Panel of Experts – Political Donations

Submitted by Bret Walker SC

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SUBMISSION TO EXPERT PANEL ON POLITICAL DONATIONS

Bret Walker SC

The following submission is made by me as a citizen, elector and counsel. (I should disclose that I appeared for Unions NSW in the proceedings in the High Court of Australia which invalidated certain provisions of the Election Funding, Expenditure and Disclosures Act 1981 (NSW).)

2. The law regulating political donations in New South Wales should reflect and advance relevant values concerning representative democracy and responsible government. These values should be informed by a thoroughgoing respect for the institution of parliament.

3. An aspirational ideal that has informed judicial rulings on political communication is the notion of a well informed electorate. Another aspirational ideal, obtaining between elections, is the right of affected persons to petition or otherwise communicate with those who hold governmental authority.

4. Unfortunately, probably rooted in our English antecedents, the corruption of election processes by promises or supply of favours – beer or money – has always accompanied these high minded aspirations. The issues before this Panel require attention to both high and low tendencies.

5. A concern with the influence of money in elections is not new.
If the law allows an opulent citizen but a single vote in the choice of his representative, the respect and consequence which he derives from his fortunate situation, very frequently guide the votes of others to the objects of his choice; and through this imperceptible channel the rights of property are conveyed into the public representation.¹

6 Anxious as they were to persuade in favour of the new Constitution of the United States of America, Messrs Hamilton, Madison and Jay capture a current dilemma. Prosperous people and their controlled entities command the attention of legislators and the public far beyond their personal numerical presence. But democracy purports to equalize the political say of every individual.

7 As can be seen from the written and spoken arguments in Unions NSW, there is at present little appetite to oppose the policy of a limit or cap on the amount of money to be expended in political campaigning (for the election of Members of Parliament), and on the amount that any one donor or contributor (including measured in kind) can provide for that campaigning. It is also clear that the social reality of political parties is thoroughly well understood by the High Court, and by the people for whom all these laws are significant.

8 Surely the whole point of elections is the choice of the people. Unless we are perverse in our adoption of that fundamental principle, our laws should favour that choice being well informed. In my opinion, these are basal considerations that have produced and will continue to justify the constitutional law currently labelled the implied right of or immunity for political communication.

¹ The Federalist ... 1787 Vol II p 139, No LIV
9 Inevitably, this easy first step requires the second step of regarding a diversity of communicated political views as a good thing. There is no serious opposition to this idea.

10 But a third step is to accept that the intensity or popularity of a view can and should properly be able to be communicated by the frequency or stridency of its expression. In a society where advertising costs money in most of the mediums that are thought to be effective, this becomes a matter of great moment.

11 Countervailing considerations, which judges in the United States of America, Canada and Australia have considered with varying cogency over the decades, include the fear which Hamilton, Madison and Jay recognized in the classical excerpt quoted above. What should, if anything, be done to counter the prestige, volume and spread accorded to the voices of the rich, in electoral contests?

12 But who are the rich? Do they include an aggregated mass of private individuals none of whom gives more than a small sum of money? Surely not. That phenomenon has to be regarded as a mark of real democracy. The widow’s mite is a critical concept. A lot of people each giving a little money may enable a great voice to be heard. No-one who cares about democracy would regard that as an undesirable occurrence.

13 On the other hand, most people resent the notion that a very wealthy industry or pressure group or billionaire, whose views have not persuaded a multitude of ordinary people to contribute financially to their dissemination, can nonetheless equal or outdo such a combination of small voices. In my opinion, speaking historically and
sociologically, this is the reason why various legislatures in societies we would care to compare with ourselves have variously imposed expenditure limits as well as contributions limits on electoral campaigning.

I suspect that all of these premises are open to considerable theoretical challenge. There is scarcely any empirical work to test the competing policies. But it seems to me, and I urge on the Panel, that there is nothing inimical to current notions of parliamentary democracy in caps on donations and limits on campaign expenditure.

This brings us to how each of those dimensions should be regulated. In turn, that evokes the evil or mischief sought to be reduced or eliminated by appropriate laws. In my opinion, these have not been sufficiently clearly articulated so as to guide the framing of good laws.

It seems to me that none of us is genuinely opposed to decent and proper persuasion, in politics as in any other sphere of life. The merits of an idea and its influence on those prepared to consider it should not be confined by artificial means such as strangling publication. On the other hand, it can hardly be said that political parties and candidates, and perhaps more importantly their advertising agencies and consultants, have been guilty of overestimating the intelligence of the audience. Too much political advertising is rubbish. To contemplate high minded notions of a well-informed electorate in the face of sentimental or fearsome television spots is a grim joke.
17 But because there is no accounting for taste, and because so-called or self-regarded elites are foreign to the operation of democracy, there should be a reasonable scope of play for even these more or less depraved appeals for a vote.

18 In short, elections are the paradigm of a contest, in social terms, where ideas and emotions vie rather than threats and violence. For these reasons, the Panel should strongly prefer laws that restrict as little as possible the free play of whatever modes of persuasion some people think might sway other people to vote in particular ways.

19 In truth, as recent slow-motion car crashes in ICAC have illustrated, the more vicious mischief is covert influence of an improper kind on executive decision-making. (I do not mean to exclude legislative decision-making, but I think there is no evidence of bribes for votes, at present.)

20 It seems to me, and apparently to others who have made submissions to this Panel, that there is a better way of doing things that the Panel should recommend. It has the following features:-

a. Expenditure by a candidate, including by a party on behalf of a candidate, can fairly be limited.

b. Current limits on electoral expenditure are not obviously too generous in favour of candidates or parties, and should therefore not be reduced. Neither should they be increased, except in line with inflation.
c. Current statutory means of auditing those expenditure levels should continue, and be enhanced by full-blooded statutory authority to conduct general or specific inspections of records without notice, and at any time.

d. Unless and until Commonwealth legislation requires broadcasting licencees to carry political advertising free or for greatly reduced rates, and unless and until this State government compels newspapers to behave similarly, the scope of political communication permitted by expenditure caps will largely be dictated by commercial decisions by media proprietors. (I leave aside clever manipulation of journalists in relation to “news”.) Whether this is a good thing is highly debatable, but on any view is beyond the remit of this Panel.

e. If the result of expenditure caps and commercial greed would be to drive candidates and parties to prefer the relatively inexpensive if irksome expedient of door knocking and public meetings, then so much the better. Most of us are still within walking distance of our front doors, or a local hall.

f. The very notion that Consolidated Revenue should pay for the administration of political parties is obnoxious. Most people, I venture to surmise, do not like any of the parties. Membership numbers, to put it mildly, bear me out in this regard. But for anyone with political opinions, there is something particularly nasty about contributing by way of tax to the partisan activities of those with political opinions at odds with the individual taxpayer. It is bad enough that we all subsidise the churches: it is appalling that we should be asked to subsidise political parties as well.
g. Along with the submissions of a number of others who have explained their views to the Panel, I regard the “put-your-money-where-your-mouth-is” gesture of membership dues or campaign donations as a critical feature of a healthy democratic and diverse political culture. A party that cannot persuade enough of its devotees to contribute the very modest sums typically required for membership subscriptions, so as to fund its own administration and political machinations, should simply not be allowed to freeloade on the rest of us. As well explained by other submissions, the metric by which such an unfair subsidy from the public at large to a splinter group (as all political parties are now, judging by their membership numbers) is utterly without rational justification. Past votes are the very standard against which current approval or disapproval is measured – it is absurd to give money to a party in order to advertise against a sentiment disapproving of its performance since it was elected. Prospective votes are simply not within any reasonable prediction justifying the outlay of public money.

h. On the other hand, there should be a relatively generous allowance for community support of political parties or campaigns (the latter because so-called independents, or candidates without any affiliation, should not be treated less favourably than those standing behind the aegis of a party). That measure can and should be gauged by reference to average earnings, and common sense. It should be informed by the notion of what could be supplied “if everyone paid (such and such) ...”. The success (from a funding point of view) of President Obama’s two campaigns supplies justification for this approach.
i. Any cap is arbitrary, and the better for being so. That is, it should be very clear how much is permitted, and how much is forbidden. In my opinion, the Panel should not go outside a range of $1,000-$3,000 per person, per annum. (Per annum rather than per campaign, because parties and even individual candidates need political support continuously.)

j. It may be that sensible guidance can be obtained from the amount that, from time to time, is allowable as a deduction for the purposes of federal income tax. However, in my view, even if not regardless of that circumstance, the Panel should decide that an amount, say, $1,500 should be the limit of any individual’s donation – changing only with inflation. The stability of a system with such a cap is important, and so the cap should be regarded as an amount that will not vary much if at all over the long term.

k. But who are individuals to whom the cap should be applied? What about artificial entities such as trade unions and trading corporations? In my opinion, both these kinds of associations, and for that matter all sorts of groups such as clubs and co-operatives, should be welcome to participate in the financing of political debate (and its demotic manifestation in electoral campaigning). After all, they are aggregates of real people.

l. It follows that, in my opinion, no trade, calling or label should prevent any individual or other legal entity from contributing by way of political donations. There is something deeply anti-democratic about allowing a school teacher to donate $1,500 to a party but prohibiting his or her neighbour, who happens to be a real estate developer, from the same
conduct. Schooling the young and building are not different in their equal command of political attention. Nor should their practitioners or proponents be treated differently.

m. I cannot see why we should differentiate between trades, professions, callings or affiliations in relation to political donations, when we do not do so in relation to the casting of votes themselves. It is, in my view, as legitimate for a publican to give money to a political party as it is for him or her to vote (which happens, regrettably, to be compulsory).

n. It follows that if there were a cap of $1,500 per donation, it should apply to individuals and entities – subject to fairly obvious provisions to counter abuse, as follows.

o. No-one should be permitted to multiply their permitted donations by incorporating numerous donor corporations, all of which are controlled by the same individual.

p. On the other hand, there are genuinely widely held entities such as trade unions or publicly listed trading corporations where the notion of a single controller is quite alien. They should be able to donate up to the appropriate limit.

q. I notice that a number of other submissions consider that there should be a ceiling below which donations can be anonymous. I utterly disagree. I cannot imagine a more obvious invitation to smart alecs, of the kind that have sought to rort the financial transaction reporting requirements
designed to assist in the struggle against organized crime and terrorism. Why invite such people to organize a plethora of anonymous donations? More to the point, every member of a political party, even at the lowest level of financial subscription, is well used to being identified by name and address. Why should that be different for those who wish to donate for political purposes, member or not? If people are ashamed or scared of donating, they shouldn't do so.

21 These features combine to a simple scheme of the same cap on donations, regardless whether a person is an individual or an artificial entity. If it were protested that this is unfair or inconvenient to those who subscribe to or otherwise fund a trade union or trading corporation, there is a solid answer to refute their claim to a higher cap. That is, political opinion is a matter for individuals. Trade unions and trading corporations proceed, and properly so, in their management by majority vote. I do not favour the cumbersome and designedly deterrent requirement for unions and corporations to be balloted for every political donation. The more efficient and fairer approach is to regard a union and a corporation as having genuinely a separate view from the several views of their numerous members – and thereby having the capacity to donate to political causes limited by the same cap as those same individuals.

22 These considerations lead to the indispensable element of disclosure. I believe that what is most appalling about recent disclosures is the access and implied influence that can fairly be seen to have been purchased by political donations. But the cause of the revulsion widely felt and expressed in this regard should be analysed.
I do not think anybody is opposed to people having access to their politicians, especially those in government, so as to express their views about what should be done, or not. I do not think anybody values that access to our representatives, and our Ministers, only in cases where our own interests are not involved. Of course we all think, and correctly so, that one of the essential features of parliamentary democracy is the ability of electors, between elections, to buttonhole their Members. And if the matter in hand involves a Minister, we all think we should be able to make our points of view known to him or her.

These are, in my opinion, essential features of a parliamentary democracy. They are mirrored by the continuous power of the Houses of Parliament to exact answers to questions and production of documents from representatives of the Government.

All this being so, the solution to bought special access is obvious. We all know that a Minister’s time is rationed, usually by a diary. These are records of public administration, that ought not be the subject of any claim of legitimate secrecy or privilege against public knowledge.

Drawing all these threads together, I urge the Panel to recommend a system under which:-

r. All donations must go to a State agency designated for that purpose, and it is an offence for a candidate or party to solicit or receive any donations.

s. Every donation received by the State agency, in whatever sum, must be accompanied or followed by sufficient information to satisfy the State
agency of the name or names of all the individuals responsible for the decision to donate (e.g., the relevant majorities of a committee or board determining a union or corporation donation).

t. Immediately upon the individual or individuals responsible for a donation being satisfactorily disclosed to the State agency, that agency should simultaneously remit the amount (minus a reasonable handling charge) to the candidate or party designated as the recipient of the donation, and also publish the name or names of the donors or those responsible, and the amount, and the recipient.

u. Donations in excess of the contribution cap could be held by the State agency until the commencement of the next year, or could be returned to the donor.

v. Thereafter, for the life of the parliament in question in the case of a candidate for election, and in any event for a party, there should be immediate publication of the fact of any written or spoken communication, or meeting, having occurred, that involves any of the persons disclosed as donors or persons responsible for donations, with any Member of Parliament, Minister or senior public servant advising a Minister.

27 This leaves the powerful factors of shame and embarrassment on the part of politicians and concern on the part of electors to deal with the question of access to politicians being purchased. It does so while permitting the critically important social liberty of funding one’s own political preferences.
28 It should go without saying that, given the inevitability of human perfidy, both the State agency in question and the Auditor General should be given the most ample powers to monitor compliance with the cap on electoral expenditure, the prohibition of acceptance of donations, and the integrity of the disclosure of identity of donors or those responsible for donations.

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