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# INQUIRY INTO ELECTORAL AND POLITICAL PARTY FUNDING

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# SUBMISSION TO

# THE INQUIRY INTO ELECTORAL AND POLITICAL PARTY FUNDING

BY THE

## LEGISLATIVE COUNCIL SELECT COMMITTEE ON ELECTORAL AND POLITICAL PARTY FUNDING, PARLIAMENT OF NEW SOUTH WALES

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My initial interest in the subject matter of the Select Committee's inquiry dates back to the early 1960s. There is a history of academic writing on the topic in my recent paper for the Democratic Audit of Australia, "Fifty years of campaign finance study in Australia" (2006). My considered view as to what might be possible and/or effective was first advanced in a paper read at the 11th Triennial Congress of the International Political Science Association held in Moscow in 1979 and subsequently published in (ed.) K.-H. Nassmacher, *Foundations for Democracy: Approaches to Comparative Political Finance* (Baden-Baden, Nomos, 2001), pp.206-21. Since writing that paper I have had opportunities to re-consider the question in what might be thought more of a real-world context, first as the Commonwealth's Electoral Commissioner 1984-89 administering the scheme proposed by the Joint Select Committee on Electoral Reform of the Commonwealth Parliament and introduced by the Hawke Government, and then in 1990 as a member of the Electoral and Administrative Reform Commission of Queensland recommending changes to the State's electoral system to remedy the situation previously critically examined by a Royal Commission into corruption and maladministration in that State.

The considered view I stated in 1979 read:

> The bottom line then is this. The essential components for an election finance system without which the system must be suspect are, first, machinery to enforce, monitor and recommend, and second, continuous, comprehensive and total disclosure of both income and outgo. All else is bells and whistles. (ed. Nassmacher, p.231)

My opinion has not changed significantly since then, and I will now apply it to the issues formulated in s.1.8 of the very useful Discussion Paper the Select Committee has published.

**Election Funding Authority**

I am in no position to comment on the EFA's performance, but can say that the only criticism I have ever heard either related to the legislative framework within which it had to work and not to how the EFA carried it out, or else was totally misconceived. More generally, it is essential that bodies which conduct elections and/or deal with election funding need effective protection from partisan interference; that comes most commonly from the government of the day. An essential ingredient of this protection is a comprehensive definition of any such body's responsibilities and how these are to be carried out, set out in statute to ensure certainty and restrict tinkering, and a highly desirable ingredient is the existence of a statutory select committee of the legislature charged with inquiring into the field as a protected forum in which concerns may be aired and assessed. My recent Senate Lecture, "The Independence of Electoral Administration," (2007) and two earlier papers, "Institutionalising electoral integrity", in (ed.) Sawer, *Elections Full, Free and Fair* (Sydney, Federation Press, 2001) pp. 142-57, and "The Independence of the Commissions: The Legislative Framework and the Bureaucratic Reality" in (eds,) Orr, Mercurio & Williams, *Realising Democracy: Electoral Law in Australia* (Sydney, Federation Press, 2003), pp. 205-15, deal with such protection in more detail.

**Public Funding**

Public funding is usually introduced in the hope or expectation that the availability of money from the state will reduce or eliminate possible improper influence by donor individuals, corporations or associations. Public funding can be introduced either with a restriction that accepting it prohibits acceptance of donations from non-state sources, or without such a restriction. As to the first option, I would point to American experience with a version confined to Presidential elections introduced following the Watergate Scandal which involved, inter alia, campaign finance abuses – the dairymen's money. In the discussion following his own paper at a conference on campaign finance held in 1979 the then Congressman from Wyoming, Richard Cheney, said:

> It is not really practically to talk seriously about a candidate not accepting federal funds once he is in the race. ... Realistically, he has no choice but to accept federal funding because he could not raise enough money without in the time available. (ed. M. Malbin, *Parties, Interest Groups, and Campaign Finance Laws* (Washington, American Enterprise Institute, 1980), p.249)

But by 2000 the provision was dead in the water and members of the Select Committee will be familiar with accounts of the level of expenditure in the run-up to the 2008 Presidential election campaign.

Australian federal experience with the second option may be somewhat controversial because some Liberal Party spokesmen aver to the contrary, but my own opinion is that the available data show no sign of private fund-raising being inhibited by public funding. It is always possible that some donors have offered the existence of public funding as an excuse to give less that the party's collectors sought or thought appropriate to the donor's affluence. If the Select Committee were starting from scratch, my advice now would be not to introduce public funding. However New South Wales already has a system of public funding, a justifiable pride in being the first jurisdiction in the country to introduce what was usually regarded as "a good thing", and it is a system that has attracted relatively little criticism. It may be unrealistic to abolish it at this point, and thus some of the Discussion Paper's dot-points relating to its operation need attention.

The prime purpose of the 4% threshold to entitlement, like the retention of a deposit by candidates, is to discourage those who are "not serious", and there might be fringe benefits like lowering the level of informal voting with fewer candidates. Because optional preferential voting is used at New South Wales state elections, the likelihood that there will be a number of candidates standing with a view to accumulating subsequent preferences for someone else ought to be reduced, at least for the Assembly. On the other hand, there is little evidence that either the threshold for public funding or the requirement of a deposit has the desired effect, and the number of candidates has risen steadily. If candidates, groups and parties were required to prove that they had incurred campaign expenditure sums approximating their entitlement to public funding AND stiff penalties for fraudulent claims existed, I think it would appear fairer to the average citizen not to have a threshold at all. Given the relative inexperience of many campaign administrators and the organisational confusion in which many campaigns are conducted, it might be more realistic to require adequate proof that sums equal to, say, 90% of

entitlement were expended. Finally, it might be advisable to have a look at the scale of deposits again to see if sums on that scale have any effect.

Registration of parties and candidates has a number of uses, putting helpful labels to candidates' names on the ballot-paper at the very least. Provided the continuing capacity of parties to meet some basic proof of viability is effectively tested by an appropriate authority, it should be maintained. The question of agents is more complicated because a different approach will be needed if campaign expenditure were to be limited, and is better examined below.

Indirect sources of funding, what are now often called the advantages of incumbency, is relatively new ground for regulation. As a first principle I would say that decisions would be better left to the ordinary courts rather than given to special statutory officers appointed for the purpose or, worse still, existing statutory officers like the Auditor-General or the Electoral Commissioner with the consequent likelihood of embroiling them in what are essentially political arguments during a highly partisan period. Might I instead call the Select Committee's attention to s.11(4) of the Commonwealth's Referendum (Machinery Provisions) Act 1984 which says the Commonwealth "shall not expend money in respect of the presentation of the argument for or against", and the very tight interpretation given the words by the High Court in *Reith v Morling* (1988), and suggest the Select Committee considers an equivalent prohibition to cover both advertising and the use of premises, equipment, materials and staff made available to incumbent parliamentarians the better to discharge their duties as representatives. Electoral law is sufficiently familiar with the concept of political advertising to adapt to such a possibility AND to avoid the pitfall of an *Evans v Crichton-Brown* (1981) decision narrowing its effect excessively.

As to any federal involvement, I think tax deductibility is a reasonable idea and should be encouraged, but I would not recommend introducing the American device of a check-off system incorporated in tax returns which was a good idea at the time but was overtaken by inflation. Insulating federal and state jurisdictions from each other is rarely practicable. This was apparent under the Commonwealth's old regulatory system for campaign finance abolished by the Fraser Government. Money is fungible and boundaries identified with a federal system will be as porous as any other boundaries.

Provision of goods and services is another can of worms best left alone. Campaigning techniques have changed considerably, are changing, and will continue to change. Today's Parliament's estimate as to which medium or media should be subsidised will not correspond to tomorrow's PR consultants' opinions as to which media are most effective in shaping electoral decisions. It may be useful for understanding the contemporary political process to know how parties and candidates divide up their spending among the media, but encouraging Medium A is likely to lead to a desire to curb or forbid spending on Medium B and that will be at risk in the High Court. Relationships among political parties and media proprietors are inevitably fraught with tensions, and they should not be added to by the clumsy interventions that governmental provision of selected goods and/or services would entail.

**Political donations – amounts**

Restricting amounts inevitably leads to "smurfing" and other devices of avoidance which produce concealment when, as I have already said, maximum disclosure should be the goal. It should be left to electors to decide whether a donation might be on a scale likely to purchase undue influence on government decision-making. If it is clearly directed to a particular purpose, then the existing law on bribery is sufficient. However, a million dollars spent by a large public corporation may be a legitimate protection of its very existence. It should be remembered that the debate effectively began in the UK with "Mr Cube" and the proposed nationalisation of the sugar industry (H.G. Nicholas, *The British General Election of 1950* (London, Macmillan, 1951), pp.71-75). Tate & Lyle could have bought media space and time to state its case, or it could have given the money to a party that might have been more successful in advancing that case; that choice should be the company's.

"Political" advertising should not be anonymous, as it might be if ten directors each give 100,000 dollars. It is unlikely that 100,000 employees can be organised so that each gives 10 dollars. Therefore there has to be a delicate judgment about cut-off points, i.e. amounts, for disclosure and that is best discussed in a subsequent section.

**Political donations – sources**

The source identified should be, as far as possible, the ultimate, the original source of the money or other benefit. Accountants, solicitors, trusts and the like should not be a permissible cover. There may be an occasional problem with, say, a subsidiary company that does not trade but merely owns an asset and whose directors do not overlap those of the holding company, being used as a laundering mechanism/ Quite possibly this may be tried for the fun of the chase rather than to conceal a sinister conspiracy. A vigilant authority with power to ask questions and provision of stiff penalties for false answers ought to be able to keep the problem under control. The Australian Electoral Commission had some experience, mentioned in its early Annual Reports, that might be of interest to the Select Committee,

The proscription of certain classes of donor has attracted some support in the past. The involvement of local developers in local government elections is probably the best documented case e.g. at the Gold Coast, Queensland. There is also US experience with prohibition of donations by foreign governments. On balance I think any prohibition is undesirable because of its encouragement of concealment and the difficulty in drawing a clean line. For example, if a developer stands for election himself, should he prohibited from spending his own money or from receiving donations from spouse, children, partners? If a foreign government wishes to get involved, it can probably find a friendly corporation that has a local subsidiary or affiliate. In the latter case the trail can lead to the overseas link that connects to someone in Australia, but will be unable to go further back Good investigative journalism will probably be a better tool for getting at the truth than any statutory prohibitions.

There is also a problem of uncertainty in what evidence is available. The memoirs of some senior Party members support the claim that the original Communist Party of Australia received financial assistance from a source abroad which could be conveniently labeled "Moscow". Would it have mattered whether the cash came from some agency of the government of the Soviet Union or from the Communist Party of the Soviet Union (Bolshevik)? Only recently have we learned that it is in the Party's archives that documents indicating involvement in Australian domestic political affairs repose. There are now a great many Foundations promoting democracy and free and fair elections around the world which assist political parties in other countries both between and during election campaigns. It is unlikely that any of them would expend scarce resources on helping Australian parties or candidates, but there have been suggestions that the central organisation of Lyndon LaRouche's ideological movement (which might just as well call itself a Foundation) provides material assistance to a small Australian party which the level of its expenditure tends to corroborate.

There are also inter-national associations of political parties, based on ideological or other similarities, the members of which exchange opinions, expertise and sometimes personnel. Accounts of the latest UK general election make much of the involvement of Australian advisers in the management of the Conservative Party's campaign. What could be the case for prohibiting a return of the favour? My conclusion is that prohibition of donations by particular persons or entities would be a mistake, but if the Select Committee were to think otherwise I would suggest that the views of existing money-laundering and terrorist-monitoring governmental bodies be sought on the practicality and resource demands of an effective operation in this field.

**Political donations – disclosure**

I lack the necessary experience to judge whether existing legislative provisions are working effectively, or whether particular defects can be identified. However I will comment on the final four dot-points.

It is not realistic to ask for "the nature of the donor's corporate activity". Realistically a corporation's sole object may be to hold shares in other companies, or the motivation behind a political donation may be agreement on the part of the beneficial owner(s) or some directors with a party's social values. EFA staff can always look at public-access documentation with company registration and regulation agencies if they need to consider going further with their inquiries.

It may be desirable that state and federal laws resemble each other as much as possible to avoid honest confusion and errors in compliance, but it is probably more realistic to recommend that the advisory literature produced by each level of government for use by interested persons specify what its requirements are AND how they differ from the other level's. As for amounts, I believe that, given the rising scale of campaign expenditures, it is better to concentrate on identifying original sources rather than fine-tuning acceptable thresholds for disclosure and whether the recipient is party, group or individual candidate. It may be that other evidence before the Select Committee will reveal that the exiting

figures, or some other set, are especially appropriate but I would be surprised. Second, in the absence of significant evidence of improper influence apart from the local government level, it would be preferable to concentrate on ensuring early access to comprehensive and accurate information about the amounts and sources of donations. It should be possible, and not very expensive, to set up a system whereby such information would be accessible to the public electronically on the day after receipt from the donor.

With a fixed term legislature, it would be possible to divide the inter-election period into a longer period when less frequent releases would be allowed, and a shorter period of 6 or 12 months before polling day when overnight availability would be required, but such a general distinction would serve no useful purpose. What might be considered is a distinction between registered parties which could be required to supply data at, say, three-monthly intervals in the first three years of a Parliament's life, and all potential players (parties, groups and candidates) which should go to the immediate supply regime at the start of the fourth year OR when the decision to contest the next election has been made as is appropriate. There remains the problem of the incumbent Independent who probably should be treated as a registered party for consistency.

**Election expenditure – amounts**

The fixing of maximum amounts for expenditure merely brings additional players into the campaign to spend sums of money over and above what the parties, groups and candidates may spend. It would be a return to a system that was more honoured in the breach than in the observance, and logically would raise questions of how "unauthorised" expenditure should be dealt with. Traditionally there was a single agent who was able to spend money, and anyone else who did so committed an offence which might then have consequences for the candidate they purported to support. Moreover expenditure could be incurred outside the jurisdiction (in this case a single State though outside the country could be easily arranged) by persons never likely to come within the jurisdiction and the resulting communications transmitted electronically or otherwise to electors within the jurisdiction. It would be a great mistake to try to introduce control of amounts.

**Election expenditure – disclosure**

To the best of my knowledge, the existing provisions relating to classes of expenditure which must be disclosed and to third parties are satisfactory, but their effectiveness is best assessed by people who have been directly involved with their application. I will comment on only the other two dot-points.

The strongest justification for expenditure disclosure is that access to expenditure figures allows a check on the accuracy of donations disclosure. How could $10x be spent when donations disclosed amount to only $5x? The reason why the returns by large and efficient media organizations, metropolitan and large provincial newspapers, radio and TV stations were so useful in the past is they provided a check from an independent source: why does a candidate say they spent $5x on radio and the radio stations say they

got $10x from him? However, absent a new ceiling on expenditure this is no longer a consideration.

There would not appear to be the same sense of urgency as there is with disclosure of donations, but many of the participants in the campaign – virtually all except the main political parties – are soon off about other business, do not preserve records, &c, so prompt collection is necessary if the information is to be as accurate and comprehensive as possible. My guess would be that 4-6 weeks would be about right, but campaign organizations may have become more efficient in the last 20 years, and the opinions of the major parties and a representative sample of smaller parties would be preferable.

I think the EFA may have to provide some assistance to most parties and groups and possibly individual candidates, probably in the form of basic software and instruction as to its use, and might find it advisable to undertake some form of interim auditing activities during the campaign as well. Whether this would be warranted for the majority of candidates not nominated by a party or part of a group is an open question. Perhaps a facility, separate computer and staffer able to assist/advise those entering data, could be provided at each electoral district office that is opened for the election, otherwise they are on their own but obliged to disclose.