Panel of Experts – Political Donations

Submitted by Tim Ayres
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Dear Dr Schott

I am writing to you in response to your invitation to respond to the Expert panel on Political Donations. The AMWU welcomes the opportunity to make submissions to the Expert Panel on Political Donations. While all of the terms of reference are important, we do not intend to respond to each item and will focus on those that are of particular relevance to our members.

The AMWU is Australia’s oldest trade union. The first union that would become the AMWU was formed in Sydney 160 years ago by tradesmen who had fled political persecution in England for their trade union activity. The modern AMWU represents over 25,000 NSW manufacturing workers across major sectors of the NSW economy. AMWU members are primarily based in the manufacturing industries, in particular food and metal manufacturing, but are also present in large numbers in mining, building and construction, printing and graphic arts, vehicle manufacture, repair and service, aircraft and airline operations, and laboratory and technical services.

The AMWU believes that strong, effective and independent unions are a vital part of any functioning pluralist democracy. The representative function at the workplace, while centrally important, is not the sole element of effective trade union activity. Involvement in the political process is vital to the ability of unions to deliver real outcomes for their members, providing working people and their families with a strong and organized voice in matters that affect them in their work, their communities and the life of the nation.

Political engagement by the AMWU is highly transparent and democratic. Political activity by the Union is debated and determined by members at the workplace level, within delegate’s forums, at the democratically elected Political Action Conferences and at state and national conferences. All activity is overseen by the member-run management committee, including affiliation by the AMWU with the ALP. In NSW party political affiliation is reviewed every three years by 150 democratically elected delegates to the AMWU’s State Conference.
The evidence that the influence of money in politics is corrosive is incontrovertible. There have been months of tawdry ICAC revelations about property developers with bags of cash and the complex web of slush fund finance used to run some marginal seat campaigns at the last state election. There has also been a seemingly endless parade of MP’s, business people and staffers caught operating in the netherworld between public service and private interest – these developments alone should satisfy anybody interested in good, clean government that something is wrong with our system and political culture.

While current evidence before the ICAC has been focussed on the NSW state and federal Liberal parties, corruption is not just a disease besetting one party. Revelations about self interest and corruption in NSW Labor’s last term in government are demoralising for Labor supporters. Nor are large donations the province of the two major parties - we note that the largest private donation in Australian electoral history was received by the Greens Party from a Tasmanian businessperson.

As one of the applicant unions in the High Court challenge to the O’Farrell Government’s election funding legislation, the AMWU makes this submission to propose a view not just about what forms of regulation should be opposed, but also a considered approach to the key principles that should underpin the next, now inevitable, tranche of legislation.

Partisan advantage guided the O’Farrell electoral legislation. The High Court saw through the thin veil of public purpose to the real agenda: weakening the labour movement. The objective of electoral legislation in a functioning democracy should never be to advantage one side of politics over another. Electoral law should promote a plurality of community voices, eliminate the unseen and unaccountable effect of money on political campaigns and be able to be readily understood by participants, candidates and voters alike. Australian politics could do without following the US into the gerrymandering of electoral systems with provisions like “ID-voting” with its obvious racist and class-based purpose of excluding black and low income potential voters.

In our view, while well intentioned, the full public funding of elections in NSW is neither practical nor desirable. In addition to likely being unconstitutional and complex, public funding is wrong in principle because it muzzles freedom of political expression, acts to privilege existing political parties and drags political debate to a mediocre centre, devoid of spirited contest and new ideas for our national future. It is also impractical because it is very unlikely that voters, already suspicious of politicians’ self-interest, will support paying political parties public money to run election campaigns.

Election funding law should focus on compliance and enforcement regimes that are at once simple, promote transparency and expenditure and donation limits and contain severe penalties in order to restore public confidence and trust in NSW political and election processes.
Full public funding of state election campaigns.

Full public funding in other jurisdictions:

Full public funding has attracted support, including from the leaders of both major political parties in the wake of evidence being led in the ICAC.

Full public funding advocates regard it as the only effective way of removing the influence of money from the political system by reducing parties’ dependence on private donations and levelling the playing field during election campaigns. Other advocates stipulate that political parties are a vital and necessary element of representative democracy, and that their activities should be funded by the state.

State support for political parties in the form of subsidies and public funding is increasingly common. Three quarters of the world’s liberal democracies provide at least some public funding to political parties. In functional terms the form of funding varies greatly. However there is no example anywhere of a fully funded national public funding scheme.

Within Australia, election funding and disclosure laws vary widely. Most jurisdictions provide some level of public funding attached to public disclosure of donations by candidates, parties and their associated entities, although South Australia, Tasmania and the Northern Territory provide no level of public funding. South Australia, Tasmania and Victoria have no disclosure requirements at a state level. NSW, the ACT and Tasmania are the only jurisdictions in which election expenditure caps on candidates and political parties remain.1

In Belgium the percentage of party revenue from public funding is approximately eighty per cent accompanied by a ban on donations from non voters and capped contributions from voters. A number of jurisdictions in the US have enacted voluntary, full public funding schemes for candidates running in some or all of their elections. These programs are ‘full’ public funding only in the sense that they require participating candidates to forgo private donations, although the receipt of donations may be a necessary qualifying factor and donations may still be raised by opponents who choose to not participate. However none of these schemes amount to ‘full public funding’ in the sense that has been raised in NSW.2

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1 Overview of Australian Election Funding and Disclosure Regimes (August 2014)
2 Update on Internal Campaign Finance laws and Full Public Funding Models in Working paper prepared for the Panel of Experts – Political Donations (July 2014)
Full public funding is well intentioned but ineffective in preventing corruption:

Elections are expensive. In particular the cost of political communication has risen exponentially. It is for this reason that political candidates and parties seek to raise donations – to gain an edge on their political opponents in the race for votes.

The premise of full public funding is that while political parties and elected representatives will act corruptly in accepting illegal donations if they perceive the need to raise money, they will not do so if they receive full public funding. Therefore the advantage in behaving corruptly is diminished or eliminated. In light of the extraordinary revelations of the ICAC in recent months, the obvious purpose of full public funding is to eliminate the opportunity for corrupt political donations by eliminating donations altogether.

In fact it is clear from evidence tendered at the ICAC that the cost of political campaigning is not the only motivation for political candidates accepting corrupt payments. Evidence was given to the ICAC that corrupt payments were used for a number of purposes, including personal expenses that were unrelated to political campaigns.

NSW already has the most heavily regulated election funding legislation in the country, including caps on donations and proscribing of certain donors. However this has had little impact on those who are corrupt. Again, evidence to the ICAC has been that one political party and some political candidates were prepared to accept political donations well in excess of the permitted caps from proscribed donors. Further, the political party and candidates concerned went to some lengths to circumvent the legislation and to disguise their actions.

While the call for full public funding is well intended, in view of this evidence, there is no reason to believe that those who are corrupt will cease being so merely because either they have no need to be so. Similarly, there is no reason to believe that those who seek to enforce their influence through corrupt means will be any less likely to do so because they fear breaching election funding legislation.

Full public funding is likely to be constitutionally invalid:

The issue of imposing caps on donations and banning of political donations has already been considered twice by the High Court. In its 1992 decision of *Lange v Australian Broadcasting Corporation*, the High Court considered Commonwealth legislation that sought to limit political advertising during an election period. The Court found that legislation to be unconstitutional. Significantly, the High Court found that there was an implied right of freedom of communication which was deemed indispensable under the Australian Constitution to our system of government.

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3 *Lange v ABC* (1997) 189 CLR 520
Arising from this case, the High Court established the so-called *Lange Test*, under which laws that ban or impose limits upon political donations or election campaign expenditure are likely to be regarded as burdening the constitutionally implied freedom of political communication. This is because they have the effect of limiting the quantity and breadth of communication about political matters. Such laws will only be valid if they are reasonably and appropriately adapted to serving a legitimate end in a manner which is compatible with the system of representative and responsible government prescribed by the Commonwealth Government *Lange v ABC* (1997) 189 CLR 520\(^4\)

In 2013 the High Court struck down O’Farrell legislation that capped election expenditure on political communication and prohibited the making of political donations by corporations, unions and anyone who was not a ‘natural person’ on the electoral roll. Reflecting the earlier *Lange* decision, the O’Farrell legislation was struck down by the High Court as imposing a burden on the implied right of freedom of political communication.

Having already been rejected by the High Court on two occasions, it is very hard to see how a ban on all donations could survive a further legal challenge.

*Full public funding is very expensive and not likely to have public support:*

The current NSW model of election funding only provides public funding for a portion of electoral expenditure (excluding travel, accommodation, research, fundraising events, and so on) and only is only available for election expenditure incurred in the 6 months prior to the election. Candidates who receive 4% of the vote in their electorate are eligible to receive public funding for part of their election expenses. Around 75% of election communication expenditure is reimbursed to major political parties through public funding. Political parties and candidates received public funding of around $22 million as reimbursement of electoral communication expenditure for the 2011 NSW state election.\(^5\)

While the bulk of spending on elections occurs during the election year, there is also some ongoing expenditure by political parties and candidates in other years. During the disclosure period covering the 2011 NSW state election there was a total of $41 million spend on election campaigning. Over the four year period from July 2009 – July 2013, political parties and candidates spent approximately $50 million on election expenses, including electoral communication and other electoral expenditure.\(^6\)

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\(^4\) Dr Anne Twomey, *The reform of political donations, expenditure and funding*, Dept of Premier & Cabinet, Nov 2008, p 6

\(^5\) Working Paper 4; Expert Panel Issues Paper

\(^6\) The Merits of Full Public Funding in Working Paper 4 Expert Panel Issues Paper
It is estimated by the Election Funding Authority (EFA) that for the last state election approximately 44% of expenditure was publicly funded, with the remaining 56% being privately sourced (donations, fund raising events and loans, and so on). In NSW there is also public funding of administration and policy development expenditure by eligible parties and independent members of parliament. Over the four financial years from July 2009 – June 2013, around $29 million was provided for administration and policy development. In addition, the NSW Electoral Commission spent around $40 million on the conduct of the election itself in 2011, with $20 million being spent on capital expenditure in support of the election.

The total amount of public funding in NSW already significantly exceeds other Australian jurisdictions and in 2011 the cost per elector of the NSW state election was similar to the cost of the 2013 federal election. NSW political finance is the most heavily regulated regime in Australia, if not the world. Without in any way diminishing the value of the democratic process; with only 44% of total election expenditure being publicly funded, the NSW public spent more than $111 million on the last state election cycle. The cost of full public funding would be expected to cost well in excess of $150 million for the same period. There may be strong support ‘inside the beltway’ for full public funding, but it is likely to fuel voter cynicism about NSW politics and political institutions.

The administration of full public funding would be complex and difficult:

Federal leaders of both major political parties have publicly opposed full public funding. State election funding legislation cannot impose its will on federal election processes and so current election funding legislation in NSW has been a source of considerable confusion and an administrative nightmare as political parties seek to differentiate their fund raising activities between state and federal campaign expenditure and also federal and state administration expenditure.

To some extent this confusion has been exploited as it provides opportunities for evasion of the NSW legislation with donations being funneled to federal fundraising accounts in an effort to avoid NSW restrictions. There is no indication that either major political party has any will to introduce full public funding at a federal level and so the problems created by the very different funding arrangements at each level. Accordingly, more sophisticated and entrenched means of non compliance with NSW legislation will continue to develop, effectively undermining what ever legislation might be introduced in this state.

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7 ibid
8 ibid
9 The Merits of Full Public Funding in Panel of Experts Issues Paper
In NSW, the Shooters Party claimed that public funding was essential in allowing them to campaign successfully and that without public funding it would have been impossible for them to contest elections.\(^\text{10}\)

However, there is a strong argument that public funding in fact entrenches the advantage of established political parties and candidates at the expense of new and minor parties and independent candidates. Associate Professor Joo-Cheung Tham argues that the ‘public funding scales are tilted towards the dominant parties’ (for instance by calculating funding according to the number of parliamentarians).\(^\text{11}\) He refers to the ‘cartel thesis’ where public funding eligibility thresholds are set so high that they effectively exclude new or smaller parties.\(^\text{12}\)

In Canada and Germany a very low eligibility requirement applies in order to support the political growth and electoral competitiveness of new and emerging political parties and candidates.\(^\text{13}\) Nevertheless, it is clear that established parties and candidates will be at an advantage as they have existing campaign resources and infrastructure that will not be available to new and emerging candidates and parties.

In practical terms it is extremely difficult for an individual who does not have the financial backing of an established political party or a very significant personal bank account to fund a competitive election campaign. However it is also very difficult to see how any system of public funding can address this issue while at the same time ensuring public accountability so that public funds are not wasted or expanded exponentially on unviable candidates and parties.

Apart from these equity issues, experience from other jurisdictions, particularly in the US, is that new and emerging candidates and parties are likely to seek out or be approached by third party campaigners who have resources and experience to support an election campaign. The third party campaigner then seeks reimbursement through the public funding process. The opportunity for corruption is clear while there is an enthusiastic but under resourced candidate and a well resourced third party campaigner seeking influence with the guarantee of reimbursement through full public funding.

\(^\text{10}\) Select Committee on Electoral and Political Funding in NSW June 2008
\(^\text{11}\) Assoc Professor Joo-Cheong Tham Establishing a Sustainable Framework for Election Funding and Spending Laws in NSW Melbourne Law School (2012)
\(^\text{12}\) Dr Joo-Cheung Tham A case against a system of full public funding of political parties (June 2014)
\(^\text{13}\) Update on International Campaign Finance Laws and Full Public Funding Models (July 2014)
Full public funding discourages public participation in the democratic process:

Former NSW Premiers Nathan Rees and Kristina Keneally introduced changes to the political donation and spending limits before the March 2011 state election. Under these amendments, annual donations to parties were capped at $5,000 and at $2,000 for individual candidates or members of parliament. Tobacco, liquor and gaming companies along with property developers were banned from making donations. The reforms also capped campaign spending by each candidate at $100,000. Parties were allowed to spend a further $50,000 in each electorate they contested. Third party campaigners such as businesses and unions had a spending cap of $1.5m.

The AMWU supported this legislation as a genuine attempt to address community concerns about the lack of transparency around election donations as well as the unhealthy political influence of property developers, tobacco, liquor and gambling companies. However, it must be said that compliance with the legislation caused a high level of difficulty and anxiety for community organisations at the March 2011 election. The O'Farrell amendments had a greater reach and complexity, and the associated uncertainty and fear of incurring penalties acted to dampen community engagement in the political process.

The AMWU appeal to the High Court was based on the Union’s concern that the legislation acted to affect its capacity to campaign and organize on political, social and economic issues, impacting on the Union’s right of freedom of association and implied freedom of political communication. Further, the legislation had the scope to prevent community organisations from engaging in political matters. These outcomes were profoundly anti-democratic.

Australia has a unique democracy. It is one of only a very few democracies in the world that enforces compulsory voting, which is essential to Australia’s democratic institutions. Also fundamental to our democracy is the right to participate – whether as a candidate or in support of a candidate. Powerful as the ballot box remains, practical and full participatory democracy requires that ordinary people should have the opportunity to participate as individuals and as groups at every level – from contributing to the development of policy to raising funds for a particular candidate or party, working in a candidate’s campaign office, distributing election material to scrutinizing the final vote.

As political parties and candidates have become increasingly dependent upon public funding, they have less incentive to seek direct participation in their campaigns from the public other than in the form of votes. There is no doubt that full public funding makes participation more remote unless you are a candidate or member of a political party.
What is the appropriate regulation of third party campaigners to run political campaigns and the impact of public funding on them

The reality of modern political campaigning means that effective advocacy and democratic engagement in the electoral system costs money. While they have clearly been ineffective at eliminating corruption, the current laws have been effective in limiting the capacity of ordinary people and the organisations that represent them to campaign and organise on political, social and economic issues. Full public funding would have a similar effect in dampening the vigor and debate associated with a healthy democracy.

Complex legislation has a chilling effect on the participation of community groups in electoral or political campaigns – the AMWU has been told by some groups that they don’t participate because they don’t understand the provision of the legislation.

By restricting donations to individuals, the O’Farrell election funding legislation removed the ability for low and middle-income people to pool resources to support candidates for electoral office that best reflect their needs and wishes, while continuing to privilege high-wealth individuals, who have a higher capacity to make personal donations. This has been a significant threat to the integrity of NSW’s democratic institutions, effectively providing wealthy people a greater say than those without significant wealth.

Full public funding would have a similar effect, effectively curtailing community organisations from ‘speaking up’ in relation to political matters where their advocacy (often on behalf of very vulnerable people) involves providing support for members of parliament, candidates and political parties. It is clear that prohibiting unions, community organisations and other groups from making political donations has already been too wide-reaching a reform, with significant negative consequences. Further restricting the activities of groups such as these serves no public benefit, and in fact substantially undermines the quality of NSW’s democracy.

Restrictions on who may engage in political communication are not consistently applied. While the current legislation regulates unions and other groups that pool resources to make a political point, there are no caps or other restrictions affecting either print or electronic media which can continue to make political commentary of any sort at any time, regardless of ownership or vested interests. Full public funding would do nothing to address this serious anomaly. Without equally stringent scrutiny of the integrity of political reporting and transparency about media ownership and agendas, it is clear that full public funding would in practice result in a lop-sided restriction on who can and cannot make political comment.
It is also unclear whether full public funding is expected to limit ‘in kind’ support for candidates. Will the offer of non-financial support of any kind also be banned? If not, why not? If a club or institution is able to offer volunteer labour to a candidate it supports, will this be permitted? Or must assistance always be purchased? If it is morally wrong to give financial support, why is it permissible to give labour?

**Recommendations**

The AMWU believes that there are stronger alternatives to public funding that would deliver a system that is simple for participants, provides for public transparency through real-time disclosure, donation and expenditure limits and a strong well-resourced compliance, enforcement and education capability in the regulator. We offer the following proposals as the foundation of a system that encourages participation, discourages corruption and may restore confidence in our public institutions:

1. We should reject as a matter of principle prohibitions on certain classes of person or organisation donating to parties or spending in election campaigns in favour of a mandated real-time disclosure regime. Real time disclosure of donations above a very low level, say $100 would simultaneously give the public instant access to information about who donates (and allow them to draw their own conclusions about why they donated) but would also be a significant disincentive to donors whose real purpose is to influence political decision-making. Real time disclosure is effective, practical and enforceable. There is no reason why a private donation to a political party or candidate could not be revealed on the Electoral Commission and that party’s websites within 24 hours of being made.

The Panel might consider extending the model developed by Ann Twomey. A simple, practical and cost effective means of improving transparency and making corruption difficult at a state and local government level would require all political donations made at any time in NSW to be made through the NSW Election Funding Authority. Donations would be recorded, receipted and disclosed (on both the EFA website and the party/candidate’s website) in real time as they are received.

2. Caps on expenditure as well as donations, in particular sensible caps on television advertising, would have a significant effect on the ‘arms race’ between the major campaigns. Targeted and enforceable caps would encourage campaigns that focus on volunteer effort and activist engagement and would discourage parties from focussing their energy on soliciting large donations from the big end of town.

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14 Twomey 28/08/14
3. We need a federal ICAC with real teeth and the capacity to oversee our federal political system. NSW Labor’s move to support a national corruption body is significant, but reform in this area is far from inevitable.

4. NSW and the Commonwealth must introduce parallel effective regulation of lobbyists who work on behalf of private interests. New regulations that register lobbyists and open up Ministers and staffers diaries are now necessary to restore public confidence.

5. Critically, new electoral legislation must be accompanied by an effective compliance regime with a well-resourced regulator and stiff penalties, including disqualification from candidacy, for breaches of the rules. Breaches by people who are not candidates and organisations, including political parties should be dealt with under the Crimes Act, commensurate with the offence.

Thank you for the opportunity to make a submission to the Inquiry. I would be very happy to discuss these matters further, or make further written submissions if that would assist the Inquiry in its deliberations.

Yours sincerely

Tim Ayres
NSW State Secretary, AMWU