

**Submission
No 154**

INQUIRY INTO ELECTORAL AND POLITICAL PARTY FUNDING

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Date received: 26/02/2008

SUBMISSION TO NSW LEGISLATIVE COUNCIL'S INQUIRY INTO ELECTORAL AND POLITICAL PARTY FUNDING

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LIST OF RECOMMENDATIONS

DEMOCRATIC PARTY CONSTITUTIONS

It is recommended that:

- requirements based on Part 5 of the *Electoral Act 1992* (Qld) be enacted;
- registered parties be required to lodge their donations policies; and
- such policies be made publicly available.

A ROBUST DISCLOSURE SCHEME

It is recommended that a disclosure scheme be enacted with the following elements:

(a) *Entities and persons required to lodge disclosure returns*

- Base scope of Division 4, Part XX of *Commonwealth Electoral Act 1918* (Cth) [‘CEA’] with disclosure obligations on:
 - candidates and groups of candidates;¹
 - donors to: i) candidates and groups of candidates;² and ii) registered political parties;³
 - registered political parties;⁴
 - associated entities of registered political parties;⁵
 - third parties.⁶
- Elaborate upon definition of ‘associated entity’ by specifying that:
 - the term ‘controlled’ be defined to *include* the right of the party to appoint a majority of directors or trustees;

¹ *Commonwealth Electoral Act 1918* (Cth) s 304 [‘CEA’].

² *CEA* s 305A.

³ *CEA* s 305B.

⁴ *CEA* s 314AB.

⁵ *CEA* s 314AEA.

⁶ *CEA* ss 314AEC-AEC.

- ‘to a significant extent’ to *include* the receipt by a political party of more than 50% of the distributed funds, entitlements or benefits enjoyed and/or services provided by the associated entity in a financial year; and
- the term, ‘benefit’, to *include* the in/direct receipt by the party of favourable non-commercial terms.⁷

(b) *Details and frequency of disclosure*

- Candidates and groups of candidates to lodge post-election returns detailing
 - gifts received with obligation to itemise for gifts amounting to \$200 or more in the case of candidates and \$1 000 or more in the case of groups of candidates;⁸
 - electoral expenditure by candidates.⁹
- Donors to candidates and groups of candidates to lodge post-election returns detailing gifts made with obligation to itemise for gifts amounting to \$200 or more in the case of candidates and \$1 000 or more in the case of groups of candidates.¹⁰
- Registered political parties and associated entities to lodge returns quarterly and lodge weekly returns during election periods that:¹¹
 - disclose details of receipts with sums to be itemised when \$1500 or more contributed by a person for the benefit of a party as a whole, whether to national, State or Territory branches of that party;¹²

⁷ This draws on recommendation made by the Australian Electoral Commission [‘AEC’]; see AEC, *Funding and Disclosure Report - Election 1998* (2000) 13.

⁸ This can draw on clauses 3-4, Schedule 3 of Electoral (Greater Fairness of Electoral Processes) Amendment Bill 2007 (Cth).

⁹ This can be modelled upon *CEA* s 309.

¹⁰ This can draw on clause 9, Schedule 3 of Electoral (Greater Fairness of Electoral Processes) Amendment Bill 2007 (Cth).

¹¹ This can be modelled upon the *Political Parties, Elections and Referendums Act 2000* (UK) ss 62-3 [‘*PPERA*’].

¹² This can draw on clause 17, Schedule 3 of Electoral (Greater Fairness of Electoral Processes) Amendment Bill 2007 (Cth).

- include ‘gift’ reports that deal separately with gifts and disclose the amount and date of such gifts and also identify the status of the donor as individual, trade union, company or other entity.¹³
- Either all returns by registered political parties and their associated entities or those with receipts exceeding a certain amount should be accompanied by certificates from auditors.¹⁴
- Third parties to lodge annual returns if incurred political expenditure exceeding \$10 000 with returns to detail:
 - political expenditure to be itemised according to broad categories;¹⁵
 - contributions received for the purpose of such expenditure.¹⁶
- A person/entity who is making a *contribution* to a registered political party, an associated entity or candidate on behalf of others be required to disclose to the political party or candidate the identities of the actual contributors and the amounts contributed.¹⁷
- A registered political party, associated entity or candidate that reasonably suspects that a person/entity is making a *contribution* on behalf of others to ascertain and verify the identities of the actual contributors and the amounts contributed.¹⁸

(c) Restriction on anonymous contributions

- Ban on receiving anonymous contributions of \$200 or more by candidates, registered political parties, associated entities and third parties.

(d) Penalties for breaches of disclosure obligations

¹³ This can be modelled upon Schedule 6 of *PPERA*.

¹⁴ This can be modelled upon *Election Funding Act 1981* (NSW) s 93 [*‘EFA’*].

¹⁵ This can be modelled upon *CEA* s 314AEB with obligation to itemise expenditure according to categories stipulated under the definition of ‘electoral expenditure’ in *EFA* s 88.

¹⁶ This can be modelled upon *CEA* ss 314AEB-AEC.

¹⁷ This can be modelled upon *PPERA* s 54.

¹⁸ This can be modelled upon *PPERA* s 56.

- Include offences modelled upon sections 315(1)-(2) of *CEA* but with:
 - higher criminal penalties;
 - administrative penalties.

- Include offences modelled upon sections 315(3) and (4) of *CEA* but:
 - make strict liability offences, subject to a defence that the agent of the political party or person took all reasonable steps to accurately perform the party's disclosure obligations;
 - higher criminal penalties;
 - administrative penalties.

- Persons and parties who fail to make or maintain such records as to enable them to comply with the disclosure provisions be subject to the same penalty provisions that apply to those who fail to retain such records.¹⁹

- An arrangement entered into which has the effect of reducing or negating a disclosure obligation be deemed as if it had not been entered into.²⁰

- Failure to properly disclose a particular receipt or indebtedness should lead to forfeiture of that amount to Consolidated Revenue.²¹

- Party to be de-registered under Part 4A of *Parliamentary Electorates and Elections Act 1912* (NSW) in the event of significant non-compliance with disclosure obligations.

(e) Powers and duties of Election Funding Authority in relation to the disclosure obligations

- Include powers modelled upon section 316 of *CEA*.

¹⁹ This has been recommended by the AEC, above n 7, [4.4].

²⁰ This has been recommended by the AEC, *Submission to the Joint Standing Committee on Electoral Matters Inquiry into Electoral Funding and Disclosure* (2001) [2.1.15].

²¹ This has been recommended by the AEC, *ibid*, recommendations 4 and 5.

- Election Funding Authority to have power to require audits either by party or by referral to other statutory agencies.²²
- Election Funding Authority to make all returns public including publishing on the internet.²³
- Election Funding Authority to review operation of funding disclosure provisions annually and report to Parliament on whether provisions ensure adequate transparency.
- Election Funding Authority to be properly resourced to undertake the above functions.

CAMPAIGN EXPENDITURE LIMITS

It is recommended that:

- campaign expenditure limits be supported in principle;
- the design of such limits be further investigated, particularly with reference to recent reforms in the UK, Canada and New Zealand; and
- an inquiry be conducted into government advertising.

BAN ON CONTRIBUTIONS FROM COMPANIES AND INDIVIDUALS WITH GOVERNMENT CONTRACTS

It is recommended that a ban on contributions from persons or companies with government contracts be instituted based either on Canadian or United States law.

LIMITS ON INDIVIDUAL CONTRIBUTIONS AND TAILORED LIMITS ON ORGANISATIONAL CONTRIBUTIONS

²² This can draw on clause 39, Schedule 3 of Electoral (Greater Fairness of Electoral Processes) Amendment Bill 2007 (Cth).

²³ This can be modelled upon *CEA* s 320.

It is recommended that:

- caps be placed on individual contributions;
- caps be placed on organisational contributions varying according to the number of members who are natural persons and subject to full democratic scrutiny; and
- measures to improve the internal accountability of companies and trade unions be considered and, if instituted, introduced simultaneously.

ESTABLISHMENT OF PARTY SUPPORT FUND

It is recommended that a Party Support Fund be established providing for:

- Election funding payments;
- Annual allowances; and
- Policy development grants.

I. INTRODUCTION

I congratulate the New South Wales Legislative Council for holding this inquiry: it is timely and deals with key questions of public importance.

My submission is divided into several parts. The first draws out how parliamentarians from across the political spectrum have expressed deep unease with the New South Wales system of political funding. This is followed by an analysis that sets out four central aims for a democratic political finance regime. Assessed against these aims, the New South Wales system is found severely wanting. To inform the process of reform, the penultimate section makes a series of recommendations. The last section concludes by rejecting the view that federal legislation is necessary in order to reform the NSW political funding regime.

II. A 'DANGEROUSLY UNSUSTAINABLE' SYSTEM

In his maiden speech to the New South Wales Legislative Council, Eric Roozendaal, a former General Secretary of the NSW ALP, took the opportunity to draw attention to the parlous condition of the NSW political finance regime. Speaking as 'someone who has had some involvement in this area', he observed that:

My experience tells me the current system is dangerously unsustainable. On a recent trip to the United States of America I was stunned by the amount of money being raised during the presidential primaries and the election campaign—in excess of \$US1 billion. This situation should be cause for concern in this country. If left unchecked, spiralling media costs will continue to fuel the need for our political parties to seek donations. There is no doubt the Australian public are uncomfortable with the interaction of donations and politics. They have every right to be. It is my strong belief that all political parties need to work together to change the funding of the political process.²⁴

²⁴ New South Wales, *Hansard*, Legislative Council, 21 September 2004, <[http://www.parliament.nsw.gov.au/prod/parlment/members.nsf/0/d9ccd231bed39458ca256ebe0004b5ab/\\$FILE/Roozendaal.pdf](http://www.parliament.nsw.gov.au/prod/parlment/members.nsf/0/d9ccd231bed39458ca256ebe0004b5ab/$FILE/Roozendaal.pdf)> at 28 January 2008 (Eric Roozendaal).

Another former general secretary of the NSW ALP, Mark Arbib has echoed Roozendaal's sentiments by calling for corporate contributions to be scrapped in favour of a publicly-funded system to 'ensure the integrity of the Australia's political system'.²⁵

Disquiet with the NSW political finance regime cuts across party lines. Andrew Stoner, the leader of the NSW National Party, has called for 'fundamental reform of political fundraising to limit the influence of unions and corporations'.²⁶ In late 2006, troubled by how NSW parties were currently funded, then NSW Opposition Leader Peter Debnam called for a review of the political funding regime.²⁷ NSW Liberal Party Shadow Minister for Finance, Michael Baird, has also been forthright with his concerns by urging reductions in political donations on the ground that:

(w)here political donations are corrosive, is when the donations are sought to influence outcomes, and directly taint or corrupt an impartial process . . . The ability to buy legislation remains a potential reality.²⁸

These parliamentarians have been joined by the NSW Premier Morris Iemma who has written to the then Prime Minister, John Howard, calling for a 'national and bipartisan' approach. Iemma stated that he 'fully support(s) the reform of political donations and not simply restricted to the involvement of developers'²⁹, whilst also supporting a national ban on developer donations.³⁰ Disquiet with the funding of political parties is not confined to New South Wales. At the federal level, Malcolm Turnbull, a former Treasurer of the Liberal Party³¹ and former ALP President Carmen

²⁵ Simon Benson, 'When Politicians are Under the Influence', *Daily Telegraph* (Sydney), 2 February 2006, 28.

²⁶ Andrew Stoner, 'Counting the Cost of Political Advertising', *Daily Telegraph* (Sydney), 27 September 2007, 1.

²⁷ Editorial, 'Debnam Promises Review of Donations', *Daily Telegraph* (Sydney), 12 February 2007, 4.

²⁸ Quoted in Andrew Clennell, 'Baird the Younger Honours Father', *Sydney Morning Herald* (Sydney), 30 May 2007, 5.

²⁹ Quoted in Andrew Clennell, 'Iemma Urges Donation Reform', *Sydney Morning Herald* (Sydney), 9 May 2007, 7.

³⁰ Anne Davies and Jonathan Pearlman, 'Top Libs Split on Corporate Donations', *Sydney Morning Herald* (Sydney), 3 November 2006, 1.

³¹ Malcolm Turnbull, *Submission to the Joint Standing Committee on Electoral Matters Inquiry into the 2004 Federal Election* (2005).

Lawrence³² are amongst those who have all called for a thorough shake-up of the federal funding regime.

These voices should be heeded. They testify to the gravity of the issues involved: a key index of the health of a State's democracy is the character of its political finance regime. These voices also represent a vehement rejection of the status quo. Following the groove of current practices is, in the words of Roozendaal, 'dangerously unsustainable'. All this points to the need for a credible reform agenda. Such an agenda should be anchored in clear aims and principles. It is this to which we now turn.

III. AIMS OF A POLITICAL FINANCE REGIME

A political finance regime should:

- Protect the integrity of political representation
- Promote fairness in politics
- Facilitate democratic deliberation
- Support parties in performing their functions.

A. *Protecting the Integrity of Political Representation*

In a representative democracy, elected officials are accountable to the citizens and expected to act in the public interest. When officials trade away the public interest in exchange for money received, there arises the spectre of corruption.

There are various shades and meanings of corruption.³³ The flow of private money into politics threatens the integrity of representative democracy by posing the danger of two kinds of corruption. First, *corruption as graft* occurs when the receipt of funds directly leads to political power being improperly exercised in favour of contributors.

³² Carmen Lawrence, *The Democratic Project* (2005) Progressive Essays <<http://www.progressiveessays.org/files/The%20Democratic%20Project.pdf>> at 22 February 2008.

³³ See Oskar Kurer, 'Corruption: An Alternative Approach to its Definition and Assessment' (2005) 53 *Political Studies* 222.

It is such corruption that was at issue with WA Inc and the Fitzgerald Inquiry into the Joh Bjelke Petersen Queensland government. Similarly, it is allegations of such corruption that is being ventilated in the current trial of former Queensland Minister, Gordon Nuttall.³⁴

The second way in which political contributions threaten the integrity of democratic representation, *corruption as undue influence*, is more insidious. Such corruption occurs when holders of public office give an undue weight to the interests of their financiers, rather than deciding matters in the public interest. In contrast with corruption as graft, corruption as undue influence does not require that a *specific act* be actuated by the receipt of funds. It exists when there is a *culture* of delivering preferential treatment to monied interests. Corruption as undue influence manifests itself in various ways. More blatant forms involve the direct sale of political access and influence. This brings in its wake less formal ways for money to influence politics. Contributors may receive more favourable hearings, with a phone call from a big donor more likely to be returned than one from a constituent. With perceptions of the merits of any issue invariably coloured by the arguments at hand, preferential hearings mean that the cast of mind of politicians, when judging what is in the ‘public interest’, will be skewed towards the interests of their funders.

A political finance regime should aim to prevent both corruption as graft and corruption as undue influence. This was a point well recognised by Kim Beazley. In his Second Reading Speech to the Political Broadcasts and Political Disclosures Bill 1991 (Cth) – the Bill that introduced a ban on political advertising and annual disclosure returns – Beazley noted that:

There is no greater duty upon the representatives of the people in a democratic society than the duty to ensure that they serve all members of that society equally. This duty requires government which is *free of corruption and undue influence*.³⁵

³⁴ See Renee Viellaris, ‘Peter Beattie to Take Witness Stand at Gordon Nuttall Hearing’, *Courier Mail* (Brisbane), 27 January 2008, <<http://www.news.com.au/couriermail/story/0,23739,23119053-3102.00.html>> at 28 January 2008.

³⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1991, 3477 (Kim Beazley, Minister for Transport and Communications, 2nd Reading Speech to Political Broadcasts and Political Disclosures Bill 1991).

Not only government should be free of graft and undue influence but:

(t)he public is entitled to be assured that *parties and candidates* which make up the government or *opposition of the day* are free of undue influence or improper outside influence.³⁶

B. Promoting Fairness in Politics

The principle of political equality lies at the heart of democracy. Without a doubt, this principle infuses Australia's constitutional and electoral institutions. The 'great underlying principle' of the Constitution, it has been said, is that citizens have 'each a share, and an equal share, in political power'.³⁷ Similarly, the key objective advanced by the original CEA was that of 'equality of representation throughout the Commonwealth'.³⁸

The principle of political equality insists not only that political freedoms be formally available to all citizens but also, as John Rawls has argued, that such freedoms have 'fair value'.³⁹ Citizens should be free from legal constraints on political activity *as well as* have a meaningful capacity to engage in such activity. In Ronald Dworkin's words, citizens must have 'a genuine chance to make a difference'⁴⁰ or, to put it simply, leverage. In a mass democracy, leverage is usually secured through acting collectively. It is very rare for a citizen of ordinary means to have political leverage on her or his own accord. It is only through mobilising in groups like parties, interest

³⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1991, 3482 (Kim Beazley, Minister for Transport and Communications, 2nd Reading Speech to Political Broadcasts and Political Disclosures Bill 1991) (emphasis added). For similar sentiments, see Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 1983, 2213 (Kim Beazley, Minister for Aviation, Special Minister of State and Minister Assisting the Minister for Defence, 2nd Reading Speech to Commonwealth Electoral Legislation Amendment Bill 1983) (emphasis added).

³⁷ Harrison Moore, *The Constitution of the Commonwealth of Australia* (1st ed, 1902) 329. This statement was cited with approval in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 139-40 (Mason CJ).

³⁸ Commonwealth, *Parliamentary Debates*, Senate, 30 January 1902, 9529 (Senator O'Connor, 2nd Reading Speech introducing Commonwealth Electoral Bill 1902).

³⁹ John Rawls, *A Theory of Justice* (1972) 225; John Rawls, *Justice as Fairness: A Restatement* (2001) 149. Carmen Lawrence has noted that '(d)espite the otherwise general equality in voting power, many are suspicious that not all citizens are equally able to influence their representatives': Carmen Lawrence, 'Renewing Democracy: Can Women Make a Difference?' (2000) *The Sydney Papers* 58.

⁴⁰ Ronald Dworkin, 'Equality, Democracy, and Constitution: We the People in Court' (1990) XXVIII (2) *Alberta Law Review* 324, 338.

and community groups that a citizen is capable of securing meaningful political power.

Citizens and their political organisations will only obtain leverage when there is fair access to the public arena, that is, the forums in which public opinion is articulated, influenced and shaped. It is such access that is the principal guarantee that the public agenda is responsive to the opinions of the citizenry.⁴¹

The ‘public arena’ is a multifarious and complex notion with public opinion voiced and shaped in numerous ways including door-to-door campaigning, party newsletters and, increasingly, advertisements through the mass media. It is also a finite and ‘limited space’⁴², where the loudness of one voice can drown out others. In particular, those with far superior means of communication can exclude less resourced citizens. This is one of the central risks that must be addressed by a political finance regime.

A political finance regime will promote fairness in politics by ensuring open access to electoral contests. It should prevent the costs of meaningful access to the public arena escalating to prohibitive levels. It should be vigilant to the danger that meaningful access will be placed beyond the reach of most citizens through the ‘competitive extravagance’⁴³ of parties that seek to outbid each other by spending excessive amounts in campaigning. Further, parties that have significant public support should have adequate resources to wage an election campaign. This may require ‘compensating steps’,⁴⁴ for example, public funding so that the electoral contest is open to ‘worthy parties and candidates (that) might not (otherwise) be able to afford the considerable sums necessary to make their policies known’.⁴⁵

⁴¹ See Charles Beitz, *Political Equality* (1989).

⁴² Rawls, *Justice as Fairness*, above n 39, 150.

⁴³ T H Marshall, ‘Citizenship and Social Class’ in T H Marshall, *Class, Citizenship and Social Development* (1964) 65, 90.

⁴⁴ John Rawls, *A Theory of Justice* (first published 1972, revised ed, 1999) 198.

⁴⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 1983, 2215 (Kim Beazley, Minister for Aviation, Special Minister of State and Minister Assisting the Minister for Defence, 2nd Reading Speech to Commonwealth Electoral Legislation Amendment Bill 1983). This specific aim is long-standing. When introducing the original *CEA*, Senator O’Connor justified the need for limits on electoral expenditure in this fashion: ‘(i)f we wish to secure a true reflex of the opinions of the electors, we must have . . . a system which will not allow the choice of the electors to be handicapped for no other reason than the inability of a candidate to find the enormous amount of money required to enable him (sic) to compete with other candidates’: Commonwealth, *Parliamentary*

A political finance regime will also promote fairness in politics by advancing ‘fair rivalry’⁴⁶ between the main parties. It will act as an antidote to ‘(a) serious imbalance in campaign funding’⁴⁷ between the major and minor political parties. As Ewing has argued, ‘no candidate or party should be permitted to spend more than its rivals by a disproportionate amount’.⁴⁸

Fair rivalry amongst the major parties, that is, the parties contending for government, may demand more than the absence of a gross disparity in resources. The most important choice citizens make in an election is to choose the party or coalition that will form government. For this choice to be meaningful in Australia’s predominantly two-party system, the two alternatives may need to be equally represented. If so, then fair rivalry amongst the major parties would imply a situation approximating ‘equality of arms’.

C. Facilitating Democratic Deliberation

Democracy is not simply a matter of the majority getting what it wants. Such crude majoritarianism fails to recognise that at the heart of political competition is a battle of rival ideas, policies and ideologies: politics is conducted through debate and discussion. Such deliberation is the basis upon which citizens engage in the *making of laws* by arguing their various positions and seeking to influence others. Deliberation also plays another role. Many citizens will be bound by laws with which they disagree. Deliberation is a process of *justifying* laws and policies to the public. It is through such justification that respect is accorded to citizens as *subjects of laws* who may or may not agree with those laws.⁴⁹

Debates, Senate, 30 January 1902, 9542 (Senator O’Connor, 2nd Reading Speech to Commonwealth Electoral Bill 1902).

⁴⁶ Keith Ewing, *The Funding of Political Parties in Britain* (1987) 182.

⁴⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 1983, 2213 (Kim Beazley, Minister for Aviation, Special Minister of State and Minister Assisting the Minister for Defence, 2nd Reading Speech to Commonwealth Electoral Legislation Amendment Bill 1983).

⁴⁸ Keith Ewing, *Money, Politics and Law: A Study of Electoral Finance Reform in Canada* (1992) 18.

⁴⁹ See Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (2004) 4-5. For a fuller discussion of the purposes of democratic deliberation, see *ibid* 10-3 and Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (1996) 41-4.

In the field of political finance, the principle of democratic deliberation has several implications. It operates as a constraint upon regulation. Freedom of political communication is indispensable to democratic deliberation. Hence, any regulation of political funding should not unduly restrict such freedoms.

This does not mean, however, that political communication should not be restricted. On the contrary, so-called free speech – i.e., the complete absence of state regulation – typically leads to the powerful and the wealthy dominating the airwaves to the marginalisation of other voices. In this sense, democratic deliberation cannot be separated out from fair access to the public arena and restrictions on freedom of political communication may be required to guarantee such access.⁵⁰ Respecting freedom of political communication, however, implies that any such restriction should be based on a legitimate aim and be proportionate to that aim.⁵¹

A political finance regime should also promote democratic deliberation by facilitating informed voting. It already does so ‘by providing details of the funding sources of political parties’.⁵² As emphasised by Kim Beazley, when introducing the amendments to the federal funding and disclosure regime:

(t)he whole process of political funding needs to be out in the open . . . Australians deserve to know who is giving money to political parties and how much.⁵³

Democratic deliberation is however, not confined to election time. It also extends to the actions of the parties and candidates in between elections. Indeed, such conduct

⁵⁰ The connection between political finance and democratic deliberation is powerfully made by Gutmann and Thompson, *Democracy and Disagreement*, above n 49, 134; Gutmann and Thompson, *Why Deliberative Democracy*, above n 49, 48-9. See also Ian Shapiro, ‘Enough of Deliberation: Politics is about Interests and Power’ in Stephen Macedo (ed), *Deliberative Politics: Essays on Democracy and Disagreement* (1999) 28, 34-6.

⁵¹ This roughly corresponds to the test laid down by the High Court in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 in relation to the implied freedom of political communication under the Commonwealth Constitution. See text below accompanying n 213.

⁵² Joint Standing Committee on Electoral Matters, *Interim Report on the Inquiry into the Conduct of the 1993 Election and Matters Related Thereto: Financial Reporting by Political Parties* (1994) [7].

⁵³ Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 1983, 2215 (Kim Beazley, Minister for Aviation, Special Minister of State and Minister Assisting the Minister for Defence, 2nd Reading Speech to Commonwealth Electoral Legislation Amendment Bill 1983). For similar sentiments, see Electoral and Administrative Review Commission, *Report on Public Registration of Political Donations, Public Funding of Election Campaigns and Related Issues* (1992) [2.5].

profoundly shapes the judgments of voters. Further, electoral accountability, while crucial, is nevertheless limited. Elections are usually contested on broad issues. Relatedly, the electoral policies of parties are sometimes vague and allow them significant room to manoeuvre once in office. This is arguably much more so the case with the Liberal Party, given that the parliamentary wings of the party are not tightly bound by the party's platforms and policies.⁵⁴ This means that *electoral politics* do not always govern what parties do in parliament, i.e. *parliamentary politics*, or what a party in office does in relation to executive action, i.e. *policy politics*.⁵⁵

All three types of politics, however, should be subject to democratic deliberation. Put succinctly by Gutmann and Thompson, '(r)eiterated deliberation, punctuated by periodic elections, is the best hope for the principle of accountability'.⁵⁶ Again this underlines the importance of fair access to the public arena. A political finance regime should also facilitate such deliberation by making public the funding details of parties and parliamentarians on a continuous basis.

D. Supporting Parties in Performing their Functions

In his major study of Australian political parties, Dean Jaensch observed that:

There can be no argument about the ubiquity, pervasiveness and centrality of party in Australia. The forms, processes and content of politics – executive, parliament, pressure groups, bureaucracy, issues and policy making – are imbued with the influence of party, party rhetoric, party policy and party doctrine. Government is party government. Elections are essentially party contests, and the mechanics of electoral systems are determined by party policies and party advantages. Legislatures are party chambers. Legislators are overwhelmingly party members. The majority of electors follow party identification. Politics in Australia, almost entirely, is party politics.⁵⁷

⁵⁴ See Liberal Party of Australia Federal Constitution cl 56-7. Cf., Rules of the Australian Labor Party (NSW) 2005-2006 cl N.11(c); Constitution of the Greens (NSW) cl 12.1.

⁵⁵ For the distinction between electoral, parliamentary and policy politics, see Ian Marsh, *Beyond the Two Party System: Political Representation, Economic Competitiveness and Australian Politics* (1995) 35-43.

⁵⁶ Gutmann and Thompson, *Democracy and Disagreement*, above n 49, 144.

⁵⁷ Dean Jaensch, *Power Politics: Australia's Party System* (1994) 1-2.

Parties are central to Australia's democracy and, indeed, 'modern democracy is unthinkable save in terms of parties'.⁵⁸

The New South Wales political finance regime should be rooted in the centrality of political parties. This means that such a regime should ensure that parties are adequately funded. Adequacy, though, does not mean what the parties want (or think they need for campaigning purposes) and must be strictly judged against the functions that parties ought to perform.

Foremost, NSW parties play a *representative* function. A healthy party-system should represent the diverse strands of opinion existing in New South Wales. This system would offer genuine electoral choice, such that the party platforms cater to the different preferences of NSW voters. Second, parties perform an *agenda-setting* function in stimulating and generating ideas for NSW politics. The richness of ideas informing NSW politics will depend heavily on how vigorous the parties are in promoting new ideas and in particular, the priority they place on policy development and research. Third, parties perform a *participatory* function, as they offer a vehicle for political participation through membership, meetings and promoting public discourse. Both the agenda-setting and participatory functions indicate how parties play a central role in facilitating democratic deliberation.

Fourth, parties perform a *governance* function. This function largely relates to parties who succeed in having elected representatives. These parties determine the pool of people who govern through their recruitment and pre-selection processes. They also participate in the act of governing. This is clearly the case with the party elected to government and also equally true of other parliamentary parties as they are involved in the law-making process and scrutinise the actions of the executive government.⁵⁹

The *principle of pluralism* is implicit in all of these functions. Party politics should provide citizens with different ways to engage in political activity and to be

⁵⁸ Elmer E Schattschneider, *Party Government* (1942) 1.

⁵⁹ For similar functions ascribed to political parties, see Karl-Heinz Nassmacher, 'Introduction' in Reginald Austin and Maja Tjenstrom (eds), *Funding of Parties and Election Campaigns* (2003) 2.

represented. Party policies and programmes should also offer clear and meaningful choices.

For such pluralism to exist, parties will necessarily be based on diverse structures. Several parties, such as the NSW Liberal Party,⁶⁰ NSW Nationals⁶¹ and the Christian Democratic Party⁶² may restrict themselves to individual memberships and are, in this way, *direct parties*. Others like the NSW Australian Labor Party⁶³ and the NSW Greens⁶⁴ allow both individual membership and collective membership of groups and are therefore, *mixed parties*. The Constitution of the Federal National Party also allows it to be a mixed party as organizations can become associations of the party where there is no State branch.⁶⁵ Some parties like the Shooters Party fall somewhere in the middle: membership is formally restricted to individuals⁶⁶, while close links are maintained with various groups. In the case of the Shooters Party, this is made clear by its Constitution, which states that one of its aims is:

*(t)o exert a discipline through shooting organizations and clubs and within the non-affiliated shooting community, to curb the lawless and dangerous element; and to help shooters understand that they hold the future of their sport in their own hands by their standards of conduct.*⁶⁷

In these situations, such groups, while not members of the party, act as *ancillary organizations*.⁶⁸ Such diversity of party structures should be respected, because it is one of the main ways in which the pluralism of Australian politics is sustained.⁶⁹

⁶⁰ Constitution and Regulations of the Liberal Party of Australia (NSW) cl 2.1.

⁶¹ Constitution and Rules of the National Party of Australia (NSW) cl 2.

⁶² Constitution and Rules of the Christian Democratic Party (Fred Nile Group) (NSW) cl 3.21.

⁶³ Rules of the Australian Labor Party (NSW) 2005-2006 cl A.2-A.3

⁶⁴ Constitution of the Greens (NSW) cl 2.1.

⁶⁵ Constitution of the National Party of Australia (Cth) cl 71.

⁶⁶ Constitution of The Shooters Party (NSW) By-law (2).

⁶⁷ Constitution of The Shooters Party (NSW) cl 2(g). In relation to the 2003 State Election, The Shooters Party received thousands of dollars in contributions from various hunting and pistol clubs including the Federation of Hunting Clubs Inc., Singleton Hunting Club, St Ives Pistol Club, Illawarra Pistol Club and the NSW Amateur Pistol Association: Election Funding Authority (NSW), *Details of Political Contributions of More than \$1,500 Received by Parties that Endorsed a Group and by Independent Group at the Legislative Council 2003* (2003) <http://www.efa.nsw.gov.au/data/assets/pdf_file/0008/30140/2003PartyContributions.pdf> at 5 February 2008.

⁶⁸ For fuller explanations of direct and indirect party structures, see Maurice Duverger, *Political Parties: Their Organization and Activity in the Modern State* (Barbara and Robert North trans, first published 1954, 2nd ed, 1959) [trans of: *Les Partis Politiques*] 6-17.

IV. PROBLEMS WITH THE NSW POLITICAL FINANCE REGIME

Evaluated against these aims, there are key problems with the NSW political finance regime:

- It provides for poor transparency;
- It allows the political process to be corrupted through the sale of access and influence and the corporatisation of politics;
- It contributes to an unfair playing field; and
- It undermines the health of the parties.

A. Poor Transparency

Under the *Election Funding Act 1981* (NSW) [*EFA*], NSW parties,⁷⁰ groups of candidates,⁷¹ individual candidates⁷² and persons incurring more than \$1 500 in ‘electoral expenditure’ (‘third parties’)⁷³ are required to lodge declarations of political contributions received and electoral expenditure spent during the election cycle.

All of these entities are required to disclose in such declarations various details relating to their electoral expenditure.⁷⁴ The details to be disclosed in relation to contributions vary somewhat. For parties, ‘gifts’⁷⁵ to the party⁷⁶ of more than \$1 500 have to be disclosed together with the dates on which the contributions were made and the names and addresses of the contributors.⁷⁷ Contributions from a single source are aggregated over a year, and if they exceed \$1 500 in a year, they are to be

⁶⁹ For fuller discussion, see Keith Ewing, *The Cost of Democracy: Party Funding in Modern British Politics* (2007) 35-8.

⁷⁰ *EFA* s 83.

⁷¹ *EFA* s 87(3).

⁷² *EFA* s 85.

⁷³ *EFA* s 85A.

⁷⁴ *EFA* s 88.

⁷⁵ This is defined by section 4 of the *EFA*.

⁷⁶ *EFA* s 87(1).

⁷⁷ *EFA* ss 83, 86(2).

disclosed.⁷⁸ For groups of candidates and individual candidates, the obligations are similar, except that the thresholds for disclosure are set respectively at \$1 000⁷⁹ and \$200.⁸⁰ For third parties, gifts of \$1 000 or more that was used to incur electoral expenditure are to be disclosed.⁸¹

For all of these entities, their declarations have to provide for additional matters. Payments to participate in fund-raising events are deemed to be ‘gifts’ under the Act⁸² and declarations are required to provide certain details regarding those events. Declarations must also detail the amount of each contribution not disclosed and the number of donors making such contributions, as well as the total amount of subscriptions excluded, the subscription rate/s and the number of members who paid such rates.⁸³ Moreover, each declaration is to be audited⁸⁴ and vouched for in a manner prescribed by the Election Funding Authority.⁸⁵

There are restrictions on receiving anonymous contributions, with parties, groups of candidates, individual candidates respectively prohibited from receiving anonymous gifts equal to or exceeding \$1 500,⁸⁶ \$1 000⁸⁷ and \$200.⁸⁸ There is no restriction on third parties receiving anonymous contributions, as the prohibition only applies to ‘a party, group or candidate or a person acting on behalf of a party, group or candidate’.⁸⁹

The disclosure scheme provides for poor transparency. One of its principal deficiencies is its lack of timeliness. By requiring only post-election declarations that are disclosed months *after* an election result, this scheme clearly does not facilitate informed voting. Neither does it provide the continuous transparency that is required for deliberative parliamentary and policy politics. Under this scheme, a party in

⁷⁸ EFA s 87(5).

⁷⁹ EFA ss 86(2), 87(3A), 87(5).

⁸⁰ EFA ss 86(2), 87(4)-(5).

⁸¹ EFA ss 86(2), 87(1A).

⁸² EFA s 87(1AA).

⁸³ EFA s 89.

⁸⁴ EFA s 93.

⁸⁵ EFA s 94.

⁸⁶ EFA s 87A(1)-(2).

⁸⁷ EFA s 87A(1)-(2).

⁸⁸ EFA s 87A(1)-(2).

⁸⁹ EFA s 87A(1).

government could make a decision in favour of one of its contributors and details of their financial arrangements may not be known for years. Through its lack of timeliness, the NSW disclosure scheme also provides a very limited deterrent for corruption as graft or undue influence.

To compound matters, information disclosed under the NSW scheme is relatively inaccessible. The *EFA* only requires that the public be able to physically inspect the declarations at the office of the Election Funding Authority.⁹⁰ In relation to the 2007 State Election, the Authority does not seem to have taken any steps beyond this undemanding statutory requirement. Unlike the declarations lodged in relation to the 1999 and 2003 State Elections, declarations relating to the previous State Elections are not available online.⁹¹ This is despite the 2007 State Election being held more than 10 months ago.⁹² Moreover, unlike the website of the Australian Electoral Commission [‘AEC’], the website of the Authority does not provide tools to allow for analysis and searching of these declarations.⁹³ It should be emphasised here that the AEC is not legally obliged to provide such facilities and is in fact, governed by a requirement relating to public access that mirrors the rules that apply to the Authority.⁹⁴

There are other significant limitations to the NSW disclosure scheme. The prohibitions against anonymous contributions do not, as mentioned earlier, extend to third parties. Also, they are respectively set too high in relation to parties and groups of candidates at \$1500 and \$1000. The *EFA* seems to be tightly linking the amount at which such prohibitions kick in to the disclosure threshold for political contributions. This is quite misconceived. The ban against anonymous contributions should be set much lower than the disclosure threshold. The purpose of such a ban is that it

⁹⁰ *EFA* s 95.

⁹¹ See Election Funding Authority (NSW), *Election Funding Reports* (2008) <http://www.efa.nsw.gov.au/state_government_elections/election_funding_reports> at 5 February 2008.

⁹² The 2007 State Election was held on 24 March 2007, see NSW Electoral Commission, *Election Timetable* (2007) <http://www.elections.nsw.gov.au/state_government_elections/state_election_2007/election_timetable> at 5 February 2008.

⁹³ See Australian Electoral Commission, *Funding and Disclosure: Annual Returns Locator Service* (2007) <<http://fadar.aec.gov.au/>> at 22 February 2008.

⁹⁴ *CEA* s 320.

provides a paper trail that allows the enforcement of the disclosure thresholds. Tightly linking the level of the ban with disclosure thresholds defeats this purpose.

The integrity of the NSW disclosure scheme is also compromised by the lack of separate disclosure obligations on contributors. Contributor declarations, like those under the *CEA*, provide a crucial way to crosscheck the accuracy of the declarations lodged by parties and candidates.⁹⁵

Lastly, there is a gaping hole in relation to ‘associated entities’ of parties. Such entities include groups that are controlled by one or more parties or that operate wholly or to a significant extent for the benefit of one or more parties.⁹⁶ In colloquial terms, these are front groups for the parties. In New South Wales, they would likely include for the ALP (NSW), the Bob Carr Campaign c/- Ken Murray and the Randwick Labour Club; for the Liberal Party (NSW), its state electoral councils and branches and the 500 Club Ltd; for the National Party (NSW), its electorate councils and for the Shooters Party (NSW), its various branches.⁹⁷

These groups are not subject to separate disclosure obligations. This provides an avenue for the wholesale circumvention of the NSW disclosure scheme: funnelling money through these groups provides a simple and completely legal method to evade the disclosure obligations that apply to the parties. Take, for example, the Randwick Labour Club that contributed \$175 000 to the ALP (NSW).⁹⁸ This amount could have been given as a lump sum by a single company to the Randwick Labour Club and yet the identity of this company need not be disclosed. If the company had, however, transferred this money directly to the ALP (NSW), the public would have known of its identity.

B. Corrupting the Political Process: the Sale of Access and Influence and the Corporatisation of Politics

⁹⁵ *CEA* ss 305A-305B.

⁹⁶ See, for example, definition of ‘associated entities’ in section 287 of the *CEA*.

⁹⁷ These examples are drawn from Election Funding Authority (NSW), above n 67.

⁹⁸ *Ibid.*

Table 1 details the amounts that parties raised through fund-raising in relation to the 1999 and 2003 State Elections. These figures obscure various matters. They significantly understate the extent of fund-raising by the parties as they do not include fund-raising by ‘associated entities’.⁹⁹ Moreover, they do not reveal how corruption as undue influence has been allowed to permeate NSW politics through blatant sales of access and influence.

Table 1: Declared fund-raising in relation to 1999 and 2003 State Elections

Party	1999 Election Cycle (\$)	2003 Election Cycle (\$)
ALP (NSW)	1 040 074	2 921 216
Liberal Party (NSW)	368 821	28 269
Christian Democratic Party (Fred Nile Group)	26 436	6081
Greens (NSW)	15 636	28 151
National Party (NSW)	40 986	114 796
The Shooters Party	6 526	17 882

Source: Election Funding Authority (NSW), Summaries of Political Contributions Received and Electoral Expenditure Incurred by Parties that endorsed a Group or by Independent Groups at Legislative Councils 1999 and 2003¹⁰⁰

The NSW branches of the ALP and the Liberal Party are major culprits in this respect. For \$102 000, a company can become a ‘foundation partner’ of the NSW ALP’s Business Dialogue and secure five places to events, such as boardroom lunches and dinners with Premier Morris Iemma and State government ministers.¹⁰¹ In late 2006, a few months prior to the State Election, the NSW ALP held a fund-raising event at the Convention Centre, Darling Harbour, which was attended by nearly 1000 people. General admission was at \$500 per head, while attending an exclusive cocktail party with ministers costed \$15 000 for nine guests and dining with the Premier Morris Iemma was priced at a hefty \$45 000.¹⁰²

⁹⁹ See text above accompanying nn 96-8.

¹⁰⁰ Election Funding Authority (NSW) <http://www.efa.nsw.gov.au/_data/assets/pdf_file/0010/30142/2000schedc.pdf> and <http://www.efa.nsw.gov.au/_data/assets/pdf_file/0015/30138/2003SummaryPartiesGroups.pdf> at 5 February 2008.

¹⁰¹ Andrew Clennell, ‘Coalition Wins Vote for Donations Inquiry’, *Sydney Morning Herald* (Sydney), 28 June 2007, 4.

¹⁰² Anne Davies and Jonathan Pearlman, ‘Top Libs Split on Corporate Donations’, *Sydney Morning Herald* (Sydney), 3 November 2006, 1.

The NSW Liberal Party runs a body called the Millennium Forum. Its website used to contain a message from former Prime Minister John Howard, stating that it is ‘one of Australia’s premier political corporate forums’ that ‘provides a wealth of opportunities for the business community and political leaders at Federal and State levels to meet and discuss key issues within an informal framework’.¹⁰³

‘Wealth’, it seems, is the operative word. For sponsorship ranging from \$10,000 upwards, company representatives are not only entitled to ‘(a)n **ENGAGING** programme of professional corporate events and "Off the Record" briefings’¹⁰⁴, but previously also had a chance to play golf with John Howard on Sydney’s Boonie Doon golf course.¹⁰⁵ Corporate Australia has not been reluctant to seize these opportunities. The major sponsors of the Forum are Australian Hotels Association (AHA), Blue Star Print Group, Clubs NSW, Deloitte, Meriton Apartments Pty Ltd., O’Neil Australia, Dr Harry Segal and zer01zer0.¹⁰⁶ The roll-call of the Forum’s sponsors also includes British American Tobacco, Publishing and Broadcasting Ltd., major construction companies like Leighton Holdings and Multiplex Constructions and defence contractors, ADI Ltd. and Tenix Group.¹⁰⁷

Through the Millenium Forum, businesses can also join the 500 Club. According to the Forum’s website:

The 500 Club provides a tailored series of informal, more personally styled, early evening events. These events have a club atmosphere and feature “Off the Record briefings” from political and business leaders while also providing the opportunity for members to meet, establish new networks and exchange ideas.

¹⁰³ Liberal Party of Australia, New South Wales, *Millennium Forum* <<http://www.millenniumforum.com.au/john.htm>> at 7 June 2007.

¹⁰⁴ Liberal Party of Australia, New South Wales, *Millennium Forum* (2008) <<http://www.millenniumforum.com.au/first.htm>> at 7 June 2007 (emphasis original).

¹⁰⁵ Emiliya Mychasuk and Pilita Clark, ‘Howard and His Team Rented by the Hour’, *Sydney Morning Herald* (Sydney), 13 June 2001, 1.

¹⁰⁶ In order of price, the four types of sponsorships are major, programme, business and individual sponsorship: see Liberal Party of Australia, New South Wales, *Millennium Forum* (2008) <<http://www.millenniumforum.org.au/packages.htm>> at 12 February 2008.

¹⁰⁷ Liberal Party of Australia, New South Wales, *Millennium Forum* (2008) <<http://www.millenniumforum.org.au/sponsors.htm>> at 22 January 2008.

All this, according to the website, will add ‘a new level of value for . . . Club members’.¹⁰⁸

Perhaps the NSW ALP and Liberal Party are merely matching their federal counterparts by peddling influence. Major companies, including NAB, Westpac and Telstra engaged a high-price escort service at the 2007 federal ALP conference. At a fee of \$7,000 per person, their representatives were accompanied by federal ALP frontbenchers. For the privilege of sitting next to ALP luminaries, businesses also purchased tables at the conference dinner for up to \$15,000.¹⁰⁹

Not to be outdone, Liberal Party ministers auctioned off their time at the 2007 Liberal Party federal council: a harbour cruise with Tony Abbott, the Health Minister, fetched \$10,000, while a night at the opera with Helen Coonan, the Minister for Communications, Information Technology and the Arts, picked up a princely sum of \$12,000. All this was embraced under the council theme of ‘Doing what’s right for Australia’.¹¹⁰ Indeed, the former Prime Minister has not been shy in using Kirribilli House and the Lodge for fund-raising.¹¹¹ In June last year, a Liberal Party meeting held in Kirribilli House was attended by business observers who paid more than \$8,000 each.¹¹² The prize for the most successful fund-raiser perhaps goes to Malcolm Turnbull who charged \$55 000 per head for a fund-raising dinner to support his bid for re-election.¹¹³

Those defending such fund-raisers sometimes deny that influence is being sold. According to them, all that is sold is access to political leaders, with leaders free to make up their minds on particular issues. This beggars belief: influence is inseparable from access. Businesses that pay for ‘off the record’ briefings with ministers not only get to meet the ministers but, in the words of the Millennium Forum’s website, secure

¹⁰⁸ Liberal Party of Australia, New South Wales, *Millennium Forum* (2008) <<http://www.millenniumforum.com.au/programmes.htm>> at 12 February 2008.

¹⁰⁹ Michelle Grattan and Katharine Murphy, ‘Hope in the Hearts of Labor Faithful’, *The Age* (Melbourne), 27 April 2007, 1.

¹¹⁰ Misha Schubert, ‘Party Hopes Party Won’t End So Soon’, *The Age* (Melbourne), 4 June 2007, 6.

¹¹¹ For details, see Michelle Grattan, ‘Labor Legal Advice: PM function was a gift’, *The Age* (Melbourne), 16 June 2007, 2.

¹¹² Brendan Nicholson, ‘Rudd Open to Melbourne PM Pad’, *The Age* (Melbourne), 11 June 2007, 5.

¹¹³ Clare Masters, ‘How \$55, 000 will Buy You a Slice of Malcolm’, *Daily Telegraph* (Sydney), 1 August 2007, 23.

an opportunity to ‘promote issues of concern and importance’ to them.¹¹⁴ The website of Progressive Business, the fund-raising arm of the Victorian ALP, used to be very up-front on what was being traded when it stated that ‘(j)oining this influential group allows you to participate in the decision making progress (sic)’.¹¹⁵

The simple truth is that corporations cannot and do not make *donations*. Under *Corporations Law*, directors and senior executives of companies are under a duty to act in good faith in the interests of shareholders. When deciding to contribute to political parties, they can only comply with this duty if the company is receiving something in return. In other words, directors and managers who authorise political donations in the strictest sense – i.e. money given with no strings attached – seriously risk breaching the law.¹¹⁶ In such a context, the frank admission of David Clarke, former Macquarie Bank chairman, that political contributions were useful not only in making the company known to politicians but could also ‘lead to direct fees and government business’¹¹⁷ should not surprise us. With each corporate ‘donation’ then, there is invariably a quid pro quo.

What that quid pro quo consists of, in relation to the purchase of access and influence, can be quite subtle. Reporting on the fund-raisers of Progressive Business, Age journalist, Michael Bachelard said:

It’s an unwritten rule that there will be no overt lobbying: businesses are there to be seen, to put a face to the name, to establish a profile in the minister’s mind.¹¹⁸

While nothing specific is promised or discussed in such events, there is still value for businesses. As an executive from a property development company observed, ‘(i)t just smooths the path to get something heard’.¹¹⁹

¹¹⁴ Liberal Party of Australia, New South Wales, *Millennium Forum* (2008) <<http://www.millenniumforum.com.au/first.htm>> at 12 February 2008.

¹¹⁵ <<http://www.alp.org.au/action/progressive>> at 13 November 2005.

¹¹⁶ See discussion in Ian Ramsay, Geof Stapledon and Joel Vernon, *Political Donations by Australian Companies* (2000) 194-5.

¹¹⁷ Quoted in Bill Birnbauer and David Elias (2001), ‘Coming to the party’, *The Age* (Melbourne), 14 February, 13.

¹¹⁸ Michael Bachelard, ‘Taking Their Toll’, *The Age* (Melbourne), 14 May 2007, 9.

¹¹⁹ *Ibid.*

The subtle nature of such influence does not detract from the conclusion that it constitutes corruption as undue influence. It is the payment of money by a company that allows it to influence politicians, not the merit of its ideas or the strength of its popular support. Such influence clearly distorts the consideration of issues by politicians.

What's worse is how such corruption pervades Australian politics. The examples given above illustrate how the major parties have no qualms in selling access and influence. On the corporate side, complicity with such practices has, in fact, become a hallmark of a 'real' business. As one leading Victorian business figure has observed, '(m)ost of the serious players in business are paying to both sides for access'.¹²⁰ Terry Barnes, chief executive of the NSW Urban Taskforce, has justified contributions from NSW developer companies to the major parties on the basis that 'the system's there and that's how things are done'.¹²¹ With similar forthrightness, Ashley Mason, the external affairs executive for Leighton Holding, observed of the purchase of access and influence through Progressive Business:

It's part of the system . . . It's seen as part of the process.¹²²

The corruption that occurs through the sale of access and influence throws light on a broader phenomenon: the corporatisation of politics. This refers to the normalisation of corporate funding of politics and the commercial ethos that comes in the wake of this practice. One of the clearest indicators of the normalisation of corporate contributions is how major businesses are contributing funds to both sides of politics. To illustrate this phenomenon, Table 2 provides examples of companies (and in the case of AHA, industry organisations) that contributed to both the NSW ALP and Liberal Party in the 2006/2007 financial year.¹²³

¹²⁰ Richard Baker, 'Are Our Politicians for Sale?', *The Age* (Melbourne), 24 May 2006, 15.

¹²¹ Quoted in Editorial, 'Cash for Concrete', *Sydney Morning Herald* (Sydney), 3 November 2006, 10.

¹²² Richard Baker, 'Are Our Politicians for Sale?', *The Age* (Melbourne), 24 May 2006, 15.

¹²³ Note that all contributions over \$10 300 are included, whether classified as 'donation' or 'other receipt'. There are significant problems with the system of self-classification under the *CEA*. For discussion, see Joo-Cheong Tham and David Grove, 'Public Funding and Expenditure Regulation of Australian Political Parties: Some Reflections' (2004) 32(3) *Federal Law Review* 397-424.

Table 2: Examples of businesses contributing to both NSW ALP and Liberal Party

Company	ALP (NSW)	Liberal Party (NSW)
Manildra Group of Companies	\$213 000	\$100 000
Australian Hotels Association (NSW)	\$189 999	\$45 000
Meriton Premier Apartments	\$100 000	\$50 000
Grocon Pty Ltd	\$82 500	\$11 000
Westfield Capital Corporation Ltd	\$75 000	\$75 000
Tenix Corporate Pty Ltd	\$30 000	\$11 000

Source: 2006/2007 Annual Returns under *Commonwealth Electoral Act 1918* (Cth)¹²⁴

Corporate money does not only inject funds into politics, but also reshapes the ethics of politics. The sale of access and influence is perhaps the most egregious instance of the corporatisation of politics. Here, we witness the logic of the market being ruthlessly applied to political power. Demand on the part of business for political influence is being met by the supply on the part of the major parties and their leaders. As a senior ALP figure put it, '(w)e use our political leadership to raise funds because they are the best product we have to sell'.¹²⁵ Like other markets, the greater the value of the product, the higher the price. Discussing the ministerial lunches organised by Progressive Business, an experienced Victorian lobbyist has said:

The cost depends on how senior the minister is. If you want a key minister, companies pay \$10,000.¹²⁶

In New South Wales, we witness some of the effects of the egregious corporatisation of politics in the hotel and property development industries. According to analysis conducted by the NSW Greens, the NSW ALP received more than \$2.9 million from hotels and \$750 496 from NSW Australian Hotels Associations ('NSW AHA') from between 1998 to 2005, with the Coalition receiving more than \$1.3 million for the

¹²⁴ See Australian Electoral Commission, *Funding and Disclosure: Annual Returns Locator Service* (2007) <<http://fadar.aec.gov.au/>> at 22 February 2008.

¹²⁵ Richard Baker, 'Are Our Politicians for Sale?', *The Age* (Melbourne), 24 May 2006, 15.

¹²⁶ Bachelard, above n 118.

same period.¹²⁷ Such contributions were explained by John Thorpe, President of NSW AHA on the ground that ‘Who said democracy was cheap?’¹²⁸

As a result of the largesse bestowed by the NSW AHA on the major parties, serious questions have been raised in relation to the handling of laws impacting NSW pubs. It has been alleged that money from the NSW AHA influenced:

- the government’s refusal to grant councils the ability to reject late-trading applications from hotels so as to prevent 24-hour access to poker machines;¹²⁹
- the drafting of legislation allowing the Gaming and Racing Minister to declare any day a ‘special event’ and therefore extend trading hours;¹³⁰
- the reception given to Sydney Lord Mayor Clover Moore’s Small Bars Bill;¹³¹
- the government reneging on its promise to stop clubs putting poker machines in outdoor smoking areas;¹³² and
- the government’s in/action on alcohol abuse by refusing to close 24-hour pubs and limit new licences in areas where heavy drinking has been documented.¹³³

According to analysis by the NSW Greens, developers and the Property Council have given NSW ALP \$10.4 million and Coalition \$7.9 million in the period 1998-2005.¹³⁴ The *Sydney Morning Herald* has estimated that more than \$1 million was given to Labor and Liberal in the 2005-2006 financial year.¹³⁵ Such money, dubbed by one

¹²⁷ Lee Rhiannon, ‘Democracy Feeds off Donations Drip’, *Sydney Morning Herald* (Sydney), 1 October 2007, 11. For further detail, see Andrew Clennell, ‘Hotel Fills Labor Coffers’, *Sydney Morning Herald* (Sydney), 20 September 2007, 5.

¹²⁸ Quoted in Stateline NSW, ‘Smoke Screen’, broadcast on 17 March 2006 (available at <http://www.abc.net.au/stateline/nsw/content/2006/s1595024.htm> on 25 February 2008).

¹²⁹ Sunanda Creagh, ‘Council Wants Power to Curb Pokies’, *Sydney Morning Herald* (Sydney), 24 October 2007, 5.

¹³⁰ Andrew Clennell, ‘Time for Tough to Get Going’, *Sydney Morning Herald* (Sydney), 29 September 2007, 24.

¹³¹ Justin Vallejo, ‘Small Bar Bill Takes on Hotels Goliath’, *Daily Telegraph* (Sydney), 28 September 2007, 37. See also, Sunanda Creagh, ‘Westfield Joins Call for Cheap Bar Licences’, *Sydney Morning Herald* (Sydney), 26 September 2007, 3.

¹³² Andrew Clennell and Alex Tibbitts, ‘Clubs Get Green Light for Outdoor Pokies’, *Sydney Morning Herald* (Sydney), 23 July 2007, 7.

¹³³ Jonathan Pearlman, ‘Call for 24-hour Pubs to be Closed’, *Sydney Morning Herald* (Sydney), 20 April 2007, 3. See also, Jill Stark, ‘Drinking Seen as Health Time Bomb’, *Sydney Morning Herald* (Sydney), 5 May 2007, 10.

¹³⁴ Lee Rhiannon, ‘Democracy Feeds off Donations Drip’, *Sydney Morning Herald* (Sydney), 1 October 2007, 11.

¹³⁵ Anne Davies, ‘Developers Dig Deep for Political Mates’, *Sydney Morning Herald* (Sydney), 2 February 2007, 2.

commentator as ‘the developer dollar’,¹³⁶ has arguably secured developers enormous influence over the political process. After observing that ‘(t)he wall of money coming at (the planning minister) is phenomenal because . . . the industry is into political donations’, former Prime Minister Paul Keating has quipped that ‘the NSW Planning Minister . . . is the mayor for (developer Harry) Triguboff’.¹³⁷ *Sydney Morning Herald* commentator, Michael Duffy, has described the funding arrangements between the ALP State government and property developer companies as involving ‘a business model based on a legal form of payola’.¹³⁸

While there are various circumstances driving the corporatisation of politics and its offspring, the sale of access and influence, one key factor is clearly the perception of the major parties that they must outspend each other in order to win elections. This perception creates the demand for funds that is then met through unsavoury fund-raising practices. The major parties may become caught in the vice of destructive competition. In order to understand their fund-raising practices, we must therefore turn to their spending patterns.

C. Unfair Playing Field

The proposition that ‘campaign expenditure buys votes’ is untenable.¹³⁹ Citizens’ voting decisions might be formed before the campaigns and remain impervious to campaign tactics. Moreover, demographic and class factors will shape a voter’s decision. Not surprisingly then, there is a complex relationship between campaign expenditure and voter support¹⁴⁰ or put differently, between ‘spending and electoral

¹³⁶ Michael Duffy, ‘This Briars, Too, Has a Little Napoleonic Connection’, *Sydney Morning Herald* (Sydney), 17 February 2007, 35.

¹³⁷ Quoted in Justin Norrie and Anne Davies, ‘Cut the Political Cashflow’, *Sydney Morning Herald* (Sydney), 2 November 2006, 2. See also, Justin Norrie, ‘You’re Ugly, Sydney, Says Feisty Keating’, *Sydney Morning Herald* (Sydney), 31 October 2006, 3; and Tony Stephens, ‘I Like a Classic Drape, Two Buttons, Never Out of Fashion’, *Sydney Morning Herald* (Sydney), 11 November 2006, 4.

¹³⁸ Michael Duffy, ‘Payola: a State-Sanctioned Business Model’, *Sydney Morning Herald* (Sydney), 12 August 2006, 33.

¹³⁹ Committee on Standards in Public Life, *Fifth Report: The Funding of Political Parties in the United Kingdom* (1998) 117 [‘Neill Committee Report’].

¹⁴⁰ Sally Young, ‘Spot On: The Role of Political Advertising in Australia’ (2002) 37 *Australian Journal of Political Science* 81, 89.

payoffs'.¹⁴¹ For instance, the biggest spender on political broadcasting for the federal elections running from 1974 to 1996 only won half of these contests.¹⁴²

While money does not buy elections in the sense that campaign expenditure is clearly not *decisive* in determining electoral outcomes, it is erroneous to say that campaign expenditure has no or little positive impact on electoral outcomes or the public agenda. Furthermore, the perception that money has a significant impact on political outcomes can in turn have a crucial bearing on the spending and fund-raising practices of the parties.

All this points to the importance of analysing the spending patterns of parties when assessing the fairness of an electoral system.

Table 3: Electoral expenditure for 1999 and 2003 State Elections

Party	1999 Election: electoral Expenditure (\$)	State Total	1999 Election: Electoral Expenditure for each first preference vote, Legislative Council (\$)	State	2003 Election: electoral Expenditure (\$)	State Total	2003 Election: Electoral Expenditure for each first preference vote, Legislative Council (\$)	State
ALP (NSW)	6 972 749		5.26		11 387 667		7.03	
Liberal Party (NSW)	5 690 699		7.06		3 081 051		3.52	
National Party (NSW)	1 190 242				1 276 798			
Greens (NSW)	165 743		1.60		547 974		1.71	
Christian Democratic Party (Fred Nile Group)	336 595		2.99		458 275		4.06	
Shooters Party¹⁴³	201 846		3.40		401 971		5.28	

¹⁴¹ Justin Fisher, 'Next Step: State Funding for the Parties?' (2002) 73 *Political Quarterly* 392, 396.

¹⁴² Young, above n 140, 91.

Average expenditure per vote	4.06	4.32
Total expenditure	14 557 874	17 153 736

Sources: NSW Electoral Commission, *Legislative Council Results for 1999 and 2003 State Elections*;¹⁴⁴ Election Funding Authority (NSW), *Summaries of Political Contributions Received and Electoral Expenditure Incurred by Parties that endorsed a Group or by Independent Groups at Legislative Councils 1999 and 2003*¹⁴⁵

Although it is only based on data for two state elections, Table 3 offers some evidence of an ‘arms race’ amongst the political parties: total electoral expenditure increased by 17.8% in this period, whilst average expenditure per vote went up by 6.4%.

Moreover, the data suggests that the electoral playing field in New South Wales is unfair in certain respects. For both the 1999 and 2003 State Elections, there was no ‘equality of arms’ amongst the contenders for government. In the 1999 State Election, the Coalition outspent the ALP by more than a third in terms of expenditure per first preference vote. The position was dramatically reversed in the 2003 State Election with ALP’s expenditure per vote nearly double that of the Coalition.

The disparity between the Coalition and the ALP might have worsened in the recent State Election. While the data on electoral expenditure for that election has yet to be posted online by the Funding Authority, the 2006/2007 returns lodged by the NSW ALP, Liberal Party and National Party under the CEA provide some indication of the relative spending of the major parties. For the 2006/2007 financial year, the NSW branch of the ALP made payments amounting to \$24.7 million – 30% more than the

¹⁴³ The Shooters Party was identified as ‘John Tingle – The Shooters Party’ in the 1999 State Election Summary.

¹⁴⁴ For 1999 State Election results, see NSW Electoral Commission <http://www.elections.nsw.gov.au/state_government_elections/election_results/legislative_council_results/1999_legislative_council_results> at 16 January 2008. For 2003 State Election results, see NSW Electoral Commission <http://www.elections.nsw.gov.au/state_government_elections/election_results/legislative_council_results/2003_legislative_council_results> at 16 January 2008.

¹⁴⁵ Election Funding Authority (NSW) <http://www.efa.nsw.gov.au/_data/assets/pdf_file/0010/30142/2000schedc.pdf> and <http://www.efa.nsw.gov.au/_data/assets/pdf_file/0015/30138/2003SummaryPartiesGroups.pdf> at 5 February 2008.

total Coalition expenditure for that period, which stood at \$18.9 million.¹⁴⁶ When government advertising is thrown into the mix, the inequality between parties becomes even sharper.¹⁴⁷

Table 3 also suggests unfairness in two other respects. First, there is the financial disadvantage experienced by the minor parties. In the 1999 State Election, the Greens, Christian Democratic Party and Shooter Party expended less than the average expenditure per vote, while the same applied to the Greens and Christian Democratic Party in the 2003 State Election. Second, the exorbitant costs of electioneering may be reducing competitiveness of elections by deterring new contenders unable to afford the money required to run a campaign.

D. Undermining the Health of Parties

The health of the NSW party system suffers from the undue influence that is spawned by the sale of access and influence. As corporate financiers of the major parties increasingly call the shots, the interests and rights of citizens that should be represented become sidelined. The ideal of governing in the public interest is placed in jeopardy when, as former High Court Chief Justice Gerard Brennan observed:

(t)he financial dependence of a political party on those whose interests can be served by the favours of government . . . cynically turn(s) public debate into a cloak for bartering away the public interest.¹⁴⁸

The agenda-setting function of the party system is also impaired, as the policies of the major parties are disproportionately influenced by a small band of businesses.

There are other serious effects on the major parties. Their ability to effectively govern is undermined by the time consumed by subsequent rounds of fund-raising. Former federal Human Services Minister Joe Hockey, for instance, is reported to have

¹⁴⁶ See Australian Electoral Commission, *Funding and Disclosure: Annual Returns Locator Service* (2007) <<http://fadar.aec.gov.au/>> at 22 February 2008.

¹⁴⁷ Andrew Stoner, Leader of the NSW Nationals, has estimated that the NSW ALP spent up to \$90 million on political advertising and government advertising: Andrew Stoner, 'Counting the Cost of Political Advertising', *Daily Telegraph* (Sydney), 27 September 2007, 30.

¹⁴⁸ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 159.

complained in the Liberal Party room about the constant pressure to attend fund-raisers.¹⁴⁹

The quality of the candidates that parties recruit may also suffer by this pre-occupation with fund-raising. For example, in the aftermath of the recent federal election, one of the factors said to have enhanced Malcolm Turnbull's chances of winning leadership of the federal Liberal Party was his ability to raise money to restore the party's depleted funds.¹⁵⁰ This has also been mentioned of Alan Stockdale's candidature for presidency of the federal Liberal Party.¹⁵¹

This is not to deny that Turnbull or Stockdale are worthy candidates. Rather, the point is that the calculus of merit appears to have been weighted too heavily in favour of their ability to fund-raise and, arguably, has detracted attention from more important leadership attributes such as their policies and ability to challenge the ALP.

The fund-raising practices may also lessen the ability of the major parties to act as vehicles for popular participation. At present, the level of membership in NSW parties is quite low. The figures for individual membership¹⁵², stated in the returns lodged in relation to the 2007 State Election by the major parties, the Christian Democratic Party, the NSW Greens and the Shooters Party add up to 99 439 persons, while the total number of persons enrolled for the 2007 State Election was 4 374 029.¹⁵³ In other words, fewer than 1 out of 44 NSW voters are members of these parties.

The fund-raising practices of the major parties will lessen their appeal to ordinary citizens as they tend to hollow out the meaning of party membership. As these parties sell influence to monied interests, they send out a signal to their rank-and-file

¹⁴⁹ Michelle Grattan, 'Our Political Guns for Hire', *The Age* (Melbourne), 25 May 2005, 21.

¹⁵⁰ See, for example, Tony Wright, 'Bold offer might help Lib reset', *The Age*, 26 November 2007 <<http://www.theage.com.au/articles/2007/11/25/1195975872419.html>> at 25 February 2008.

¹⁵¹ See, for example, Michelle Grattan, 'Lib Senate leader urges conservatives to unite', *The Age*, 26 January 2008 <http://www.theage.com.au/cgi-bin/common/popupPrintArticle.pl?path=/articles/2008/01/25/1201157673214.html#> at 25 January 2008.

¹⁵² These figures do not include members of trade unions affiliated to the NSW ALP.

¹⁵³ See NSW Electoral Commission, *Summary of the Percentage of Votes to Enrolment* (2007) <http://www.elections.nsw.gov.au/_data/assets/pdf_file/0009/40005/LC_2007_Summary_Percentage_Votes.pdf> at 13 February 2008.

members that the voices that will be listened to are those with large purses, rather than those who faithfully subscribe to party principles.

The role of party members is also sidelined in other ways. ‘Capitalist financing’ increasingly outstrips ‘democratic financing’ through membership subscriptions in terms of financial importance.¹⁵⁴ This occurs through corporate fund-raising, but also through the growing reliance of the major parties on investment arms.¹⁵⁵ This ‘business’ model of the party vests control over fund-raising in the party leadership and tends to centralise power. With growing centralisation, responsiveness to rank-and-file members correspondingly decreases. This development directly undermines the participatory function of the major parties. In addition, the bypassing of rank-and-file members saps the ability of these parties to generate new ideas and policies, and weakens their claims to be representative of citizens.

V. THE WAY FORWARD: A REFORM AGENDA

The citizens of New South Wales are poorly served by their political finance regime. Its principal regulatory measure, a disclosure scheme based on post-election returns, does not provide timely information and worse, by failing to cover ‘associated entities’, can be easily circumvented. The major parties appear to demonstrate a laissez-faire attitude to the law and the ethics of fund-raising. With neither law nor self-regulation providing sufficient restraint, the sale of access and influence has become so normalised, such that corruption as undue influence is now an endemic feature of NSW politics. Unfairness in accessing political power is paralleled by unfairness in electoral competition, with the playing field far from level. The parties themselves both benefit and suffer from this dire situation. As the major parties grow rich on corporate money, they are less able to serve the community and their members. All of this casts a pall of illegitimacy on NSW parties and brings the crucial activity of politics into disrepute.

¹⁵⁴ Duverger, above n 68, 63.

¹⁵⁵ See Editorial, ‘Secret Donations Aid Political Parties’, *The Age* (Melbourne), 1 February 2008.

The relationship between money, politics and the law needs to be radically reshaped in New South Wales. This should involve a fundamental reform of the law to put in place:

- Democratic party constitutions;
- A robust disclosure scheme;
- Campaign expenditure limits;
- Bans on contributions from companies and individuals with government contracts;
- Limits on individual contributions and tailored limits on organisational contributions;
- A Party Support Fund.

A. Democratic Party Constitutions

There are presently very minimal requirements relating to party constitutions. The main requirement is that an application for registration by a party under Part 4A of *Parliamentary Electorates and Elections Act 1912* (NSW) must be accompanied by a copy of its constitution.¹⁵⁶ Parties are not required to register under this Act but have very strong incentives to do so, as registration is necessary for receipt of funds from the Central and Political Education Funds.¹⁵⁷

This contrasts with the position under Part 5 of the *Electoral Act 1992* (Qld).¹⁵⁸ Parties will be refused registration under this Act if they do not lodge a ‘complying constitution’.¹⁵⁹ A ‘complying constitution’ must deal with the following matters:

- the party’s objects;
- procedures for amending the constitution;

¹⁵⁶ *Parliamentary Electorates and Elections Act 1912* (NSW) s 66D(2)(f). See other requirements in the additional sub-sections of section 66D.

¹⁵⁷ See text below accompanying nn 237, 246.

¹⁵⁸ Like the *Parliamentary Electorates and Elections Act 1912* (NSW), registration, while voluntary under the *Electoral Act 1992* (Qld) [‘EA’], is required for receipt of electoral funding: see EA Part 7.

¹⁵⁹ EA s 73(5).

- rules for party membership (e.g. rules for accepting and ending membership of the party);
- rules for managing internal affairs (e.g. party structure and process for dispute resolution);
- rules relating to election of office-bearers; and
- rules relating to pre-selection of candidates.¹⁶⁰

The Act stipulates in relation to the last requirement that the party's constitution must include 'a rule requiring that a preselection ballot . . . satisf(ies) the general principles of free and democratic elections'.¹⁶¹ These principles are defined to include

- only members of the party who are electors and eligible to vote under the party's constitution may vote;
- each member has only one vote; and
- voting must be done by secret ballot.¹⁶²

Registered parties are also required to provide updated copies of their constitutions¹⁶³ which are open to public access.¹⁶⁴

These requirements should be enacted in New South Wales. They should also be supplemented by a requirement that registered parties lodge their donations policies, which should subsequently be made publicly available.¹⁶⁵ The rationale for these requirements is powerfully put by Democrats Senator Andrew Murray:

all political parties must be obliged to meet minimum standards of accountability and internal democracy. Given the public funding of the elections, the immense power of political parties

¹⁶⁰ EA s 73A(1).

¹⁶¹ EA s 73(1)(f).

¹⁶² EA s 73(2).

¹⁶³ EA s 76A.

¹⁶⁴ EA s 76.

¹⁶⁵ See Ewing, *The Cost of Democracy*, above n 69, 231-2. The Federal ALP has a fund-raising code of conduct as part of its constitution: see Constitution of the Australian Labor Party (Cth) Part E: Australian Labor Party Code of Conduct for Fundraising.

(at least of some parties), and their vital role in our government and our democracy, it is proper to insist that such standards be met.¹⁶⁶

Put differently, these requirements, especially the requirement to lodge donations policies, will assist in protecting the integrity of political representation and by promoting greater transparency of the internal workings of the parties, facilitate a more informed democratic deliberation. At the same time, the requirements, which are mainly aimed at transparency, have only minimal prescriptions in relation to the content of the parties' constitutions and hence, respect the diversity of party structures.

It is, therefore, recommended that:

- requirements based on Part 5 of the *Electoral Act 1992* (Qld) be enacted;
- registered parties be required to lodge their donations policies; and
- such policies be made publicly available.

B. A Robust Disclosure Scheme

1. No Case for Increasing Disclosure Thresholds

It should be said at the outset that there is no case for increasing the disclosure thresholds under the *EFA* to those that currently exist under the *CEA*. An argument based on harmonisation is not available. The changes that increased these thresholds have been dubbed 'corrupt' by various senior ALP figures including then Opposition Leader, Kim Beazley¹⁶⁷ and are due to be repealed by the Commonwealth Parliament. The platform of the ALP's 44th National Conference states that:

Labor supports public transparency of political donations. Labor will therefore reverse the outrageous changes instituted by the Howard Government to limit the public disclosure of

¹⁶⁶ Joint Standing Committee on Electoral Matters, *Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto* (2005) 389 (Supplementary Remarks – Senator Andrew Murray). The majority of the committee agreed with Senator Murray's recommendations at 93-5.

¹⁶⁷ See Denis Peters, 'Beazley in 'Corruption, Theft' Blast', *Daily Telegraph* (Sydney), 22 June 2006, 2.

political donations. Labor will not support millions of dollars being hidden from public scrutiny.¹⁶⁸

Special Minister of State, John Faulkner, has publicly stated that ‘Labor proposes to bring integrity back into the electoral system by reversing the massive increase in donation disclosure thresholds legislated by the Howard government’.¹⁶⁹

More substantively, these changes have resulted in an unacceptable level of non-disclosure. As summarised in Table 4, research by Sarah Miskin and Greg Barber of the Commonwealth Parliamentary Library has concluded that under the previous disclosure threshold of \$1 500 or more, nearly three-quarters, i.e. 74.7% of declared total receipts were itemised over the period spanning from the 1998/99 financial year to the 2004/05 financial year. If the threshold of more than \$10 000 were applied to the same data, this average figure, however, drops to 64.1%.

Table 4: Disclosure figures for major parties, 1998–9 to 2004–05

	Percentage of declared total receipts itemised under disclosure threshold of \$1 500 and over	Percentage of declared total receipts itemised under disclosure threshold more than \$10 000
1998–99	77.2	70.6
1999–00	67.7	55.9
2000–01	63.0	51.5
2001–02	77.8	69.8
2002–03	69.2	55.8
2003–04	72.8	58.6
2004–05	81.9	70.0
Annual average	74.7	64.1

Source: Sarah Miskin and Greg Barber, *Political Finance Disclosure under Current and Proposed Thresholds: Parliamentary Library Research Note No 27/ 2006* (2006)

Moreover, it is possible that the level of non-disclosure for State branches may be even higher with an increase in the disclosure thresholds. For instance, the NSW Greens have estimated that if the threshold were increased to \$5000, 56 per cent of

¹⁶⁸ Australian Labor Party 44th National Conference cl 49.

¹⁶⁹ Editorial, ‘Secret Donations Aid Political Parties’, *The Age* (Melbourne), 1 February 2008.

the money received by the NSW branch of the Liberal Party—nearly \$5 million dollars—would remain undisclosed.¹⁷⁰

2. An Effective NSW Disclosure Scheme

In order to address the very limited transparency now achieved by the *EFA*, it is recommended that a disclosure scheme be enacted with the following elements:

(a) *Entities and persons required to lodge disclosure returns*

- Base scope of Division 4, Part XX of *CEA* with disclosure obligations on:
 - candidates and groups of candidates;¹⁷¹
 - donors to: i) candidates and groups of candidates;¹⁷² and ii) registered political parties;¹⁷³
 - registered political parties;¹⁷⁴
 - associated entities of registered political parties;¹⁷⁵
 - third parties.¹⁷⁶

- Elaborate upon definition of ‘associated entity’ by specifying that:
 - the term ‘controlled’ be defined to *include* the right of the party to appoint a majority of directors or trustees;
 - ‘to a significant extent’ to *include* the receipt by a political party of more than 50% of the distributed funds, entitlements or benefits enjoyed and/or services provided by the associated entity in a financial year; and

¹⁷⁰ Lee Rhiannon and Norman Thompson, ‘Hidden Money’ (2005) 78 *Arena* 12, 12–3.

¹⁷¹ *CEA* s 304.

¹⁷² *CEA* s 305A.

¹⁷³ *CEA* s 305B.

¹⁷⁴ *CEA* s 314AB.

¹⁷⁵ *CEA* s 314AEA.

¹⁷⁶ *CEA* ss 314AEC-AEC.

- the term, ‘benefit’, to *include* the in/direct receipt by the party of favourable non-commercial terms.¹⁷⁷

(b) *Details and frequency of disclosure*

- Candidates and groups of candidates to lodge post-election returns detailing
 - gifts received with obligation to itemise for gifts amounting to \$200 or more in the case of candidates and \$1 000 or more in the case of groups of candidates;¹⁷⁸
 - electoral expenditure by candidates.¹⁷⁹
- Donors to candidates and groups of candidates to lodge post-election returns detailing gifts made with obligation to itemise for gifts amounting to \$200 or more in the case of candidates and \$1 000 or more in the case of groups of candidates.¹⁸⁰
- Registered political parties and associated entities to lodge returns quarterly and lodge weekly returns during election periods that:¹⁸¹
 - disclose details of receipts with sums to be itemised when \$1500 or more contributed by a person for the benefit of a party as a whole, whether to national, State or Territory branches of that party;¹⁸²
 - include ‘gift’ reports that deal separately with gifts and disclose the amount and date of such gifts and also identify the status of the donor as individual, trade union, company or other entity.¹⁸³

¹⁷⁷ This draws on recommendation made by the AEC, above n 7.

¹⁷⁸ This can draw on clauses 3-4, Schedule 3 of the Electoral (Greater Fairness of Electoral Processes) Amendment Bill 2007 (Cth).

¹⁷⁹ This can be modelled upon *CEA* s 309.

¹⁸⁰ This can draw on clause 9, Schedule 3 of the Electoral (Greater Fairness of Electoral Processes) Amendment Bill 2007 (Cth).

¹⁸¹ This can be modelled upon *PPERA* ss 62-3.

¹⁸² This can draw on clause 17, Schedule 3 of the Electoral (Greater Fairness of Electoral Processes) Amendment Bill 2007 (Cth).

¹⁸³ This can be modelled upon Schedule 6 of *PPERA*.

- Either all returns by registered political parties and their associated entities or those with receipts exceeding a certain amount should be accompanied by certificates from auditors.¹⁸⁴
- Third parties to lodge annual returns if incurred political expenditure exceeding \$10 000 with returns to detail:
 - political expenditure to be itemised according to broad categories;¹⁸⁵
 - contributions received for the purpose of such expenditure.¹⁸⁶
- A person/entity who is making a *contribution* to a registered political party, an associated entity or candidate on behalf of others be required to disclose to the political party or candidate the identities of the actual contributors and the amounts contributed.¹⁸⁷
- A registered political party, associated entity or candidate that reasonably suspects that a person/entity is making a *contribution* on behalf of others to ascertain and verify the identities of the actual contributors and the amounts contributed.¹⁸⁸

(c) Restriction on anonymous contributions

- Ban on receiving anonymous contributions of \$200 or more by candidates, registered political parties, associated entities and third parties.

(d) Penalties for breaches of disclosure obligations

- Include offences modelled upon sections 315(1)-(2) of *CEA* but with:

¹⁸⁴ This can be modelled upon *EFA* s 93.

¹⁸⁵ This can be modelled upon *CEA* s 314AEB with obligation to itemise expenditure according to categories stipulated under the definition of ‘electoral expenditure’ in *EFA* s 88.

¹⁸⁶ This can be modelled upon *CEA* ss 314AEB-AEC.

¹⁸⁷ This can be modelled upon *PPERA* s 54.

¹⁸⁸ This can be modelled upon *PPERA* s 56.

- higher criminal penalties;
 - administrative penalties.
- Include offences modelled upon sections 315(3) and (4) of *CEA* but:
 - make strict liability offences, subject to a defence that the agent of the political party or person took all reasonable steps to accurately perform the party’s disclosure obligations;
 - higher criminal penalties;
 - administrative penalties.
 - Persons and parties who fail to make or maintain such records as to enable them to comply with the disclosure provisions be subject to the same penalty provisions that apply to those who fail to retain such records.¹⁸⁹
 - An arrangement entered into which has the effect of reducing or negating a disclosure obligation be deemed as if it had not been entered into.¹⁹⁰
 - Failure to properly disclose a particular receipt or indebtedness should lead to forfeiture of that amount to Consolidated Revenue.¹⁹¹
 - Party to be de-registered under Part 4A of *Parliamentary Electorates and Elections Act 1912* (NSW) in the event of significant non-compliance with disclosure obligations.

(e) Powers and duties of Election Funding Authority in relation to the disclosure obligations

- Include powers modelled upon section 316 of *CEA*.

¹⁸⁹ This has been recommended by the AEC, above n 7, [4.4].

¹⁹⁰ This has been recommended by the AEC, above n 20.

¹⁹¹ This has been recommended by the AEC: AEC, *ibid*, recommendations 4 and 5.

- Election Funding Authority to have power to require audits either by party or by referral to other statutory agencies.¹⁹²
- Election Funding Authority to make all returns public including publishing on the internet.¹⁹³
- Election Funding Authority to review operation of funding disclosure provisions annually and report to Parliament on whether provisions ensure adequate transparency.
- Election Funding Authority to be properly resourced to undertake the above functions.

3. Inherent Limitations of Funding Disclosure Schemes

While there is a strong case for enhancing the transparency of political funding in New South Wales, it should be stressed that such schemes are inherently limited in their ability to prevent corruption as graft and undue influence.

While disclosure schemes expose details of the funding received by parties, they do not cast light on the effect of such funding. It then becomes a matter of conjecture as to whether, in the case of graft, favourable treatment by a political party or its representative resulted from a donation. Similarly, in some cases of undue influence, a bystander can only speculate as to whether political access or influence secured by a donor resulted from a donation. In other words, the effectiveness of funding disclosure schemes in preventing graft and undue influence flounders upon the problem of proving a causal link between preferential treatment and donations, which is always of course denied.¹⁹⁴

¹⁹² This can draw on clause 39, Schedule 3 of Electoral (Greater Fairness of Electoral Processes) Amendment Bill 2007 (Cth).

¹⁹³ This can be modelled upon *CEA* s 320.

¹⁹⁴ This problem of proof was in fact, highlighted by the recent report by the Senate Select Committee on Ministerial Discretion on Migration Matters, which investigated, among others, the 'cash for visa' allegations. After referring to its attempt to 'explore any connection between Mr Karim Kisrwni's political donations and the minister's exercise of his discretion', the Committee concluded that it 'was unable to determine the extent of community or political bias in the exercise of the powers because

Apart from the problem of proof inherent in the funding disclosure scheme, this scheme is also limited in another respect. It cannot solely prevent the selling of political access and influence, because parties, which engage in such sales, clearly accept that fund-raising practices are acceptable. Political parties affirm these fund-raising practices even when they clearly involve the undue influence of politicians: i.e. access to and influence on political power is secured through the payment of money.

The inherent limitations of the funding disclosure scheme must be taken seriously. They are one of the key reasons for considering other regulatory methods. They do not, however, signify that the funding disclosure scheme has no role in achieving the sort of transparency that can deter *some* corruption as graft or undue influence. Instead, such schemes should not be invested with elixir-like qualities and expected, even if ‘loophole free’, to banish graft and undue influence simply by virtue of making transparent the funding of parties.

A much more modest role should be reserved for funding disclosure schemes in the fight against graft and undue influence.¹⁹⁵ Such a role, while attenuated, will still be significant. For example, funding disclosure schemes still serve to put the public – via a virile media – on notice of the risk of corruption. If armed with such information, independent journalists (and indeed in a truly competitive electoral system, rival parties) will vigorously ‘shine a bright light and poke around with a long stick’,¹⁹⁶ thereby forming a useful antidote against graft and undue influence. In the context of lazy journalism and lax political morality, however, the information disclosed by the disclosure scheme will by and large remain meaningless. In the worse case scenario, the disclosure of the frequency and the amount of donations received by the parties may simply contribute to the perception that political parties are regularly trading away the public interest to monied interests. In such situations, a funding disclosure

there was no way it could check who or what influenced the minister’s decision to intervene’: Senate Select Committee on Ministerial Discretion in Migration Matters, *Report* (2004) xv-xvi.

¹⁹⁵ Such schemes clearly have a role beyond preventing corruption and undue influence. For one, they provide invaluable information relating to the funding of parties.

¹⁹⁶ Keith Ewing, *Trade Unions, the Labour Party and Political Funding: The Next Step – Reform With Restraint* (2002) 29.

scheme, far from shoring up the integrity of the electoral system, may corrode the public's trust in democracy.

It is important though to note that a funding disclosure scheme is still relevant in preventing corruption as graft and undue influence, because other regulatory devices will not work without it. For instance, caps on contributions and expenditure limits will help prevent graft and undue influence. Neither, however, could work without a funding disclosure scheme that ensures that party finances are sufficiently transparent.

C. Campaign Expenditure Limits

As argued by Eric Roozendaal, there is a strong case for putting in place limits on campaign spending. There are two main reasons. First, it helps protect the integrity of political representation ('the anti-corruption rationale') and, secondly, as Roozendaal puts it, it has 'the purpose of achieving a fairer political process' ('the fairness rationale').¹⁹⁷

The anti-corruption rationale¹⁹⁸ argues that expenditure limits can perform a *prophylactic* function by *containing* increases in campaign expenditure and therefore, the need for parties to seek larger donations – especially donations which carry the risk of graft and undue influence.¹⁹⁹ The need for such limits is underscored by the fund-raising practices of the parties²⁰⁰ and the evidence of an 'arms race'.²⁰¹ If effective, expenditure limits will also regulate the time spent by the parties on fund-raising and allow them to devote more time to their legitimate functions.²⁰²

The prophylactic function of expenditure regulation can be performed by limits set at present levels of campaign expenditure. Such limits will clearly ensure that campaign expenditure does not increase beyond this point. Otherwise, a future increase in real

¹⁹⁷ New South Wales, *Hansard*, Legislative Council, 21 September 2004, <[http://www.parliament.nsw.gov.au/prod/parliament/members.nsf/0/d9ccd231bed39458ca256ebe0004b5ab/\\$FILE/Roozendaal.pdf](http://www.parliament.nsw.gov.au/prod/parliament/members.nsf/0/d9ccd231bed39458ca256ebe0004b5ab/$FILE/Roozendaal.pdf)> at 28 January 2008 (Eric Roozendaal).

¹⁹⁸ Keith Ewing, 'Promoting Political Equality: Spending Limits in British Electoral Law' (2003) 2 *Election Law Journal* 499, 507.

¹⁹⁹ Neill Committee Report, above n 139, 116-7.

²⁰⁰ See text above accompanying nn 99-138.

²⁰¹ See text above accompanying Table 3.

²⁰² See text above accompanying nn 149-151.

campaign expenditure would lead parties, in the absence of more generous public funding, to seek extra and/or larger donations to meet burgeoning campaign costs. This pressure will increase the risk of corruption that arises with political donations.

Besides a prophylactic function, expenditure limits can also perform a remedial function. For instance, if present spending levels were judged to be excessive and to carry an inordinate risk of corruption, expenditure limits could be aimed at decreasing the amount of real spending and, in turn, the risk of graft and undue influence.

The fairness rationale²⁰³ contends that fair electoral contests demands the imposition of constraints on campaigning costs through campaign expenditure limits.²⁰⁴ Campaign expenditure has positive, albeit limited electoral impact (something parties implicitly recognise) and expenditure limits can promote fair access to the public arena and fair rivalry amongst the parties.²⁰⁵

The fairness rationale can, in fact, be explained in a way that every Australian who follows sport will clearly understand. By analogy with the ‘salary cap’, expenditure limits on campaigns will help avoid unhealthy monopolisations of campaign advertising/marketing systems (helping to ensure that ideas and policies – assuming a responsible media – are not drowned out). But also by dampening down inflation in campaigning, expenditure limits will help ensure the long-term stability of the parties and their branches.

Nonetheless, it remains to be considered various arguments against expenditure limits. There is the argument that expenditure limits are ‘unenforceable’²⁰⁶ or ‘unworkable’, which are usually presupposed by Australia’s experience with expenditure limits.²⁰⁷

²⁰³ Ewing, above n 198, 499, 507.

²⁰⁴ Neill Committee Report, above n 139, 116-7.

²⁰⁵ Note Ewing’s comment that fairness in elections goes beyond the question of resources and embraces the content of messages: Ewing, above n 198, 499.

²⁰⁶ Neill Committee Report, above n 139, 172.

²⁰⁷ Commonwealth of Australia, *Inquiry into Disclosure of Electoral Expenditure* (1981) 8-9 (‘Harders Report’) 13.

Arguments based on ‘unenforceability’ or ‘unworkability’, however, typically suffer from vagueness. In Australia, these arguments, as they relate to campaign expenditure limits appear to be proxy for two specific arguments. It is said that ‘(a)ny limits set would quickly become obsolete.’²⁰⁸ Moreover, these limits are seen overly susceptible to non-compliance.²⁰⁹

It is possible to quickly dispense with the first argument. For instance, the problem with obsolescence can be dealt with automatic indexation of limits together with periodic reviews. As to the question of non-compliance, it is useful at the outset to make some general observations concerning the challenges faced by the enforcement of party finance regulation.

Certainly, all laws are vulnerable to non-compliance. Political finance regulation is no exception and the degree of compliance will depend on various factors. It will depend on the willingness of the parties to comply. This, in turn, will be shaped by their views of the legitimacy of the regulation process and their self-interest in compliance. The latter cuts both ways. For example, breaching expenditure limits might secure the culpable party a competitive advantage through increased expenditure, but this needs to be balanced against the risk of being found out and the resulting opprobrium. Weak laws without adequate enforcement or penalties, invite weak compliance.

The extent of compliance will also depend on methods available to the parties to evade their obligations. The effectiveness of political finance laws invariably rubs up against the ‘front organisation’ problem. This problem arises when a party sets up entities that are legally separate from the party but can still be controlled by that party. Political finance laws will be undermined if parties channel their funds and expenditure to these entities and these entities fall outside the regulatory net or are subject to less demanding obligations.

²⁰⁸ Neill Committee Report, above n 139, 172.

²⁰⁹ Before they were repealed, the Australian expenditure limits were, in fact, subject to widespread non-compliance. For example, 433 out of 656 candidates for the 1977 federal elections did not file returns disclosing their expenditure: Harders Report, above n 207, 18. But this is largely because the laws were left to decay. Indeed as early as 1911 the Electoral Office and the Attorney-General’s Department signalled lax compliance in a policy of not prosecuting unsuccessful candidates for failure to make a return: Patrick Brazil (ed), *Opinions of the Attorneys-General of the Commonwealth of Australia: Vol 1 1901-14* (1981) 499-500.

The answer to this problem is to adopt the fairly robust approach towards ‘front organisations’ found in the *CEA*. The definition of ‘associated entity’ is potentially broad and the scheme treats ‘associated entities’ as if they were registered political parties by subjecting both to identical obligations.²¹⁰

A separate issue faced by political finance laws lies with third parties, that is, political actors which are not parties or sufficiently related to the political parties. The challenge posed by third parties is not that the laws provide a vehicle for parties to evade their obligations simply because third parties are, by definition, not appendages of the parties. Political finance laws that do not deal adequately with the ‘third party’ problem risk not evasion but irrelevance. For instance, if there were substantial third-party electoral activity, a regulatory framework centred upon parties and their associated entities would, in many ways, miss the mark by failing to regulate key political actors.

The above circumstances demonstrate that political finance regulation will *always* face an enforcement gap. But to treat these circumstances as fatal to any proposal to regulate party finance would be to give up on such regulation. By parity of reasoning, it should not necessarily be fatal to the proposal to impose expenditure limits, given that it is unenforceable to some extent because of these circumstances.

The key issue is whether there is something peculiar to such limits that make it particularly vulnerable to non-compliance. It is this that is hard to make out. On its face, the regulation of political expenditure would be easier to enforce than regulation of political funding because a large proportion of such expenditure is spent on visible activity like political advertising and broadcasting. Further, the parties themselves, in a competitive system, have incentives to monitor each others’ spending.

²¹⁰ The principle of subjecting ‘front organisations’ to the same obligations which apply to political parties dates back to the Joint Select Committee on Electoral Reform, Parliament of Australia *First Report* (1983) 166.

Lastly, it is said that expenditure limits constitute an unjustified interference with freedom of speech.²¹¹ This argument must be taken seriously, not only because it poses a question of principle but also because in Australia, a statute which unjustifiably infringes freedom of political communication will be unconstitutional.²¹²

As the discussion below will demonstrate, the question of principle can in fact be usefully approached by applying the test for constitutionality. In short, the question of principle and that of constitutional validity can be approached in the same breath.

The High Court has held that a legislative provision will be invalid if:

- it effectively burdens freedom of communication about government or political matters either in its terms, operation or effect; and
- it is not reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with representative and responsible government.²¹³

With respect to the first criterion of invalidity, expenditure limits do not, on their face, burden freedom of political communication, because their immediate impact is on the spending of money. Indirectly however, these limits do impose a tangible burden on such a freedom. This occurs because the lion share's of such expenditure is spent on communicating political matters whether it be promoting a policy or criticising parties. This is especially the case with political broadcasting which has been found by the High Court to come within the scope of protected communication.²¹⁴

It is important to note, however, that the weight of this burden will depend on the design of limits. The level at which the limit is pitched will be significant, with the lower the level, the heavier its burden on the freedom of political communication. Clearly, following the *Australian Capital Television* case, such limits would have to

²¹¹ Neill Committee Report, above n 139, 118.

²¹² The vulnerability of expenditure limits to arguments based on political freedoms also exist in the UK, see discussion of *Bowman v United Kingdom* (1998) 26 EHRR 1 in Ewing, above n 198, 505-7.

²¹³ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567. A modification of the second limb of the *Lange* test was accepted by four of the judges in *Coleman v Power* (2004) 220 CLR 1.

²¹⁴ See *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

be high enough to allow for a reasonable amount of broadcast advertising by the party or group concerned. It might be noted here that quite low expenditure limits apply across the board in Tasmanian Upper House elections.²¹⁵

Similarly, the burden will depend on whether the limit is instituted through a simple prohibition, as in the UK, or as a condition on public funding.²¹⁶ If the latter is adopted, the burden on freedom of political communication will be much less as parties can still choose not to receive public funding and hence, be exempt from campaign expenditure limits.

Given that campaign expenditure limits invariably impose, to some degree, a burden on the freedom of political communication, the critical question then is whether the instituted limit is reasonably appropriate and adapted to a legitimate aim.

At the outset, it can be categorically said that expenditure limits do not *necessarily* fail this test of proportionality. There are clearly legitimate aims that can be invoked, namely, the anti-corruption²¹⁷ and the fairness rationales. Whether an expenditure limit is an unjustifiable interference with freedom of political speech and/or unconstitutional cannot be answered in advance. The answers to these questions will depend on the design of the limits.

It should be noted that electoral expenditure limitations apply in our chief common law comparators: the UK, Canada and New Zealand (see Table 5). Each of those countries has not only strong traditions of liberal democracy, but constitutional and court jurisprudence based on rights including liberty rights (Canada in particular with its *Charter of Rights* and the UK with the *Human Rights Act*). There is no reason to presume that similarly crafted expenditure limits for Australian elections would infringe the ‘implied freedom’ doctrine.

Table 5: Expenditure limits of selected countries

²¹⁵ Approximately \$9000 per Legislative Council candidature – this amount includes parties and supporters.

²¹⁶ If this method were adopted, other measures would have to be implemented to bring third parties, which do not receive public funding, within regulatory regime.

²¹⁷ This rationale was accepted in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

	Canada	New Zealand	UK	Australia
Spending limits	Yes and calculated according to the number of listed electors in the contested electoral district	Yes If contests party vote, limit of NZ\$1 million plus NZ\$20 000 for each electorate candidate nominated by the party If does not contest the party vote, limit NZ\$20 000 per nominated candidate	Yes and calculated according to seats contested	Only for Tasmanian Legislative Council elections

Finally, it should be emphasised that the question of campaign expenditure by the parties cannot be separated from the ability of governing parties to use government resources for partisan purposes, in particular, government advertising. Indeed, restricting the amount Opposition parties can spend while leaving governing parties free access to the public purse to run their ads will be deeply inequitable. While this submission has not tried to do justice to the question of government advertising,²¹⁸ it recommends a separate inquiry into that topic.

It is therefore recommend that:

- campaign expenditure limits be supported in principle;
- the design of such limits be further investigated, particularly with reference to recent reforms in the UK, Canada and New Zealand; and
- an inquiry be conducted into government advertising.

D. Ban on Contributions From Companies and Individuals With Government

Contracts

²¹⁸ See generally Sally Young and Joo-Cheong Tham, *Political Finance in Australia: A Skewed and Secret System* (Audit Report No 7), Chapter 4.

The potential for political donations to become linked to Government decisions benefiting donors was most starkly illustrated in Australia by the Queensland “Fitzgerald” Royal Commission. The Bjelke-Petersen National Party Government awarded lucrative contracts to donors to the Party’s Bjelke-Petersen Foundation.²¹⁹

There is no evidence that such corrupt processes occur under the current New South Wales Government. However, the sums involved in government contracts for goods and services provide massive incentives for prospective suppliers to attempt to influence decisions on awarding those contracts.

In other jurisdictions, firm regulatory measures have been enacted to deal with the risk of graft that stems from such decisions. Canadian law imposes a ban on contributions from Crown corporations and corporations that receive more than 50 per cent of their income from the federal government. In the United States, a broader ban applies, with contributions from persons or companies with contracts with the federal government rendered completely illegal. Such regulation reflects the notion that contributions from donors that have a particularly strong interest in governmental action carries a serious danger of graft and, therefore, should be limited.

It is thus recommended that a ban on contributions from persons or companies with government contracts be instituted, based either on Canadian or United States law.

E. Limits on Individual Contributions and Tailored Limits on Organisational Contributions

There is a strong case for instituting limits on contributions from individuals in order to protect the integrity of political representation. Such limits will act as a preventive measure in relation to graft. Moreover, as the amount of money contributed by an individual increases, the risk of undue influence heightens. Therefore, bans on large contributions can directly deter corruption as undue influence and counter the

²¹⁹ Tony Fitzgerald, *Report of a Commission of Inquiry into Pursuant to Orders in Council* (1989) [‘Fitzgerald Report’].

corporatisation of politics. The United States and Canada, for example, have instituted caps on individual donations.

Table 6: United States and Canadian caps on individual donations

	Limits on individual donations to candidates	Limits on individual donations to parties etc
United States	US\$2100 to each candidate per election cycle	US\$26 700 to each national party committee per election cycle
	US\$40 000 to all candidates per election cycle	US\$5000 to each political committee or state party committees per election cycle
	US\$101 400 per election cycle for all contributions	US\$61 400 for political committees per election cycle
		US\$101 400 per election cycle for all contributions
Canada	C\$1000 to each registered political group (i.e. party, district associations and endorsed candidates) per annum	
	C\$1000 to each candidate not endorsed by a registered party per election	

More difficult questions may arise in relation to extending these limits to organisations like companies, trade unions and community groups. The key issues are whether limits that apply to individuals should similarly apply to these entities and in particular, whether New South Wales should follow the Canadian system by imposing bans on corporate and trade union contributions.

The appeal of the Canadian system lies in its apparent fairness. As the argument goes, ‘(i)f big business is to be prevented from bankrolling political parties in return for favourable policies, surely the same rule must apply to unions’.²²⁰ Why should trade unions be allowed to freely donate, especially to the ALP, whereas business donations are largely prohibited? After all, shouldn’t the interests of labour and capital be fairly represented in the political arena?

There is a false equation at the heart of this argument. There is no parity between businesses and trade unions from a democratic point of view. Commercial corporations have an ambiguous status in a capitalist democracy like Australia. On the one hand, the reality is that such corporations wield enormous economic power with their decisions affecting the livelihoods of most Australians. In such circumstances, they rightly have the ear of politicians. On the other hand, such corporations do not have a legitimate claim to political representation. They do not have a direct claim to representation, as they are not citizens, the ultimate bearers of political power in a representative democracy. As stated by former Chief Justice Mason, ‘the concept of representative government and representative democracy signifies government by the *people* through their representatives’.²²¹

Commercial corporations do not even have a derivative claim to political representation. This is because they are inherently undemocratic in their decision-making structure. Shareholder control must necessarily imply that power in a business is parcelled out according to the criterion of wealth. The plutocratic nature of corporations can be clearly contrasted to organisations like trade unions, which are legally required to accord one member, one vote and to engage in majoritarian decision-making processes.²²²

This argument implies that trade unions have a *prima facie* claim to democratic representation while denying commercial corporations any such right. Is this not

²²⁰ Janet Albrechtsen, ‘End the stench of political donations’, *The Australian*, 24 February 2008 (available at

http://blogs.theaustralian.news.com.au/janetalbrechtsen/index.php/theaustralian/comments/end_the_stench_of_political_donations/; accessed on 25 February 2008)

²²¹ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 137 (emphasis added).

²²² *Workplace Relations Act 1996* (Cth) (Registration and Accountability of Organisations Schedule).

counter to the principle of political equality? Indeed, this concern misconceives the principle of political equality. Resting upon equal concern and respect for all *citizens*, it does not require that all political participants be treated as equals. Instead, the principle of political equality requires that only citizens be treated as equals. From this perspective, it is quite legitimate to distinguish between commercial corporations that treat citizens unequally by calibrating decision-making power according to units of capital and trade unions that are required by law to accord each member a single vote.

There are then *always* question marks over the political influence wielded by commercial corporations. This is particularly the case when they seek to influence politics through money. This brings us to the second difference between corporate and trade union money in Australia. Trade unions largely give money to the ALP by way of membership affiliations. This is not the case with corporate contributions.

Several consequences flow from this fact. First, membership subscriptions, whether by individuals or groups need to be accompanied by an open declaration that the member supports the party's Constitution, policies and principles.²²³ With corporate contributions, on the other hand, such principled support is not required and all that seems to be present is the profit motive of the company. Second, there is much greater transparency in relation to the influence wielded by members, because such influence is formalised in the party structures. The NSW ALP's Constitution, for example, sets up a Labor Advisory Council whose role 'is to provide a formal consultative mechanism between the Party and the union movement in NSW'.²²⁴

Further, the fact that some contributions, in particular, trade union funding comes in the form of membership affiliation fees implicates the principle of respect for the diversity of party structures. Banning affiliation fees breaches this principle, whereas prohibiting contributions by non-members does not. The effect of a ban would be to make illegal parties like the ALP, the NSW Greens and the federal National Party that

²²³ See, for example, Constitution of the Greens (NSW) cl 5.4(6).

²²⁴ Rules of the Australian Labor Party (NSW) 2005-2006 cl Q.2.

currently have indirect structures.²²⁵ As a consequence, the law will be requiring all parties to be direct parties, that is, be based solely on individual membership.

Further, an anomaly arises with regards to banning contributions *to* parties by third parties, whilst still allowing independent political expenditure by third parties. Such an approach expresses preference for political activity *outside* parties over that *through* parties. Pressure group activity is favoured over party activity. This may undermine the health of the party system, especially its participatory function.

Besides the differences between corporate and trade union contributions that stem from the fact that the latter comes by way of membership affiliation fees, there is also greater transparency in trade union funding because of the differences in the manner in which trade unions and companies engage in politics. Trade union money is given to political parties with a publicly known agenda. Resolutions passed by a particular union or by the ACTU make clear what barrow is being pushed by trade union money. If a trade union is also affiliated to the ALP, its views will also be apparent from its position at ALP conferences.

With trade union funding of the ALP, citizens are in a better position to factor the influence of such money in determining whether the ALP, with its trade union affiliation is fit to govern, or whether the Greens which receive some trade union money deserves their support. If they feel that these parties are too beholden to trade unions or do not like the policies advocated by trade unions, citizens can then choose not to vote for them. For example, it is clear that the principal agenda driving trade union money in the recent federal election was the repeal of the *WorkChoices* industrial laws. With this very much out in the open, citizens can accordingly cast their votes adequately informed of the political agenda of the trade union movement.

However, no such luxury is afforded in relation to corporate money, since the actions of commercial interests are typically 'cloaked in great discretion'²²⁶. When companies contribute to the major parties, it is secrecy that prevails.

²²⁵ See text above accompanying nn 60-9.

²²⁶ Duverger, above n 68, xxxiv.

Corporate donors are coy as to the reasons for their largesse. For publicly listed companies, it is rare for annual general meetings to specifically discuss political donations, let alone the reasons for those donations. Perhaps the fear is that full and frank disclosure, like that of David Clarke's, would raise the charge of graft. Or it could be fear that the shareholders of the companies would oppose such engagement in the political process. The latter sentiments were reflected well by the disquiet expressed by some businesses in relation to the Business Council of Australia and Australian Chamber of Commerce and Industry creating the National Business Action Fund to fund ads to campaign in favour of *WorkChoices*. According to a senior business figure, there was a difference between trade unions and business in that unions have long been part of political process and are expected to run campaigns, but:

Business is not like that. Business associations are about issues and the best interests of their members. They shouldn't be part of the political process like this.²²⁷

These sentiments are explicitly captured by the policy of the Australian Shareholders Association on political donations, which states:

Companies must operate within the legal and regulatory system applying in the places in which they operate. There is an economic role - as expressed in the dictum "The business of business is business" - not a political one. It is legitimate for companies to attempt to influence government through lobbying and similar representational processes, but provision of funds to political entities taints the democratic process by creating expectations of favours in return.

Accordingly, the Australian Shareholders Association completely opposes political contributions by public companies.²²⁸

From a democratic perspective then, there is no equivalence between trade union and corporate money. The former comes from formally democratic organisations while the latter is sourced from inherently plutocratic organisations. Trade unions largely donate as members of the ALP, while corporate contributions are actuated by the

²²⁷ Phillip Coorey, 'Exposed: the Secret Business Plot to Wreck Labor', *Sydney Morning Herald* (Sydney), 20 June 2007, 1.

²²⁸ See Australian Shareholders' Association, *Political Donations: Policy Statement* (2004) <<http://www.asa.asn.au/PolicyStatements/PoliticalDonations.pdf>> at 19 February 2008.

profit motive. The first is given with a transparent agenda while the second is given in clandestine circumstances. While voters may know that the major parties are being funded by the corporate sector, they are usually in the dark as to the covert influence brought to bear by such money. In sum, there is no reason to view trade union funding with the opprobrium that attends the corporatisation of politics.

This still leaves the question: should organisational contributions be restricted if individual contributions are to be capped? The answer is yes. Otherwise, the caps on individual contributions can be easily evaded. Also, the corruption of politics that has occurred through the sale of access and influence needs to be dealt with. Restrictions on organisational contributions should, however, pay heed to the differences between trade union and corporate contributions.

One way forward is to adopt the recommendation of the UK Power Inquiry that organisational contributions be subject to caps that vary according to the number of members who are natural persons and be subject to full democratic scrutiny within the organisation.²²⁹

This recommendation has several virtues. By linking the level of caps to the number of individual members, it is informed by the principle of political equality. It requires intra-organisational democracy and, in doing so, promotes greater transparency. In addition, by allowing for collective or group membership affiliations, it respects the diversity of party structures. Under this recommendation, trade unions, religious and environmental groups, as well as organisations of farmers and shareholders can still contribute to and be members of parties. Businesses will still be able to contribute funding, but the amount they can give will depend on the number of shareholders who are natural persons.

Two final points should be made. The condition of full democratic scrutiny within the contributing organisation is likely to require that trade union and corporations respectively seek specific authorisation from their members and shareholders before making political contributions. An authorisation requirement in relation to trade union

²²⁹ The Power Inquiry, *Power to the People: An Independent Inquiry into Britain's Democracy* (2006) 210-1 (copy on file with author).

political expenditure has Australian precedent: for a few years, Western Australian trade unions were required to set up a separate fund for political spending.²³⁰ Similarly, Democrats Senator Andrew Murray has recommended that businesses and trade unions respectively seek authorisation from their shareholders and members at annual general meetings or at least every three years.²³¹

Another possible model are the UK controls on the donations made by trade unions and companies. British trade unions are required to ballot their members every ten years for authority to promote their political agendas. Once authorised, political expenditure by a trade union must be made from a separate political fund which individual members have a right to refrain from contributing to. British companies, on the other hand, are required to seek authorisation from their shareholders every four years to make political donations and/or political expenditure.²³²

These models are certainly worth considering. If they are instituted, the controls on trade union and business donations should be simultaneously introduced as a matter of political equality. Imposition of trade union controls without equivalent restrictions on business donations would, for example, be a serious violation of this principle: it would disadvantage political participants that have a prima facie entitlement to democratic representation, while favouring those who have no such right.

Lastly, it is quite possible that adoption of this recommendation will result in a disparity of resources between the ALP and the Coalition parties, with trade union funding still flowing strongly to the ALP, while corporate funding is restricted. This is not necessarily unwelcome. Indeed, it is a natural consequence of distinguishing between democratically constituted and plutocratic organisations: trade unions and democratically organised groups whether be of people of faith, environmentalists or farmers should not be placed on the same footing as commercial corporations. At the same time, it does give rise to unfairness in elections when one of the parties

²³⁰ Former section 97P of the *Industrial Relations Act 1979* (WA). This requirement was in force from 1997 to 2002.

²³¹ Joint Standing Committee on Electoral Matters, above n 166 (Supplementary Remarks – Senator Andrew Murray [2.2] (trade unions) and [5.5] (corporations)).

²³² For the requirements applying to trade union political expenditure, see discussion in Ewing, *The Funding of Political Parties in Britain*, above n 46, Chapter 3; and Keith Ewing, *Trade Unions, the Labour Party and the Law: A Study of the Trade Union Act 1913* (1982).

contending for the office of government has resources far superior to its competitors. This, however, is not a sufficient reason for rejecting caps on organisational contributions. Such unfairness should be prevented instead by appropriate campaign expenditure limits.

It is therefore recommended that:

- caps be placed on individual contributions;
- caps be placed on organisational contributions varying according to the number of members who are natural persons and subject to full democratic scrutiny; and
- Measures to improve the internal accountability of companies and trade unions be considered and, if instituted, introduced simultaneously.

F. Establishment of Party Support Fund

There are currently three separate pools of public funds under the *EFA*. There is the Central Fund and the Constituency Fund²³³, with 2/3 of the funds credited to both funds²³⁴ going to the Central Fund²³⁵ and the remaining to the Constituency Fund.²³⁶ Registered parties, independent groups and candidates that received at least 4% of the first preference votes cast in Legislative Council elections or were elected are eligible to receive payments from the Central Fund²³⁷, with the amount of payment calculated according to a formula based on the number of first preference votes received.²³⁸ No party, independent group or group of candidates may receive more than half of the monies in Central Fund or a proportion of funds exceeding its proportion of primary votes.²³⁹

²³³ *EFA* s 56.

²³⁴ *EFA* s 57 determines amount going to both funds.

²³⁵ *EFA* s 58.

²³⁶ *EFA* s 64.

²³⁷ *EFA* ss 59 (parties), 60 (independent groups), 61 (independent candidates).

²³⁸ *EFA* s 62.

²³⁹ *EFA* s 63.

Candidates who received at least 4% of the first preference votes cast in a Legislative Assembly election or were elected are eligible for payments from the Constituency Fund²⁴⁰ and the amount of payment is also calculated according to a formula based on the number of first preference votes received.²⁴¹ No candidate is to receive more than half of the monies in the Constituency Fund earmarked for his or her constituency²⁴² or a proportion of funds exceeding his or her proportion of primary votes.²⁴³

The claims for payments from the Central Fund and the Constituency Fund are only approved if they are audited²⁴⁴ and the amount claimed does not exceed the amount incurred for election campaign purposes.²⁴⁵

Registered parties eligible for payments under the Central Fund are also entitled to annual payments from the Political Education Fund.²⁴⁶ These payments can be used for 'political education purposes'. These purposes are subject to determinations made by the Authority²⁴⁷ and include the posting of written materials and information.²⁴⁸ The entitlement of a party to monies from this fund is based on the number of first preference votes received.²⁴⁹

These three Funds should be replaced by the Party Support Fund. This Fund will have three components. First, it should provide *election funding payments*. The threshold for eligibility for these payments should be 2% of first preference votes cast in Legislative Council elections and 4% of first preference votes cast in a Legislative Assembly election. The amount of payments should be subject to a tapered scheme with the payment rate per vote decreasing according to the number of first preference votes received. For instance, the first 5% of first preference votes received by a party could entitle it to a payment of \$2.00 per vote, while a payment rate of \$1.50 per vote

²⁴⁰ EFA s 65.

²⁴¹ EFA s 67.

²⁴² EFA s 66.

²⁴³ EFA s 68.

²⁴⁴ EFA s 75 lists the requirements of the audit.

²⁴⁵ EFA s 74(2).

²⁴⁶ EFA s 97C.

²⁴⁷ EFA s 97D.

²⁴⁸ EFA s 97C(2).

²⁴⁹ EFA s 97E.

applied to the next 20% of first preference votes and a payment rate of \$1.00 per vote attached to votes received beyond the 25% mark.

Second, the Fund should provide for *annual allowances*. Parties and candidates eligible for election funding payments should be eligible for these annual allowances. In addition, parties that have individual membership exceeding a certain level, for example, 500, should also be eligible for these payments. The formula for distributing these allowances should be based on both votes received in the previous election and current membership figures.

Third, the Party Support Fund should include *policy development grants*. These could be modelled upon the policy development grants under the UK political finance scheme.²⁵⁰ Eligibility for these grants should be the same as that which applies to annual allowances. These funds should only be used to fund activities that are strictly aimed at policy development and not electioneering.

The establishment of a Party Support Fund as described above will ensure that parties are adequately funded especially in light of the drop in private funding once contribution limits are adopted. More than this, a Party Support Fund scheme funds parties in a way that promotes fairness, especially by financially assisting parties with significant electoral and/or membership support through a tapered scheme. This is akin to a progressive income tax system, with less resourced parties helped to a greater degree. Also, the payment of public funds is explicitly tied to the promotion of party functions. The policy development grants should encourage parties to devote more time and energy to generating new ideas and policies. Linking annual allowances to membership figures may result in the parties recruiting more members and thereby, invigorating themselves. Both may result in a richer democratic deliberation.

It is therefore recommended that a Party Support Fund be established providing for:

- Election funding payments;

²⁵⁰ *PPERA* s 12.

- Annual allowances; and
- Policy development grants.

VI. CONCLUSION

Premier Morris Iemma has resisted the push for improved regulation of NSW political funding by pointing to the need for national regulation. In particular, he has argued:

Potential donors could escape any new state laws by simply approaching political parties in another jurisdiction – state or federal – and seek to have their donations channelled back into NSW.²⁵¹

There are two points to be made about this claim. Premier Iemma's reasoning being directed at contribution limits does not actually apply to many of the regulatory measures recommended in this submission. These include:

- Democratic party constitutions;
- A robust disclosure scheme;
- Campaign expenditure limits; and
- A Party Support Fund.

Further, in relation to contribution limits, there are regulatory measures to deal with the real problem identified by Premier Iemma. Recommendations made above in relation to disclosure obligation include requirements that:

- A person/entity who is making a contribution to a registered political party, an associated entity or candidate on behalf of others be required to disclose to the political party or candidate the identities of the actual contributors and the amounts contributed; and
- A registered political party, associated entity or candidate that reasonably suspects that a person/entity is making a contribution on behalf of others to

²⁵¹ Quoted in Andrew Clennell, 'Iemma Urges Donation Reform', *Sydney Morning Herald* (Sydney), 9 May 2007, 7.

ascertain and verify the identities of the actual contributors and the amounts contributed.

These obligations, if properly enforced and implemented, would identify contributors who seek to channel their monies to NSW parties from branches of the parties that are located elsewhere. Once identified, their contributions can be subject to contribution limits.

In short, there is no need to wait for federal legislation regulating political funding. In 1981, the New South Wales parliament pioneered the way in this area through its introduction of a disclosure scheme and a system of public funding.²⁵² It is time again for it to assume the mantle of reform.

²⁵² See Ernest Chaples, 'Election Finance in New South Wales: the First Year of Public Funding' (1981) *Australian Quarterly* 66.