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# PUBLIC MONEY AND ELECTIONEERING

# A View from Across the Tasman

## Introduction

This article compares some key aspects of political finance regulation in Australia and New Zealand. It centres on public money and electioneering expenditure. These are treated in three sections: expenditure limits; incumbency benefits, such as government advertising and parliamentary entitlements; and direct public funding of electioneering. A comparison paper by Joo-Cheong Tham explores private money in politics, in particular donations and their disclosure.

With one significant exception – public funding – Australia’s approach to political finance has been decidedly *laissez-faire* (see Orr, 2010; Tham, 2010). This is clear by comparison with New Zealand, Canada and the United Kingdom. Australia and New Zealand may be separated by just 2,000 kilometres of the Tasman Sea but, in regulatory terms, New Zealand lies close to Britain and Australia lies closer to the United States.

That said, Australia might be catching up on international developments. For the past couple of years, concerns with accountability, corruptibility and the cost of electoral politics have driven several inquiries and elicited cross-party support for significant reform. There is some bipartisan support for both contribution and expenditure limits. The trajectory of Australian debate is thus towards more regulation, at a time when New Zealand is turning the other way, particularly as regards third parties. At the time of writing, however (May 2010), Australia is yet to see any comprehensive reform bills.

## Expenditure limits

New Zealand has, for some time imposed limits on election year expenditure. Only in the last two years has Australia begun to seriously consider capping expenditure. The only jurisdiction in Australia that caps campaign expenditure currently is Tasmania’s upper house (in practice a cap on candidate spending, as the house is the only Westminster-style chamber to remain dominated by independents).

The belated emergence of interest in expenditure caps in Australia is born of a widespread and multi-partisan feeling that Australian political finance needs significant reform. The feeling is strongest in New South Wales, where local and state-level corruption and undue donor influence are particularly pronounced. In March a multi-party committee recommended:

- capping expenditure by parties and candidates, the party cap to be based on seats contested. The cap might apply from the beginning of each election year. In comparison, New Zealand is proposing to reduce its regulated period to a maximum of 90 days prior to the poll.
- capping third-party expenditure, at a figure ‘significantly lower’ than the party cap. In comparison, New Zealand is abolishing its cap on third-party or ‘parallel’ campaigns. (NSW Parliament, 2010, recommendations 19–22)

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The New South Wales committee did not suggest a figure for the expenditure caps, or define their scope except to give two principles:

- electioneering, but not administration costs, should be covered;
- public funding levels, government advertising and third-party activities should be taken into account.

## Notoriously, in 2005 the New Zealand auditor-general identified 'widespread' electioneering abuses of MP support, leadership and party funds. All but one party was implicated, and over NZ\$1.17m was involved.

The New South Wales Electoral Commission stuck out its neck and proposed more detail, in particular that third-party, or lobby, groups be capped at the equivalent of NZ\$260,000 per election year, with only New South Wales electors or New South Wales organisations being entitled to electioneer.

These caps were proposed in tandem with a tight annual limit on donations, of about NZ\$2,600 per annum from any elector to any party or its candidates. Corporations and organisations would not be permitted to donate; but they could (a) join parties or (b) affiliate, like trade unions, but with their fees corralled for administrative and not electioneering purposes. The committee recommended increasing public funding to compensate, but opposed any move to 'full public funding' (NSW Parliament, 2010, recommendations 28–29).

The recommendations were heavily influenced by the Canadian system, discussed by Colin Feasby in this issue. Attention to New Zealand experience was less apparent. Whilst the sensitivity of restricting third-party restrictions was acknowledged in a recommendation for wide-ranging consultation prior to legislative drafting, the New South Wales committee nonetheless recommended consideration of mandatory registration, auditing and disclosure for third-party

campaigns. In contrast, having repealed the Election Finance Act 2007 as too heavy-handed, the New Zealand Cabinet decided to favour 'lighter touch' regulation of third-party (or 'parallel campaigner') campaigns (New Zealand Cabinet, 2009, p.2). Under its Electoral (Finance Reform and Advance Voting) Bill, electioneering campaigns of over NZ\$12,000 would still require

registration. Unlike parties and candidates, however, third parties will no longer face expenditure caps, let alone an obligation to submit expenditure or donation returns (New Zealand Cabinet, 2009).

Nor has Australia confronted the question of what to include in an expenditure cap. At present, Australian definitions of 'electoral matter' or 'political expenditure' are quite broad. They cover anything 'intended or likely to affect voting in an election', or 'the public expression of views on an issue in an election'.<sup>1</sup> But these were designed to trigger disclosure of the authors and funders of political speech. Narrower definitions may be required for restrictions on expenditure on – and hence the quantum of – such speech. Indeed, even the 2007 Act sought to avoid capturing pure issue advertising in its net (Geddis, 2008, pp.220–1). Of course, the distinction between issue advertising and advertising promoting or denigrating a particular party is a slippery one. It may be cleaner to simply bite the bullet and restrict all political campaigning during the election period.

Designing expenditure caps in Australia will be bedevilled by two factors. One is constitutional. The High Court, in the ACTV case in 1992,<sup>2</sup> discovered an implied freedom of political communication. At the suit

of a television company, it used that implied freedom to strike down a United Kingdom/New Zealand-style system of banning campaign broadcasts in favour of free air-time. Expenditure limits need not be unconstitutional, however, provided they are proportionate to legitimate ends such as electoral equality and political integrity.

A second complication, which New Zealand legislators do not face, is Australia's federal system. It is one thing for a state or national parliament to legislate caps, but political issues and money are fluid and cross-jurisdictional. Legislators can force their parties to keep separate campaign accounts, but once regulation extends beyond the narrow and formal election campaign period the problem of regulating political money in a federation becomes more complex, and ideally requires uniform laws.

### Incumbency benefits: parliamentary allowances and government advertising

Parliamentary entitlements are numerous, intricate,<sup>3</sup> and subject to perennial tinkering. Concern in Australia lies chiefly in two types: electorate allowances, and printing and communication allowances. Electorate allowances of between NZ\$40,000 and \$60,000pa are paid without strings attached. Federal MPs can use them to top up their base salary and defray expenses. Or, like salary, they are free to plough them into electioneering. There are calls for separate accounting of electorate allowances and to ensure that they are not used for electioneering.<sup>4</sup>

Other, non-salary allowances are sizeable: amounting to about NZ\$210.6m in 2008–09 (or just over NZ\$930,000 per federal MP). Of these, printing and communication entitlements permit MPs to address their electorates through direct mail and newsletters. There has been an ongoing tug of war over their quantum and use. Formerly uncapped, these allowances drew the ire of the auditor-general in 2001. A choice example of the problem involved Bob Horne, a Labor MHR in a marginal seat, spending about NZ\$284,000 on printing allowance alone, six times the average of other MPs. Dubbed 'Bob-the-Printer', he still lost his seat (Tham and Young, 2006, p.55).

The Howard government subsequently introduced caps. But these were generous in size and scope. The printing allowance still exceeded NZ\$195,000 per annum in 2006.<sup>5</sup> Close to half could be squirrelled away and rolled over, say into an election year, and special ministers of state ruled that it could be used for pure electioneering in the form of how-to-vote and postal vote material. Unlike in New Zealand, there has not even been an explicit rule against such moneys being used for 'electioneering'. Unsurprisingly, the auditor-general recently found that nearly three-quarters of MPs' communications were likely to be outside the notional purpose of 'constituency service' (Auditor-General for Australia, 2009–10, p.17).

This is not to say that New Zealand has had best practice. Notoriously, in 2005 the New Zealand auditor-general identified 'widespread' electioneering abuses of MP support, leadership and party funds. All but one party was implicated, and over NZ\$1.17m was involved. The Parliamentary Service Act 2000 definition currently only forbids parliamentary funds being used to explicitly seek voter support. This creates a loophole for both negative and issue advertising using parliamentary entitlements. The Electoral Act 1993 definition of 'election advertising', capping private expenditure, is broader. The New Zealand Cabinet has endorsed a proposal to harmonise the definitions by adopting the broader definition for parliamentary material, but only during the regulated election campaign period (New Zealand Cabinet, 2009, appendix 2). This restriction is only a partial solution. Yet it is tighter than anything yet proposed in Australia. Australia in many regards is in catch-up mode with New Zealand. It took until mid-2009 to adopt the New Zealand practice of pre-screening MPs' material.

In both countries, the department overseeing parliamentary entitlements (New Zealand Parliamentary Services and the Australian Department of Finance) has faced criticism for a lack of rigorous scrutiny.<sup>6</sup> Parliamentarians argue that they act in good faith, on conventional beliefs about proper usage. In other words, everyone makes hay when the

system lacks clear rules and accountability. The convention is one of a double effect: electoral benefit is fine, provided it is incidental to material that is otherwise directed to constituency business. But in Australia particularly, the convention is belied around election time by a 'surge' in use of allowances leading up to each election; and by leaflets that mirror party

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(especially attack) advertising.<sup>7</sup> Rules have even had to be devised to prevent MPs in safe seats – and senators who do little personal campaigning – from using their allowances to prop up other campaigns. While New Zealand lacks an upper house, a similar problem must arise if party-list MP allowances are used in a targeted way to assist colleagues in marginal constituencies.

An Australian special minister of state independent committee is due to report on parliamentary entitlements. This should build on decisions made in mid-2009 to rein in crasser aspects of system – by confining printing allowances to 'parliamentary or electorate business' and not 'party business or electioneering', including capping postal vote applications to 50% of the electorate and not allowing incumbents to print how-to-vote material with parliamentary funds. The problem, as with government advertising, is how to restrain incumbency benefit without strangling legitimate information and communication. Government advertising is the bigger concern in Australia, however, for two reasons (Orr, 2006). One is the sheer size of the campaigns: the High Court effectively ruled that the size is up to the executive and campaigns can even promote government bills prior

to parliamentary consideration.<sup>8</sup> Around NZ\$195m was spent on media costs alone for the WorkChoices industrial relations campaign, in which the conservative government dramatically outbid its trade union opponents. The other is that government advertising benefits only the governing party.<sup>9</sup> (Governments already benefit from a lion's share of

corporate donations, especially under an uncapped donations system, since big donations tend to favour the party in power (at least until the writing is on the wall – see McMenamin, 2008).) At least parliamentary entitlements are capped and spread across all parliamentary parties.

A repeated refrain about both government advertising and parliamentary entitlements in Australia is the absence of principles-based legislation defining and restricting their use. Instead, loose guidelines and bureaucratic discretion govern both types of expenditure. Any real oversight is falling, periodically and post-hoc, to the auditor-general. Since 2007, for instance, the Australian auditor-general has been involved in both vetting government advertising campaigns prior to their approval and auditing select campaigns after the event (Hawke, 2010). Yet that vetting role is being taken away.

#### **Public electoral funding**

Since the early 1980s, Australia has had public funding of elections.<sup>10</sup> Federal parties receive money for votes received, paid in a lump sum after each election. Each vote, in 2010, will be worth about NZ\$3, or NZ\$6 per elector given the twin House and Senate ballots. Small parties

miss out in races where they don't meet a 4% threshold. The payments come without strings attached, and although they rarely cover the full cost of electioneering in an uncapped 'arms race' they are predictable and significant. The 2007 Australian election generated the equivalent of about \$NZ60m in public funding. In contrast, the 2008 New Zealand electoral broadcasting allocation (the only direct electioneering funding) was just \$NZ3.2m.

New Zealand – like the United Kingdom – lacks either a neat or a

purpose they wish, the effect is electoral reimbursement. Such public funding explicitly recognises that electioneering is a public necessity or good, and accepts that elections are party-centred. It bypasses the problem with parliamentary entitlements of separating legitimate from illegitimate types of communication and advertising.

But that problem is far from eliminated. Public funding, far from being a magic bullet, has not restrained demand for political money in Australia. On the contrary, the arms-race in the

where parties spend money on a daily basis on confidential market research.

In the United States, a perennial problem is the size of the war chests needed to unseat an incumbent. This contributes to a sense that politics is closed to all but insiders and the individually wealthy and well-connected. Perversely, the old mechanism to wrestle power away from insiders in the form of party bosses – the primary election – only magnifies the war-chest problem.

In Westminster systems the war-chest problem may be less acute, but only by a matter of degree. It is also manifested differently. Unlike in the United States, the problem is not one of candidate finances, but party finances. And the problem is not just of private money leveraging and entrenching power, but also of public moneys reinforcing incumbency.

Australian politicians currently appear keen on increasing public funding and limiting donations, two measures not on the New Zealand radar. Cynics will note that enthusiasm for this has coincided with a decline in corporate donations during the global financial crisis; but a general weariness with fund-raising and carpet-bagging predates that crisis. While Australian campaign finance law has been less interventionist than in its common law-cousins, when Australia regulates it tends to do so with a statist bias. In particular, parties will have little stomach for imposing expenditure caps on themselves but not third parties. Libertarians in New Zealand would look askance at this approach: third-party expenditure caps in Australia could indeed be dangerous without governments accepting real restrictions on government advertising, especially in election years.

In the meantime, public funding is the only area where Australian practice is more developed than New Zealand's. Direct public funding to defray election expenses may be a cleaner and more honest method than what Geddis has labelled 'backdoor' support through a convoluted set of parliamentary service funds (Geddis, 2008, p.218). However, Australian experience shows that tight, even legislated controls and vetting of materials is needed to prevent MPs misusing parliamentary allowances for partisan purposes. In this

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developed approach to public funding. There may be good reasons for this, such as the belief that parties are private associations, not quasi-state actors. This belief has two pragmatic manifestations. There is a fear that public funding might incite taxpayer cynicism, and a longer-term concern that parties might lose sight of their grassroots.

Certainly, party membership is parlous in Australia, but that trend is common internationally. But unrestrained corporate donations are the greatest danger to parties' responsiveness to their bases. Any taxpayer opposition to public funding appears to be short-term, and counterbalanced by the fact that the money comes without strings attached.

The New Zealand Royal Commission on the Electoral System recommended Australian-style public funding. Its benefit is its simplicity. A single payment is made per electoral cycle, and democratic principle underlies paying per vote received. The 4% threshold may need lowering to take MMP into account. Whilst parties can use the funding for whatever

absence of expenditure limits has created a 'have your cake and eat it too' mentality. Generous parliamentary allowances were misused and needlessly expanded. The current Labor government's more chaste approach to government advertising and printing allowances has helped. But such tempering is likely to be temporary, unless legislation is introduced to reinforce it.

#### **Conclusion**

A common lament is that we get the best democracy money can buy. That is cynical, given there is no guaranteed, let alone linear, relationship between money spent and political outcomes. Even large-scale political expenditure can be of little avail: witness the WorkChoices government advertising and the fate of 'Bob the Printer'. Nonetheless, all else being equal, money matters. And the more the merrier: no political campaign would prefer fewer resources to more. As politics becomes even more leader-centred, it is now common for new leaders to be introduced with an advertising blitz – an example of the 'permanent campaign'



and other egalitarian measures – notably capping party expenditures – Australia lags behind New Zealand in retaining a laissez-faire bias. That libertarian bias is eroding, however, and there is momentum, across the Australian spectrum, for stronger regulation, possibly on the Canadian model of limiting donations and expenditures. Australians are considering this trajectory at the same time as New Zealand is pulling back from its high point

of interventionism, under the short-lived Election Finance Act 2007.

- 1 Commonwealth Electoral Act 1918, s4 ('electoral matter'), s314AEB ('political expenditure').
- 2 *Australian Capital Television v Commonwealth* (1992), 177 CLR 106.
- 3 Recently described as 'difficult to understand and manage' and 'complex and overdue for reform': see Auditor-General for Australia, 2009–10, pp.15, 17.
- 4 For example, former Senator Murray's submission to the Committee for the Review of Parliamentary entitlements, p.11, [http://www.finance.gov.au/parliamentary-services/docs/Mr\\_Andrew\\_Murray.pdf](http://www.finance.gov.au/parliamentary-services/docs/Mr_Andrew_Murray.pdf).
- 5 Australian MPs currently serve electorates with over twice the enrolment of those represented by New Zealand constituency MPs.

- 6 The Australian auditor-general described the Department of Finance as adopting 'a relatively gentle approach to entitlements administration' (Auditor-General for Australia, 2009–10, p.16).
- 7 The Australian auditor-general shows expenditure increasing from two to five times in election years over non-election years, as war chests are squirrelled away then spent. (Auditor-General for Australia, 2009–10, p.30; appendix 4.)
- 8 *Combet v Commonwealth* (2005), 221 ALR 621.
- 9 This need not necessarily be the case. Queensland now allows the Opposition leader to access funds for policy advertising (Department of Premier and Cabinet, 2002, section 4.5).
- 10 First for New South Wales elections (1981), then national elections (1983). Four smaller jurisdictions still lack public funding (Western Australia, South Australia, Tasmania and the Northern Territory).

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