

E – BRIEF



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Political Donations Law Update

by Gareth Griffith

1 Recent developments

Significant developments in the laws relating to political donations in NSW have occurred since the publication in June 2007 of the Parliamentary Library's briefing paper on [Election Finance Law](#).

In June 2008 a Legislative Council Select Committee [reported](#) on the subject;¹ in the same month two pieces of legislation were passed to reform the system of political donations for State and local elections - the [Election Funding Amendment \(Political Donations and Expenditure\) Act 2008](#) and the [Local Government and Planning Legislation Amendment \(Political Donations\) Act 2008](#).

Further, the Government announced it had commissioned Associate Professor Anne Twomey to prepare a paper on the constitutional and legal issues surrounding the reform of election campaign financing. Twomey's paper, [The Reform of Political Donations, Expenditure and Funding](#), was published in November 2008. One of the issues considered in the paper was the constitutionality of laws banning or imposing limits on political donations.²

A [Bill](#) to reform federal political donations law has also been introduced into the Commonwealth Parliament.³ It was referred to the Joint Standing Committee on Electoral Matters, which [reported](#) in October

2008.⁴ Under the Bill, all political donations of or above \$1,000 would have to be disclosed. Also foreshadowed by the Commonwealth Government is the release of a Green Paper on electoral reform.⁵

2 Political backdrop

The developments in NSW can be seen against a backdrop of political controversy, not least the unfolding events which resulted in an [ICAC](#) inquiry into the Wollongong City Council. In September 2007 the ICAC had [recommended](#) that the election funding law be amended, among other things to require development applicants to the Minister for Planning to declare any political donations they had made to the Minister or his/her party.⁶

Concerns about political donations from property developers are of longstanding in NSW. A Galaxy survey of 290 people conducted on behalf of the Greens in August 2008 found that 82% of respondents favoured a complete ban on donations from property developers.⁷

Back in March 2008, then Premier lemma announced he would press for bipartisan support for an outright ban on political donations.⁸ Responding, Opposition Leader Barry O'Farrell said he would support the proposed ban.⁹

Current NSW Premier Nathan Rees has come down on the same side of

the debate, wanting 'political donations to become a thing of the past, saying taxpayer-funded elections are the only way to ensure the political system is squeaky clean'.¹⁰

3 Political donations law prior to 2008 reforms

The disclosure scheme in place before the 2008 reforms was set out under Part 6 of the *Election Funding Act 1981* (NSW). In summary, its main features were that, for State parliamentary and local government elections¹¹ all parties, groups and candidates had to lodge a declaration of 'political contributions' for 'the current election'. The definition of 'the current election' varied as between parties, groups and candidates. For political parties, the declaration covered a four-yearly cycle, from one general election to another. In all three cases the registered agent of each party, group or candidate had to lodge a declaration of contributions received and expenditure incurred within 120 days after the return of the writs for a general election (or by-election in the case of candidates).

Parties had to disclose 'gifts' of \$1500 or more; groups \$1000 or more; and candidates \$200 or more. Anonymous donations above these amounts were prohibited. Entry fees to fund-raising functions and the like were 'gifts' for this purpose. However, gifts made to candidates in a 'private capacity' for their 'personal use' did not need to be disclosed. Nor did two or more gifts from one source over a 12-month period, which in aggregate exceeded \$1500, \$1,000 or \$200, as the case may be.

Not included under this scheme were donations made to already elected Members of State Parliament and elected local councillors.

Third parties incurring electoral expenditure of more than \$1500 within the four-yearly election cycle had to lodge a declaration. In terms of contributions, third parties had to disclose 'gifts' of \$1000 or more.

4 Legislative Council's Select Committee report

The recommendations of the [Select Committee on Electoral and Political Party Funding in NSW](#) included:

- A ban on all but small political donations by individuals, to be capped at \$1,000 per political party per year, and \$1,000 per independent candidate per electoral cycle.¹²
- A ban on in-kind donations, other than volunteer labour and the purchase of merchandise.¹³
- Donations by candidates to own campaigns capped at \$1,000.¹⁴
- Election spending for parties, groups and candidates to be capped at a sum determined by the Auditor General.¹⁵ Further to this, spending by third parties would also be capped.¹⁶
- Individual donors linked to NSW electoral roll, and organisations linked to an ABN number.¹⁷
- A disclosure threshold of \$500 for all donations.¹⁸
- Disclosures to be made every six months, to be published on the website of the Election Funding Authority.¹⁹
- Powers of Election Funding Authority increased to identify breaches and penalties to be increased.²⁰
- At the local government level, applicants to declare political donations over \$1,000 when lodging development applications.²¹

Of the proposed model, Select Committee chairman, Reverend the Hon. Fred Nile, said it supported the two 'underlying objectives' of the 1981 election funding legislation:

first, prevent corruption and undue influence; and, second, level the playing field by reducing the disparity in financial resources available to parties, groups and candidates.²²

As of 3 December 2008, no Government [response](#) to the report had been received.

5 Election Funding Amendment (Political Donations and Expenditure) Act 2008

In the [Second Reading speech](#) the Attorney General said:

The legislation being introduced today will be the most significant reform of the Election Funding Act 1981 since its enactment. It will give New South Wales the most robust funding and disclosure regime in Australia.²³

The Bill passed without amendment. Better to reflect its content, the name of the legislation was altered, from the *Election Funding Act* to the [Election Funding and Disclosure Act](#). Bringing the disclosure regimes under one statutory scheme, Part 6 of the Act applies directly to local government elections (instead of being applied by provisions of the *Local Government Act 1993*).

Substantive reforms to the political donations scheme include a single 'reportable political donation' disclosure level of \$1000 or more (consistent with the Commonwealth proposal).²⁴ This applies to parties, groups, candidates and *elected members* (s 86(1)(a)). It also applies to

donations made by or to a 'major political donor' (s 86(1)(b)). Separate donations from a single source, made over a financial year, to a party, group, candidate or elected Member that, in aggregate, add up to \$1,000 or more must also be disclosed (s 82(2)). Likewise, multiple donations, made over one financial year, from a single source to a party and to an 'associated party' must be disclosed by the major political donor concerned (s 86(3)).

Instead of the four-yearly cycles, disclosure for parties (and all others) is on a biannual basis, as at 30 June and 31 December of each year (s 89).

As soon as practicable after the due date, the Election Funding Authority is to make information relating to donations and electoral expenditure accessible to the public on a website (s 95).

By s 92, full details are required of each reportable political donation and the total amounts of smaller donations (together with details relating to fund-raising ventures, party membership or affiliation fees and loans).

Also introduced are new rules for the management of campaign finances that prevent elected members and candidates from having personal campaign accounts or having direct involvement with the receipt and handling of political donations. Under ss 96A and 96B, donations must be paid into and from special campaign accounts. This money is for use exclusively for campaign and other authorised purposes. The special campaign accounts are managed by the agent of a political party, or by an 'official agent' of a group, candidate or elected member.

While the new regime does not ban donations from foreign parties (as in Canada and the UK), it does prohibit corporations and the like ('entities') from making reportable political donations unless they have an ABN. No such prohibition applies to individuals (s 96D).

A prohibition is placed on the making of certain 'in-kind' or indirect campaign contributions, including the provision (for free or for a nominal sum) of office accommodation or equipment for use in an election campaign (s 96E(1)). This prohibition refers to gifts of \$1,000 or more in value. Expressly excluded therefore are gifts under that threshold. In line with the Select Committee recommendation, also excluded is the provision of volunteer labour and other related matters (s 96E(3)).

In terms of enforcement, penalties for failing to make disclosures or making false disclosures have been increased (ss 96H-96I), as have the investigative powers of the Election Funding Authority (s 96K). The [Second Reading speech](#) stated:

Specifically, the authority will have the power to conduct compliance audits and will be able to request any person to provide it with relevant information for this purpose.

6 Local Government and Planning Legislation Amendment (Political Donations) Act 2008

Cognate with the 2008 Act amending the election funding laws is legislation amending the [Local Government Act 1993](#) and the [Environmental Planning and Assessment Act 1979](#). As acknowledged by the Minister in the [Second Reading speech](#), aspects of the new scheme reflected recommendations made by ICAC in its

2007 position paper [Corruption Risks in NSW Development Approval Processes](#).

In summary, the changes to the Local Government Act:

- require the general manager of a council to record which local councilors voted for, and which local councillors voted against, each planning decision of the council (and make that record publicly available),²⁵ and
- enable matters relating to political donations in connection with local councillors to be referred to the Pecuniary Interest and Disciplinary Tribunal.²⁶

As amended, s 147 of the Environmental Planning and Assessment Act declares that its object is to minimise any perception of undue influence. However, it makes it clear that political donations or gifts are not relevant to the determination of the planning application and are not grounds for challenging the decision on a planning application (s 147(1)).

Basically, s 147 provides that, when any relevant planning application is made to the Planning Minister, Department or local council:

- the applicant or
- any person making a public submission opposing or supporting the application
- is required to disclose reportable political donations of or above \$1,000 and gifts
- made within 2 years before the making of the application or submission.

According to the [Explanatory Note](#) for the Bill the 'section will apply to a

range of planning applications to the Minister or to a council (including applications to the Minister for approval of Part 3A projects, applications to a council for Part 4 development consent and formal requests to the Minister to make environmental planning instruments)'.²⁶

Also introduced in June 2008 was [The Model Code of Conduct for Local Councils in NSW](#), which requires councillors to disclose political donations exceeding \$1,000 where the donor has a 'matter before the council' (the donation must have been made within the last four years and directly benefited the councillor's electoral campaign).²⁷

7 Twomey's paper

In conclusion to the [Second Reading speech](#) for the 2008 legislative reforms, the Attorney General commented that the Government had commissioned Associate Professor Anne Twomey to prepare a paper

outlining the key issues that need to be addressed for the next stage of donations reform. These issues include a complete ban on donations, donations and expenditure caps, and full public funding of election campaigns.

[Twomey's](#) main finding was that:

The reform of Australia's system of political party financing is not a simple matter. There are a number of jurisdictional, constitutional, policy and practical issues that must be considered in assessing any proposal.

Jurisdictional issues arise in part because State registered branches of national political parties fund candidates in both Commonwealth and State elections. Potential questions of constitutional inconsistency emerge therefore, which

leads Twomey to conclude: 'it would be preferable for any substantial reforms to be undertaken nationally on a co-operative Commonwealth and State basis'.²⁸

Constitutional constraints are mainly derived from the implied freedom of political communication, as defined in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. According to Twomey:

Laws that ban or impose limits upon political donations or election campaign expenditure are likely to be regarded as burdening the constitutionally implied freedom of political communication. This is because they have the effect of limiting the quantity and breadth of communication about political matters. Such laws will only be held valid by the courts if they are reasonably and appropriately adapted to serving a legitimate end in a manner which is compatible with the system of representative and responsible government prescribed by the Commonwealth Constitution (the *Lange* test).²⁹

In Twomey's opinion:

An outright ban on political donations is likely to be struck down as constitutionally invalid on the ground that it is not 'reasonably appropriate and adapted' to serving the legitimate end of reducing the risk of corruption and undue influence. Banning small donations from individuals, for example, would not assist in achieving that end.

Twomey continued:

Caps upon political donations are more likely to be constitutionally acceptable, but this would depend upon the level of the cap and its effect upon the capacity of parties and candidates to communicate with electors.³⁰

Caps on campaign spending, especially by third parties, were also considered by Twomey to be open to constitutional challenge. Expenditure limits on candidates and parties could also be problematic, at least at the Commonwealth level, as limiting the quantity and diversity of political communication.³¹

8 The ensuing political debate

Based on this advice, Premier Rees informed Parliament:

It is clear from Dr Twomey's report that this will not be an easy task. The issue is difficult and complex and any lasting reforms must be addressed at a national level in order for them to be effective. I have asked all State Premiers to join with me in working with the Commonwealth to clean up donations across the country once and for all. Dr Twomey makes it clear that any attempts by one State government or by the Federal Government to reform donation laws on their own risks being undermined.³²

Public comment on the issues raised by Twomey was called for, as part of the NSW Government's submission to the Commonwealth's Green Paper on electoral reform.

Opposition Leader Barry O'Farrell responded critically to the Premier's announcement, saying 'Mr Rees has seized on the first excuse to come along to dump the bipartisan commitment to try to limit the amount of money washing around in NSW politics'. It seems the Opposition had received its own legal advice, from Professor Patrick Keyzer and Arthur Moses SC, to the effect that

a blanket ban on political donations would not work constitutionally but a cap on campaign spending would

provide "political parties with an equal opportunity to advance their message".³³

Greens MLC Lee Rhiannon and Norman Thompson [wrote](#) in *New Matilda*:

Just eight weeks earlier Premier Rees pledged to overhaul political donations with a "very significant package ... that cleans this up once and for all". But the Premier responded to Twomey's report by declaring that it was all too hard and that reform required state and federal governments to work together. He was adamant that NSW could not go it alone.

They continued:

The Premier would gain public support if he took the lead and moved to clean up political donations. But he has decided to leave these vital reforms to his federal colleagues. This decision looks set to create more delay, since there too, urgent reforms are long overdue. The federal Special Minister of State, John Faulkner is now four months behind his promised release date of a Green Paper outlining federal Labor's options for political funding reform.

9 Comment

Clearly, difficult legal and other issues are raised by the further reform of political donations law. A complete ban on political donations may not survive constitutional challenge. Spending caps on political parties may do so, but whether the same applies for third party campaign expenditure is more doubtful.

It may be that the difficulties involved can be overstated, and that the High Court will not place undue impediments in the way of laws

designed to strengthen the functioning of representative and responsible government. A ban on all but small individual donations, as recommended by the Legislative Council Select Committee, may satisfy the *Lange* test. So, too, may reasonable limits on campaign expenditure. Until such questions are tested, there are no certainties either way.

There are many issues to consider. Where no limits exist on campaign expenditure, there is the potential for the process to become subject to vastly escalating costs, in which the market place of political ideas becomes more and more the domain of rich and powerful parties. Limits on campaign expenditure are one answer, but these must pass both the constitutional test of validity and the practical tests that they are enforceable and workable. Reliance on public funding is another response. However, this can isolate political parties from their grassroots members. It is argued in this context that there is a 'need to direct public funding more effectively towards encouraging parties to perform their democratic functions'.³⁴

The NSW Government's approach is to link any further changes to the process associated with the Commonwealth's Green Paper on electoral reform. What emerges from that process remains to be seen.

As discussed, significant reforms have already been introduced in NSW. While the disclosure regime currently in place may not be the last word on the subject, it is an improvement on previous arrangements – in terms of the criteria of timeliness, accessibility, accuracy and effective enforcement.

For an update on relevant developments in the UK see the House of Commons research paper on [The Political Parties and Elections Bill](#) by Oonagh Gay and Isobel White.

- ¹ Parliament of NSW, Legislative Council, Select Committee on Electoral and Political Party Financing, [Electoral and Political Party Funding in NSW](#), June 2008.
- ² This was in line with Recommendation 7 of the above report.
- ³ [The Commonwealth Electoral Amendment \(Political Donations and Other Measures\) Bill 2008](#) was introduced on 15 May 2008.
- ⁴ The Parliament of the Commonwealth of Australia, Joint Standing Committee on Electoral Matters, [Advisory Report on the Commonwealth Electoral Amendment \(Political Donations and Other Measures\) Bill 2008](#), October 2008.
- ⁵ For a commentary see – G Barker, 'Critical test for electoral law reform', [Australian Policy Online](#), 22 September 2008. The reform package was foreshadowed in Senator Faulkner's [Media Release](#) of 28 March 2008.
- ⁶ ICAC, [Corruption risks on NSW development approval processes](#), Position Paper, September 2007, Recommendation 23.
- ⁷ 'Poll backs donations ban', *SMH*, 8 September 2008, p 4. Back in April 2008, the Greens had introduced a Bill for that purpose – the Environmental Planning and Assessment Amendment (Restoration of Community Participation) Bill 2008. To date, it has not proceeded beyond its Second Reading stage.
- ⁸ A Clennell, 'lemma plan to ban political donations', *SMH*, 22 March 2008, p 1.
- ⁹ 'Support for donation ban', *The Sun Herald*, 23 March 2008, p 34.
- ¹⁰ 'Rees: donations a thing of the past', *The Australian Financial Review*, 10 October 2008, p 16.
- ¹¹ By Part 8 of the *Local Government Act 1993*, the *Election Funding Act 1981* was to apply to the disclosure of donations in local government elections.
- ¹² Recommendation 7.
- ¹³ Recommendation 11.
- ¹⁴ Recommendation 16.
- ¹⁵ Recommendation 18.
- ¹⁶ Recommendation 19.
- ¹⁷ Recommendation 21.
- ¹⁸ Recommendation 25.
- ¹⁹ Recommendations 27 and 28.
- ²⁰ Recommendations 42 and 43.

- ²¹ Recommendation 34.
- ²² [NSWPD](#), 24 September 2008, p 9850. The proposed model was said to be similar to the Canadian scheme where individuals are permitted to donate \$1,000 annually to a political party or candidate, but donations from corporations and trade unions are totally banned, as are donations from foreigners.
- ²³ [NSWPD](#), 18 June 2008, p 8576.
- ²⁴ Under the transitional provisions, as set out in Part 5 of Schedule 2, disclosures for the first relevant disclosure period for parties, groups, candidates and elected members was before the end of August 2008; for major political donors it was for the disclosure period ending 31 December 2008.
- ²⁵ *Local Government Act 1993*, s 375A.
- ²⁶ *Local Government Act 1993*, s 328B.
- ²⁷ The Code was made further to s 440 of the *Local Government Act 1993*. For a comment on its application see – M Knox, ‘Moore’s donor vote broke council code’, [SMH](#), 1 December 2008, p 3.
- ²⁸ A Twomey, [The Reform of political donations, expenditure and funding](#), November 2008, p 6.
- ²⁹ *Ibid*, p 1.
- ³⁰ *Ibid*, pp 1-2.
- ³¹ *Ibid*, p 28.
- ³² [NSWPD](#), 13 November 2008, p 11421.
- ³³ A Smith, ‘Opposition slams Rees backdown on donations’, [SMH](#), 8 November 2008.
- ³⁴ S Young and J Tham, *Political finance in Australia: a skewed and secret system*, ANU, 2006, p 126.

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