

Regulating Political Contributions Another View from Across the Tasman

This article compares the Australian and New Zealand electoral finance regimes, with a particular focus on political contributions. Three specific areas are examined: disclosure of contributions; limits on contributions; and regulating the sale of access and influence. This examination is underpinned by what I see as the key purposes of democratic political finance regimes (Tham, 2010, ch.1):

- protecting the integrity of representative government, an aim which encompasses the prevention of corruption;
- promoting fairness in politics, especially in elections;
- supporting parties to discharge their functions;
- respecting political freedoms, in particular freedom of political expression and freedom of political association.

Disclosure of contributions

The key principle underlying disclosure schemes is transparency of electoral financing. Such transparency is required to protect the integrity of representative government in three ways. It aids informed voting, thereby buttressing the integrity of electoral processes. Moreover, it is a crucial tool for preventing corruption. Further, such transparency is in itself necessary to protect public confidence in representative government. Besides these broader rationales, transparency of political funding is also necessary to ensure the effectiveness of specific regulatory measures. For instance, contribution limits can only work effectively if

accompanied by adequate disclosure of political contributions.

In Australia, a mix of federal, state and territory schemes governs the disclosure of political contributions. Here I will focus on the federal scheme, which is found in the Commonwealth Electoral Act 1918 (Cth). Under this Act, registered political parties and their 'associated entities'¹ are obliged to submit annual disclosure returns. Virtually identical disclosure requirements apply to each. The returns are required to be in a form approved by the Australian Electoral Commission (AEC) and must disclose the total amount received, paid or owed by, or on behalf of, the registered political party or associated entity for the financial year. In addition to disclosing these totals, registered 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 exceeding an indexed threshold. In 2009–10 the indexed threshold stood at AUD\$11,200 (or around NZ\$13,250). In calculating whether this sum has been reached for payments made to the party (or associated entity), amounts below the indexed threshold can be disregarded. Consequently, cumulative donations that exceed the threshold can be disregarded unless one or more of these donations

Dr Joo-Cheong Tham is a Senior Lecturer at Melbourne Law School, Melbourne, Australia.

exceed the threshold. Once the indexed threshold has been reached, however, registered 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.

Persons who donate to a registered political party an amount exceeding the indexed threshold in any particular year are also subject to annual disclosure obligations in that they must lodge a statement disclosing all such gifts to the AEC and itemise those exceeding the indexed threshold; they are also obliged to itemise gifts exceeding the indexed threshold that were used to make the gifts to the political party. Further, third parties that have spent more than the indexed threshold in a financial year on political expenditure must disclose to the AEC details of gifts received exceeding the indexed threshold that were used for such spending.

Candidates and groups of candidates are required, after every election, to provide to the AEC a statement disclosing details of gifts received during the period between elections if they exceeded the indexed threshold. Persons who have donated amounts exceeding the indexed threshold to candidates (and groups of candidates) must also disclose details of such gifts to the AEC after the relevant election.

This scheme is, as Graeme Orr characterised it, 'lackadaisical' (Orr, 2007). First, there is the high disclosure threshold of AUD\$11,200 (in New Zealand, the threshold is NZ\$10,000). This has the effect of shrouding considerable portions of the parties' income in secrecy. According to Commonwealth Parliamentary Library research, the previous disclosure threshold of \$1,500 or more resulted in nearly three-quarters – 74.7% – of declared total receipts being itemised over the period spanning from the 1998–99 financial year to the 2004–05 financial year. A threshold of \$10,000 applied to the same data lowers this figure to 64.1% (Miskin and Barber, 2006). Updating the research of the Commonwealth Parliamentary Library, the Joint Standing

Committee on Electoral Matters found that under the \$10,300 threshold (which applied in 2006–07), only 52.6% of the income of the Australian Labor (ALP) and Coalition parties was itemised for that year (Joint Standing Committee on Electoral Matters, 2008, p.33) On these calculations, we have a remarkable situation where the source of nearly half of the income of the major parties is unknown.

Lack of transparency in relation to the funding of third parties (and their parallel campaigns) corrupts the electoral processes as it undermines informed voting decisions.

Second, there is the high threshold for anonymous contributions: AUD\$11,200 (in New Zealand, it is NZ\$1,000). This is the result of the Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006 (Cth), which lifted the cap on allowable individual anonymous donations from \$1,000 to \$10,000 (and indexed this cap to inflation). Such a high threshold seriously risks compromising transparency. It is less about public disclosure of donations and loans and more about records kept by parties: it will mean that parties can legally accept larger sums without recording details of the donor. This potentially renders the whole notion of disclosure thresholds meaningless.

A further limitation of the federal disclosure scheme is the lack of timeliness. The AEC has observed in relation to federal annual returns that '[t]his form of ... reporting and release can result in delays that can discount the relevance of making the information public' (Australian Electoral Commission, 2000,

para 2.10). Specifically, the dated nature of the returns means that voters do not have access to the relevant information when determining their voting choices. For example, in late September 2004 British Lord Michael Ashcroft donated \$1 million to the federal Liberal Party, barely a fortnight before the October 2004 federal election. Citizens casting their votes in that election were completely unaware of this contribution and only found out more than 15 months later, on 1 February 2005 when the AEC released the disclosure returns. Here, there is much to be said for the New Zealand requirement to disclose any donation exceeding NZ\$20,000 within 10 working days of its receipt.²

Are there elements of the Australian federal disclosure scheme that might provide lessons for New Zealand? One area is perhaps worth mentioning. This concerns the disclosure obligations of third parties. All four principles of a democratic political finance regime are implicated here. Lack of transparency in relation to the funding of third parties (and their parallel campaigns) corrupts the electoral processes as it undermines informed voting decisions. There is also a question of fairness in politics, specifically fairness between political parties and third parties: subjecting political parties to disclosure obligations while leaving third parties exempt potentially provides the latter with an unfair advantage. This unfair advantage further risks undermining the ability of political parties to discharge their functions, in particular their electoral function of providing choice and competition to voters. The danger here is that political parties focus more on fending off the attacks of third parties than on competing amongst themselves. And, finally, the principle of respect for political freedoms clearly applies as disclosure obligations on third parties will mean greater regulation of political campaigning.

Presently, the federal scheme provides for greater transparency in relation to the financing of third parties by subjecting these groups to disclosure obligations, a measure that is not contained in the current New Zealand Electoral (Finance

Reform and Advance Voting) Amendment Bill. On the other hand, the Australian scheme does not require third parties which spend beyond a certain amount to register with the AEC, a measure that is in the bill. In my view, both registration and disclosure obligations should apply. Concerns about the impact on political freedoms can be addressed through properly tailored provisions.

Limits on contributions

Here the position in Australia is very similar to New Zealand in that there are very few limits on contributions to candidates, their parties or other electoral actors. Indeed, there are fewer limits than in New Zealand. Whereas New Zealand bans foreign donations exceeding NZ\$1,000,³ there is no such ban in Australia except in Queensland. The only other source restriction is a New South Wales ban on political donations from property developers. The only restriction as to the amount of political funding is that which applies under the Victoria's Electoral Act. This legislation prohibits holders of casino and gambling licences and their related companies from making political donations exceeding \$50,000 in a financial year to each registered political party.

In Australia, greater restrictions on political contributions have growing support across the political spectrum. Former New South Wales premier Morris Iemma has even advanced the radical proposal of completely banning political contributions in favour of a system of complete public funding. Following closely, his predecessor Bob Carr has advocated banning political contributions from organisations like trade unions and companies and allowing only those made by individuals. Former leader of the federal opposition Malcolm Turnbull and the New South Wales Greens have similar positions. Queensland premier Anna Bligh has also called for a national cap of political donations exceeding \$1,000 and has signalled that Queensland will act to implement such a cap by July 2010 if there is no movement on the federal front. In a bipartisan report, the New South Wales Legislative Council Select Committee on Electoral and Political Party Funding

(NSW Select Committee) recommended that there be a ban on all political donations except those by individuals. Contributions by individuals are further to be limited to \$1,000 for each political party per annum (and \$1,000 for each independent candidate per electoral cycle) (NSW Select Committee, 2008, p.105).

There are compelling arguments for a limit on contributions such as those recommended by the NSW Select Committee. Such limits will clearly act as a preventive measure in relation to corruption: as the amount of money contributed by an individual increases,

... contribution limits are likely to mean that parties will spend more time fundraising; they will need to persuade more individuals to part with their money, a development that is likely to detract from the performance of their democratic functions ...

so does the risk of corruption. Therefore, bans on large contributions can directly deter corruption (and also obviate the need for selective bans on property developers and holders of gambling licences). On a related point, such limits will promote fairness in politics as they prevent the wealthy from using their money to secure a disproportionate influence on the political process. The result is to promote the fair value of political freedoms despite limiting the formal freedom to contribute.⁴ Further, by requiring parties to secure the support of a large base of small contributors, such limits are likely to enhance their participatory function.

Significant objections to contribution

limits do, however, need to be addressed (Ewing, 2007, pp.227-30). First and foremost, instituting such limits by themselves will leave the parties seriously underfunded given that the major Australian political parties are presently heavily reliant on large contributions. In the context of party government, jeopardising the existence of the parties must mean placing the system of government at risk. It is also unclear what impact the contribution limits will have on fairness amongst the parties. Further, contribution limits are likely to mean that parties will spend more time fundraising; they will need to persuade more individuals to part with their money, a development that is likely to detract from the performance of their democratic functions (apart from the participatory function). This will intensify especially if the 'arms race' between the major Australian parties continues.

These objections are, however, not insurmountable. It is, firstly, imperative that contribution limits be adopted as part of a broader package of reform. One of the central difficulties with the position of those who advocate contribution limits as the principal, or even the only, reform measure is that they do not fully deal with the potential adverse impact of such limits. To ameliorate such impact, there needs to be a reconfiguration of public funding of parties and candidates, including a significant increase in such funding to make up for the shortfall resulting from limits on contributions. Such funding should provide for sustainable parties, redress any inequities that arise from contribution limits and also lessen the risk of parties devoting an undue amount of time to fundraising. Further, contribution limits must be accompanied by election spending limits. The latter limits will staunch the demand that fuels the parties' aggressive fundraising activities.

A vexed issue concerns the impact of such limits on trade union affiliation fees. My view is that membership fees (within limits) should be exempted from any contribution limits. As the NSW Select Committee correctly recognised, 'membership of political parties is an important means for individuals to participate in the political process' (NSW Select Committee, 2008, p.113). Specifically,

it involves participation within political parties, thereby directly enhancing the participatory function of parties. Whilst contribution limits permit membership fees below the limits, an exemption goes beyond such permissiveness by encouraging party membership. Second, the exemption for membership fees should extend to organisational membership fees, including trade union affiliation fees. A ban on organisational membership fees will give rise to anomalies, is misdirected at 'trade union bosses' and constitutes an unjustified limitation on freedom of party association (Tham, 2010, ch.4).

Dealing with the sale of access and influence

The sale of access and influence is endemic amongst the major Australian parties. Here are some examples. The Victorian ALP's Progressive Business has been described as 'one of the most efficient money-making operations in the country' (Bachelard, 2007). Its website states that its 'express purpose [is] building dialogue and understanding between the business community and government'. It currently offers to two types of membership, corporate and small business, priced at \$1,550 and \$990 per annum respectively, entitling the company to a set number of breakfast and twilight ministerial briefings. The 2009 annual Progressive Business dinner, for example, witnessed Latrobe Fertilisers, a company vigorously advocating the use of Gippsland coal mines for the production of fertiliser, paying \$10,000 to the ALP so that its chairman, Allan Blood, could sit at the side of Victorian premier John Brumby and, in Blood's words, 'ben[d] his ear' (Millar and Austin, 2009). The Liberal Party has a fundraising organisation that goes by the name of the 500 Club. According to its website, membership of the 500 Club will provide 'a tailored series of informal, more personally styled, early evening events', thus 'adding a new level of value for ... Club members'.

Party meetings are also a favoured venue for selling influence. At the 2007 federal ALP conference, major companies, including NAB, Westpac and Telstra, engaged a high-price escort service: at \$7,000 per person, their representatives were accompanied by

federal ALP frontbenchers for the span of the conference. Tables at the conference dinner were also sold for up to \$15,000 for the privilege of sitting next to shadow ministers (Grattan and Murphy, 2007). At the 2007 Liberal Party federal council, federal ministers auctioned off their time to the tune of thousands of dollars: a harbour cruise with Tony Abbott, then health minister, fetched \$10,000, while a night at the opera with Helen Coonan, then minister for communications, information technology and the arts, picked up a princely sum of \$12,000. This activity took place under the council theme of 'Doing what's right for Australia' (Schubert, 2007).

... the experience of other countries can often cast light on how the role of money in politics is variously addressed and regulated.

These practices are emphatic instances of what Michael Walzer characterises as a 'blocked exchange', where money is used to buy political power (Walzer, 1983, p.100). They constitute a form of corruption. It is uncontroversial that public officials including elected officials are to act in the public interest. A central part of this duty is to decide matters on their merits. The purchase of access and influence, however, creates a conflict between the public duty of deciding matters on merits and the financial interests of the party or candidate, resulting in some public officials giving undue weight to the interests of their financiers. This is corruption through undue influence (Lowenstein, 1989, pp.323-29).

That the bargains struck in the sale of access and influence are not overt or explicit makes little difference to the question of corruption through undue influence: the structure of incentives facing parties and their leaders once a contribution is received remains the same, with their judgment improperly skewed towards the interests of their financiers (Beitz, 1984, p.137). With these incentives, there is a double injury to the democratic process: wealthy donors are unfairly privileged, while the interests of ordinary citizens become sidelined. Such injury highlights how the sale of access and influence is not only corrupt because it undermines merit-based decision making but is also unfair: contributors are illegitimately empowered in the political process, while others are illegitimately disempowered.

What, then, should be done as a matter of regulation? Limits on contributions, of course, provide one way forward. There are also other measures that could be more effective. For example, there could be a ban on ministers and parliamentarians attending fundraising events, a measure that has been adopted by Queensland premier Anna Bligh. The sale of access and influence can also be tackled through greater transparency in relation to lobbying (which is what these occasions amount to). There should an obligation to publish, at regular intervals, specific information on the meetings between lobbyists and government representatives, including the name of the lobbyist/s, dates of contact, meeting attendees and a summary of issues discussed. This has been the recommendation of a New South Wales parliamentary committee and the New South Wales Independent Commission Against Corruption, as well as by various British committees on standards in public life (New South Wales Legislative Council General Purpose Standing Committee, p.60; NSW ICAC, p.101; Committee on Standards in Public Life, 2000, p.36, 2008, p.4; Committee on Standards in Public Life, 2000, p.36, 2008, p.4).

Conclusion

Ewing and Issacharoff have identified a (non-exhaustive) list of factors that determine the choice of regulatory method

in the area of political finance. These factors relate to history, geography, class structures, constitutional systems, party systems, electoral systems and ideological traditions (Ewing and Issacharoff, 2006, pp.6-7). If we take such complexity seriously – and we should – it is obvious that questions as to whether any country, including New Zealand, should adopt particular regulatory measures are only properly answered by an in-depth inquiry into its specific circumstances and cannot (and should not) be read off comparisons (including the one essayed in this article).

We should abandon the misconceived notion that there is an international ‘best practice’, or that there is a continuum on which we can locate regulatory models as ‘strong’ or ‘weak’.

To make these points is not, however, to advocate a parochial stance closed off to overseas example; the experience of other countries can often cast light on how the role of money in politics is variously addressed and regulated. The aim is not to deprecate the importance of comparative analysis but rather to point to its limits: it broadens our horizons by gesturing to

what is possible, but often says very little as to what is desirable.

References

- Australian Electoral Commission (2000), *Submission to the Joint Standing Committee on Electoral Matters Inquiry into Electoral Funding and Disclosure*, http://www.aph.gov.au/house/committee/em/f_d/subseven.pdf
- Bachelard, M. (2007) ‘Taking their toll’, *The Age*, 14 May, p.9
- Beitz, C. (1984) ‘Political Finance in the United States: a survey of research’, *Ethics*, 95 (1)
- Committee on Standards in Public Life (2000), *Standards in Public Life: first report of the Committee on Standards in Public Life: volume 1*
- Committee on Standards in Public Life (2008), *Reinforcing Standards: sixth report of the Committee on Standards in Public Life*
- Ewing, K. and S. Issacharoff (2006) ‘Introduction’, in K. Ewing and S. Issacharoff (eds), *Party Funding and Campaign Financing in International Perspective*, Oxford: Hart Publishing
- Ewing, K. (2007) *The Cost of Democracy: party funding in modern British politics*, Oxford: Hart Publishing
- Grattan, M. and K. Murphy (2007) ‘Hope in the hearts of Labor faithful’, *The Age*, 27 April, p.1
- Joint Standing Committee on Electoral Matters (2008) *Advisory Report on the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008*
- Lowenstein, D. (1989) ‘On campaign finance reform: the root of all evil is deeply rooted’, *Hofstra Law Review*, 18
- Millar, R. and P. Austin (2009) ‘\$10 000 to sit next to Brumby’, *The Age*, 3 November, p.1
- Miskin, S. and Barber, G. (2006) *Political Finance Disclosure under Current and Proposed Thresholds*, Parliamentary Library Research Note No 27/2006
- New South Wales Independent Committee against Corruption (NSW ICAC), *Report on Investigation into Planning Decisions Relating to the Orange Grove Centre*
- New South Wales Legislative Council General Purpose Standing Committee, *Badgerys Creek Land Dealings and Planning Decisions*
- New South Wales Select Committee on Electoral and Political Party Funding (2008), *Electoral and Political Party Funding in New South Wales*, <http://parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/1CA6D5A89FABD975CA25746D00063640>
- Orr, G. (2007) ‘Political disclosure regulation in Australia: lackadaisical law’, *Election Law Journal*, 6 (1)
- Rawls, J. (1996) *Political Liberalism*, New York: Columbia University Press
- Rawls, J. (2001) in E. Kelly (ed.) *Justice as Fairness: a restatement*, Cambridge, MA: Belknap Press
- Schubert, M. (2007) ‘Party hopes party won’t end so soon’, *The Age*, 4 June, p.6
- Tham, J. (2010) *Money and Politics: the democracy we can’t afford*, Sydney: University of New South Wales Press
- Walzer, M. (1983) *Spheres of Justice: a defense of pluralism and equality*, New York: Basic Books

-
- 1 ‘Associated entities’ of political parties are defined in the Commonwealth Electoral Act 1918, s.287. Essentially the terms covers individuals or groups controlled by or operating for the benefit of a political party, as well as individual members of or those with voting rights in a party.
 - 2 Queensland recently has adopted a similar requirement that political parties disclose gifts of \$100,000 or more within 14 days.
 - 3 The Electoral (Finance Reform and Advance Voting) Amendment Bill proposes amending this cap to make it clear it applies to each foreign donor, not to each particular donation.
 - 4 John Rawls has referred to restrictions on contributions as a possible means for ensuring fair value of political liberties: see Rawls, 1996, pp.357-8 and 2001, p.149.