that was compatible with the maintenance of the system of representative and responsible government. But the Court held it was not – it failed this proportionality test.

The lesson we learn from that case is not that political advertising cannot be regulated or limited, but rather that it can be done only in a reasonable and proportionate manner where the restriction on political communication is not disproportionately more than is necessary to achieve the legitimate end of preventing the risk or perception of corruption. Given that advertising on television and radio is by far the most expensive aspect of running an election campaign, and given that the current level of saturation advertising is far from necessary in order for parties to get their message across, it is probably time for some limits to be placed upon political advertising in election campaigns through the electronic media, as long as they are reasonable, meet the proportionality test and are not used as a means of favouring incumbents or particular political parties.

Government advertising This raises the difficult issue of government advertising. If there are to be limits placed upon political advertising during election campaigns, or a longer period of, say, 6 months before an election, then there must also be restrictions placed upon government advertising to prevent incumbents gaining a significant advantage by both avoiding expenditure caps and relying on taxpayers' funds, rather than capped political donations, to pay for the advertising.

Much government advertising, regardless of which party is in government and regardless of which level of government is involved, shamelessly promotes the government and government policies, in the guise of 'education campaigns' or 'informing' citizens about the marvellous things the government has done or is about to do. As part of a comprehensive reform to political donations and campaign expenditure, government advertising in the electronic media should simply be banned either for the election campaign or preferably for a longer period leading up to the election. If that meant that it had the side-effect of temporarily stopping advertising educating us about climate change, or road safety or the dangers of smoking or the need for energy efficiency, then so be it. The benefits would outweigh the costs. Once exceptions start creeping in and someone is appointed to determine whether or not government advertising is 'political' in nature, then avoidance again becomes rampant, undermining the reforms.

Third parties If limitations are imposed upon donations to political parties or the expenditure of political parties during election campaigns, including expenditure on advertising, then it is essential that some kind of limitation be imposed upon political expenditure of third parties, such as unions, business groups and other lobby groups. If not, third parties would be able to swamp the advertising of political parties, so that campaigns end up being focused on well-funded single issues, as often occurs in the United States. Moreover, there is a significant risk that political parties will become beholden to third parties to run campaigns for them as unregulated surrogates.

But any limitation upon the political expenditure of third parties must be carefully tailored to ensure that they are not unreasonably restricted in conveying their message to voters and can run a modest national campaign. In some jurisdictions this has been achieved by setting a cap on political

expenditure of third parties during election periods, but permitting a higher cap if third parties register with the Electoral Commission and agree to higher levels of disclosure and scrutiny.

Practical problems Apart from the constitutional constraints, there are again practical problems concerning the type of expenditure to be covered:

- Should it include the costs of party administration and operation, or should it be confined to election expenditure only?
- Should expenditure caps include the market price of goods and services that have been given for free or at a discount?
- Should it cover capital expenditure or the wages of staff during election campaigns?
- Should it include the market cost of wages for people who volunteer?
- Should it include interest on loans or expenditure on income generating activities?

Timing Issues also arise around timing. Should limits on expenditure apply only to the formal campaign, from the issue of the election writs to polling day, or for a longer period of, say, one year before polling day? The problem is that if the period during which the limits apply is relatively short, there will be massive spending in marginal electorates before the period starts to avoid the expenditure limits. The effect would be simply to move the timing of expenditure rather than reducing it. If, however, expenditure limits apply to parties all the time, the administrative and compliance burden may be excessive.

Application of expenditure limits There are also practical issues as to how the limits should be applied:

- Should expenditure limits apply to parties only, or to each candidate, or should there be separate limits for parties and for candidates?
- How should those limits be calculated?
- What level of expenditure is necessary in order to allow parties and candidates to communicate adequately with voters?
- Is it reasonable to argue that the cost of campaigning in some electorates is greater than in others, for geographical or other reasons? The cost of campaigning in country and city areas may vary greatly. Should the limit be the same, and if not, how should it be assessed?
- Should limits for parties be based upon the number of electorates in which they run candidates and should there be a minimum amount of expenditure which any political party is entitled to make?

Wealthy candidates Another problem arises where wealthy candidates wish to use their own resources to pay for their election campaign. Should they be limited in the amount of money they can expend from their own pocket? If the legitimate aim of expenditure limits is to prevent the risk or perception of corruption, then it would not seem to support laws that prevent candidates using their own money to back themselves, rather than money donated by others seeking influence or favour (unless, of course, their money came through political donations to begin with). On the other hand, does this make electoral contests unfair, and is 'fairness' something that should be mandated by law or the courts?

Conclusion

There is no simple, uncontentious and completely effective way of dealing with political donations and the attendant risks of corruption, or the perception of corruption. Yet the task is not impossible. Three

things are required.

The first is political will. There needs to be a strong bipartisan will to initiate change and to be rid of the scandals, even if that entails a potential short-term political disadvantage for whichever party thinks it is currently in a position to out-fundraise the other. Ideally, this approach needs to extend to the national sphere, resulting in a nationwide co-operative and effective scheme.

Secondly, there needs to be a preparedness to work through all these technical and practical issues that I have raised concerning donations and expenditure so that a fair, transparent and rational system can be introduced that satisfies constitutional requirements and does not overly burden either the parties themselves in terms of administration or the taxpayers of New South Wales in terms of funding. A quick band-aid approach will not be effective and is likely to have the unfortunate effect of undermining confidence in the system.

Finally, there should be recognition that in addition to political donations reform, the political process needs to be supported by strong anti-corruption measures, such as:

- transparent procedures for decision-making;
- effective administrative review mechanisms;
- constraints upon lobbyists; and
- powerful and well-resources watchdog bodies such as the Auditor-General, ICAC and the Ombudsman.