

Submission
No 115

INQUIRY INTO ELECTORAL AND POLITICAL PARTY FUNDING

Organisation:

Name:



Telephone:

Date received: 15/02/2008

Select Committee on Electoral and Political Party Funding
Parliament House, Macquarie St, Sydney 2000

This is a submission to the Inquiry of the Select Committee on Electoral and Political Party Funding. That committee has been requested to report to Parliament on issues pertaining to Electoral and Political Party Funding. Part of the terms of reference includes:

1. That a select committee be appointed to inquire into and report on the funding of, and disclosure of donations to, political parties, and candidates in state and local government elections, and in particular:

(a) all matters associated with electoral funding and disclosure

(b) the advantages and disadvantages of banning all donations from corporations, unions and organisations to parties and candidates

(c) the advantages and disadvantages of introducing limits on expenditure in election campaigns

(d) the impact of political donations on the democratic process and

(e) any related matters.

Background

In the past 8 years the NSW Labor Party has accepted \$48,108,485 and the NSW Liberal/National Coalition accepted \$45,605,511 whilst in opposition. Further, election candidates from the major parties at the 2003 NSW State election accepted almost \$7 million in election donations and via fundraising events.

During that time the NSW ALP has accepted over \$10,710,157 in developer donations and the NSW Liberal National Coalition has accepted over \$7,325,187 from developers. The NSW Government is unlikely to have an unbiased and principled attitude when it comes to responding to this inquiry or further regulating political donations, and this alludes to how the dominance of free-market capitalism can be contrary to democratic principles.

In late 2007, ICAC released its report into corruption risks in the NSW planning system "Corruption Risks in NSW Development Approval Processes: Position Paper" ("ICAC report"). That report touched on many issues of relevance to this inquiry, especially consideration of political donations. This submission focuses on local government and development assessment. I believe that this level is most susceptible to the problems introduced by political donations, given the potentially large monetary gains that developers can make from a development. consent.

This submission takes the fundamental position that political donations are leading to a kind of corruption and lack of transparency in the political system, and significant changes to the structural of the political system are needed. Existing laws attempt to regulate the effects of political donations, however I think that existing laws are inadequate. Before explaining why this is so, I will firstly give a brief summary of the existing provisions under the Local Government Act that relate to political donations.

Election Funding Act applying to Local Government:

At the local government level, political donations can constitute non-pecuniary interests, governed by the Model Code of Conduct for Councils. They can also constitute pecuniary interests, and subject to the pecuniary interest provisions under the Local Government Act, such as reporting, and avoiding decision-making over developments related to the donor (see ICAC report at pp 34-36).

Part 8 of Chapter 10 of the LG Act regulates the disclosure of election funding for local government candidates. Section 328 applies various provisions of the Election Funding Act 1981. The Election Funding Authority keeps three registers: A 'Local Government Register of Candidates' for each election and by-election (s 325); a 'Local Government Register of Party Agents' to be kept on a continual basis (s 326), and a 'Local Government Register of Official Agents' for each election and by-election (s 327). Section 328 applies certain provisions of the Election Funding Act 1981 to local government, requiring disclosure of election funding, subject to certain rules of interpretation set out in Schedule 6 to the Local Government (Elections) Regulations 1997.

Like for State General elections, the disclosure period for political donors for local government elections commences on the 31st day after the previous local government election and ends on the 30th day after the current ordinary election or by-election. This means that donations for the previous four or so years do not get revealed to the public until well after an election.

Pecuniary Interests under LG Act

Part 2 of Chapter 14 of the Local Government Act regulates the honesty and disclosure of interests held by Councillors and other "designated persons" under s 441. Such persons must disclose "pecuniary interests". Whether or not a political donation constitutes a 'pecuniary interest' and therefore subject to the disclosure requirements, will depend on individual circumstances, and I understand is regulated by a local government Code of Practice. "Pecuniary interests" are defined in s 442:

442 *What is a "pecuniary interest"?*

(1) For the purposes of this Chapter, a pecuniary interest is an interest that a person has in a matter because of a reasonable likelihood or expectation of appreciable financial gain or loss to the person.

Pecuniary interests cover a person's spouse, de-facto partner, relatives, business partners and employer (s 443). Section 448 sets out interests that do not need to be disclosed for the purposes of chapter 14. These include an interest as an "elector", which defined in the Dictionary to the Act as a person who is entitled to vote in an election.

The first significant implication of a pecuniary interest is that if a Councillor has a pecuniary interest in any matter before Council or committee meeting, the Councillor must disclose this to the meeting, under s 451.

Secondly, section 449 requires a councillor or designated person to complete and lodge with the general manager, within **3 months** after becoming a councillor (a much longer period than

under the WA scheme) a return in the form prescribed by the regulations. The relevant regulations, including clause 180(1), require disclosure of a description of each gift received since the last return was made, and the name and address of the donor of each of the gifts. A “gift” is defined under s 180:

“Gift” means a disposition of property made otherwise than by will (whether or not by instrument in writing) without consideration, or with inadequate consideration, in money or money’s worth passing from the person to whom the disposition was made to the person who made the disposition, but does not include a financial or other contribution to travel.

Like the WA scheme to be described below, it is uncertain whether this definition of gift is intended to cover gifts made to a candidate’s political party or other associated interests. The Act should be amended to clarify the coverage of this definition.

Recommendation: *amend definition of gift in s 180 to clarify that it covers the maximum possible scenarios of how gifts can occur, including to a candidate’s political party.*

Clause 184(2)(b) of the Local Government (Elections) Regulations 1997 (NSW) states a person making a return under section 449 (3) of the Act need not disclose gifts that are political contributions required to be disclosed under Part 6 of the *Election Funding Act 1981*. Presumably this is because such donations are covered by s 326-328 of the Local Government Act. Therefore I understand that there are two parallel disclosure schemes in NSW that could potentially cover political donations (the first being that established under ss 326-328, and secondly the disclosure requirements under s 449).

Electoral Funding

I consider that the preferred method of electoral funding is where it is a set amount of public funds being made available to political parties, proportional to voting patterns.

If private political donations are to continue in NSW, then an alternative is to ensure public disclosure of the donations before the time that any election is held, to allow voters to assess any perceived influence that donations may have on their preferred political candidate. Disclosure requirements that apply 3 months after an election (under the Local Government Act), or up to 4 years for State elections, do not allow the public to assess the effect political donations and respond accordingly by influencing voting patterns. Any conclusions by voters drawn from patterns of political donations can be easily forgotten or overtaken before the next election cycle 4 years later.

Through the effluxion of such a long time period, in the case of local government, a controversial development that was approved in part due to the influence of political donations could have been built, the companies involved dissolved, the persons involved moved on, before the public can assess the nature of the donations. This minimises the accountability and transparency of the process of the consent authority in assessing the development. I understand that the results of previous local government elections (eg Tweed Council) have been influenced by large donations from developers to a preferred candidate. If such candidates are elected on the back of a well-resourced advertising campaign, the potential for bias in approving that developer’s development is obvious. Existing disclosure laws, which do not allow for immediacy of disclosure, are inadequate to address this situation.

Immediacy under WA scheme

Current disclosure laws (Local Government Act, Election Funding Act) do not allow for immediacy in disclosure in NSW. There is no logical reason why it should not. It would be possible for a political candidate/party to report on donations within a few days of receipt. The scheme established by Part 5A (Disclosure of Gifts) of the Local Government (Elections) Regulations 1997 (WA) accomplishes this.

Under the WA scheme, disclosure must be made within 3 days of the receipt (or promise) of the gift, once nominations are made. If a gift is received prior to a candidate's nomination but still within the relevant 6 months disclosure period prior to election day, then disclosure must be made within 3 days of nomination.

The disclosure does not need to take place within those time frames if the CEO is satisfied that the lodging of a disclosure has occurred outside the time periods due to circumstances beyond the candidate's control (cl 30D).

A candidate must use a certain prescribed form for the purposes of disclosure, which provides details of the gift including name and address of donor, date of receiving the gift, value and description of the gift (cl 30E). A person does not commit an offence under the Regulations by not providing this required information if the person (a) provides as much of the information as is available to the candidate (b) indicates what of the required information has not been provided; and (c) sets out the reasons for not being able to provide the information. Those reasons must be, in the opinion of the CEO, sufficient and appropriate (cl 30F).

The Disclosure is sent to the CEO, who maintains a public register under cl 30G by publishing on the register the disclosure forms "upon receipt". The register must be made available at the "appropriate local government offices" (cl 30H).

Under cl 30I, a person must not publish information or comment on aspects of the electoral gift register unless it is a "fair or accurate report or summary" of information and is done "in good faith".

Recommendation: *Introduce amendments to the Local Government Act and Electoral Funding Act to require immediacy of disclosure of political donations.*

True source of donations

I understand that the true source of donations can be hidden through the use of front companies, and donations from multiple sources. Political donors can avoid disclosure through the use of fundraising bodies. For instance, recently the Cormack Foundation gave \$1.8-million to the Liberal Party. One of its directors, John Calvert-Jones is currently the Treasurer of the Liberal Party. These foundations are investment fronts for political parties, and they allow individuals or corporation to make donations without disclosure.

I am not sure of the best way to tackle such indirect relationship between politician and donor. Disclosure requirements should be reviewed to ensure that the maximum range of third party donors, be they trusts, associated entities, companies, or anyone making significant donations, can not avoid reporting. Politicians and donors can both be required to make disclosure if they are aware of facts that indicate that the true source of any donation, or something to that effect. Penalties could apply to deliberately making misleading comments in that regard.

Another difficult issue in enacting any reform package is specifying the necessary causal nexus between the donation and election campaign. The WA scheme excludes gifts "*that the*

candidate would have received notwithstanding his or her candidature” (cl 30A(5)).
Presumably any donor could seek to argue that a candidate was going to receive some gift despite their candidature.

Recommendations 20-21 of the ICAC report suggest one way to manage political donations is not to establish some comprehensive definition of a political donation and impose legislative restrictions on them, but rather leave some discretion to the relevant candidate to decide what type of donations are likely to influence their discretionary decision making in the future, and make disclosure on those donations. Obviously this is not entirely satisfactory due to the biased consideration that a candidate may bring to the question. Accordingly, the Electoral Commission or some independent commissioner could be appointed to inquire into such matters.

More broadly, the Australian Electoral Commission and the NSW Electoral Funding Authority should be given expanded role to report on a systematic examination of corporate donations to political parties.

Recommendation: *Investigate means to require transparent disclosure from ‘feeder’ trusts and fundraising bodies, to minimise the ability of persons to avoid political donation disclosure laws*

Recommendation: *An independent authority be given expanded powers to audit and scrutinise the level of reporting with existing disclosure laws on political donations.*

Effect on democracy

In 2004, the nation's largest shareholder lobby group, the Australian Shareholders Association, called for an end to party political donations by publicly listed companies, arguing that the gifts are a form of bribery that can corrupt the democratic process.

Australian Shareholders Association chairman John Curry stated that corporate donations could taint the democratic process because they created the belief that vested interests were seeking special favours. "Whether the expectation is real or simply perceived, it is not in the interest of democracy, and companies that make political donations must fully consult with their shareholders," he said. "It's almost a form of bribery. No company's going to give something unless they expect to get some benefit from it, and so we're against that in principle." (SMH 21.5.2004). British American Tobacco has in the past donated to all major parties.

Political parties defend the current system by arguing that there's a separation between the parliamentary part and the organisational part of a party. The latter seeks to accumulate money for things including election campaigns, and the former claims that there is no direct influence and that it is independent from the organisational aspect when it comes to money. The Committee should address this argument in sufficient detail.

Rather than accept major political party rationalisations, the Committee should examine clear evidence of what is actually occurring. Why have political donors, such as the gaming industry and tobacco industry, given money to the “organisational” part of a party with the effect of having no influence on the democratic process? Why has Labor now made it policy

not to accept money from tobacco firms?

Planning and Environmental policy

I believe that political donations by property developers influence the discretion inherent in NSW planning laws, such as the Environmental Planning and Assessment Act 1979. The NSW Opposition Leader Barry O'Farrell recently commented that: *'In politics perception is everything....something is crook under this (NSW ALP) government ...the perception is there is a link between political donations and decision making'*.

Political donations are not prescribed as a relevant factor for consideration in determining a development application. If the NSW wishes to not reform the political donation arrangement, it could at least be transparent, and amend the EP&A Act to specify the type of influence that political donations should have.

With political donations effecting planning decisions, the planning system is currently biased towards the needs to large developments that generate large cash flows. Accordingly, this suits the needs to developers, but such developments are not necessarily suitable to the social, environmental and even and long term economic welfare of citizens, and the objectives of the EP&A Act. As recommended in the ICAC report, third party appeal rights to the Courts to challenge inappropriate developments influenced by donations could to some extent minimise the detrimental effects of donations on environmental decision making. One wonders whether government policy response to climate change has been unduly slowed and hampered given that the coal and nuclear lobby is relatively wealthier than the alternative energy sector. Without tougher disclosure laws, who knows what kinds of political donations are being made by the nuclear or coal industry right now?

~~General principles of transparency suggest that~~ At a local and state level, when such decision makers make decisions (eg Local councillors determining development applications, Minister for Planning determining rezoning or matters under Part 3A of the Environmental Planning & Assessment Act), that there should be transparency and accountability.

Recommendations 23 of the ICAC report has recommended amendments to EP&A Act to require developers to declare any political donations they have made to the Minister or to her is her political party, especially in view of the wider discretion available under Part 3A of the Act.

Recommendation

Based on the ICAC report recommendations, I suggest the following measures are appropriate:

(a) requiring developers to declare political donations in respect of development applications to decisions makers of the relevant political party, and having such information maintained on a public register.

(b) in the case of local councillors, absentioning themselves from voting on development applications from political donors. This would involve simply clarifying the existing set of circumstances when councillors must absent themselves due to more direct pecuniary benefits. Prescribing the types of situations that trigger councillors absentioning themselves should not be left to unclear and unenforceable Codes of Code.

(c) Adopt recommendation 23 of the ICAC report, and the introduction of third party appeal rights where a development assessment has been the subject of developer donations.

Information Campaigns

Increasingly, electoral advertising is being conducted by Government using public money under the guise of 'information campaigns'. There should be an objective auditor-general who reviews all government information to ensure objectivity.

Recommendation: *Appoint independent authority to review NSW Government 'information campaigns'.*

