

Rethinking the Funding of New Zealand's Election Campaigns

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The 2005 general election campaign was notable not only for its close-fought nature, but also for a range of deeply concerning, and in some cases undoubtedly unlawful, behaviour by various electoral participants. The Labour Party exceeded the statutory maximum on its 'election expenses' by at least \$418,603, primarily due to the costs associated with producing and distributing its pledge card to voters. Furthermore, the use of parliamentary funding to pay for this campaign material prompted a post-election review by the auditor-general, which revealed widespread misuse of this source of funds by a range of parties and individual MPs (Auditor-General, 2006). The National Party's negligence in failing to account for GST when booking election broadcast time meant that it was able to screen some \$112,000 more in campaign advertising than the law allowed. Both National and Labour, and to a lesser degree some smaller parties, used anonymous donations and trusts to shield the identity of their major donors, allowing hundreds of thousands of dollars to flow into their campaign coffers from hidden sources. An extensive leaflet campaign funded by members of the Exclusive Brethren church and devoted to attacking the Labour and Green parties was carried out with a (still disputed) degree of knowledge on the part of the National Party, and on at least some occasions breached the legal requirement that they identify the 'true identity' of the person publishing them (Hager, 2006, pp.238-40). Other examples of 'third-party' advertising by various trade unions and the racing industry also appeared to contravene the rules requiring the authorisation of such messages and the identification of their source.

Taken alone, any of these matters would be cause for concern. In combination they reveal an urgent need for an extensive overhaul of the rules governing how electoral campaigns can be funded in New Zealand. The Ministry of Justice has completed a review of the

present law, with the government signalling its intention to enact legislation dealing with the issue by the end of 2007. The National Party has also indicated that it is prepared to provide bi-partisan support for at least some reform measures. However, the exact nature of any proposals for change is not clear at the time of writing. This article is therefore intended to provide a background to whatever planned reforms may emerge by setting out the underlying problem involved with the issue of funding election campaigns. It then outlines the various regulatory choices available to respond to this problem. The difficulties that the 2005 campaign caused for New Zealand's present regulatory scheme are then recounted, along with some suggestions for how these may be combatted. Shortcomings with the present method of enforcing the rules on election campaign funding are examined. Finally, the article concludes with some suggestions as to how the process of reforming the rules in this area should be approached.

Election campaign funding and its discontents

When viewed in an international context, the events at the 2005 election should not provoke surprise. The funding of election campaigns has created endemic problems for representative democracies (Ewing and Issacharoff, 2006). This fact reflects the Janus-faced nature of money in the electoral context. An adequate supply of cash is essential for running an effective campaign. All the elements of modern electioneering – producing campaign material, distributing advertising messages, conducting opinion polls, hiring campaign staff, candidate travel, etc – come at a cost. Without money to meet these costs, a party or individual candidate simply cannot reach the voters to persuade them of how to cast their ballots. Spending on election campaigns can thus be a positive good, in terms of

informing the electorate about the various parties and individuals seeking their support at the polls.

However, money is not distributed equally in our (or any) society. Simply put, some persons and groups have much, much more of it than do others. The importance of money at election time can then give them a great deal of potential influence over the outcome of the contest. At worst this influence may take the form of a direct, *quid pro quo* donation for a desired policy outcome: the outright purchase of public decision-making power through the funding of an election contestant's campaign. Even without such overt corruption, however, the very idea that an individual or group's electoral influence reflects their wealth is still troubling. It sits uneasily with our society's commitment to electoral equality, as made manifest in the 'one person, one vote' standard. The right of the wealthy to cast multiple votes based on their property holdings was abolished well over a century ago precisely because each individual's say about how the country should be run is considered as important as all others', irrespective of how much or little they own. Additionally, should 'money politics' come to be seen to dominate the country's elections, there is a risk that voters will become disillusioned and feel disenfranchised by the process. In an era of already declining turnout rates and falling political party membership, any development that might further decrease popular electoral participation deserves close and critical scrutiny.

Because money is both necessary for and potentially harmful to the electoral process, every democracy requires rules to govern how it can and cannot be used for campaign purposes. The form those rules will take then depends upon a number of factors (Ewing and Issacharoff, 2006, pp.6-7). One is the perceived importance of the issue in a society's particular context. For example, New Zealand's relatively low-cost electioneering environment, generally non-corrupt governing processes, and absence of any galvanising event or scandal has long permitted it to maintain a relatively 'light touch' regulatory environment. A second factor is the perceived political benefit that any particular regulatory regime may provide to the various parties in Parliament. The rules governing election funding are chosen by MPs, who will then campaign for re-election under those rules. It is hardly surprising, therefore, that a degree of partisan calculation will

accompany any decision as to what rules ought to be in place. Finally, every regulatory regime must strike a balance between the fundamental freedom of electoral participants to communicate with the voters and the equality concerns that campaign spending can generate. Different democratic societies have come to opposing conclusions as to the most appropriate balance within their particular cultural and constitutional context (Geddis, 2001a).

Furthermore, a range of differing policy tools are available to achieve the appropriate balance between individual freedom and participant equality. These various tools can be grouped under three general categories of regulatory response.

1: Supply side controls on election funding

The first set of regulatory responses can be termed *supply side controls*. These restrict the way that primary participants may raise money from private sources for the purpose of funding their election campaign. By controlling how the electoral participants gain the funds needed to run their campaigns, these measures are intended to mitigate the risk that the interests and policy preferences of those with money to give will receive a disproportionate amount of attention from those seeking election. Such supply side controls include requirements to publicly disclose the sources of an election participant's funding, and restrictions on who may provide donations, as well as on how much may be donated to an election participant by any individual supporter.

2: Demand side controls on election funding

The second set of regulatory responses can be termed *demand side controls*, involving caps on how much the election participants can spend on their election-related activities. The aim of this form of regulation is not to create complete equality between all electoral contestants – a gap will still remain between the resources available to various electoral participants, even with some spending cap in place – but rather to prevent a well-funded participant from 'buying' an election by outspending the competition by a large amount. Furthermore, by controlling overall electoral spending, such caps seek to reduce the 'arms-race' phenomenon, whereby every electoral participant seeks to raise as much funding as is possible in case an opponent proves able to raise and

spend substantially more. Demand side controls may apply to the electoral participants' total spending at election time, or to some more limited range of expenses (such as election advertising, or broadcasting). Further, they may apply only to the immediate contestants (i.e. the candidates and their political parties), or to a wider range of interested 'third parties' that involve themselves in the campaign.

3: Public assistance measures for electoral participants

The third set of responses can be termed *public assistance measures*. They complement the egalitarian objective of the previous two forms of regulation by replacing the role that private (and thus unequally distributed) sources of wealth can play in the electoral process with a 'clean' source of funding – the general taxpayer. Further, such measures may be designed to provide funding to parties or candidates which otherwise would struggle to raise private funds, thereby enabling a greater range of voices to participate at the election. A variety of different forms of public assistance measures are available: direct payments to electoral participants on a 'dollar-per-votes' basis; post-election refunds of the expenses incurred in campaigning; matching donations for small, individual donations; tax credits to compensate small donors for their gift; the provision of broadcasting time or other campaign benefits to qualifying contestants.

The need for election funding reform in New Zealand

The events of the 2005 election demonstrate flaws in every aspect of the regulatory regime governing the funding of election campaigns in New Zealand (for a more complete description of the present rules, see Geddis, 2004a).

1: Supply side problems

The lack of transparency involved in the supply of money to electoral participants is perhaps the most serious shortcoming in New Zealand's current regulatory regime (Geddis, 2001b). The Electoral Act 1993 does require that the identity and address of donors giving \$10,000 or more to a political party be reported annually to the Electoral Commission.¹ However, where the donor's

identity is not 'known' to the party, the contribution is listed only as coming from an anonymous source. In 2005 the Labour Party received \$275,000 by way of such 'anonymous' donations. Where a contribution is received via a conduit organisation, such as a trust entity, the party's report need only list that conduit organisation as the donor. In 2005 the National Party received \$1,741,793 from such sources. The law also permits a single donation to be split amongst several 'straw donors', thereby causing each purported donor's share to fall beneath the threshold at which disclosure is required. Furthermore, it is entirely legal for a donor and a political party (or individual candidate) to actively plan how one of these stratagems will be used to pass along a contribution 'facelessly' – that is, make a donation in a manner that does not involve the public disclosure of the donor's identity.

These disclosure rules are inadequate in two ways (Geddis, 2001b). First, they require public disclosure only *after* the election has taken place. Consequently, voters remain in the dark during an election campaign as to who is supporting each party financially in its bid to win public power. While an effective post-election disclosure regime has value in respect to tackling undue donor influence, it would be preferable to also allow voters the chance to assess this matter prior to casting their votes. Second, the ability of political parties (as well as individual candidates) to receive 'faceless' donations allows any donor who wishes to avoid publicly disclosing his or her identity to do so, and even permits the intended recipient of a political donation to advise a donor on how to achieve this result. The result is that the current public disclosure regime for political donations is all but voluntary in application.

This state of affairs is indefensible. The basic reason for requiring the disclosure of the identity of a political party's large donors is to combat any potential *quid pro quo* arrangement by enabling the public to judge the extent of the donor's influence on the actions of the party's representatives. A disclosure system that enables large donors to easily (and lawfully) remain 'faceless' hamstringing its very purpose – it is hardly likely that a donor expecting some pay-off for his or her contribution will choose to identify themselves to the public. Further, the present system of disclosure lets the public see that the political parties are receiving hundreds of thousands of dollars from private sources (thus raising concerns about

¹ Donations of \$1,000 or more to an individual candidate must be disclosed to the chief electoral officer following the election.

what may be expected in exchange for this largesse), but prevents them from checking what effect those donations have on policy. This is hardly a recipe for increasing the public's overall confidence in the political process.

In light of these problems, New Zealand should follow the example of Australia, Canada, the United States and the United Kingdom and require political parties (as well as individual candidates) to ascertain and publicly reveal the true identity of every donor who gives more than a nominal amount (say, \$300). This was the approach recommended by the Royal Commission on the Electoral System, which also called for preventing the use of conduit organisations to avoid the disclosure requirements (Royal Commission, 1986, pp.189-90). The splitting of donations amongst 'straw' donors also should be prohibited (although lowering the required level of disclosure would itself undermine this tactic). Furthermore, the regular public disclosure of large donations (say, over \$5,000) should be required prior to the election, so that voters are able to ascertain before casting their ballots who is financially backing the parties and individual candidates.

Aside from reforming the disclosure requirements for donations, thought is also needed as to whether limits should be placed on who may fund electoral participants, and how much they may donate. At present, any person or organisation can give as much money as he, she or it wishes to any political party or candidate. Contributors need not be citizens, nor even residents, of New Zealand. The legitimacy of persons who are not eligible to vote in this country's elections funding those who are contesting them is debatable, to say the least. Similar considerations apply to contributions to electoral contestants from organisations such as companies or unions. Finally, it may be questioned whether even individual supporters ought to be permitted to make unlimited donations to parties or candidates. The concern is that reliance on large financial backers can have a detrimental effect on the internal policy development and direction of a party, as well as creating a sense of obligation towards the donor. It is for these reasons that both Canada and the United States have banned donations to electoral participants from foreign citizens, unions and companies, as well as imposed caps on how much individuals may donate in any year.

However, such donation caps raise at least three potential problems. First, they infringe on the right of

donors to use their financial resources to promote their political beliefs through supporting particular parties or candidates. What is an appropriate restriction to place on a supporter's ability to contribute money when there is no legal limit on the number of hours an individual may volunteer to work for an electoral contestant? Second, if restrictions are placed upon private sources of funding, it raises the question as to how electoral contestants will raise the money they need to mount effective campaigns. If sufficient funds cannot be raised by lawful means from private sources, then public funding may be required instead, an issue which raises its own set of problems (discussed below). Finally, there is the problem of displacement of political spending. If private donors are prevented from giving money directly to the electoral participants, they may instead use their cash to fund 'third-party' campaigns around the election (an issue further discussed in the next section).

2: Demand side problems

New Zealand traditionally has used demand side controls as its primary form of election funding regulation. A cap applies to the 'election expenses' that political parties and individual candidates may incur in the three months leading up to the election.² Similarly, the amount that may be spent on using the broadcast media to screen 'election programmes' (i.e. campaign advertisements) is strictly limited through the broadcast allocation process carried out by the Electoral Commission. Restrictions also apply to election spending by 'third parties': individuals or organisations not directly contesting the election, but with an interest in influencing its outcome. Any advertising paid for by third parties that 'is used or appears to be used to promote or procure the election of a constituency candidate', or 'encourages or persuades or appears to encourage or persuade voters to vote for a party', must be authorised in writing by the party or candidate concerned.³ The efficacy of each of these forms of demand side control may be questioned following the 2005 election.

2 For individual candidates, the cap is \$20,000. For political parties it is \$1 million + \$20,000 for each electorate contested by the party (i.e. a party contesting all 69 electorates may spend up to \$2.38 million on its 'election expenses').

3 Where such authorisation is given, the party or candidate must then count that spending as a part of its own 'election expenses'. In addition, the advertising must carry the 'true name' and address of the person authorising it.

Most obviously, the fact that the Labour Party exceeded the cap on its election expenses by at least \$400,000 without facing any legal consequences puts the limit's effectiveness in doubt. The overall issue of enforcing the rules on election campaign funding is discussed later in this article. However, beyond problems with policing the present spending limits, there is also reason to be concerned about their reach. Current restrictions apply only to 'election expenses', which include only advertising activities designed to promote a political party or candidate's chances of being elected. Because activities such as opinion polling, travel, consultant fees, etc do not count as 'election expenses', unlimited sums may be spent on them. In practice, then, the electoral contestants may spend vastly more on their campaigns than the apparently low limits provide. It is not clear, therefore, whether this regulatory control is adequate to stop the development of an 'arms race' in election spending. Certainly, both Canada and the United Kingdom require that electoral contestants include a far wider range of expenditures under their election caps (Ghaleigh, 2006).

The present cap on spending on election broadcasting is also problematic. It is not clear why a separate limit is even required, given the overall limits on 'election expenses'. In addition, because parties may only spend as much on election broadcasting as they are allocated by the Electoral Commission before the election, there is a large discrepancy between the ability of smaller and larger parties to access this medium. In 2005, for instance, Labour was entitled to spend \$1.1 million on broadcasting its campaign advertisements, while the ACT, Green, New Zealand First and United Future parties could spend only \$200,000 each. Whether it is legitimate for the law to mandate that one party will get five times more direct broadcast media exposure than its competitors is highly debatable (Geddis, 2003).

Finally, the controls placed on third-party election spending present a real difficulty. The current authorisation requirements for messages that appear to promote or encourage support for a political party or candidate only cover 'express advocacy': messages that *explicitly* urge voters to vote for some identified contestant. Consequently, third parties can spend as much as they wish on 'negative advocacy' (messages that attack or criticise a candidate or party) or 'issue advocacy' (messages that purport to discuss issues,

even if intended to help a party or candidate).⁴ For one thing, this regulatory framework encourages third parties to engage in the kind of negative, attack politics so disliked by the general public and epitomised by the Exclusive Brethren church's leaflets targeting Labour and the Greens. Furthermore, the loophole created by allowing third-party 'issue advocacy' fatally undermines the limits on 'express advocacy', as was also graphically illustrated during the 2005 campaign. For example, various unions distributed leaflets 'comparing' the policy stance of differing parties on matters such as employment and education policy, with the clear intention of encouraging a vote for the Labour, Green or Progressive Coalition parties. Similarly, the racing industry's 'vote for fair tax' campaign was a barely-disguised attempt to increase National's share of the vote (Hager, 2006, ch.13). However, clamping down on this kind of election-related spending brings to the fore the clash between participant freedom and equality outlined earlier. Closing 'loopholes' in the regulatory scheme means limiting individual and group (other than the candidates and political parties) participation during the course of the election campaign. Deciding whether this is a desirable step requires a careful balancing of our commitments to individual freedom and equality (Geddis, 2001a, 2001c; Geddis, 2004b).

3: The issue of increased public assistance

The auditor-general's post-election finding of widespread misuse of parliamentary funding has produced calls to reduce the temptation that political actors will exploit this resource, by expanding the amount of direct public funding available for electoral campaign purposes. At present, direct public funding of the election participants' activities is restricted to the \$3.212 million broadcasting allocation. There are several arguments for why this limited form (and level) of funding may be inadequate. The Royal Commission on the Electoral System, for example, recommended that registered political parties should receive a bulk sum based on the number of votes gained by a party at the previous election (Royal Commission, 1986, pp.226-9). It claimed that this measure would alleviate financial inequality between the parties and reduce the risk that large donors might exert unwarranted influence over

4 However, the Electoral Act 1993 does require that such messages identify the 'true identity' and address of the person responsible for them.

a party's policy positions. Increased campaign costs in the following two decades, allied to the overall decline in party membership, only served to strengthen these concerns. In addition, it has been argued that a fall in private funding following any introduction of tighter supply side controls, such as more stringent public disclosure of the identity of individual donors, might require compensatory public funding. Simply put, if the New Zealand public wants to avoid its political parties being dependent upon a few large-scale donors to fund their activities, or even skirting the legal rules in order to obtain the money they need to operate, then it will need to provide the necessary funding through general tax revenue.

However, there are also potential problems involved in establishing any public-funding scheme (Geddis, 2002). Its design will require careful attention, lest it entrench already established political parties against displacement by emerging political movements. Crucial to this issue is the support threshold at which public funding is made available to electoral contestants: a higher threshold privileges established parties, while adopting a lower threshold will increase overall financial costs. On a more principled level, we must ask whether the taxpaying public should be forced into contributing financially to political parties that cannot convince individuals to support them voluntarily. Furthermore, there is a risk that providing a stream of guaranteed funding might contribute to the further 'cartelisation' of the political parties (Miller, 2006). If parties are able to fund their activities substantially through direct grants from the state, then their leadership may become even more insulated from the influence of its grass-roots membership. Such an outcome would be of real concern in an era of already declining levels of party membership.

There are, of course, means of trying to bring about the positive ends promised by public assistance measures while limiting any risks involved in their adoption. One is to combine only partial taxpayer funding for political parties with restrictions on how much private donors may contribute. Political parties would thus be forced to raise the extra campaign funds they may require from an extended pool of supporters, rather than being able to rely on a few large-scale backers. The way in which public assistance is provided can also be tailored to encourage parties to seek (and supporters to give) small,

individual donations: by providing a tax write-off in the same way as gifts to charities, or by giving parties a matching amount for small contributions. Finally, there is the more invasive option of requiring that parties wishing to receive public assistance must first agree to a set of standards relating to internal party democracy. These standards could set out an individual member's basic right to participate in choosing the party's office holders and candidates, as well as take part in the development of party policy. However, bringing the regulatory power of the state to bear on the internal workings of the political parties raises its own particular set of problems (Geddis, 2005).

The problem of rule enforcement

Following the 2005 election, New Zealand's electoral administrators reported 17 potential electoral offences to the police. However, the police subsequently declined to prosecute any of these matters, even after accepting that there was strong prima facie evidence that an offence had occurred in some instances (New Zealand Police, 2006). This failure to bring a prosecution even in a situation where the law clearly appeared to have been breached raises the general problem of enforcing the rules around election campaign funding. Simply put, there is little point in having a well designed and comprehensive set of rules to govern how money may be raised and spent at election time if those who break the rules are not held to account for their actions.

One response to this enforcement problem would be to transfer responsibility for investigating and responding to potential breaches of (at least some) matters of electoral law from the police to the electoral administrators.⁵ The role played by the commissioner of Canada elections provides a useful template in this regard. The commissioner of Canada elections is a non-partisan official appointed by Canada's chief electoral officer (who is in turn appointed by, and reports directly to, the Canadian House of Commons), with the statutory duty to ensure compliance with Canada's electoral law (Davidson, 2004). In carrying out this responsibility, the commissioner of Canada elections can investigate any alleged breach of the electoral law and decide on an appropriate course of action to remedy any infraction.

5 There may still be some serious criminal matters – such as allegations of bribery or undue influence – for which the police should retain responsibility for investigating and prosecuting.

Therefore, he or she has exclusive responsibility for initiating a prosecution under Canada's electoral law. In addition, the commissioner of Canada elections may negotiate binding compliance agreements with electoral participants to remedy a breach of the electoral law, or seek injunctions from the courts to prevent an ongoing breach of the law.

Alternatively, if enforcement is going to be left in the hands of the police, steps need to be taken to ensure that they take this role more seriously than at present. One means of achieving this would be to raise the potential penalties for a breach of electoral law. At present, 'illegal practices' attract only a fine of up to \$3,000, while more serious (but far less commonly alleged) 'corrupt practices' attract a possible sentence of up to one year in prison, a fine of up to \$4,000, or both. Consequently, even if a prosecution is successful, the likely penalty at present makes it appear that it is not worth the time and effort involved. Additionally, the police should incorporate a 'harm to the democratic process' component when they are deciding whether to prosecute an electoral offence. That is to say, they should not treat a breach of the rules governing the funding of elections as being a kind of 'victimless crime'. In so far as such breaches undermine the overall integrity of the election process, they threaten the legitimacy of our entire system of government. The enforcement agents' attitude towards pursuing and prosecuting those who have broken the law governing election campaign funding should reflect this fact.

How should reform be implemented?

To return to the beginning of this article, the 2005 election has revealed problems with New Zealand's regulatory scheme that require (and have been promised) urgent attention. At a minimum, the disclosure rules applying to donations, the present controls on third-party advertising and the method of enforcing the election laws all must be tightened considerably. Donations from foreign individuals and companies should also be banned, and serious thought needs to be given to whether companies, unions and wealthy individuals should remain free to make unlimited contributions to those contesting each election. My own view is that it is inconsistent with the broadly egalitarian thrust of our electoral processes to allow such unequal funding practices to continue, and that only donations from individuals should be

allowed up to a limit of (say) \$20,000. Finally, New Zealand should bite the bullet and accept that taxpayer funds are necessary to ensure that a range of sufficiently well-resourced political parties continue to exist in our MMP environment. The optimum way to distribute this public assistance, I would argue, is by allowing individual donors to registered parties a tax write-off of up to \$500, just as is provided to those who give money to charity (Geddis, 2002).

That being said, the final shape of any reform measures will inevitably be fiercely contested. For one thing, any proposal will have partisan political implications, raising the spectre that its intention is to maximise the interests of the parties that designed it. But beyond calculations of electoral gain and loss, any set of new rules will also involve a trade-off between values of freedom and equality, upon which reasonable, well-meaning people may disagree. Consequently, the process of reform must ensure that the chances of partisan manipulation are minimised, while principled disagreements are recognised and debated thoroughly. In an ideal world, a process akin to the Royal Commission on the Electoral System, or the recent Citizens' Assembly on Electoral Reform held in British Columbia, could be adopted. However, such processes are time consuming, and it is perhaps better to address this issue while there is momentum behind it. Furthermore, it is questionable whether parliamentarians would be prepared to allow control over the issue to slip out of their hands.

Therefore, the manner in which Parliament goes about examining and debating changes to the rules governing the funding of election campaigns is going to be particularly important. At a minimum, the process should be approached with the aim of getting as many parties to support as many of the changes as possible. Any rules enacted by a narrow majority will immediately raise concerns about partisanship, as will rules that are supported by the two major parties alone. Furthermore, the scrutiny of proposed changes by the justice and electoral committee will be critical to the overall legitimacy of the reform process. At present only the Labour, National and Green parties have members on this committee. Clearly, the other parties represented in Parliament will need to become involved in the scrutiny process by providing members for this issue. Furthermore, the committee could profitably consider inviting submissions on proposed

legislation from a range of international electoral experts. Although every country is somewhat different, and a New Zealand solution is required for New Zealand's problems, the experience of other nations can still be useful and instructive. And finally, there will be a general responsibility on the part of parliamentarians, the media and academics to ensure that the public is kept fully aware of what changes are proposed. For in the end, it is their electoral system that is at stake.

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