

## **Democratic Audit of Australia**

### **Submission to the Inquiry into Campaign Finance Reform**

#### **Standing Committee on Justice and Community Safety, ACT Legislative Assembly**

##### **Background**

Since 2002 the Democratic Audit of Australia has been auditing the health of Australian democracy, using an international framework developed for this purpose. While the Audit was based at the Australian National University (ANU), it provided regular updates on democratic developments in Australia as well as publishing 10 Audit Reports, 200 Audit Discussion Papers and a capstone book, *Australia: The State of Democracy* (Federation Press, 2009).

In 2008 the bulk of the administrative responsibility for the Audit moved to the Institute for Social Research at Swinburne University. The ANU, however, continues to take an active role when it can, as evidenced by its contribution to the ACT Legislative Assembly's 2009 Select Committee Inquiry into Campaign Advertising.

The regulation of campaign finance is one of the most complex, controversial and seemingly intractable problems currently on the Australian political agenda. The issues have been extensively canvassed in numerous parliamentary inquiries and reports since 1983. In recent years the Democratic Audit has been a regular contributor to these parliamentary inquiries, including extensive evidence given to the important Legislative Council Select Committee Inquiry, *Electoral and Political Party Funding in New South Wales* (June 2008). Political finance has been a central concern of the Audit, which has produced a range of papers both on specific aspects of the issue (including government advertising) and on the regulatory regimes of comparator democracies.<sup>1</sup> For a comprehensive discussion, the Audit recommends to the Committee its 2006 report - *Political finance in Australia: a skewed and secret system* – by Sally Young and Joo Cheong Tham.<sup>2</sup>

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<sup>1</sup> For some 30 Audit publications on political finance see [http://arts.anu.edu.au/democraticaudit/categories/polfin\\_gafrm.htm](http://arts.anu.edu.au/democraticaudit/categories/polfin_gafrm.htm)

<sup>2</sup> This report is accessible at [http://democratic.audit.anu.edu.au/papers/focussed\\_audits/20061121\\_youngthamfin.pdf](http://democratic.audit.anu.edu.au/papers/focussed_audits/20061121_youngthamfin.pdf).

## **Campaign finance reform in international perspective**

Australia is not the only country grappling with the complex issues of campaign finance reform. The International Institute for Democracy and Electoral Assistance (IDEA), the auspicing body for the Democratic Audit of Australia, regards party finance as one of the key issues for the future of democracy. The combination of the escalating costs of campaigning, shrinking party membership and deepening public mistrust about the role of money in politics contributes to loss of confidence in democratic institutions.

But while other democracies have taken serious steps in recent years to tighten up their political finance regulation, Australian governments have been slow to grasp the nettle. The steps taken so far have been relatively small and largely restricted to the area of disclosure. There are still remarkably few restrictions on the size or source of donations to political parties. One recent exception is the legislation passed in NSW in December 2009 prohibiting donations from property developers.<sup>3</sup>

The dependence of Australian political parties on corporate donations is exacerbated by the arms race in electronic campaign advertising, the historic absence of limits on such advertising, and the complete lack of any expenditure caps. The arms race increases public distrust in politics in two distinct ways: first, dependence on corporate donations arouses suspicions that policy will favour the ‘big end of town’ that provides donations; second, corporate donations help pay for the negative advertising that creates generalised distrust in politics and politicians.

By contrast, in Canada both Liberal and Conservative Governments have taken major steps to remove the influence of corporate money from the electoral process. At the federal level (and in provinces such as Quebec and Manitoba) the Canadians ban all corporate or union donations to parties and candidates and limit individual donations (by citizens or permanent residents) to relatively small amounts - \$1000 adjusted for inflation. To ensure a level playing field Canada also limits the expenditure of parties and candidates and of third parties that wish to engage in campaign advertising.

In Australia, the focus in discussions of campaign finance reform is often on integrity—the anti-corruption argument concerning the need to prevent private interests exerting undue influence on public decision-making through the dependence of political parties on corporate donations. But an equally strong argument concerns the basic democratic principle of political equality and its corollary—the level playing field for electoral competition.

The principle of political equality has been described as the ‘great underlying principle’ of the Australian Constitution.<sup>4</sup> It is enshrined in provisions such as the prohibition on plural voting (whereby property owners used to enjoy more than one vote). Dependence on corporate donations undermines the principle of political equality through the back

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<sup>3</sup> *Election Funding and Disclosures Amendment (Property Developers Prohibition) Act 2009 (NSW)*.

<sup>4</sup> W Harrison Moore, *The Constitution of the Commonwealth of Australia*, London: John Murray, 1902, p. 329.

door. Corporate entities gain greater access to decision-makers and greater power over the democratic process than do citizens, displacing the principle that only people, not property, should have voting rights. It also undermines the level playing field. Unlike public funding, corporate donations are not made in accordance with a formula such as the degree of community support enjoyed by a political party. When made on top of public funding they undo the degree of fairness that public funding was intended to introduce into democratic elections.

In Canada the fairness argument has been wielded by the Supreme Court in dealing with the bogey often raised by those who oppose any restriction on the role of private money in elections—the infringement of Constitutional rights to freedom of expression or of political communication. Canada, of course, does have a Charter of Rights and Freedoms that includes the right of freedom of expression. However, in an important case, *Harper v Canada* (2004), the Supreme Court found that while limiting third party election advertising did restrict freedom of expression, the restrictions were reasonable in the interests of electoral fairness. It concluded that the restrictions were necessary to provide a level playing field for political discourse and to prevent wealthy voices from overwhelming others. The restriction of some voices was necessary so that others might be heard.

### **Campaign finance reform in the ACT**

In terms of campaign finance reform in the Australian Capital Territory, the Audit begins with the following general observations. First, parties play a crucial role in representative democracy and they need income to maintain their administrations and discharge their important functions both during and between elections. Reform should not have the effect of impoverishing parties or damaging their capacity to communicate with the electorate. Second, because of the fungibility of money, all funding and disclosure regimes will have loopholes and it would be counter-productive to attempt to close all of them. The Australian Capital Territory's scheme should be based on firm principles and not be over-burdened with administrative or regulatory detail, despite the challenges involved.

The Audit makes the following specific comments on the Committee's Terms of reference:

- (1) regulation of:**
- a) donation size;**
  - b) political party campaign expenditure; and**
  - c) third party campaign expenditure;**

The current lack of limits on donations distorts electoral competition, allowing some individuals and organisations to have a disproportionate influence in election campaigns, at the expense of the views of individuals and segments of society with less access to

funds. This restricted access to public debate results in only a partial range of views and opinions being expressed during an election.

As the Territory's electoral system is based on the principle of equality, including 'one vote, one value', the Audit similarly believes financial participation should be regulated to encourage equality of financial participation. The Audit recommends that individuals be limited to donating no more than \$1,000 to any political party during any one year.

This would obviously impact on the size of parties' campaign expenditure. However, to slow the 'arms race' associated with increased electronic election advertising, there should also be limits on campaign expenditure, whether this is expenditure by political parties, candidates or third parties during the identified 'election period'. Through ensuring that these limits are reasonable and appropriate to achieving electoral fairness, they should not fall foul of the 'implied right of political communication' identified by the High Court in the 1992 *Australian Capital Television Case*.<sup>5</sup>

**Third parties** – Although effective regulation of third party involvement in election campaigns is difficult, a lack of effective regulation, when parties and candidates themselves are restricted in campaign expenditure to ensure fairness and a level playing field, allows an alternative avenue for campaigning that distorts electoral competition.

Canada, New Zealand and the United Kingdom are among the countries that require third parties that wish to spend above specified amounts on election campaigning to register with election authorities. For example, in Canada, third parties need to register with Elections Canada once they have spent more than \$500 on election advertising, disclose their expenditure and donors, and comply with an upper limit on third party expenditure (\$150,000). Indications are that these regimes have had reasonable levels of success.

## **(2) financial disclosure laws**

The major problem with the current donation disclosure laws is a **lack of timeliness** in disclosure. The purpose of a donation disclosure regime is to allow electors to make an informed choice at election time. Disclosure thresholds intended to provide transparency are undermined if such transparency occurs well after the relevant event.

While all Australian jurisdictions suffer from this problem, there are overseas examples of timelier reporting. For example, British electoral law requires donations to be disclosed on a quarterly basis, and then on a weekly basis during an election campaign period. Ideally though, in order to achieve maximum transparency of the original source of political donations they should be disclosed as received, something that information and communication technology now renders relatively simple. The Audit recommends the arrangement discussed by the ACT Electoral Commissioner in his evidence before the

<sup>5</sup> See Joo Cheong Tham, *Towards a More Democratic Political Funding Regime in NSW: A Report Prepared for the NSW Electoral Commission*, February 2010, pp. 91-109.

Committee<sup>6</sup> namely that the Australian Electoral Commission maintain an on-line system for parties to enter their donations as they receive them, making disclosure possible within fourteen days of receipt.

The other contentious issue is at what level or **threshold** should donations be disclosed. This issue becomes more critical where there is no cap placed on the allowable size of donations. An internet-based system of disclosure would be easy for parties and candidates to administer, as it would become part of the ordinary accounting functions of the organisation, and therefore a low threshold could be established. The Audit recommends that all campaign donations to parties, candidates and third parties of \$50 and above be required to be disclosed.

When the issue of more timely disclosure has been raised in other parliamentary inquiries, political parties regularly argue that reporting more frequently would create too much of an administrative burden on the party. However, the burden is no different to the work involved in depositing donations in a bank account, and does not add any significant administrative load. Parties should also be reminded that the benefits of registration, such as receiving public funding, are balanced by obligations of transparency and accountability.

Parties are increasingly using functions such as dinners and business breakfasts, as fundraising events, by highly inflating the actual cost of the meal. The added cost is justified in terms of the access provided to Ministers and Assembly members (itself a corruption of democratic process). Guaranteeing such access means that the money can be classified by a business as payment for a service rather than being a 'gift'. The definition of a 'gift' or donation should capture charges levied for attendance at such functions beyond actual reasonable costs.

### ***(3) direct and indirect public funding of elections***

Public funding was introduced to provide parties with the resources to develop and promote policies and candidates. As mentioned in our introduction, the combination of public funding with unlimited private funding creates an imbalance in electoral competition. Unlike public funding, private funding is not necessarily proportionate to the level of public support that parties receive. This is particularly the case where incumbent parliamentarians and governments can utilise their positions to raise funds.

Restrictions on the size and source of private donations will necessitate a larger contribution from the public purse. However, an increase in the current level of public funding should not be calculated to replace existing levels of campaign expenditure, which has grown exponentially due to unrestricted private donating, and the absence of caps on campaign expenditure or limits on the purchase of electronic advertising.

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<sup>6</sup> Phillip Green, Evidence to the Legislative Assembly Standing Committee on Justice and Community Safety, 17 February 2010, p. 12.

The Audit supports a moderate increase to public funding **if** restrictions and limits are placed on private funding. Public funding should primarily be based on election results, but also take into account other measures of public support, including opinion polling, the size of party membership, Assembly representation, and the need to provide a fair opportunity for election candidates to convey their policies to the public.<sup>7</sup>

**(4) regulation of:**

- a) donations by private individuals, organisations and other contributors; and corporations, unions,**
- b) personal candidate funding**

The 2007 Australian Election Study showed that 69 per cent of voters believe that big businesses—the kind of organisations who make the most substantial donations to political parties—have too much power. This sentiment has increased from 51 per cent in 1987. In addition, in 2007, 38 per cent of voters believed that government is run for the benefit of a few big interests, and not for all interests.<sup>8</sup> These figures indicate the influence (either real or perceived) that large political donations can have on the health of Australian democracy.

Assembly elections are held to choose representatives of ACT citizens, and therefore it is ACT citizens, and not other entities, such as corporations, companies, or overseas interests who should be entitled to participate in election campaigns through making donations to parties and candidates. The Democratic Audit recommends that donations only be allowed from individuals. In addition, attempts at ‘smurfing’ (that is, the splitting of large donations among directors, employees, members, etc) should attract appropriate penalties.

**Anonymous donations** - The current situation where parties and candidates can receive anonymous donations of up to \$1,000 is a serious weakness in the ACT’s electoral laws. As the ACT Electoral Commissioner noted in his evidence before the Committee, the fact that a party can receive over half a million dollars of income from undisclosed sources is a serious affront to transparency. The Audit recommends that parties not be allowed to accept more than \$50 in any single anonymous donation (to cover activities such as raffles), but that an overall cap on anonymous donations also be imposed (that is, the source of all income in any one year above the cap needs to be identified). This would prevent anonymous donations being received corruptly – as the Commissioner stated - *if someone wanted to get around the disclosure laws by giving someone a brown paper envelope filled with ...dollars every day or every week or every month.*

<sup>7</sup> These criteria are used for the allocation of publicly-funded broadcasting expenditure for New Zealand elections. See Section 75 of New Zealand’s *Broadcasting Act 1989*.

<sup>8</sup> Ian McAllister and Juliet Clark, *Trends in Australian Political Opinion: Results from the Australian Election Study 1987-2007*, pp. 63, 65. Accessible at <http://assda.anu.edu.au/aestrends.pdf>.

***(5) enforcement of funding and financial disclosure law***

The Democratic Audit also supports the Commissioner's comments of 17 February that if a greater emphasis were placed on parties needing to fully disclose their sources of their donation income, this would alleviate the need to audit and investigate donor returns. In addition, if the Audit's recommendations that donations should only be received from individual citizens, and that a donation cap of \$1,000 be introduced, this would make for a far easier and clearer audit trail.

In regard to sanctions, the current Electoral Act adopts the Territory's penalty units system for offences under the Act. It may be worthwhile to consider using a party's entitlement to public funding, as a penalty option. For example, non-compliance with funding and disclosure requirements may result in a certain percentage or amount of public funding being withheld in the future.

***(6) the relationship between ACT electoral law and Commonwealth electoral law; any Constitutional matters; and any other relevant matter.***

Ideally, there should be the highest degree of uniformity of campaign finance regimes across federal, state and territory jurisdictions by way of mirror legislation. However, if such uniformity is not possible, this should not be used as an excuse not to implement much-needed reforms in this critically important electoral area. The ACT has led Australia in many electoral system initiatives in recent decades (for example, electronic voting), and it would be encouraging to see the Assembly adopt the same attitude in terms of campaign finance reform.

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