Panel of Experts – Political Donations

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Date: 17 September 2014
THE GREENS SUBMISSION TO THE PANEL OF EXPERTS – POLITICAL DONATIONS

Key Recommendations:

1. retain and tighten existing electoral expenditure and donation regulation framework
2. reduce expenditure caps in each lower house seat to around half existing levels
3. reduce annual caps on donations to $1,500 for a party and $500 for a candidate
4. increased public funding rates to 85% of expenditure within existing election fund model
5. self funded Legislative Council campaigns to be subject to caps similar to other donors
6. introduce criminal sanctions for serious electoral funding law breaches
7. extend statute of limitations to 10 years for electoral offences
8. tighten regulation of third party campaigners
9. extend donations bans to mining and exploration entities, to those holding or seeking major government contracts, and to all entities (including registered clubs) with gambling/gaming interests
10. expedite disclosure and publication of donations, particularly during campaign periods
11. require parties to disclose per-district spending details
12. change party administration funding to a per-vote model
THE GREENS SUBMISSION TO THE PANEL OF EXPERTS – POLITICAL DONATIONS

The Greens welcome the opportunity to make this submission to the Panel of Experts for its investigation into potential reforms to election funding laws.

The Greens through our extensive work over the past fifteen years on political donations have found there is widespread cynicism within the community about political donations. Allegations made during the Independent Commission Against Corruption’s Operation Spicer inquiry into serious electoral fraud within the NSW Liberal party have precipitated debate about 100% public funding of political parties in NSW elections.

Whilst public confidence in the NSW political system has plummeted, the Greens believe it is important for the public to be actively involved in any debate on election funding.

Many people believe that:

- political donations purchase unfair influence in political parties and are consequently a form of bribery or corruption;
- those who give donations and attend expensive party fundraisers are buying access to decision makers which would not be available to those who do not make large-scale donations;
- politicians are influenced by large donations to their party;
- donors and politicians exploit loopholes and weaknesses in disclosure laws to hide money and avoid scrutiny;
- large donations can create a conflict of interest for politicians; and
- governments make decisions that favour donors to their party even when there is significant community opposition to the decision.

A High Court challenge of the 2009 ban on political donations from property developers is threatening to re-open NSW politics to rivers of cash from not just that sector but also from companies in the alcohol, tobacco and gambling industries.

The current bans capture not only donations from business entities in these industries, but also close associates such as directors and industry organisations that represent them. If the existing bans on prohibited donors are overturned, donations reform in NSW will be dragged back to the bad old days. Efforts to expand the laws to cover other corruption-risk industries such as mining and government contractors will be much less likely to succeed.

Now is the time to broaden and strengthen, not overturn, laws designed to stop the corrosive impact of donations from high corruption risk businesses on policy decision-making.

The Greens support maintaining and extending the partial public funding for state election campaigns to establish a fairer system for party administration expenses to reduce reliance on donations. However, we have also highlighted the risks associated with third-party advertising, public funding models that favour the parties in power and the limitations placed on further donations reform by the High Court.

We acknowledge the following arguments in FAVOUR of 100% public funding:

- **removing a key source of corruption and influence peddling.** Allegations before ICAC suggest that the Liberal party has accepted banned donations through front organisations. It is also alleged that donations were given with the anticipation of favours. Ending all donations would close the door on this form of corruption;
• creating a more level playing field, where wealth would have less impact on the ability to influence outcomes. With no anticipation of rewards in the form of donations, politicians would be more inclined to treat all voters equally. Parties with ideas that are unpopular with the wealthy or with corporate interests could have a better chance of breaking through, depending on how start-up funding is allocated;
• allowing politicians to better concentrate on serving their communities. It is clear that disproportionate efforts are expended on raising funds from donors, distracting from the important work of serving the electorate and articulating new ideas;
• facilitating a reduction in the total amount of money spent on elections. While the current laws cap electoral communications spending (at about $9 million for a party that stands candidates in all Lower House seats and a ticket in the Upper House), full public funding would put downward pressure on the total cost of elections. It is likely that the electorate would be even less tolerant of saturation negative advertising campaigns when they were paying for them; and
• reducing pressure on media outlets to compromise independence to secure advertising. The print and broadcast media receive significant revenue from election campaign advertising, creating a conflict with their responsibilities for disinterested journalism.

The Greens offer the following key points AGAINST 100% public funding.
It has been argued\(^1\) that a ban on donations could have a number of potential negative impacts on the quality of democracy, including:
• moving political parties further away from the community. "Rather than relying upon members and supporters (whether unions, companies or individuals) for resources, parties look to the state for their survival. If campaigns are fully paid for, there is little incentive to actively canvass for community support through soliciting donations or signing up members;" It could remove one way in which the public can be involved in the democratic process;
• intensifying the trend towards 'cartel parties' run by political elites that are increasingly disconnected from their party’s membership and its social base. Greater levels of public funding increase the ability of parties to shift campaigning from volunteers (letterboxing, stalls, doorknocking) to professional services such as advertising and media;
• creating a greater incentive for political parties to cultivate wealthy third parties to run advertising campaigns on their behalf. The experience of US politicians pandering to wealthy "Super PACs" raises concerns that a ban on donations would just shift the corrupting influence to an auction for the support of corporations and their peak bodies. At the very least, restrictions on third party advertising in elections would need to be tightened, consistent with the High Court’s interpretation of the implied freedom of communication on government and political matters;
• creating complex problems in determining funding allocation. Basing funding on the proportion of votes in the previous election could unfairly disadvantage a party that was starting up, experiencing rapid growth or had one unusually bad election. While there are ways these issues could be addressed (e.g. start-up funding and an option to average over a number of previous elections), none is simple and each could create opportunities for rorting;
• possibly creating barriers to new parties gaining a foothold. Depending on start-up funding, new and emerging parties could be unfairly disadvantaged. It is critically important to protect diversity in democracy by allowing ideas and votes to be contested by parties and groups that have not yet established a strong voter base or accumulated significant campaign funding from previous elections;
• risking locking in a two party state. If the funding formula is biased toward the big parties, smaller parties such as the Greens could be locked out of significant funding to reach voters. Without access to donations from supporters and members, smaller parties could go into long term decline;

♦ **creating a greater draw down on public funds.** The public may be concerned that even more of their money is being used for attack advertising and other apparently unproductive purposes;

♦ **adding another layer of complexity to the interaction with federal electoral funding laws.** The existing differences between NSW and Commonwealth electoral law create loopholes and complexity for parties, donors and electoral authorities. A total ban on donations would intensify these issues;

♦ **may be unnecessary to defeating corruption if other changes are made to the electoral funding laws,** including improved enforcement, greater penalties for breaches, wider bans on sensitive industries, more effective prohibitions on slush funds, tighter spending caps and more immediate declarations and certification of donations. The ICAC revelations will inevitably improve the political culture by removing corrupt individuals and practices and discouraging those who thought they would rort the system from entering politics;

♦ **might be seen by the High Court as unconstitutional.** The Court might find that banning all donations is an imposition on the implied freedom of communications on government and political matters that is disproportionate to the problem it is attempting to fix;

♦ **might be susceptible to manipulation by the dominant political parties.** The Coalition and Labor could gang up and pass funding laws which suited their purposes at the expense of the smaller parties;

♦ **distracts the political debate away from expenditure caps and other electoral fairness and democracy measures.** It is unlikely that either Mike Baird or John Robertson genuinely intend to impose a total ban on donations. They probably expect their push to fail, but meanwhile it serves as a distraction from more achievable reforms to electoral funding and disclosure; and

♦ **does not protect against other areas of corporate influence.** The effect of a fair distribution of public funding between major, minor and new parties could be reversed by other inequalities in society, such as in media ownership, which tend to advantage business over community interests.

### CAPS ON POLITICAL DONATIONS

By reducing the expenditure cap in each lower house seat to around half existing levels and increasing public funding, the need for donations at the local seat level could be greatly reduced. If donations are rendered less important, it would be possible to reduce the maximum donations allowable from $5,700 to just $1,500 to a party (in line with the tax exempt donation amount) and $500 to a candidate, without undermining the capacity of the candidate to communicate with their voters.

Overall, this would create a fairer system where policies, not the willingness to accept donations, decided the outcome of an election.

### MEASURES FOR ENSURING CAPS ARE EFFECTIVE

**(i) Expenditure caps**

Expenditure caps on the election spending of grouped Legislative Council candidates should be aggregated to prevent self-funding being used to subvert the donation and expenditure caps. Lower house candidates currently have a spending cap, but an upper house ticket of wealthy people, without any applicable spending cap, could avoid and abuse the party caps.

**(ii) Criminal sanctions**

Secondly, we believe that criminal sanctions for serious breaches of the legislation will present a more effective deterrent to both donors and parties. Penalties should be proportionate to the seriousness of the offence and the impacts it has on the integrity of the political process.
One of the commonly heard responses to the revelations from Operation Spicer is dismay that corrupt behaviour by donors, candidates and party officials is not subject to criminal prosecution, and in many cases there isn’t even any scope to summons and fine the perpetrators due to the short time prescribed in the statute of limitations for these kind of offences.

The prospect of facing a criminal trial and, if convicted, becoming ineligible to sit in parliament is not a disproportionate caution against the kinds of behaviour that the ICAC has exposed.

(iii) Avoidance of donations bans

Donors and party officials caught breaching the ban on prohibited donors have alleged that they did not understand the nature and extent of the ban. An article in the Sydney Morning Herald, 7 November 2011, “Billionaire Tinkler investigated over Nationals campaign donations” suggested that if a party deposited such donations in a federal election account other than its state election campaign account then that would be acceptable under the law.

The issue of washing prohibited donations through various means will remain until there is uniform electoral funding legislation in all Australian jurisdictions, but it may be possible to further strengthen disclosure requirements in NSW legislation.

REGULATION OF THIRD PARTY CAMPAIGNERS

The third party expenditure cap of $1.1 million should be reduced substantially to an amount of about $250,000 state-wide and $20,000 per seat.

It is unacceptable that wealth can buy an election outcome through a massive advertising campaign when an election should be won or lost by voters assessing the merit of parties and candidates. Reducing the third party expenditure cap would still allow third party campaigning but weaken the unfair influence that third party wealth could currently buy.

The US experience of capping spending resulted in the growth of political action committees or PACs and other vehicles which exacerbated the political power of wealth, reduced voter capacity to reach independent judgments on candidates and undermined electoral funding transparency.

For the same reason that they are banned from donating, prohibited donors should to be banned from third party campaigning. A well funded third-party campaign which promoted a specific candidate or candidates is the equivalent of donating directly to those candidates and legislation imposing such a ban would be no more subject to challenge than the existing donation bans.

IMPACT ON MINOR PARTIES AND INDEPENDENT CANDIDATES

The Greens believe it is important that lower donation caps do not impact the viability of emerging parties. There is a need to ensure any new regime does not make it harder for new parties to obtain registration and participate in the democratic process.

We would support independent candidates standing for the Legislative Assembly being allowed a higher spending cap to offset parties’ extra spend locally and party state-wide advertising.

LEVEL OF PUBLIC FUNDING

Increased public funding as a percentage of reduced expenditure caps will help to sever the link between donations and public funding. On the other hand, for reasons explored above, we do not support 100% public funding.

If each lower house candidate could only spend $60,000 (compared to the current $111,000) but 85% was reimbursed from public funding once a candidate received more than 4% of the vote, there would be less incentive to raise donations. The influence of money on the political system would be reduced.

The Greens recommend reimbursement of 100% of the first 10% of the expenditure cap, and 85% of the remaining cap.

CONTROLS TO MAKING OF DONATIONS

The current list of prohibited donors should be expanded to include business and other entities in sectors that pose demonstrable corruption or undue influence risks, their close associates and industry representative groups. This should include those involved in:

1. mining and petroleum extraction;
2. currently holding major government contracts or intending to bid for such government contracts in the next 4 years; and
3. registered clubs and other not-for-profit gambling entities.

FREQUENCY AND TIMING OF DISCLOSURE OF DONATIONS

There is a widely held public perception that donors and politicians exploit loopholes and weaknesses in the disclosure laws to hide donations and avoid public scrutiny. Disclosure procedures need to be tightened to restore public confidence in the system.

Publishing donations on the web: Details of political donations of $1,000 or more received by parties and candidates should be displayed on the Election Funding Authority [EFA] website. The current level of web technology should make it easy and affordable for the EFA to both allow for electronic lodgement of returns via the internet, and to display all the donations data stored in its database in a user friendly, fully searchable website.

Donations data should be available by donor name, donor sector, donor close associations, date of donation, electorate, candidate (or local MP), party and amount. This should be the baseline standard for transparency in the public disclosure of donations information.

The technological feasibility of this level of donations transparency is established by the Greens democracy4sale.org website which has provided this service to the public for the past fifteen years on a minimal budget.

Elections Canada has an excellent website where donations above $200 go on the public record within four months, since donor declarations are made quarterly. The Canadian website also publishes raw election data in spreadsheets to enable research and analysis of the data. See http://www.elections.ca.

Continuous disclosure of donations: The time lag between when parties and candidates receive donations during an election campaign and when those donations are publicly disclosed months after the election dramatically reduces the accountability of political parties and candidates.
Voters have a right to know about donations before they go to the polls. To this end, the Greens support donations of $1000 or more being:

- disclosed weekly outside of election periods, and
- disclosed within 24 hours in the six months prior to the state election, and
- banned in the final 48 hours before the election.

**PENALTIES**

We support the introduction of criminal sanctions for serious breaches of the legislation and extension of the statute of limitations period to 10 years. Small fines have been grossly inadequate and failed to protect the integrity of democracy from tainted money and banned donations, combined with long delays between donations law breaches and required disclosure. Reform is urgently needed to send a message to politicians and parties that banned donations corrupt democracy and destroy public confidence.

**ANY OTHER MATTERS RELEVANT TO POLITICAL DONATIONS**

Other relevant matters we would like to bring to the Panel's attention are included below.

**Expenditure caps**

The NSW expenditure caps are too generous but at least they have resulted in a reduction in the massive expenditure that took place in some hotly contested seats in the 2007 election. Party expenditure caps of $9.3 million, and candidate expenditure caps of $100,000 should be reduced to ease financial pressure on parties and candidates and to help ensure that wealth is not buying an election outcome.

**Income that can be deposited in campaign account**

Some of the limitations on the types of income that can be deposited in a party's election campaign bank account are unnecessarily restrictive and do not serve an anti-corruption or undue influence purpose.

For example, the prohibition on depositing membership fees into the election account cannot be justified. They are subject to a cap per member and are a low corruption risk source of income for a party.

The cap on membership fee amounts in the Election Funding and Disclosures Act is too generous at $2,000 (indexed) per annum and should be more reflective of the costs to parties of the administration of that membership.

**Funding for party administration based on votes not MPs**

The public funding available for party administrative expenditure has helped reduce the parties’ reliance on corporate donations. The method of calculating the amount parties receive is currently based on the number of elected members of parliament. A fairer system however would be to base the calculation on the vote a party obtains in the election for either house of parliament.

The single member electorate system in the Legislative Assembly results in a substantially larger proportion of MPs for major parties than their proportion of the primary vote. The current method of calculation could produce party administration funding outcomes that are grossly disproportionate to a parties vote and not reflecting the reasonable costs of administering parties capable of genuinely contesting elections state wide.
Cap on donations from party to its candidates needs clarification

Most supporters and members of a party donate to the party rather than to the party’s candidate. This combined with the fact that the $2,400 cap on donations to a candidate applies to a party when donating to its candidate, creates a problem for parties not being able to transfer available funds to the campaign account of its endorsed candidate.

Currently parties effectively donate much more than $2,400 to its candidates by utilising section 84(7) of the Act and invoicing them for election expenses incurred by the party, but the candidate never pays the invoice, or by making loans to the candidates. Either is a convoluted method for a party to provide essential support to its candidates’ campaigns. Section 84(7) effectively acknowledges that parties will need to finance their candidates, but it is a cumbersome and questionable way to achieve this objective.

The simple solution is that parties and candidates should be exempt from the donations caps when the party makes donations to its endorsed Legislative Assembly candidates. Apart from being more transparent than the current obscure method of parties funding their candidates, it would facilitate more local campaigning autonomy as the funds would end up in the campaign account of a local candidate rather than remain in a party head office bank account. It is also noted that the expenditure cap on candidates would still apply so that it would be pointless for parties to donate an amount above the limit the candidate may spend.

Parties to disclose specific electorate expenditure

Under the Act there is no requirement for parties to disclose the amount of electoral expenditure incurred substantially for the purposes of an election in a particular electorate.

This means that electorate specific expenditure can be hidden in the state party’s return making it difficult to determine if the party electorate specific expenditure cap of $50,000 per electorate has been observed or breached. There are strong suspicions that one or more parties in the 2011 state election breached this cap in relation to a number of electorates, but the absence of a disclosure requirement makes this harder to verify. The resultant uncertainty further taints voter confidence in the fairness of elections and the integrity of parties and candidates.

Audit requirements

The requirement for disclosures to be audited by a Registered Company Auditor is impractical and unnecessary. Accountants with appropriate professional standing should be able to audit candidate and party disclosures and returns.