

Lessons from a 'Relaxed and Comfortable' Country: Money and politics in Australia (or how not to regulate political finance)

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LESSONS FROM A 'RELAXED AND COMFORTABLE' COUNTRY: MONEY AND POLITICS IN AUSTRALIA (OR HOW NOT TO REGULATE POLITICAL FINANCE)

I INTRODUCTION

This paper provides a description and critique of Australian political finance and its regulation. With a focus on the federal level, the first three sections respectively examine the private funding, public funding and expenditure of Australian political parties, candidates and third parties. The next section highlights three major problems with Australian political finance: a lack of transparency, the normalisation of the sale of political access and influence, and serious political inequality. The paper concludes by identifying various lessons from the Australian experience.

II PRIVATE FUNDING AND ITS REGULATION

At the federal level, the only restriction on contributions coming from particular sources is a prohibition on parties, their associated entities,¹ third parties² and candidates from receiving anonymous gifts³ or loans exceeding \$10,300.⁴ There are no controls on the amount of political contributions made. [

The key source of federal regulation of private funding stems from disclosure obligations imposed upon parties, their associated entities, third parties, candidates and donors under the *Commonwealth Electoral Act 1918* (CEA). Currently, persons who donate more than \$10,300 in a year to a political party are subject to annual disclosure obligations in that they must lodge a statement disclosing all such gifts to the AEC.⁵

¹ An 'associated entity' is an entity that is either controlled by one or more political parties or operates wholly or to a significant extent for the benefit of one or more political parties. With the enactment of the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth), the definition of 'associated entity' under the CEA has been extended to include entities that are financial members or have voting rights in a political party: CEA s 287.

² In this paper, third parties refer to entities other than parties, their associated entities and candidates.

³ Under the CEA, 'gifts' are generally defined as any disposition of property made with inadequate or no consideration: s 287.

⁴ *Ibid* s 306 (anonymous gifts), s 306A (anonymous loans). The amount stated in section 306 is indexed according to section 321A.

⁵ *Ibid* s 305B.

Political parties and their associated entities are also obliged to submit annual disclosure returns. Virtually identical disclosure requirements apply to political parties and associated entities. The returns submitted are required to be in a form approved by the Australian Electoral Commission (AEC) and must disclose the total amount received by, or on behalf of, the political party or associated entity for the financial year. In addition to disclosing this total, political parties and associated entities are required to make further disclosure if they have received from, or owe, a particular person or organisation a sum amounting to more than \$10,300 for that financial year. In calculating whether this sum has been reached for payments made to the party, amounts of \$10,300 or less can be disregarded. Once this threshold of more than \$10,300 has been reached, political parties and associated entities must disclose certain particulars, namely, the amount of the sum or debt and the name and address of the person (or organisation) who paid or is owed the sum.⁶

Candidates, Senate groups, certain donors and third parties are subject to post-election disclosure obligations. Candidates and Senate groups are required, after every election, to provide to the AEC with a statement disclosing details of gifts received during the period between elections that exceed \$10,300.⁷ Persons who have donated more than \$10,300 to candidates must also disclose details of such gifts to the AEC after the relevant election.⁸

Further, third parties that have spent more than \$10,300 in a financial year on electoral expenditure must disclose to the AEC details of gifts received which exceed \$10,300 that were used for such spending as well as details of their electoral expenditure.⁹

All these returns must eventually be made available for public inspection.¹⁰ The AEC also publishes a report on the operation of these provisions after each federal

⁶ Ibid ss 314AB-AC, 314AE (political parties), 314AEA (associated entities).

⁷ Ibid s 304.

⁸ Ibid s 305A.

⁹ Ibid ss 314AEB-AEC.

¹⁰ Ibid s 320.

election.¹¹ These statements and returns gain further publicity via media reporting and their posting on the AEC's website.¹²

These returns indicate that all the key parties are significantly reliant on private funding. As Table 1 shows, more than half of their budgets were privately financed in the financial years, 1999/2000 to 2001/2002. The extent of reliance on private money varies. The major parties, that is, the Australian Labor Party (ALP), the Liberal Party and National Party are heavily dependent on private monies with more than 80 per cent of their funding coming from this source. The Greens, on the other hand, are slightly less dependent with nearly three-quarters of its budget derived from private funding. The Democrats stand out with slightly over half of their funding from private sources.

Table 1: Party dependence on private funds

Party	Total receipts (\$)	Private funding (% of total)	Public funding (% of total)
ALP	117, 273, 999	81.85	18.15
Liberal Party	95, 542, 648	83.61	16.39
National Party	21, 725, 957	84.89	15.11
Australian Democrats	6, 667, 728	56.90	43.10
Greens	6, 495, 651	74.56	25.44

Source: Annual returns for financial years, 1999/2000 to 2001/2002 (as calculated in Joo-Cheong Tham and David Grove, 'Public Funding and Expenditure Regulation of Australian Political Parties' (2004) 32(3) *Federal Law Review* 397, 401).

The figures in Table 2 attempt to give some indication of the composition of these private funds. Being based on sums declared as 'donations' in the party annual returns for the financial years, 1999/2000 to 2001/2002, they are to be treated with some caution. The classification of a contribution as a 'donation' or otherwise depends entirely upon a voluntary system of self-classification. Moreover, these sums do not

¹¹ For reports on the last four federal elections, see

http://www.aec.gov.au/_content/How/political_disclosures/ (accessed on 5 June 2007).

¹² See <http://fadar.aec.gov.au/> (accessed on 5 June 2007).

include membership fees, including trade union affiliation fees,¹³ and are comprised only of amounts of \$1,500 or more.¹⁴

Nevertheless, this table reveals that, in Australia, political donations are dominated by corporate donations. Such donations are the principal source of donations for all parties except for the Greens. For most of these parties, such donations greatly outstrip other sources of donations. For example, the amount of corporate donations received by the Liberal Party was more than 18 times the amount of individual donations received. The ratio for the National Party stood slightly over 11. It is only the Greens and Democrats that can plausibly claim to have a strong funding base grounded in individual donations.

As with trade union donations, such money is unsurprisingly a key source of donations for the ALP. It also is a minor source of donations for the Democrats and the Greens with slightly over two per cent of their donations coming from trade unions.

Table 2: Composition of sums declared as ‘donations’

Party	Corporate donations (%)	Trade union donations (%)	Individual donations (%)
ALP	88.08	7.75	4.18
Liberal Party	94.94	Nil	5.06
National Party	91.93	Nil	8.07
Democrats	66.07	2.26	31.66
Greens	41.34	2.38	56.28

Source: Annual returns for financial years, 1999/2000 to 2001/2002 (as calculated in Joo-Cheong Tham and David Grove, ‘Public Funding and Expenditure Regulation of Australian Political Parties’ (2004) 32(3) *Federal Law Review* 397, 402.

Table 3 points to a different phenomenon. It shows how donations are dominated by large donations. While donations of \$25,000 or more form only four per cent of the number of donations made in the 2003/2004 financial year, they amounted to nearly half of the amounts donated. A reverse situation applied to donations of less than

¹³ See definition of ‘gifts’ in section 287 of CEA.

¹⁴ This was the disclosure threshold that applied during this period.

\$1,500. They formed nearly half of the number of donations made but only four per cent of the amount donated.

Table 3: 2003/2004 Donor Returns Summary

Donations Size (\$)	Amount (\$million)	Amount of donations (%)	Number of donations made (%)
Less than \$1,500	0.82	4	47
\$1,500 to \$2,999	1.23	7	18
\$3,000 to \$4,999	0.82	4	7
\$5,000 to \$24,999	7.31	39	24
\$25,000 or more	8.54	46	4
Total	18.72	100	100

Source: AEC, *Funding and Disclosure Report: Election 2004* (2005) 21

In sum, several features distinguish the funding of Australian political parties: dependence on private funds and, in particular, reliance upon corporate money and large donations.

III PUBLIC FUNDING AND ITS REGULATION

A *Election funding*

In Australia, the federal election funding scheme operates in a simple manner. So long as parties and candidates poll at least four per cent of the first preference votes cast in a constituency, they are entitled to a certain sum for each first preference vote cast in their favour.¹⁵ For the last federal election that was held in 2004, this indexed sum stood at \$1.94 per first preference vote resulting in a total of \$41.9 million being paid out in election funding.¹⁶ Apart from proof of electoral support, this entitlement is unconditional. For instance, there is no present requirement for proof of electoral expenditure.¹⁷

¹⁵ CEA ss 294, 297.

¹⁶ AEC, *Behind the Scenes: The 2004 Election Report* (2005) 45 (available at <http://results.aec.gov.au/12246/pdf/BehindTheScenes.pdf>; accessed on 5 June 2007). For the section providing for indexation, see CEA s 321.

¹⁷ Prior to 1995, the federal election funding scheme operated as a reimbursement scheme hence, required proof of electoral expenditure. This feature of the scheme was abolished by *Commonwealth Electoral Amendment Act 1995* (Cth).

Table 4 demonstrates that the role played by election funding differs for the major and minor parties. The major parties rely only to a limited extent on election funding with such money constituting less than one-sixth of their budgets for the 1999/2000 to 2001/2002 financial years. On the other hand, election funding forms a significant part of the budgets of the minor parties. Such funding constitutes nearly 40 per cent of the Democrats' budget and nearly a quarter of the Greens'.

Table 4: Party dependence upon election funding

Party	Total receipts (\$)	Election funding (% of total)
ALP	117, 273, 999	13.57
Liberal Party	95, 542, 648	14.57
National Party	21, 725, 957	11.43
Australian Democrats	6, 667, 728	38.80
Greens	6, 495, 651	23.94

Source: Annual returns for financial years, 1999/2000 to 2001/2002 (as calculated in Joo-Cheong Tham and David Grove, 'Public Funding and Expenditure Regulation of Australian Political Parties' (2004) 32(3) *Federal Law Review* 397, 401.

B *Parliamentary entitlements*

Australian political parties are indirectly provided public funding in various ways. Instances include compulsory voting which shifts the burden of getting the vote out from the parties to the state and the provision of the electoral roll free of charge to candidates.¹⁸

What, arguably, is the most important source of indirect public funding is parliamentary entitlements¹⁹ simply because of the amount involved. In the 1999–2000 financial year, for instance, the cost of such entitlements amounted to \$354 million.²⁰ To get a sense of proportion, the parties' budgets for the *three* financial

¹⁸ Joint Select Committee on Electoral Reform, Parliament of Australia *First Report* (1983) 145–7.

¹⁹ For a brief discussion of these entitlements, see Sally Young, 'Killing Competition: Restricting Access to Political Communication Channels in Australia' (2003) 75 *AQ: Journal of Contemporary Analysis* 9, 9–11.

²⁰ Australian National Audit Office, *Parliamentary Entitlements: 1999–2000* (2001) paras 2–3.

years of 1999/2000 to 2001/2002 was less than this amount and stood at approximately \$248 million.²¹

These entitlements are provided under the *Parliamentary Entitlements Act 1990* (Cth) and determinations made under the *Remuneration Tribunal Act 1973* (Cth). Collectively, these instruments provide for two tiers of entitlements. The first applies to all parliamentarians whereas the second tier provides parliamentary office-holders (including Ministers)²² with additional entitlements.

Various entitlements are provided under the first tier including:

- allowances like the electorate allowance,²³ the private vehicle allowance²⁴ and the provision of office accommodation and facilities;²⁵ and
- the reimbursement and/or defraying of travel costs.²⁶

The second tier generally provides parliamentary office-holders with more generous travel entitlements.²⁷ It also entitles the leaders and deputy leaders of the Opposition in both the House of Representatives and the Senate, as well as the leader of parties with more than five representatives, to additional office accommodation.²⁸

It is clear that some of these entitlements cannot be used for party activity like campaigning. The entitlement to have certain medical expenses defrayed²⁹ is a case in point. Further, there are other entitlements which are unlikely to be used for party purposes, for example, the travel allowance provided to retired parliamentarians.³⁰

On the other hand, many of these entitlements can, and will, be used for party activity. This is clearly the case with entitlements which have no restriction as to use.

²¹ Calculated from Table 1.

²² See definition of 'parliamentary office-holders' at *Parliamentary Entitlements Act 1990* (Cth) s 3.

²³ *Remuneration Tribunal Determination 2003/14* (consolidated) para 1.

²⁴ *Ibid* para 4.

²⁵ *Parliamentary Entitlements Act 1990* (Cth) sch 1, pt 1, item 7 and *Remuneration Tribunal Determination 2003/14* (consolidated) para 9.

²⁶ *Parliamentary Entitlements Act 1990* (Cth) sch 1, pt 1, items 8–9 and *Remuneration Tribunal Determination 2003/14* (consolidated) para 2 (scheduled commercial transport); para 3 (car transport); para 5 (provision of vehicle); para 6 (charter transport) and para 9 (overseas study trips).

²⁷ See *Parliamentary Entitlements Act 1990* (Cth) sch 1, pt 2.

²⁸ *Ibid* sch 1, pt 2, item 5.

²⁹ *Ibid* sch 1, pt 1, item 9(1)(d).

Specifically, the use of this type of entitlements for party purposes is not prohibited.

Entitlements falling within this category include:

- the provision of office accommodation and facilities;³¹ and
- the entitlement of members of the House of Representatives to have the costs of certain items of printing, including newsletters for distribution to constituents, covered up to \$125,000 per year.³²

These entitlements would allow parliamentarians, for instance, to use fax machines and phones for the purpose of campaigning. Similarly, members of the House of Representatives could use their printing allowances to distribute newsletters to their constituents urging their re-election.

There are other entitlements which are subject to a nominal prohibition that they cannot be used for party purposes. The typical restriction which applies to these entitlements is that they can be used for 'parliamentary or electorate business (other than party business)'. This restriction applies, for example, to:

- the postage allowance;³³
- the communication allowance;³⁴ and
- various travel entitlements.³⁵

Despite this restriction, these entitlements are quite malleable and can fund many types of party activity. This malleability is due to the fact that the legislative instruments do not define either 'parliamentary or electorate business' or 'party business'. Thus, there is no statutory delineation between legitimate and illegitimate use. This is despite calls from bodies like the Australian National Audit Office for clearer definition and guidance.³⁶

³⁰ *Remuneration Tribunal Determination 2003/14* (consolidated) para 8.

³¹ *Parliamentary Entitlements Act 1990* (Cth) sch 1, pt 1, item 7 and *Remuneration Tribunal Determination 2003/14* (consolidated) para 9.

³² *Parliamentary Entitlements Regulations 1997* (Cth) reg 3. A much more limited allowance is provided to Senators with their entitlement limited to 10 reams of paper per month: at reg 3A(2)–(3).

³³ *Parliamentary Entitlements Act 1990* (Cth) sch 1, pt 1, item 3.

³⁴ *Remuneration Tribunal Determination 2003/14* (consolidated) para 10.4.

³⁵ *Ibid* para 2 (scheduled commercial transport); para 3 (car transport); para 4 (private vehicle allowance) and para 5 (provision of vehicle).

³⁶ Australian National Audit Office, above n 20, paras 2.61–2.68.

More fundamentally, even if there were a definition of the relevant phrases, the inescapable fact is that there is an overlap between parliamentary/electorate business and party business. This overlap is nicely illustrated by the handbook on Members and Senators' Entitlements issued by the federal Ministerial and Parliamentary Services. Elaborating upon the distinction between parliamentary/electorate business and party business, this handbook states that:

(i) it is accepted practice that material concerned with the re-election of the Member in his or her electorate may be included in a newsletter, but not material concerned with the election or re-election of anyone else.³⁷

This statement vividly demonstrates that a particular activity can be simultaneously characterised as parliamentary/electorate as well as party business.

IV POLITICAL EXPENDITURE AND ITS REGULATION

A *Expenditure by parties, third parties and candidates*

In Australia, political finance law leaves the campaign expenditure of candidates and parties largely unregulated. Candidates are under no obligation to disclose details of their campaign expenditure. Parties, on the other hand, are only required to disclose the *total amount* of their expenditure in their annual returns.³⁸ There is no obligation to specify any of the transactions that make up this amount in the annual returns. Neither is there a separate obligation on parties to disclose the amounts of their campaign expenditure. While such disclosure was required as part of the original funding and disclosure scheme, this requirement was repealed in 1998.³⁹ Hence, parties did not have to disclose details of their campaign expenditure for the last three federal elections.

Oddly, from a regulatory perspective, the expenditure of third parties is the most regulated. Third parties that have spent more than \$10,300 in a financial year on electoral expenditure must disclose to the AEC details of their electoral

³⁷ Commonwealth of Australia, Ministerial and Parliamentary Services, *Senators and Members: Entitlements* (2001) 30.

³⁸ CEA s 314AB(2)(b).

³⁹ *Electoral and Referendum Amendment Act 1998* (Cth). This requirement was also removed for the 1993 election but reinstated for the 1996 election, see respectively *Commonwealth Electoral Amendment Act 1992* (Cth) and *Commonwealth Electoral Amendment Act 1995* (Cth).

expenditure.⁴⁰ The relative strictness of such regulation must be seen in the context of growing interest in the spending of third parties.

The most notable instance is the ad campaign being conducted by the Australian Council of Trade Unions (ACTU) against the Coalition government's 'WorkChoices' industrial legislation. This, however, is not the only example of third party spending attracting attention. In 2005, for example, the AEC has investigated GetUp!, a self-described 'new independent political movement to build a progressive Australia'⁴¹ which hosts the most popular political website,⁴² for the purpose of determining whether it was an 'associated entity' of the ALP and concluded in the negative.⁴³

One of the most controversial cases revolves around the hundreds of thousands of dollars spent by Willmac Enterprises Pty Ltd on election material that attacked the Greens while supporting the re-election of John Howard in his seat of Bennelong in the last federal election.⁴⁴ At the heart of the controversy is whether Willmac Enterprises was funded by the Exclusive Brethren and, if so, whether the Exclusive Brethren complied with its disclosure obligations. Late last year, the AEC concluded that Willmac Enterprises did not receive funding from outside sources or, more specifically, from the Exclusive Brethren.⁴⁵ The matter has, however, been revisited with the AEC referring the matter to the Australian Federal Police in May this year.⁴⁶

Despite the increased focus on third party spending, election spending in the last federal election was still very much dominated by party expenditure. In that election,

⁴⁰ CEA s 314AEB.

⁴¹ http://www.getup.org.au/page.asp?page_id=1 (accessed on 3 June 2007).

⁴² Background Briefing, 'Politics and the Internet', ABC Radio National, 20 May 2007 (available at <http://www.abc.net.au/rn/backgroundbriefing/stories/2007/1924783.htm#transcript>; accessed on 5 June 2007).

⁴³ See AEC's advice on this matter at http://www.aec.gov.au/content/how/political_disclosures/advice/2006-02-09.htm (accessed on 3 June 2007).

⁴⁴ The exact amount is \$370 461 (see 'Third Party' election returns for 2004 federal election, available at <http://fadar.aec.gov.au/>; accessed on 3 June 2007).

⁴⁵ See the AEC's advice on the matter at http://www.aec.gov.au/content/how/political_disclosures/advice/2007-01-02.htm (accessed on 3 June 2007).

the parties spent \$37.4 million on election advertising while the amount of third party election spending was slightly over a tenth of this amount at \$4.4 million.⁴⁷

The figures also give good evidence of an ‘arms race’ between the ALP and Liberal Party. Table 5 details the total payments made by the federal branches of the ALP and the Liberal Party for the last three federal election years. With most of these payments devoted to electioneering, these amounts are a very good proxy for the amount of campaign expenditure. What they show are sharp increases in campaign expenditure. The amount spent by the federal ALP in 2004/2005 was nearly one half more than that expended in 1998/1999. The federal Liberal Party increased its spending even more exponentially with its expenditure in 2004/2005 more than double that of 1998/1999.

Table 5: Total payments by federal branches of ALP and Liberal Party in past three federal election years⁴⁸

	Liberal Party (\$million)	Liberal Party (% change from last election year)	ALP (\$million)	ALP (% change from last election year)
1998/1999	12.26	N/A	20.29	N/A
2001/2002	17.11	+ 39.56	25.40	+ 25.18
2004/2005	26.98	+ 57.69	30.14	+ 18.66

Source: Annual returns for financial years, 1998/1999, 2001/2002, 2004/2005

B *Government Advertising*

In Australia, government advertising has become one of the key political finance issues. To be sure, much of government advertising is non-partisan and devoted to uncontroversial items like job advertisements. Since the mid-90s, however, federal governments, whatever their political hue, have spent big on ad campaigns in order to shore up their electoral support.

⁴⁶ Michael Bachelard, ‘Electoral body to seek police probe into Brethren sect’, *The Age* (Melbourne), 24 May 2007, 1.

⁴⁷ AEC, *Funding and Disclosure Report: Election 2004* (2005) 28.

⁴⁸ The last three federal elections were held on 3 October 1998, 10 November 2001 and 9 October 2004 (see http://www.aec.gov.au/_content/When/elections/index.htm; accessed on 31 May 2007).

In the lead up to the 1996 federal election, the Keating ALP federal government spent \$9.4 million on its ‘Working Nation’ ads. Despite denouncing the ‘Working Nation’ ads while in Opposition, the Coalition once in government has outdone its predecessor. Its ‘Unchain My Heart’ ad campaign for the GST has been estimated to cost around half a billion dollars.⁴⁹ As will be seen below, it has also spent big on promoting its controversial ‘WorkChoices’ laws.⁵⁰

Table 6 details the total amount spent by the federal government on advertising campaigns for the period from 1991/1992 to 2004/2005. It shows that the first few years of the Howard Coalition government was marked by relatively low spending on government advertising. The ‘Unchain my Heart’ ad campaign that ran from 1998 to 2000, however, witnessed a massive increase in government advertising. Spending levels have dropped somewhat since then but remains significantly higher than the costs of government advertising under Keating ALP government.

Table 6: Federal government expenditures for advertising campaigns over \$10 000

	Nominal (\$m)	2004–05 prices (\$m)	Change from last federal election year based on 2004–05 prices (%)
1991–92	\$48	\$63	
1992–93	\$70	\$91	
1993–94	\$63	\$81	
1994–95	\$78	\$100	
1995–96	\$85	\$106	+16.5
1996–97	\$46	\$56	
1997–98	\$76	\$92	
1998–99	\$79	\$96	-9.4
1999–00	\$211	\$250	
2000–01	\$156	\$177	
2001–02	\$114	\$126	+31.3
2002–03	\$99	\$106	
2003–04	\$143	\$149	
2004–05	\$138	\$138	+9.5
TOTAL	\$1 406	\$1 525	

Source: Fiona Childs, *Federal government advertising 2004-05* (2006), Commonwealth Parliamentary Library Research Note 2/2006-07⁵¹

⁴⁹ For an excellent account, see Sally Young, *The Persuaders: Inside the Hidden Machine of Political Advertising* (2004) 122-9.

⁵⁰ See text below accompanying nn 79-80.

⁵¹ The emboldened years are federal election years. For dates of past federal elections, see http://www.aec.gov.au/content/When/elections/fed_state_elecdates.htm (accessed on 1 June 2007).

Much of this increase has occurred in the context of lax regulation of government advertising. In *Combet v Commonwealth*,⁵² the High Court, by a majority, rejected a challenge brought by the ACTU and the ALP to the legality of the first round ‘WorkChoices’ ads. The majority, relying upon broadly worded budget items in appropriation statutes, essentially endorsed government spending on advertising without specific parliamentary approval.⁵³ What’s left are porous government guidelines that not only make no mention of the need to avoid party-political ads but also are completely self-administered with no supervision by an independent agency.⁵⁴

VI THREE PROBLEMS

1 *Lack of transparency*

The federal disclosure scheme fails to ensure adequate transparency. By requiring, at the most, annual disclosure, the scheme does not provide timely disclosure. Speaking of the federal scheme, the AEC has argued that ‘(t)his form of . . . reporting and release can result in delays that can discount the relevance of making the information public.’⁵⁵

More specifically, the dated nature of the returns means that Australian citizens do not have access to the relevant information when deciding how to vote. A vivid example is the \$1 million dollar contribution made by UK Lord Michael Ashcroft to the federal Liberal Party on 23 September 2004⁵⁶ barely a fortnight before the 2004 federal election. Citizens casting their votes in that election were completely unaware of this contribution and only found out months later on 1 February 2005 when the AEC released the disclosure returns.

⁵² (2005) 224 CLR 494

⁵³ For discussion, see Senate Finance and Public Administration References Committee, *Government Advertising and Accountability* (2005) 38-45; Graeme Orr, ‘Government Advertising: Parliament and Political Equality’ in Kay Walsh (ed), *Images, Colours and Reflections: Lectures in the Senate Occasional Lecture Series 2005-2006* (2006) 1, 12-5.

⁵⁴ See generally Sally Young and Joo-Cheong Tham, *Political Finance in Australia: A Skewed and Secret System* (2006) 82-5.

⁵⁵ AEC, *Submission to the Joint Standing Committee on Electoral Matters Inquiry into Electoral Funding and Disclosure* (2000) para. 2.10.

⁵⁶ Donor return lodged by Lord Michael Ashcroft (available at <http://fadar.aec.gov.au/>; accessed on 30 May 2007).

Another serious limitations of federal disclosure scheme is the lack of compliance. Such non-compliance, of course, cannot be definitively identified. There is, at the same time, good evidence that the parties are not treating their disclosure obligations under the federal scheme seriously. The AEC has recently observed:

The legislation's history to date can be characterised as one of only partial success. Provisions have been, and remain, such that full disclosure can be legally avoided. In short, the legislation has failed to meet its objective of full disclosure to the Australian public of the material financial transactions of political parties, candidates and others.⁵⁷

Much of the AEC's cause for complaint is based on its view that a culture of evasion existed in some quarters. It has previously stated that 'there has been an unwillingness by some to comply with disclosure; some have sought to circumvent its intent by applying the narrowest possible interpretation of the legislation'.⁵⁸

What is perhaps the most serious limitation of the current federal scheme is the astonishing level of non-disclosure permitted by high disclosure thresholds. With the enactment of the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth) in the middle of 2006, parties and their associated entities were required only to itemise sums exceeding \$10,000 instead of disclosing details of receipts of \$1,500 or more.⁵⁹ The Act also indexed the level of the disclosure threshold with the effect that it now stands at \$10,300.⁶⁰

Table 7 summarises recent research by Sarah Miskin and Greg Barber of the Parliamentary Library on the effect of increasing the disclosure threshold. This research 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 1998/99 financial year to 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%.

⁵⁷ AEC, above n 55, para. 2.9.

⁵⁸ AEC, *Funding and Disclosure Report Following the Federal Election Held on 3 October 1998* (2000) para. 2.

⁵⁹ For disclosure thresholds that applied prior to the 2006 amendments taking effect, see Young and Tham, above n 54, 113, Table 6.1. It should be noted that while the amendments were passed in 2006, they were retrospective and took effect on 8 December 2005: *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth) s 2(1), Column 1, Rows 19, 21.

⁶⁰ CEA s 321A.

Table 7: 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)

Further, while the above table gives some indication of the level of non-disclosure under the current threshold, it may under-estimate the proportion of funds that will be undisclosed. As non-disclosure is increasingly legitimised, it is likely that parties will take greater advantage of the regulatory gaps that are opened up by the changes. One gap stems from disclosure thresholds applying *separately* to each registered political party. In the context where the national, State and Territory branches of the major political parties are *each* treated as a registered political party, this means that a major party constituted by the nine branches has the cumulative benefit of nine thresholds. So it is, for example, that a company can presently donate \$10,300 to each State and Territory branch of the Labor Party as well as its national branch—a total of \$92,700—without the Labor Party having to reveal the identity of the donor. Having such a high threshold in practice can only mean more secret donations.

The *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth) also increased the threshold at which the prohibition against anonymous donations and loans applies from amounts greater than \$1,000 to sums exceeding \$10,000; a level that is also indexed. It is this increase that will perhaps most seriously compromise transparency. This change is less about public disclosure of donations and loans and rather about records kept by parties. It will mean that

parties can legally accept larger sums without knowing details of the donor. This potentially renders the whole notion of disclosure thresholds meaningless.

Take, for instance, a situation where the Liberal Party, through its various branches accepts anonymous donations from a single company to the amount of \$92,700. The company then gives an additional \$9000 that is publicly disclosed. Under the current law, details of the entire \$101 700 should be disclosed. The ability to legally accept \$92 700 in anonymous circumstances, however, potentially destroys the paper trail required to enforce such an obligation. At best, this change is an invitation to poor record keeping; at worse, it is a recipe for wholesale circumvention of the disclosure scheme.

It is clear then that, in Australia, federal regulation of private funding relies upon a porous disclosure scheme. Under this scheme, there is a high level of non-disclosed contributions and delays in disclosure. There also seems to be a culture of non-compliance. In short, this scheme is a leaky sieve that permits evasion of adequate disclosure.

2 *The limits of disclosure: sale of political access and influence*

In Australia, there is a widespread practice of selling political access and influence. Such sales take various forms. National party conferences are a favoured venue for selling access and influence. At this year's federal ALP conference, businesses willing to pay \$7,000 had a representative escorted by federal frontbenchers. At \$15,000 per table, businesses and lobbyists could sit next to shadow ministers and ALP grandees.⁶¹ Two weeks ago, in the Liberal Party's federal council meeting which had the theme, 'Doing what's right for Australia', time with federal ministers was auctioned off. 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 \$12,000.⁶²

⁶¹ Michelle Grattan and Katharine Murphy, 'Hope in the hearts of Labor faithful', *The Age* (Melbourne), 27 April 2007, 1.

⁶² Misha Schubert, 'Party hopes party won't end so soon', *The Age* (Melbourne), 4 June 2007, 6.

The sale of political access also occurs through fund-raising organisations. For example, the New South Wales branch of the Liberal Party has an outfit named the 'Millennium Forum'. Previously, a message from John Howard, the Prime Minister on its website, stated that '(t)he Millennium Forum provides a wealth of opportunities for the business community and politicians at federal and State levels to meet and discuss key issues within an informal framework'. Companies can join this forum by becoming sponsors. While the costs of sponsorship is not publicly disclosed on its website, it was reported in 2001 to range between \$10,000 and \$19,999 per annum. Sponsorship can entitle a company to invitations to boardroom lunches, places at VIP drinks and 'off the record' briefings.⁶³

The Victorian branch of the Labor Party, on the other hand, runs an organisation by the name of 'Progressive Business'. According to its website, its 'primary objective is to build relationships between the business community and the Australian Labor Party'.⁶⁴ In the past, the website also used to state that '(j)oining this influential group allows you to participate in the decision making progress (sic)'.⁶⁵ It offers three levels of membership: corporate, business and individual respectively priced at \$1400, \$880 and \$295 per annum. Each type of membership entitles the company or individual to a set number of breakfast and twilight ministerial briefings.

Such established practice of selling political access and influence corrupts Australia's democracy in two ways. It raises the risk of corruption as graft where political power is exercised improperly in the favour of donors. This is especially a danger when companies buying access and influence are tendering for lucrative government contracts and licences.

⁶³ The official websites of the NSW and federal branches of Liberal Party (see respectively http://www.nsw.liberal.org.au/component/option.com_frontpage/Itemid,1/; <http://www.liberal.org.au/>; accessed on 3 June 2007) no longer provide any links to the Millennium Forum. For a report on a recent Millennium Forum fund-raiser where both the Prime Minister, John Howard, and the then New South Wales Opposition leader, Peter Debnam, spoke, see Andrew Clennell, 'NSW most incompetent state, says Howard', *Sydney Morning Herald*, 4 October 2006 (available at <http://www.smh.com.au/articles/2006/10/03/1159641327634.html>; accessed on 3 June 2007).

⁶⁴ See http://www.vic.alp.org.au/index.php?option=com_content&task=view&id=237&Itemid=9 (accessed on 3 June 2007).

⁶⁵ Quote from http://www.vic.alp.org.au/index.php?option=com_content&task=view&id=237&Itemid=9 (accessed on 30 June 2005).

Less obviously but more insidiously, the sale of access and influence gives rise to corruption as undue influence. Such corruption occurs when political contributions undermine the ability of citizens to have a fair opportunity to influence political outcomes.⁶⁶ The objectionable nature of such corruption stems from the principle of political equality, that is, the notion that citizens have ‘each a share, and an *equal share, in political power*’.⁶⁷ With the sale of access and influence, political leaders are not granting a hearing to companies and individuals according to the democratic support they have or the merits of their arguments. Rather, ‘air time’ is being parcelled out based on the contributions their parties have received.

The problems associated with the sale of political access and influence also highlight the limits of disclosure of party finances. The critical point is that disclosure regimes rely upon ‘letting the sunshine in’ by making public various details of donations made, for example, the date of the donation, the identity of the donor and the amount of the donation. It is then hoped that such exposure would prevent graft and undue influence by exposing such corruption.

Such a method, however, presupposes that donors and political parties fear, or are, at the very least, anxious to avoid, disclosure of political donations because disclosure would reflect adversely on them. But when the sale of political access and influence is normalised, this fear or anxiety largely dissipates. The lever of deterrence no longer works.

The other inherent limitation of disclosure schemes stems from the problem of proof. It is generally difficult to establish a causal link between political contributions and particular government actions.⁶⁸ Disclosure regimes do very little to erode this difficulty. Indeed, they *cannot* expel this difficulty. All they do is put into the public realm various details of donations. The effect of this, together with government

⁶⁶ For an examination of the different notions of corruption in the area of political finance, see Young and Tham, above n 54, Chapter 1.

⁶⁷ Harrison Moore, *The Constitution of the Commonwealth of Australia* (1902, 1st ed) 329 (emphasis added). According to Moore, this was the method chosen by the framers of the Constitution to protect citizens’ rights.

actions which benefit contributors, might give rise to suspicion of impropriety. But without more, this can only be a suspicion. Short of a full-scale police investigation, citizens would not know whether these suspicious circumstances were in fact based on impropriety or were only an innocent coincidence. Moreover, this fog of inconclusiveness is all the more effective when political contributions are the norm for corporations. The sunshine may have been let in but the smell remains.

3 *Exacerbating political inequality*

The sale of political influence is not the only way in which the funding of political parties undermines the political equality of Australian citizens. Another feature of this funding, large corporate contributions, also has a corrosive effect on Australia's democracy.

What is clear is that corporations that give large sums to the major political parties *do* seek something in return, whether it be the opening of the doors of power or a more favourable hearing. Indeed, a director or senior executive of Australian companies risks breaching their duties under *Corporations Law* by acting purely charitably by making a genuine donations to these parties.⁶⁹ So it is that when drug company, Pfizer, the maker of Viagra, sponsors a breakfast session at the recent Liberal Party's federal council meeting, we can readily presume that it sought to earn it a few brownie points with the Liberal Party.⁷⁰

From a democratic perspective, the influence bound up with these large corporate contributions is undue for two reasons. First, the amounts involved are far out of reach of the ordinary Australian. As noted earlier, in the 2004/2005 financial year, donations of \$25,000 or more amounted to nearly half of the amounts donated.⁷¹ The median household *annual* income in 2004, on the other hand, was \$25,584.⁷²

⁶⁸ See discussion in Royal Commission (chair: Judge Kennedy), *Report of the Royal Commission into Commercial Activities of Government and Other Matters* (1992) para. 26.2.4.

⁶⁹ See discussion in Ian Ramsay, Geof Stapledon and Joel Vernon, 'Political Donations by Australian Companies' in (2001) 29 *Federal Law Review* 177, 194-5.

⁷⁰ Jason Koutsoukis, 'Sketch', *The Sunday Age* (Melbourne), 3 June 2007, 2.

⁷¹ See text accompanying Table 3.

⁷² This figure was calculated from the median household weekly income of that year as found in Australian Bureau of Statistics, *Australian Social Trends 2006* (available at

Second, commercial corporations, that is, corporations formed with the principal purpose of making profit, do not have a claim to democratic representation. They do not have a direct claim to democratic representation, as they are not citizens—the ultimate bearers of political power in a representative democracy. More than this, these 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 mean 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 have majoritarian decision-making.⁷³

Besides large corporate contributions, the flow of money, both private and public, undermines political equality by tending to favour the major parties over their competitors. Table 8 attempts to gauge how the amount of the parties' funding compares with their electoral support. In essence, the amount of total funding, private funding and election funding received by a party was divided by the number of first preference votes the party received in the 2001 federal election. Being derived on a vote-basis, these figures are not affected by the different levels of electoral support enjoyed by the parties and hence, give a much better picture as to their fund-raising abilities.

Table 8: Funding per vote

Party	First preference votes in 2001 election	Total funding (\$ per vote)	Private funding (\$ per vote)	Election funding (\$ per vote)
ALP	4, 341, 41	27.01	22.14	3.67
Liberal Party	4, 291, 03	22.27	18.62	3.25
National Party	643, 924	33.74	28.64	3.86
Democrats	620, 248	10.75	6.12	4.17
Greens	569, 075	11.41	8.51	2.73

http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/7F6E1B1E4079DC78CA2571B00015A_C23?opendocument; accessed on 3 June 2007).

⁷³ Federally registered trade unions, for one, are *legally* required to have majoritarian structures: *Workplace Relations Act 1996* (Cth) Registration and Accountability of Organisations Schedule. For fuller discussion of the issues relating to trade union donations, see Young and Tham, above n 54, 26-7.

Source: Annual returns for financial years, 1999/2000 to 2001/2002 (as calculated in Joo-Cheong Tham and David Grove, 'Public Funding and Expenditure Regulation of Australian Political Parties' (2004) 32(3) *Federal Law Review* 397, 404.⁷⁴

These figures reveal a dramatic funding inequality between the major parties, i.e. ALP, Liberal Party and National Party, on one hand, and the minor parties, the Democrats and the Greens, on the other. The former received more than \$20 per 2001 election vote. The Democrats and Greens, however, receive around \$10 per 2001 election vote. To illustrate: for each dollar per vote received by Democrats, nearly three dollars was received by ALP. And for each dollar per vote received by the Greens, the Liberal Party received nearly two dollars.

Table 8 indicates that this inequality is due largely to the different amounts of private money received by the parties. There is a clear correspondence between the pattern of private money received per vote and the pattern of total funding received per vote with both revealing a sharp cleavage between the ALP, the Liberal Party and the National Party, on one side, and the Greens and the Democrats, on the other. For example, for each dollar of private money received per vote by the Democrats, more than three dollars was received by the ALP. And for each dollar of private money received per vote by the Greens, the Liberal Party received two dollars.

Election funding has a limited levelling effect on the funding inequality between the parties. This effect also varies significantly according to the party. For example, the effect is quite substantial in relation to the Democrats. As an illustration, the ratio of private funding per vote for the ALP and the Democrats stands at 3.62. The corresponding ratio of total funding (which includes electoral funding) per vote is, however, 2.51. In contrast, the levelling effect is very modest in relation to the Greens. For example, the ratio of private funding per vote for the Liberal Party and the Greens is 2.19 whereas the corresponding ratio of total funding per vote was marginally less at 1.95. Such difference will largely be due to the inferior election funding that the Greens receive.

⁷⁴ The figures relating to the number of first preference votes secured by the parties are available at http://www.aec.gov.au/_content/when/past/2001/results/NATIONAL.htm (accessed on 9 December 2003).

While election funding does advance political equality by boosting the finances of the Democrats and, to a much lesser extent, the Greens, it is clear that such funding along with parliamentary entitlements exacerbate political inequality in several respects. Contrary to its rationale of facilitating open electoral contests, election funding through the 4 per cent threshold clearly discriminates against parties like the Greens which enjoy significant electoral support but fail to cross the threshold. This threshold explains, in part, why the Greens receive \$2.73 of election funding per first preference vote secured in the 2001 federal election whereas all the other major parties receive more than three dollars per vote. Moreover, election funding is calculated on the basis of past electoral support. While this is probably the most equitable basis for calculating such funding, it does inevitably mean that established parties enjoy a financial advantage over newer parties.

Parliamentary entitlements obviously confer an advantage to incumbent parliamentarians. Even among incumbent parliamentarians, this advantage is distributed inequitably with the ALP and the Liberal Party reaping a disproportionate benefit. This is because their parliamentary representation would be greater than their electoral support.⁷⁵

While it is quite right that parliamentarians be properly supported in the discharge of their functions, the structural inequality of parliamentary entitlements and the amount of money that they are costing raise serious questions. As noted above, this amount far outstrips the parties' annual budgets.⁷⁶ All in all, it is highly questionable whether the amount spent on parliamentary entitlements is justifiable.

⁷⁵ This can be explained by two features of Australia's electoral system. First, House of Representatives seats are single-member electorates whereas Senators are elected according to a proportional system (*CEA* ss 273 (Senate) and 274 (House of Representatives)). This favours the larger parties. For example, in the 2001 federal election, the Liberal Party and ALP respectively received 37.08 per cent and 37.84 per cent of the first preference votes while their share of the House of Representatives seats stood at 45.3 per cent and 43.3 per cent (Figures derived from Australian Electoral Commission <http://www.aec.gov.au/_content/when/past/2001/results/; accessed on 28 January 2004). Secondly, the number of House of Representatives members is constitutionally mandated to be twice the number of Senators (*Commonwealth of Australia Constitution Act* s 24).

⁷⁶ See text above accompanying nn 20–1.

The major parties also benefit from taxpayers' money in a different way. As noted above, these incumbent parties have not been shy in using government advertising for partisan purposes.⁷⁷ So much so that Sally Young, the leading Australian expert on political advertising, has described government advertising as 'one of the greatest benefits of incumbency'.⁷⁸

Arguably, the current Coalition government has taken matters to a new low with its 'WorkChoices' ad campaign. \$55 million was spent in the first round of ads months *before* any Bill was introduced to Parliament.⁷⁹ History repeated itself this year when, in an effort to counteract the ACTU's ad campaign, \$5 million dollars of public money was spent advertising the Workplace Relations Amendment (A Stronger Safety Net) Bill 2007 that, at the time of the ads, had yet to be introduced in Parliament.⁸⁰

The skewed nature of parliamentary entitlements and partisan government advertising are of concern not only because they confer an unfair financial advantage to the major parties but also because they increase the costs of effective electioneering. Along with direct spending by the parties, they contribute to the 'arms race' between the major parties.⁸¹ Such a development threatens political equality because it raises the cost of a 'real' campaign and, thereby, risks locking out new parties and candidates.

VI CONCLUDING THOUGHTS

This paper has sought to provide an account of Australian political finance by outlining its regulatory framework, patterns of funding and spending as well as its key deficiencies. It would, however, be an act of hubris to prescribe a reform agenda for New Zealand based on the Australian experience. Political finance reform in any

⁷⁷ See text above accompanying n 49.

⁷⁸ Young, above n 49, 123.

⁷⁹ Senate Finance and Public Administration References Committee, *Government Advertising and Accountability* (2005) 47

⁸⁰ For further information on this Bill, see <http://www.workplace.gov.au/workplace/Category/Legislation/WRAct/WorkplaceRelationsAmendmentAStrongerSafetyNetBill2007.htm> (accessed on 3 June 2007).

⁸¹ See text above accompanying Table 5.

country is a complex matter depending upon a range of social, political and historical factors.⁸²

Two general lessons can perhaps be drawn from the Australian experience. The first relates to the scope of the reform agenda. Neither the concept of party finance nor campaign finance fully captures all the dimensions of such an agenda. The notion of party finance unduly focuses on direct spending by one type of political actor, parties. It neglects *indirect spending* by parties, whether through their parliamentarians or government departments, and expenditure by other political actors, most notably, third parties. The concept of campaign finance, on the other hand, is too tied to spending during election campaigns. It sits awkwardly with the phenomenon of the 'permanent' campaign where electioneering by parties *between* elections is as important as their campaigning *during* the formal election periods. Thus, money used on the 'permanent' campaign, for example, parliamentary entitlements should be part of the reform agenda.

The governing concept should perhaps be political finance. With political finance, questions underlying the reform agenda are conceived broadly: How does money, whether public or private, influences politics? How should money influence politics? Viewing matters through the lens of *political* finance has the virtue of being alert to the varied manifestations of political activity. Party funding and expenditure are significant but so are partisan government advertising and third party expenditure. Spending on election campaigns warrants our attention as does money used for electioneering in between elections.

The second lesson is that reform debates should not solely revolve around the question of private versus public funding. It is the *character of private and public funding* that is crucial. While large sums by commercial corporations carry the acute danger of corruption, private funding in small sums by many citizens is a sign of a vibrant democracy. Public funding, unlike private funding, does not carry the risk of corruption and undue influence by a donor. It can also level the playing field and

⁸² See factors listed in K D Ewing and Samuel Issacharoff, 'Introduction' in K D Ewing and Samuel Issacharoff (eds), *Party Funding and Campaign Financing in International Perspective* (2006) 6-7.

assist parties in performing their democratic functions. Yet it also poses its own dangers. These dangers arise from the nature of public funding of political parties in a parliamentary democracy — the amount and character of such funding is controlled by its primary recipients, the major political parties. As a result of this control, there is clearly a risk that public funding is provided in a manner that serves the interests of the major political parties while undermining the health of the country's democracy. In Australia, this risk has been realised in various ways: the threshold of election funding discriminates against new and minor parties; parliamentary entitlements provide an unfair advantage to the major parties and the use of government advertising for party-political purposes confers a tremendous resource to incumbent parties.

These are perhaps the modest lessons from a 'relaxed and comfortable' country.⁸³

⁸³ The phrase comes from the Australian Prime Minister, John Howard: Pre-election interview with Kerry O'Brien, cited in Pamela Williams, *The Victory* (1997) 256.