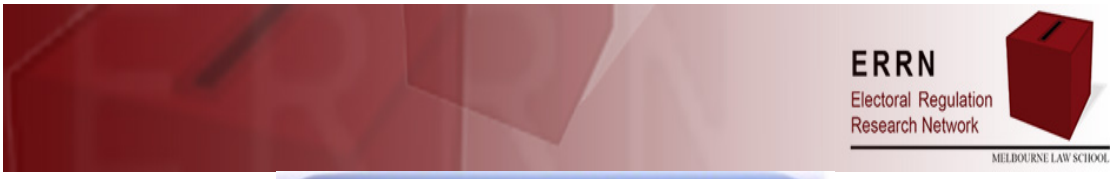

ELECTORAL REGULATION RESEARCH NETWORK/DEMOCRATIC AUDIT OF AUSTRALIA JOINT WORKING PAPER SERIES

AUSTRALIAN POLITICAL FINANCE LAW IN INTERNATIONAL PERSPECTIVE

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The regulation of political finance is becoming an increasingly salient element of the global debate about electoral integrity. The Global Commission on Democracy, Elections and Security chaired by Kofi Annan, which reported in 2012, specified it as one of five key recommendations:

- Governments should control political finance by regulating donations and expenditures, public financing of political campaigns, disclosure and transparency of donations and expenditures, and sanctions and penalties for non-compliance.

International IDEA, which was jointly responsible for establishing the Global Commission, is supporting this debate through the Global Political Finance Database, which assembles, analyses and makes public and accessible the legal and regulatory provisions relating to political finance worldwide. From the Database and its accompanying research, it is possible to make comparisons of political finance frameworks and of the principles which underlie them.

What kind of measures can be enacted to regulate political finance? Global experience shows that the menu includes:

- Income bans and donation limits – for example on corporate funding, foreign funding, or anonymous funding of participants in the political process.

- Spending bans – for example against vote buying, as in many countries, or against paid TV advertising, as in Mexico and the UK – and spending limits, restricting the amounts that parties and candidates can spend on their campaigns.

- Disclosure and publication requirements, which make the details of funding available for public inspection and scrutiny.

- Audit requirements.

- Provision of public funding to participants in the political process.

Note that not all options are possible or easily available in all countries, as constitutional provisions and their interpretation by judicial institutions may make some actions impossible in practice.

In comparing Australian and global political finance practice, it may be of particular interest to look at the systems to which Australia might have the closest relationship for historical reasons: the UK, Canada and New Zealand. A simplified summary of major areas appears in Table 1 (at the end of this document).

However, the comparison shows major divergences. In broad terms, Australian regulation falls consistently at the lighter end of the spectrum of policy options, issue by issue; Canadian regulation at the opposite, heavier end; and the UK and New Zealand take an intermediate position. This is nowhere more clear than in the attitude taken to the question of whether the deployment of money for political purposes is a question of free speech which outweighs any desire to ensure that unequal access to money does not unbalance the electoral playing field to an extent that elections are no longer seen as fair. The former approach was confirmed in Australia in a 1992 High Court ruling[1]; the Supreme Court of Canada took the opposite approach in 2004[2]. No issue has been litigated in either the UK or New Zealand that has led to a decision which firmly establishes the primacy of one or other of these two conflicting principles.

The same pattern is evident when global data is considered. Whether the issue is an area in which relatively few countries worldwide regulate, such as bans on corporate and trade union political funding, or an area in which the majority of countries regulate, such as bans on foreign political funding or free airtime for political parties during campaigns, the Australian approach is consistently hands off.

Were change to be desired at any point, let us consider the process by which it takes place, both in its design and its implementation. The basic question to ask about the possible effectiveness of any proposed is: What are the incentives that it creates?

[1] Australian Capital Television Pty Ltd v Commonwealth of Australia (1992)
[2] Harper v Canada (Attorney-General) (2004)

What can those who wish to find ways round it do? What will the bad guys (of whatever gender) do? To give a few examples:

All controls and regulations over political finance can apply to candidates and/or to parties. If you only control parties, money will flow to candidates; if you only control candidates, money will flow to parties. Legislation is much more likely to be effective if it controls both parties and candidates. In Asia, 62% of countries apply controls to candidates, but only 32% apply them to parties… guess where the money goes!

The time at which controls apply is important. Thirty years ago I was responsible for electoral campaigning for a UK political party. We had to declare all spending within the electoral district during the election period. This naturally led to two strategies. One, try to make sure that spending was done by the national party and was not attributable to any particular electoral district (a loophole that has since been closed). Two, make sure that as much as possible of the district level spending took place outside the election period: buy the equipment and materials before the election, rent them to the campaign for a few weeks.

The major parties in Australia have both a federal level organisation and an organisation within each of the six states and two territories. The limit above which individual donations have to be declared is now over AUD 12,400 – but a donation can be made separately to each organisation of a party. It is thus possible to give over AUD 100,000 to a party – which is a lot of money – without having to declare yourself as the donor. The effect of the regulation is limited.

Spending to influence the political process is of course not restricted to political parties and candidates. Third party organisations – businesses, trade unions, civil society organisations – may validly wish to make a political case. If the mechanism for doing this is unregulated, the incentive will exist to channel political spending through it. In addition, organised crime may find it desirable to pursue its objectives by channelling money into the political process.

Even when regulation is effectively designed, that is however only half the story. However much noise is made, it is of limited use if the rules that are in place are in

the end only paper tigers. As Michael Pinto-Duschinsky, who has specialised for many years in the field of political funding, says of the field in general: 'There are too many rules and too little enforcement'.

What does effective enforcement look like? It needs an enforcement body, just like any other body charged with upholding standards: independent in its operation, open in its appointment procedure, with members that have security of tenure during their term of office, without the potential of political interference with its funding flow, and with clarity of mandate and no question of overlapping jurisdiction and confusion of responsibility. In short, it needs fearless independence, the same quality as an electoral administration itself needs. Note that this is not the same as mere functional independence. World experience shows that not every body called an Independent Election Commission can be relied on to protect and enforce a level playing field for participants in the legitimate and credible despite being conducted by a government or local authority department; while there are countries, especially in Europe, where the election administration is regarded as unbiased and credible despite being embedded in an executive department of central or local government. In the same way, the task of ensuring effective enforcement is not completed by the mere creation of something labelled an Independent Political Finance Commission or equivalent.

In designing the framework for political finance oversight (and indeed political party registration and regulation), it is possible either to give responsibilities to electoral management bodies, or to take the view that this area is sufficiently sensitive that it is better to insulate the EMB and establish separate institutions. Either solution can work: the decision may depend on the extent to which the EMB enjoys public trust and respect and enjoys political capital, as perhaps exemplified by India. The IDEA database shows that Australia gives the responsibility for receiving political finance declarations to the electoral management body, the AEC – in common with 46% of countries in the database – while other countries give the responsibilities to for example courts or auditing agencies. The AEC also has responsibility for scrutinising these declarations, as done by the EMB in 33% of the countries in the database.

In common with 59% of the database countries, Australia, like Canada, New Zealand and the UK, publishes the declarations it receives. However, the timetable for

publication is long: returns by donors and returns of election expenses are only required to be published 24 weeks after polling day. Political party financial declarations become public even later: they only have to be submitted to the AEC by a deadline 16 weeks after the close of the financial year, the 30 June following the election. Thus for example the party declarations for the period leading up to the 2013 election only need to be submitted by October 2014, with a further period before publication. By this time, the caravan of public interest may have well and truly moved on.

There is always institutional resistance to measures to control political finance: those who benefit do not want change. Scandals relating to expenses, corruption and the like are thus not all bad news for political reformers. In the words of Mayor Rahm Emmanuel of Chicago: 'Never let a good crisis go to waste.' When the issue is high on the scale of public perception, reaction and indignation, there may be a political opportunity for legislators and anti-corruption campaigners to use the momentum for change.

At the same time, it is important to sound a warning. While advocates for cleaner elections and cleaner politics are making progress along the learning curve on political finance regulation, they are not alone. Those who wish to undermine the integrity of political and electoral processes will equally remain active and inventive. It is clear that protecting and building integrity, inclusiveness, effectiveness, and legitimacy is not a progression towards a perfect end, but more of a continuing "leapfrog" process seeking to keep ahead of those who do not wish elections to be legitimate and politics to be credible, or are indifferent to this. Ultimately, the successful control of political finance comes down to political will and commitment.

Table 1: Political funding regimes compared

	Australia	Canada	NZ	UK	Global
Electoral environment	'free speech'	'fair elections'	no ruling	no ruling	
Receipts					
Ban on corporate & TU donations	No	Yes	no	no	21% corporate, 22/23% TUs
Ban on foreign contributions	No	Yes	only small amounts allowed	yes	63% to parties, 48% to candidates
Ban or limit on anonymous contributions	weak limit	strong limit	medium limit	medium limit	parties: 49% ban, 12% limit candidates: 37% ban, 10% limit
Limits on size of donation to parties	No	Yes	no	no	31%
Limits on size of donation to candidates	No	Yes	no	no	30%
Third party funding constraints	No	Yes	yes	yes	
Tax relief for donations	Yes	Yes	no	no	
Spending					
Campaign spending limits	No	Yes	yes	yes	28% for parties, 42% for candidates
Free airtime for parties	No	limited	yes	yes	66%
Public funding of parties	No	Yes	yes	mainly parliamentary support	54%
Public funding of campaigns	Yes	Yes	yes	no	32%

Source: Online Political Finance Database, International IDEA
Percentages in response to each particular question are of all countries in the global database including those for which data is not available