



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

POLITICAL DONATIONS AND SAFEGUARDS CODE

Neil A. Freestone (Solicitor)¹

WORKING PAPER NO. 43 (AUGUST 2016)

¹ Neil Freestone is not affiliated with any political party, political movement, union, corporation or any related organisation. The author's work '*Political Donations & Safeguards Code*' is 65 pages and is available free from the author's website for private use. The author's website is www.neilfreestone.com.au

Abstract

This working paper looks at how we might change the current system of political donations (and expenditure) and the form such changes might take.

Introduction

In the seven years to 2014, there has been a drop of 25% in the proportion of Australians believing it makes a difference who is in power. In 2014, this proportion had dropped to 43%.¹ This drop may be related to the role of money in politics, and political donations in particular.

Evidence shows:

- ***7% of donors contribute 57% of donations***

The Australian Electoral Commission (AEC) figures indicate that a small percentage of donors to political parties donate most of the funding. For instance, in 2009-2010, a mere 7% of the donors contributed 57% of the donations.²

- ***Many donors donate to both sides of politics***

AEC figures show that many donors donate to more than just the one political party.³ Interpreting the AEC information for the 2013-2014 period, it appears that at least seventy-seven donors donated to both Liberal and Labor.

- ***Large donations come from Australian and foreign individuals***

AEC figures for the 2013-2014 period show evidence of large donations being made by individuals from both within and outside Australia.⁴

- ***Foreign corporations donate to Australian political parties***

Many of the entities donating to Australian political parties are corporations that have their roots outside Australia. Many more have shareholders who are not Australian nationals. In the US, foreign nationals are prohibited from making contributions that might influence American elections.⁵ The impact foreign donations may be having on Australian sovereignty is concerning.

- ***Public funding of elections has failed***

The introduction of public funding in 1983 was aimed at reducing the influence of lobby groups and others who were prepared to put substantial sums of money towards

campaign funding reserves in order to influence policy decisions by politicians. As the then Minister of State in 1983, Mr Beazley noted:

“It is simply naive to believe that no big donor is ever likely to want his cut sometime. The price of public funding is a small insurance to pay against the possibility of corruption.” (Mr Beazley – Second Reading speech 2 November 1983)

Using 2007-2008 election year figures as a base, public election funding had grown by 18.5% by the 2013-2014 election year. In the same period, the growth in political party receipts increased by 29.5%. This rate outstripped the public funding increase by 11%.⁶ Public funding has not curbed the appetite for donors to donate. Even with some improvements to disclosure rules, public funding has made little if any impact on the problems that Mr Beazley spoke of in 1983.

In the light of the evidence, it may be reasonable to conclude that changes to the current system of political donations are required if Australians are to be permitted the right to meaningfully participate in the government of their country.

Discussion

How might we change the current system and what form should such changes take?

It is my contention that it is possible to bring about major, meaningful and long-lasting change to this important area of the law. The detail of what the changes might look like is set out in the author’s work *‘Political Donations & Safeguards Code’*. The work sets out a new model – a *Code* – of how political donations and political expenditure might occur in Australia.

At present Australian electoral laws are a mixture of state and Commonwealth laws. For a new model to be successful, the model must apply across all jurisdictions in Australia. For this to occur the Commonwealth’s exclusive powers under the Australian Constitution (the ‘Constitution’) would need to be expanded or the various states would each need to transfer their relevant powers to the Commonwealth. The expansion of the Commonwealth’s powers by way of a constitutional change would provide a more permanent path to follow, especially if a *‘Code’* that encompasses the cornerstones of the new laws is developed and included in the Constitution.

What would such a *‘Code’* look like?

The *Code* should include the ‘nuts and bolts’ of the new proposal. It should contain rules that address many of the concerns that have already been identified by many Australians. It should provide for a coherent and workable system that delivers the outcomes that are required for our democracy to allow equal participation by all Australians.

To this end, perhaps the new system will need to include the following provisions:

- The rights to freedom of speech, of expression, of association, of political communication, and the right and freedom to equally partake with other Australians in the election of Australian citizens to public office in Australia, are to be upheld and that the provisions of the *Code* in respect to political donations and political expenditure and the associated matters share the objective of respecting, protecting and upholding such rights;
- The system would apply to all levels of government and to all jurisdictions across Australia. It would also apply to by-elections, to pre-selection or nomination processes relating to a potential candidate, to any election or by-election in respect to any position within a political party, associated entity or third party, and it would relate to any poll in respect to any referendum or plebiscite;
- Only ‘*eligible voters*’ should be permitted to make political donations;
- Eligible voters should be Australian citizens;
- Corporations, unions and any other entities should NOT be permitted to make political donations;
- Foreign persons or entities should NOT be permitted to make political donations;
- Political donations should be subject to a yearly cap;
- The yearly donation cap for each eligible voter should be tied to the median average weekly wage for a full time worker in Australia for the particular year. In my initial work I suggested that the ‘cap’ would equal the average weekly wage. Upon reflection, and feedback already received, this would not be fair. The ability for those on lower incomes to afford discretionary spending (such as the making of a political donation) is more restricted than it for those on higher incomes. Therefore, it will be important for some accurate modelling to be carried out to ascertain what proportion of the median average weekly wage would be an appropriate proportion that would allow for an equal opportunity for the making of maximum donations by all eligible voters;
- Political expenditure should be subject to a yearly cap;
- The yearly expenditure cap should be calculated on a ‘per-candidate’ basis and should be equal to the average annual wage for a full time worker in Australia for the particular year. Modelling should however be carried out to ensure that the ‘expenditure cap’ is realistic. The result of the modelling may indicate that the ‘cap’ should either be a proportion of, or some multiple of, the median average annual wage;

- All political donations would be made through the AEC;
- All political expenditure would be made through the AEC;
- Associated parties and third parties would only be permitted to obtain their funding from eligible voters – and caps would also apply;
- The AEC would set up a unique trust account for every eligible voter. The AEC would also set up unique trust accounts for every candidate, political party, associated entity and third party. The AEC would manage each such account by receiving instructions in writing and applying the terms of the *Code* to each transaction in real time;
- The AEC would disseminate some election material for all candidates free of charge. Subject to the other provisions of the *Code*, candidates would continue to be permitted to directly deliver their own election material to eligible voters;
- The numbers of persons required to nominate candidates should be capped;
- The registration fees payable by candidates to the AEC should be capped;
- A donation made by an eligible voter should not be part of the public record nor should it be made known to the recipient of the donation. Initially, I proposed that an eligible voter should have the right to direct the AEC to make public the donation made by the eligible voter. However, on receiving some feedback and after reflecting on the matter, it may be better to ensure that a valid donation is never made public. This would have the benefit of denying a person or entity the opportunity of checking if their employees or contractors (for example) have made donations. In turn, this may provide a disincentive for a person or an entity to give an employee or a contractor money on the basis that that employee or contractor shall use the money to make a donation to a particular political party or candidate;
- Candidates, political parties, associated entities and third parties should all make such disclosures as would be expected by a reasonable person to be required by the AEC so that the AEC may make an assessment that the *Code* is being complied with;
- A ‘Commonwealth Electoral Disputes Arbitration Commission’ should determine disputes arising under the *Code* at no cost to the applicant and subject to the right of appeal to the High Court;
- The operation of the *Code* should be subject to periodic and random audits by the Commonwealth;

- The *Code* should also provide for other safeguards, including anti-avoidance provisions that are general and specific in nature, and where the test in respect to particular conduct is not the intention of the person involved, but rather what the view of a reasonable person might be in respect to what has occurred.

Some of the specific anti-avoidance provisions include:

- Disclosure by a candidate or a candidate's relations of any financial or other interests, where '*a candidate's relations*' include (apart from relatives) business partners, accountants, solicitors, stock or share brokers, financial advisers, political advisers, bankers, fund managers, and any other professional adviser or assistant of the candidate where such assistance has been provided within four years prior to an election, or within four years after an election;
- Preventing the use of confidentiality agreements in respect to certain court and other settlements;
- The re-direction of any awards regarding the reputation of a candidate or a candidate's relations to the Commonwealth for payment to one or more registered charities (of the Commonwealth's choosing);
- Except for reasons of national or domestic security, prevent the use of confidentiality clauses or agreements where the expenditure of public monies is involved in the award of any tender;
- Preventing situations where a conflict of interest may arise between a candidate's duties of public office and his or her private interests;
- Preventing the payment of inducements;
- Preventing candidates from receiving payments for a period of fifteen years after they cease to hold public office that may be related to how they conducted their responsibilities while they occupied public office;
- The deeming as corrupt behaviour the holding of foreign accounts by a candidate where there is no just reason for doing so – and disqualifying the minimisation of tax or other similar payments as being just reasons;
- The cancellation, without compensation, of a contract to expend public money where a candidate corruptly influenced the award of that contract; and

- Causing candidates guilty of corrupt behaviour to be personally responsible for appropriate compensation;
- The establishment of a ‘Commonwealth Independent Commission Against Corruption’;
- Measures to ensure all political parties adopt a set of model rules, where all voting is by secret ballot, and where the office bearers of such parties must adhere to similar obligations (where relevant) that apply to office bearers of corporations;
- Measures to ensure Commonwealth departments and public servants are protected from the possibility of political interference;
- Offence provisions providing for disqualification from involvement in politics, substantial financial penalties and imprisonment for offenders; and
- Transitional provisions to provide for a period of between one and two years for compliance, with transactions after the end of the transitional period being overseen by the AEC.

Conclusion

The public funding for the federal election in 2013 absorbed \$58.1 million of Australian government funds. It would be more advantageous to the Australian community if this funding were re-directed to the AEC to assist it in defraying some of the increased administrative costs that would arise under the operation of the new model.

Under the Australian Constitution there are circumstances where a majority of senators (that is, 39 of our 76 senators) may be able to have our Governor-General cause the required changes to go to a referendum. If this were to happen, it would then take around 6 out of every 10 Australians to make the changes a reality.

References

- 1 *ANU-SRC Poll: Changing views of governance: Results from the ANU poll, 2008 and 2014, Professor Ian McAllister, ANU College of Arts and Social Sciences, Report No. 17, August 2014 at page 8: politicsir.cass.anu.edu.au*
- 2 *Australian Electoral Commission Funding and Disclosure Report – Federal Election 2010 at page 30 - http://www.aec.gov.au/about_aec/Publications/Reports_On_Federal_Electoral_Events/2010/index.htm*

- 3 *Australian Electoral Commission Analyse Donor Returns – 2013-2014 – <http://periodicdisclosures.aec.gov.au/AnalysisDonor.aspx>*
- 4 *Australian Electoral Commission Election Returns – 2013-2014 – <http://periodicdisclosures.aec.gov.au/AnalysisDonor.aspx>*
- 5 *Federal Election Campaign Act summary published by the Federal Election Commission – July 2003*
- 6 *Neil A. Freestone, 'Political Donations & Safeguards Code', self-published on 3 June 2016 [ISBN: 9780994606969 (loose-leaf); ISBN 9780994606952 ebook version] at page 64*