The Centre for Public Integrity

7 October 2022

Committee Secretary
Joint Standing Committee on Electoral Matters
PO Box 6021
Parliament House
CANBERRA ACT 2600

Dear Secretary

**Inquiry into the 2022 federal election**

The Centre for Public Integrity welcomes the opportunity to make a submission to the Committee's inquiry into the 2022 federal election.

The Centre for Public Integrity is a non-partisan thinktank led by integrity experts from academia, public policy, and the judiciary. Since our establishment in 2019, one of our primary research focuses has been **money in politics**. We believe that there is now a real opportunity to clean up the nefarious influence of private money in our politics, and to level the playing field with electoral expenditure caps and appropriate modifications to the public funding system. Accordingly, our submission will focus on terms of reference (a) and (b). Specifically:

- Reforms to political donations laws;
- The implementation of electoral expenditure caps; and
- Reforms to the public funding of political parties and candidates.

We see our suggestions here as part of a **comprehensive system of reforming political finance in Australia.** It is important to acknowledge that these reforms are complementary, and best function in the presence of each other. As we will discuss, donations caps in the absence of electoral expenditure caps risk entrenching incumbency, and public funding can best serve its integrity function when there are electoral expenditure caps. Public funding similarly seeks to recompense at least some of the private funding lost by more restrictive donations laws. Each of our recommendations for each term of reference forms part of a suite of mutually reinforcing reforms to protect the integrity of Australian elections for years to come.

## Reforms to political donations laws

The Commonwealth's political donations laws are the least stringent in the federation. Commonwealth electors have a right to know *from whom* donations are coming, and how large they are. Donations laws should also be amended to limit the *amount* that can be donated to minimise the prospect of corruption.

### Amending the disclosure threshold

The Commonwealth disclosure threshold for political donations, currently set at $15,200 (as indexed for the 2022/23 financial year), is unjustifiably high and should be substantially lowered to promote transparency and accountability.

With Australian political parties declaring $1.38 billion in income of unexplained origin between 1998/99- 2020/21, it is beyond contestation that the Commonwealth's high disclosure threshold is creating a transparency void. For the 2020/21 financial year alone, 38.6% of parties' income – or $68,265,479 – was of unexplained origin.[1]

Not only is the high Commonwealth disclosure threshold flooding Australia's political system with hidden money, it is also significantly out of step with the thresholds for disclosure set by the states and territories. These thresholds, as set out in Figure 1, sit at $1,000 in New South Wales, Queensland, and the Australian Capital Territory, marginally higher in Victoria (where the threshold is indexed annually), slightly higher again in the Northern Territory and Western Australia ($1,500 and $2,500, respectively), and $5,576 in South Australia.

The rationale for setting the disclosure threshold at $1,000, as Australia's three most populous states and the ACT have done, is sound: it is approximately equal to median Australian weekly earnings. In contrast, the Commonwealth disclosure threshold is fifteen times that amount.

| | NSW | QLD | ACT | NT | Vic | WA | SA | TAS |
|---|---|---|---|---|---|---|---|---|
| Disclosure threshold* | $1,000[2] | $1,000[3] | $1,000[4] | $1,500[5] | $1,080[6] | $2,500[7] | $5,576[8] | NA* (*reform Bill currently before the Parliament) |

**Figure 1: Annual return disclosure thresholds in Australian States and Territories[9]**

[1] The Centre for Public Integrity, *Shining light on political finance for the next federal election* (Report, February 2022) <https://publicintegrity.org.au/wp-content/uploads/2022/02/Hidden-money-2021.docx.pdf>.
[2] *Electoral Funding Act 2018* (NSW) s 12.
[3] *Electoral Act 1992* (Qld) s 201A.
[4] *Electoral Act 1992* (ACT) div 14 4.
[5] *Electoral Act 2004* (NT) div 3.
[6] *Electoral Act 2002* (Vic) s 216.
[7] *Electoral Act 1907* (WA) pt VI div 3.
[8] *Electoral Avt 1985* (SA) s 130ZF(4)(a)
[9] Note that some jurisdictions establish different threshold for election returns compared to annual returns.

The need for a reduced disclosure threshold at the Commonwealth level is immediately evident when one considers the purpose towards which disclosure is directed. Disclosure of political donations is intended to promote transparency and accountability. The public rightly expects the sources of political actors' funds to be traceable, so that they can be scrutinized.

In addition, bringing the Commonwealth disclosure threshold (and other political finance laws) into line with the more robust state regimes would limit the ability of donors to circumvent one jurisdiction's laws by making donations to a party branch in a less restrictive jurisdiction. For example, in Victoria donations above $1080 need to be disclosed. A Victorian donor wishing to donate a substantial amount to their preferred political party but maintain their anonymity could simply donate any amount up to the current federal threshold of $15,200 into the federal account of their preferred party's Victorian branch, and thereby avoid Victorian disclosure requirements.

In respect of whether a reduced disclosure threshold should be indexed, we note that Victoria is the only state to require that its threshold be indexed (annually). The Centre for Public Integrity supports this approach, to maintain a stable real disclosure threshold, particularly as inflation rises rapidly. If the disclosure threshold is not indexed, its real value will decrease over time. There is a risk that decreasing real mutual disclosure obligations may place undue pressure on smaller groups in civil society and deter them from making what is otherwise a legitimate and bona fide donation.

**The Centre for Public Integrity recommends:**

- **A reduction in the reporting threshold for donations, with individual donations over $1,000 and aggregated donations of $3,000 over 3 years to political parties, candidates, associated entities, third parties and significant third parties being required to be disclosed; and**

- **The reduced disclosure threshold be indexed annually.**

**Real-time disclosure of donations**

The current federal disclosure regime, which allows donations to be hidden for up to 18 months, is in urgent need of reform. Best practice disclosure regimes provide for 'real time' disclosure, with 'real time' functioning as shorthand for disclosure that is relatively immediate after the making of a donation.[10] There is no agreed definition in respect of precisely what constitutes 'real time': while a 7-day requirement constitutes 'real time' in Queensland, a disclosure period three times that described as 'real-time' in Victoria.[11]

Requiring the disclosure of donations to be as proximate as possible to their making is an important scrutiny measure: it enables interested parties to examine whether there may be, for example, a correlation between the making of a donation by a donor, and the making of a controversial regulatory decision in that donor's favour by the donee

[10] Insofar as the focus of this term of reference is on 'real time' disclosure, we have not dealt at with annual return disclosure requirements. For example, in addition to its disclosure returns Victoria requires annual returns to be made under Division 3C of the Electoral Act 2002 (Vic). Queensland also requires candidates to disclose donations within 15 weeks after an election, as well as in election summary returns (ss 261(3) and 262(3) of the *Electoral Act 1992* (Qld). Parties and associated entities are required under ss 290(4) and 294(4) to make periodic returns.
[11] 'Victoria To Have Nation's Strictest Donation Laws', *Premier of Victoria* (Web Page) <https://www.premier.vic.gov.au/victoria-have-nations-strictest-donation-laws>.

The importance of timely disclosure is heightened in elections, when voters have a legitimate interest in knowing how much has been donated to candidates, and by whom. The special importance that disclosure assumes during elections is recognised by the approach taken in New South Wales, Queensland, South Australia and the ACT, where the disclosure period during elections is shorter than the otherwise applicable disclosure period (in Queensland, the 7-day disclosure period reduces to 24 hours during elections.

| | QLD | VIC | ACT | NSW | NT | WA | SA | TAS |
|---|---|---|---|---|---|---|---|---|
| Disclosure time* (for non-donors) | 7 days (24 hours during election)[12] | 21 days[13] | 7 days during election[14] | Half-yearly (21 days during election)[15] | Various timeframes established under the relevant Act[16] | Up to 17 months (for parties and associated entities)[17] | Half-yearly (7 days during election)[18] | NA* (*reform Bill currently before the Parliament)[19] |

**Figure 2: Time to disclosure in Australian States and Territories**

In New South Wales and South Australia, the general half-yearly disclosure requirement reduces to 21 days and 7 days respectively, and the ACT's general disclosure requirement also reduces to 7 days.

Out of all Australian jurisdictions, Queensland is the exemplar in respect of disclosure immediacy: donations received must be disclosed by candidates, parties and associated entities within 7 days, except for in the week prior to election day, when disclosures must be lodged in the state's Electronic Disclosure System within 24 hours (ss 8A, 10 and 10A *Electoral Regulations 2013* (Qld)).

Victoria's 21-day disclosure requirement is the next best general (non-election) disclosure requirement amongst Australian jurisdictions. Under s 216 of the *Electoral Act 2002* (Vic), donors, candidates, parties, groups, nominated entities, associated entities and third-party campaigners must all make disclosure returns within 21 days of an over-threshold donation. In our view, however, 21 days is substantially longer than is ideally required to promote transparency and accountability, and federally it would be preferable to adopt the standard set by Queensland.

**The Centre for Public Integrity recommends:**

- **Real time disclosure of donations, with disclosure required within 7 days except in election periods where it should be required within 24 hours.**

[12] *Electoral Act 1992* (Qld) div 7.
[13] *Electoral Act 2002* (Vic) s 216.
[14] *Electoral Act 1992* (ACT) div 14.4. Note that in an election year, donations that reach the threshold between 30 April-1 July are to be disclosed by 7 July; donations that reach the threshold after 1 July are to be declared within 7 days.
[15] *Electoral Funding Act 2018* (NSW) s 13
[16] *Electoral Act 2004* (NT) ss 191-192.
[17] *Electoral Act 1907* (WA) pt VI div 3.
[18] *Electoral Act 1985* pt 13A div 7.
[19] See Electoral Disclosure and Funding Bill 2022.

**Definition of 'donation'**

Donations made through attendance at party fundraisers, priced at $10,000-20,000 per person, are currently not categorised as gifts. Corporate sponsorship or membership of cash-for-access business forums, with reports citing corporate contributions of $27,500 and $110,000, are at risk of being hidden from public view.

**The Centre for Public Integrity recommends:**

- **Broadening of the definition of 'donation' to include income from party fundraisers, corporate sponsorship of business forums, membership fees over $2,000 per year, and any gift that is spent on electoral expenditure (see section 5 of the *Electoral Funding Act 2018 (NSW)*).**

**Donations caps**

Currently, donations caps are in place in New South Wales, Queensland, and Victoria (see Figure 3).

| | NSW | QLD | VIC |
|---|---|---|---|
| Cap | $6,700 (party) or $3,100 (candidates/third party campaigners) per financial year[20] | From 1.07.2022 – 25.11.2024:<br>$6,000 (to an independent candidate) or<br>$6,000 (to candidates endorsed by the same party).[21]<br><br>*New caps will apply after the 2024 election | $4,210 over 4-year election period[22] |

**Figure 3: Donations caps in New South Wales, Queensland, and Victoria**

The absence of donations caps at the federal level means that well-resourced individuals and entities have an opportunity to buy undue influence and access. The public is aware of this risk, and as a consequence the absence of caps also has a deleterious impact upon fraying public trust: public trust in democracy requires that impartiality in government decision-making not only exist but be *seen* to exist.

The ability of a well-resourced selected few to exercise a disproportionate influence on parliamentary representatives plays out in the available donations data. Our analysis of donations data from 1998-99 until 2018-29 showed that 0.6 per cent of donors made up 30 per cent of donations

| Segment | Number of Donations | Sum Value | % of Total Donations |
|---|---|---|---|
| >$10 million | 3 | $112,353,208 | 9.3 |
| >$1 million | 102 | $242,228,943 | 20.1 |
| >$100,000 | 1,789 | $392,120,911 | 32.5 |
| >$10,000 | 15,426 | $459,720,930 | 38.1 |
| **Total** | 17,320 | $1,206,423,992 | **100** |

**Figure 4: Donations by value in constant dollars 1998-99 – 2018-19**

[20] *Electoral Funding Act 2018* (NSW) pt 3 div 3.
[21] *Electoral Act 1992* (Qld) s 252.
[22] *Electoral Act 2002* (Vic) pt 12 div 3A.

The High Court has recognised the utility of donations limitations, holding in its 2015 *McCloy v New South Wales* ('*McCloy*') decision that '[t]he risk to equal participation posed by the uncontrolled use of wealth may warrant legislative action to ensure, or even enhance, the practical enjoyment of popular sovereignty'.[23] This judgment – which upheld the constitutionality of NSW laws imposing caps on political donations, banning donations by property developers and prohibiting indirect campaign contributions – specifically recognised that the donations caps in question did not impede the system of representative government provided for by our Constitution; but *preserved* and *enhanced* it.[24]

In reaching its conclusion in *McCloy*, the Court considered at length the nature of different kinds of corruption: quid pro quo, clientelism, and war chest corruption. The first two it described as threatening 'the quality and integrity of governmental decision-making',[25] whereas the third may pose a threat to the electoral process.[26] While quid pro quo is a more overt form of corruption (occurring where a candidate 'may be tempted to bargain with a wealthy donor to exercise his or her power in office for the benefit of the donor in return for financial assistance with the election campaign'[27]), clientelism is 'more subtle' and involves 'the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder.'[28] Because clientelism is, as the US Supreme Court noted in of *McConnell v Federal Election Commission* 540 US 93 at 153 (2003), neither easy to detect nor practical to criminalise, '[t]he best means of prevention is to identify and to remove the temptation'.[29]

The Centre for Public Integrity considers that the capacity for well-resourced parties to exert this kind of undue influence could be countered by the implementation of caps set at $2000 per annum per candidate and $5000 per party, from a single person or entity (aggregated).

In our view, any donation cap regime should provide for a limited membership exclusion. Such an exclusion would encourage parties and organisations to raise basic organisational revenue through broad participation of individuals, and limiting it to $600 would help counter the ability of corporations to exert undue influence via $10,000 'membership' fees to a party's business networks or advocacy peak bodies. A reform of this nature would also bring the national scheme into line with section 96D of the *Election Funding, Expenditure and Disclosure Act 1981* (NSW).

Any donations cap regime must also ensure that the donations of related companies are aggregated. For example, under s 9(8) of the *Electoral Funding Act 2018* (NSW), related companies are treated as a single entity (and whether entities are related is a question to be determined by reference to the federal *Corporations Act 2001* (Cth).

[23] (2015) 257 CLR 178, 207 [45] (French CJ, Kiefel, Bell and Keane JJ).
[24] Ibid 208 [46]-[47].
[25] Ibid 205 [38].
[26] See ibid.
[27] Ibid 204 [36].
[28] See ibid citing *McConnell v Federal Election Commission* 540 US 93 at 153 (2003).
[29] Ibid 205 [37].

**The Centre for Public Integrity recommends:**

- **The implementation of donations caps set at $2000 per annum per candidate and $5000 per party, from a single person or entity (aggregated);**
- **A membership exclusion, limited to fees of up to $600; and**
- **The aggregation of donations of related companies for the purposes of caps.**

## Electoral expenditure caps

Electoral expenditure caps existed at the Commonwealth level until 1980, and it is high time that they were re-introduced. While the Commonwealth has historically been seen as a progressive electoral reformer, when it comes to curbing electoral expenditure it now lags behind both the states and comparable electoral democracies around the world.

### Trends in Commonwealth electoral expenditure

It is incredibly difficult to estimate electoral expenditure at the Commonwealth level for political parties and their endorsed candidates. The Australian Electoral Commission (**AEC**) currently only record *total payments* of political parties and their branches. Moreover, payments data for the 2021-22 financial year will not be released until early 2023. Notwithstanding, estimates of electoral expenditure can made using the payments data.

Total party payments have been increasing in real terms since data began being collected in 1998-99. Indeed, between 1998-99 and 2018-19, total payments of political parties grew almost 50 per cent. We expect this trend to continue upon the release of the payments data for 2021-22.

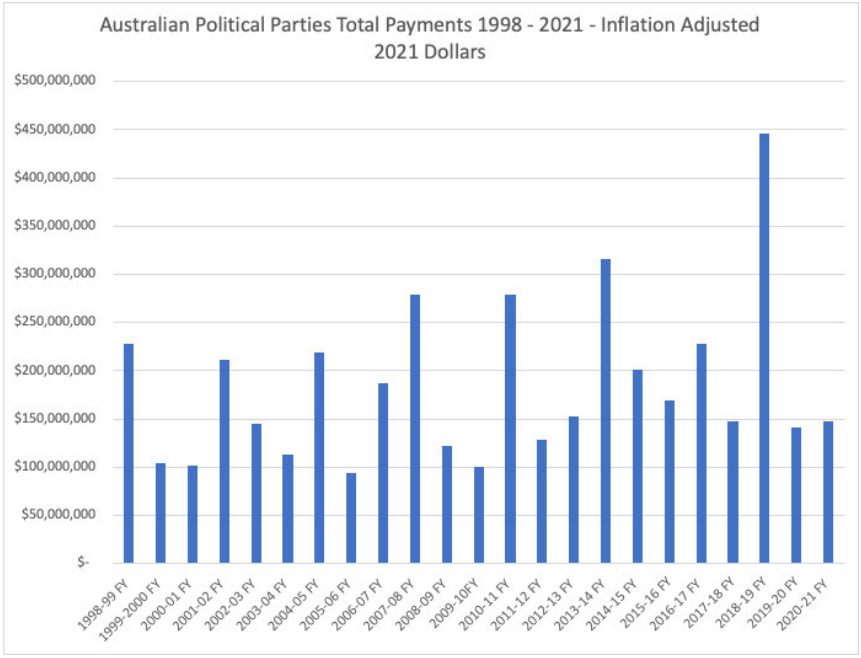


**Figure 5: Australian Political Parties Total Payments 1998 – 2021 – Inflation Adjusted 2021 Dollars[30]**

[30] Data Source: 'Transparency Register', *Australian Electoral Commission* (Web Page) < https://www.aec.gov.au/parties_and_representatives/financial_disclosure/transparency-register/>.

This trend has also played out for estimated electoral expenditure. We estimate that between the 1998 and 2019 elections ALP electoral expenditure grew by over 50 per cent from $49.5 million to $74.5 million, and Coalition electoral expenditure grew by over 80 per cent from $64.4 million to $116.5 million.

Of perhaps even more concern is the increasing presence of 'big money' at Australian elections. For example, our estimates suggest that despite being a relatively minor electoral force, the United Australia Party managed to outspend the Australian Labor Party (**ALP**) at the 2019 election.

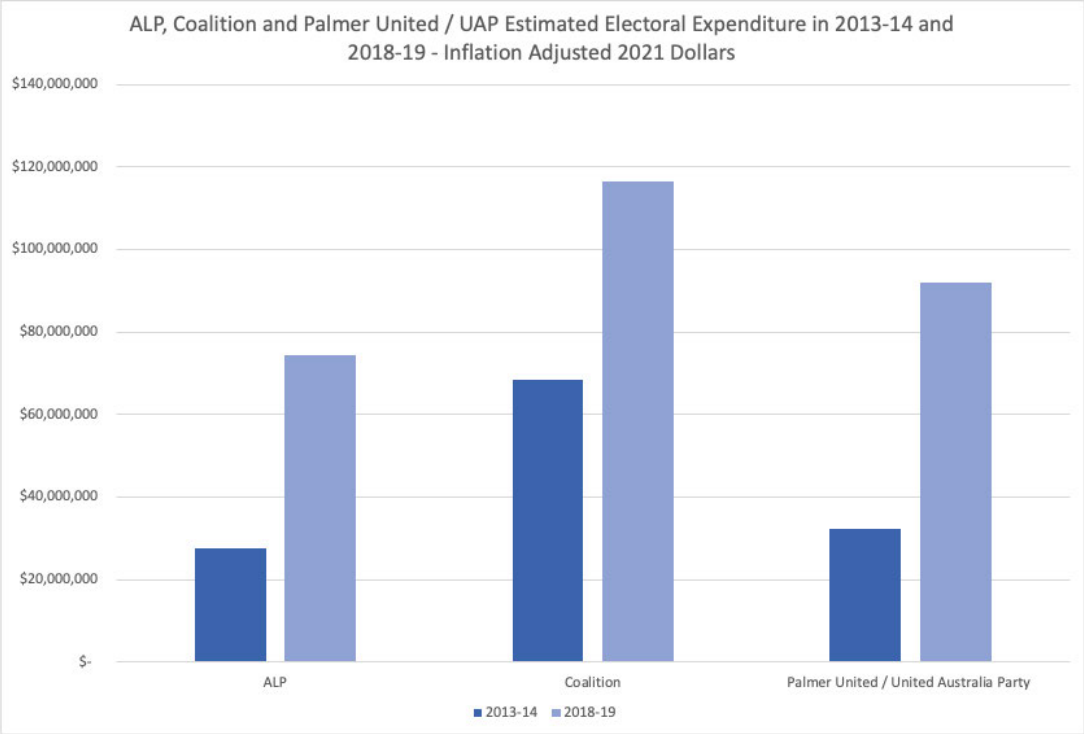


**Figure 6: ALP, Coalition and Palmer United / UAP Payments in 2013-14 and 2018-19 – Inflation Adjusted 2021 Dollars[31]**

High levels of electoral expenditure are not confined to political parties. Third parties, such as unions and corporations, sporadically engage in such expenditure – often at the expense of good public policy.

For example, in 2009-10 the Minerals Council of Australia spend over $21 million inflation adjusted dollars to persuade the public to vote against the Gillard Government at the 2010 election in response to their proposed Minerals Resource Rent Tax. BHP alone spent another $5 million on the same issue.

Similarly, in 2010-11, the Alliance of Australian Retailers, bankrolled by British American Tobacco, Philip Morris and Imperial Tobacco spent almost $11 million inflation adjusted dollars to fight the proposed plain packaging legislation. Imperial Tobacco spent another $5 million inflation adjusted dollars independently over this same period.

[31] Data Source: 'Transparency Register', *Australian Electoral Commission* (Web Page) < https://www.aec.gov.au/parties_and_representatives/financial_disclosure/transparency-register/>.

While such expenditure would no longer constitute electoral expenditure due to the definition being modified in 2018. The Centre for Public Integrity believes that such influence is unacceptable, and that the definition should be re-broadened either in accordance with the New South Wales, or Canadian definition of 'electoral matter' (See Recommendation 8).

**The problem with excessive electoral expenditure**

As it currently stands, there is an 'arms race' in electoral expenditure. In each successive election more and more electoral expenditure is incurred. This cost explosion has considerable negative externalities for the Australian polity. While it is clear that elections are not 'for sale' – with the biggest spender not always being the victor – these effects are not to be underestimated.

Uncapped, unequal and excessive electoral expenditure has implications for **political equality**. Large amounts of spending by established payers may dissuade potential candidates from entering the race and serve to entrench incumbents with more established fundraising networks. An election must be, to the greatest practical extent, a competition of ideas rather than of dollars. A plurality of competitive candidates should and would be promoted by capping expenditure. This is well recognised as a constitutional prerogative by the High Court. In *McCloy*, French CJ, Kiefel, Bell and Keane JJ held that '[e]quality of opportunity to participate in the exercise of political sovereignty is … guaranteed by our Constitution'.[32]

Excessive electoral expenditure also has implications for **fundraising, decision making and resourcing**. We expect our elected members to represent their constituencies' interests and, where applicable, exercise their ministerial responsibilities. If they are focussed on raising funds for the next campaign on the 'permanent campaign' – then they are distracted from their real role. Moreover, as campaign costs increase and the 'low hanging fruit' of campaign funds dries up, the search for more campaign funds may leave candidates and incumbents facing re-election vulnerable to quid pro quo corruption from large donors with ulterior motives.

Finally, excessive third-party expenditure allows interested third parties to exercise a disproportionate and **undue influence** on the preferences of electors. While third party participation should be largely welcomed – specifically from civil society – unions and large corporations protecting their pecuniary interests should not be able to shout down potentially good public policy to protect their bottom line.

**Expenditure caps as a potential solution**

In 2010, 2011 and 2012 respectively, New South Wales, Queensland and the Australian Capital Territory each introduced electoral expenditure caps. A simple analysis of electoral expenditure data from each shows the potential for expenditure caps to decrease demand for funds, to arrest the arms race and to broadly equalise spending between the major political forces, reasserting the primacy of the *contest of ideas* rather than dollars.

[32] *McCloy* (n 23) 207 [45] (French CJ, Kiefel, Bell and Keane JJ).

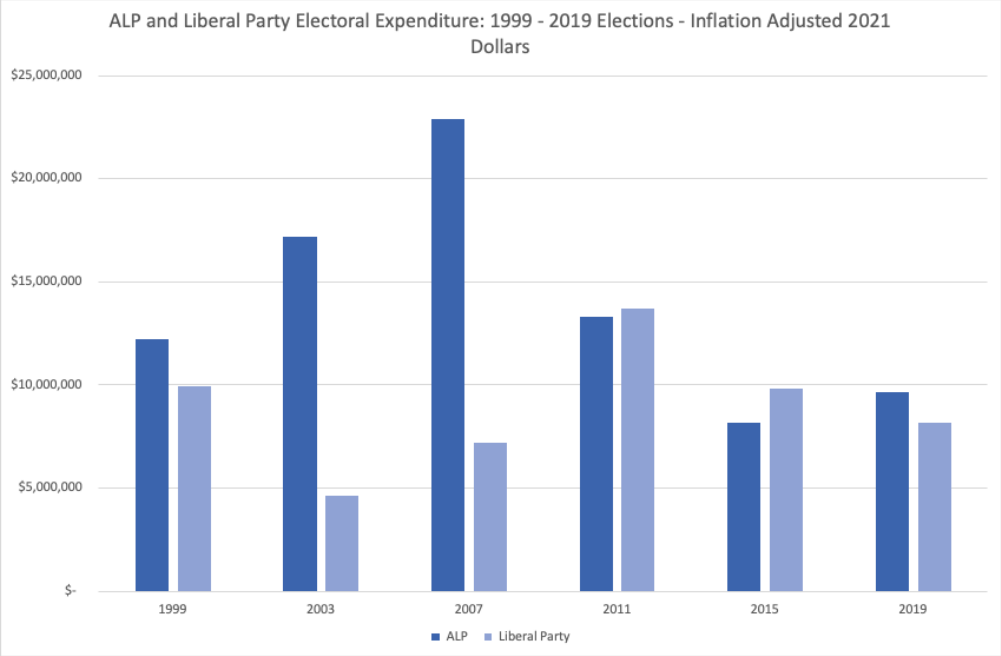


**Figure 7: <u>New South Wales:</u> ALP and Liberal Party Total Electoral Expenditure: 1999 – 2019 Elections – Inflation Adjusted 2021 Dollars[33]**

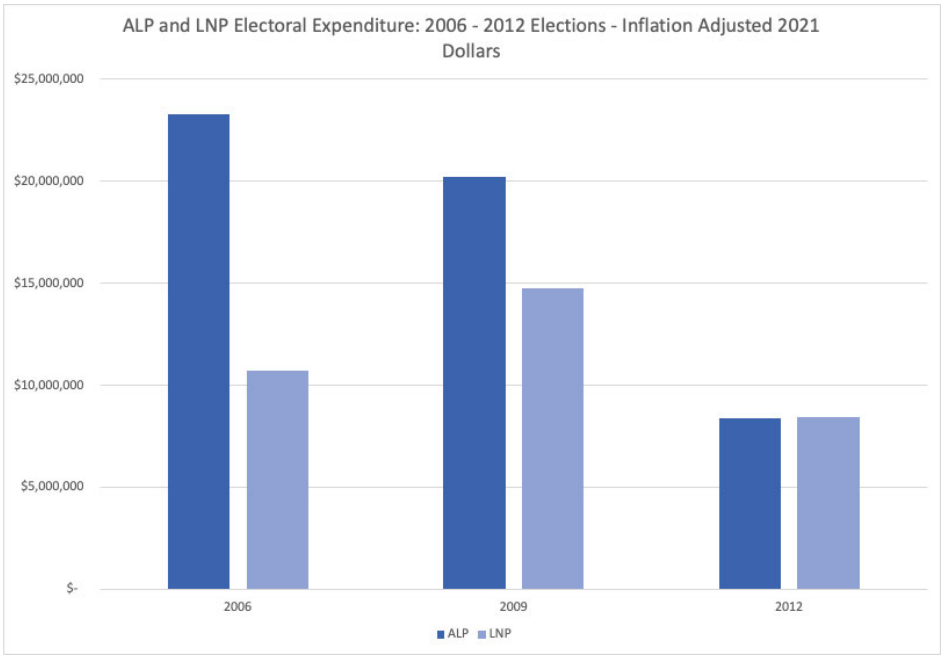


**Figure 8: <u>Queensland:</u> ALP and Liberal National Party Total Electoral Expenditure: 2006 – 2012 Elections – Inflation Adjusted 2021 Dollars[34]**

[33] Data Source: 'View disclosures', *NSW Electoral Commission* (Web Page, 30 August 2021) < https://www.elections.nsw.gov.au/Funding-and-disclosure/Disclosures/View-disclosures>.
[34] Data Source: Jennifer Rayner, 'More regulated, more level? Assessing the impact of spending and donation caps on Australian State elections' in Anika Gauka and Marian Sawer (eds), *Dilemmas of political party regulation in Australia* (ANU Press, 2016) 147.

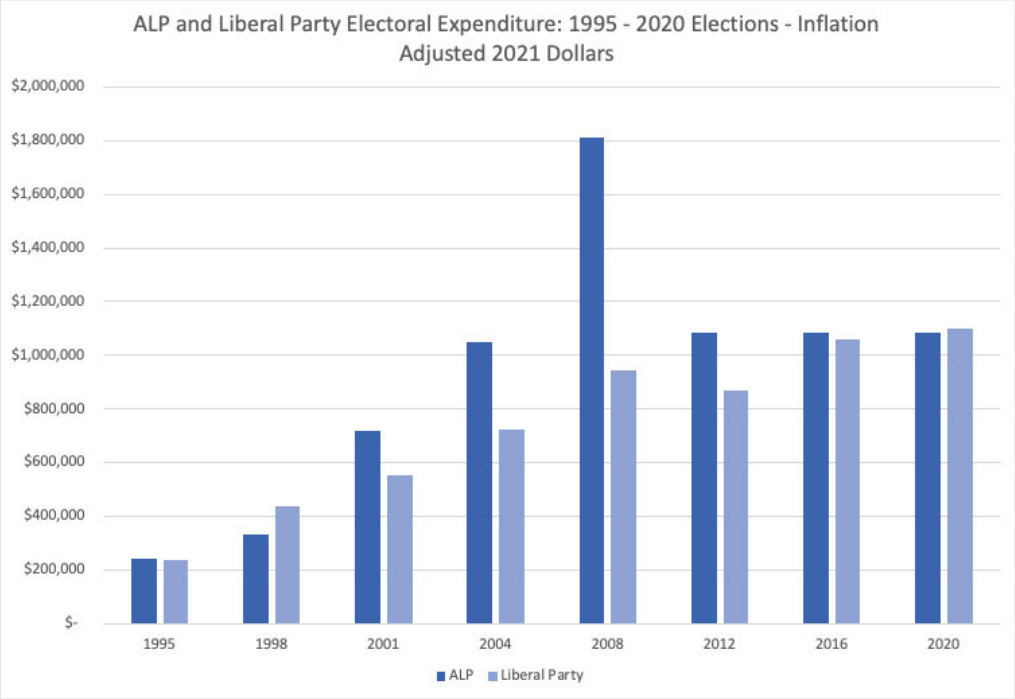


**Figure 9: Australian Capital Territory: ALP and Liberal National Party Total Electoral Expenditure: 2006 – 2012 Elections – Inflation Adjusted 2021 Dollars[35]**

[35] Data Source: 'Financial disclosure returns – election returns', *Elections ACT* (Web Page) < https://www.elections.act.gov.au/funding_and_disclosure/financial_disclosure_returns/financial-disclosure-returns-election-returns>.

Western Australia provides a useful counterfactual for electoral expenditure dynamics without expenditure caps. There is a stark difference between Western Australia and the capped jurisdictions. Electoral expenditure in aggregate continues to largely climb in accordance with the arms race, and the spends between the major parties tend to be vastly different – indicating a level of political inequality at election time. As far as is observable given data constraints, the Western Australian and Commonwealth patterns in spending are highly comparable.

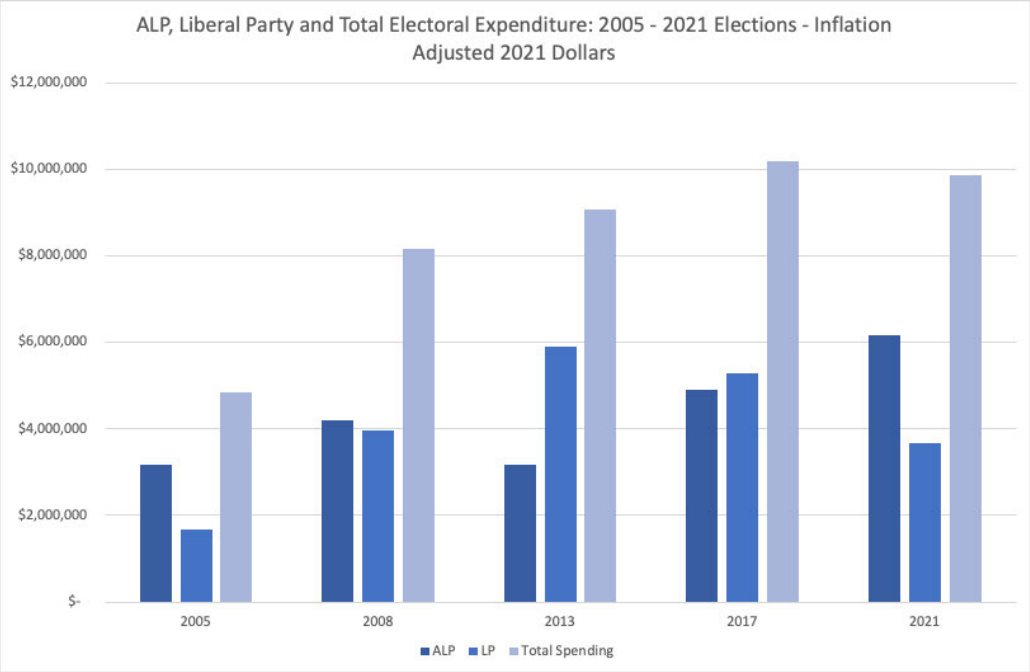


**Figure 10: Western Australia: ALP and Liberal Party Total Electoral Expenditure: 2005 – 2021 Elections – Inflation Adjusted 2021 Dollars[36]**

Research in overseas jurisdictions suggests that caps on electoral expenditure increase the size of the pool of candidates, the diversity of candidates, and competitiveness of elections.[37]

[36] Data Source: 'Elections Returns', *Western Australian Electoral Commission* (Web Page) < https://www.elections.wa.gov.au/candidates-and-parties/funding-and-disclosure/elections-returns>.
[37] Alexander Fouirnaies, 'How Do Campaign Spending Limits Affect Elections? Evidence from the United Kingdom 1885-2019' (2020) 115(2) *American Political Science Review* 395; Eric Avis, Claudio Ferraz, Frederico Finan and Carlos Varjão, 'Money and Politics: The Effects of Campaign Spending Limits on Political Entry and Competition' (2022) *American Economic Journal: Applied Economics* (forthcoming); Nikolaj Broberg, Vincent Pons and Clemence Tricaud, 'The Impact of Campaign Finance Rules on Candidate Selection and Electoral Outcomes: Evidence from France' (NBER Working Paper 29805, February 2022) < https://www.nber.org/papers/w29805>.

**The Centre for Public Integrity's recommendations for effective expenditure caps**

In designing an appropriate regime for expenditure caps, the Commonwealth has the luxury of being able to select best practice from other domestic and international jurisdictions. The Centre for Public Integrity suggests the following 13 principles for guiding a best-practice expenditure cap regime. These are:

1. **A capped expenditure period commencing two years after previous polling day;**

Unlike state elections, Commonwealth elections are not regulated by statutory cycles. Most recent elections have been on almost exactly 36-month cycles. Accordingly, electoral expenditure should be capped *two years after the previous polling day* to allow for an approximately one-year capped expenditure period.

2. **Caps on electoral expenditure for political parties proportional to the number of electoral divisions in which they endorse candidates;**

There should be caps on electoral expenditure for political parties determined by the number of divisions in which parties run candidates. The Centre for Public Integrity recommends an extrapolation of the New South Wales caps.[38] Accordingly, this would impose a cap of approximately $257,113 per set aggregating to $38,824,039 for a party running in every seat. This figure should be indexed to inflation.

It is unlikely that general caps on electoral expenditure will offend the *Australian Constitution*. They exist in some form in New South Wales, Queensland, South Australia, the ACT, the Northern Territory and Tasmania. Indeed, they have been in place in New South Wales since 2011 and only in the decision of *Unions NSW v New South Wales* ('*Unions (No 2)*') has the High Court found a cap to be an impermissible burden on the implied freedom of political communication.[39] However, it is critically important to note that in the *Unions (No 2)* case, the High Court was concerned not with the validity of expenditure caps *generally*. Rather, it was specifically concerned with the validity of a New South Wales law which reduced the electoral expenditure cap applicable to third parties by 50 per cent, setting it at half the cap of parties and candidates. In their joint judgment, Kiefel CJ, Bell and Keane JJ noted that the general purpose of expenditure caps had been accepted in *Unions NSW v New South Wales* (*Unions (No 1)*):[40]

> The amount of money available for campaign expenditure is linked with what is received by way of political donations. In *Unions NSW [No 1]*, the general purpose of the provisions of the EFED Act which imposed caps on that receipt and expenditure was not in issue. The purpose was to secure the integrity of the legislature and government in New South Wales, which was at risk from corrupt and hidden influences of money.[41]

The insurmountable problem in *Unions (No 2)* was that New South Wales was unable to justify why preventing voices other than third parties from being drowned out required the halving of the pre-existing cap on third-party expenditure. In particular, the Court noted that a relevant expert report contained no basis for such a recommendation, and there had been no inquiry made in respect of the level of expenditure that third parties required in order to reasonably communicate their message.

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[38] *Electoral Funding Act 2018* (NSW) s 29.
[39] (2019) 264 CLR 595.
[40] *Unions NSW v New South Wales* ('*Unions (No 1)*') (2013) 252 CLR 530.
[41] *Unions (No 2)* (n 39) 604 [5] (Kiefel CJ, Bell and Keane JJ).

In our view, the approach previously taken by the High Court in dealing with challenges to the efforts of Parliaments to promote a level playing field –in the form of both donation caps and expenditure caps – means that appropriately designed, evidence-based expenditure caps are likely to survive any constitutional challenge on the basis of the implied freedom of political communication.

**3. A bargaining system between endorsed candidates and political parties over the applicable expenditure cap;**

There should be no independent candidate expenditure cap for endorsed candidates. Instead, there should be a single 'pot' from which the cap is allocated based on bargaining between the party and the candidate – consistent with the South Australian legislation.[42] The maximum allocation per candidate should be $300,000, and the minimum reserve allocation in the event of disagreement $50,000. It should be noted that the maximum allocation is below the ideal expenditure cap for an independent candidate (see Recommendation 5).

This distinction would require a differentiation between 'candidate spending' and 'party spending'. Candidate spending should be defined in accordance with the Queensland definition as spending which:

(a) is communicated to electors in the candidate's electoral division; and

(b) is not mainly communicated to electors outside the candidate's electoral division.[43]

For parties with less than 10 endorsed candidates in the House of Representatives but endorsing a Senate group, or only running in the Senate; the Centre for Public Integrity recommends a similar extrapolation of the New South Wales caps in the Legislative Council (See **Appendix 1**).[44]

**4. Aggregation of associated entity electoral expenditure with party expenditure – with associated entity defined narrowly;**

The definition of associated entities should be narrowed in accordance with the New South Wales definition to account for entities which operate 'solely for the benefit of one or more registered parties or elected members or is controlled by one or more registered political parties'.[45] Expenditure by associated entities so-defined should be captured for the associated party's expenditure cap. Associated entities previously captured by the Commonwealth's broad definition should now be subject to the third party expenditure cap (see Recommendation 6) and closely monitored for violations of the anti-circumvention offence (See Recommendation 9).

[42] *Electoral Act 1985* (SA) div 6.
[43] *Electoral Act 1992* (Qld) s 281B.
[44] *Electoral Funding Act 2018* (NSW) ss 29(4)-(5), 29(7). See Appendix 2.
[45] *Electoral Funding Act 2018* (NSW) s 4 (definition of 'associated entity').

**5. Caps on electoral expenditure for independent candidates which are proportionally higher than those for endorsed candidates and parties to account for the positive externalities of general party advertising;**

There are undoubtedly positive externalities to general party advertising. Radio, television and social media advertisements are usually of benefit to all party endorsed candidates. Parties also maintain a distinct organisational and fundraising advantage compared to independent candidates.

To account for this, we recommend a maximum independent candidate spend of $350,000 – that is, a maximum spend $50,000 higher than the maximum candidate allocation. This figure should be identical for ungrouped independent Senate candidates. This figure is consistent with successful independent candidates at the 2019 election and prior.

While it is to be expected that successful high-profile independents at the 2022 election spent significantly more, pre-2022 data shows that this cap should by no means limit the ability of independent candidates to successfully contest elections.

| Electoral event | Independent candidate | Elected? | Electoral expenditure (2021 dollars) |
|---|---|---|---|
| **2019 Federal election** | Helen Haines | Yes | $333,959 |
| | Julia Banks | No | $112,260 |
| | Kerryn Phelps | No | $293,222 |
| | Zali Steggall | Yes | $947,239 |
| | Andrew Wilkie | Yes | $102,721 |
| **2018 Wentworth by-election** | Kerryn Phelps | Yes | $152,528 |
| **2016 Federal election** | Catherine McGowan | Yes | $233,715 |
| | Andrew Wilkie | Yes | $151,608 |
| **2013 Federal election** | Catherine McGowan | Yes | $148,971 |
| | Andrew Wilkie | Yes | $157,925 |
| **2010 Federal election** | Rob Oakeshott | Yes | $97,014 |
| | Bob Katter | Yes | $153,023 |
| | Andrew Wilkie | Yes | $44,546 |
| | Antony Windsor | Yes | $116,868 |

**Figure 11: Victorious and/or incumbent independent candidate electoral expenditure since the 2010 Federal election[46]**

[46] Data Source: 'Transparency Register', *Australian Electoral Commission* (Web Page) < https://www.aec.gov.au/parties_and_representatives/financial_disclosure/transparency-register/>.

6. **Moderate third-party expenditure caps with a requirement to register with the Australian Electoral Commission (AEC) when intending to, or having reached, a threshold level of electoral expenditure;**

There should be a cap on third-party electoral expenditure, and a requirement to register with the Australian Electoral Commission when a third party intends to exceed, or has already exceeded, such an amount. The registration threshold should be sufficiently high to encourage participation by smaller organisations and civil society without being an undue administrative burden. It should not deter participation, and the AEC should play a role in providing informal advice to organisations seeking to incur electoral expenditure.

A third-party cap is not as easily determined or extrapolated as a party or candidate cap. In *Unions (No 2)* the High Court held that the effective halving of the New South Wales third-party expenditure cap infringed the implied freedom of political communication. According to the majority, this was because the New South Wales Parliament had failed to justify the burden of halving the cap as necessary to fulfil its intended purpose of levelling the playing field and preventing the drowning out of other voices.[47] Gageler J further held that a valid third-party cap should 'at the very least, leave a third-party campaigner with an ability meaningfully to compete on the playing field'.[48]

Accordingly, any third-party cap and associated registration threshold requirement should be determined by an inquiry by suitably qualified persons appointed by the Parliament to be consistent with the findings in *Unions (No 2)* and therefore the Constitution – and should be periodically reviewed to ensure its ongoing compatibility. Irrespective of the final amount, it should be considerably lower than the cap for a party contesting all electoral divisions – as was the New South Wales cap before it was halved and subsequently voided.[49]

7. **Capped in-electorate spending by third parties;**

While capped in-electorate spending by endorsed candidates and their parties is captured by the bargaining process in Recommendation 2, third parties must also be captured by a limit on in-electorate spending to prevent the flooding of specific races. The definition of in-electorate spending should accord with Recommendation 2.

8. **A broader definition of electoral matter such that most third-party issues-based advertising campaigns are captured;**

The definition of 'electoral matter' was narrowed in 2018, which in turn narrowed the definition of 'electoral expenditure'. The new definition requires that the expenditure be for the 'dominant purpose'. Historic third-party campaigns such as mining and plain packaging would not be captured by the amended definition.

[47] *Unions (No 2)* (n 39) 611 [30] (Kiefel CJ, Bell and Keane JJ).
[48] *Unions (No 2)* (n 39) 633-4 [101] (Gageler J).
[49] For example, at the 2015 New South Wales State Election, the cap was $1,166,000 for a registered third-party campaigner whereas the cap for a party running candidates in all 93 electoral districts was $10,341,600.

The definition of electoral expenditure should be re-broadened in accordance with the New South Wales definition to capture third-party issues-based advertising campaigns which seek to influence voting at an election.[50]

Alternatively, the Canadian definition of 'election advertising' would prove useful in measuring and capping third party electoral expenditure. The definition includes 'taking a position on an issue with which a registered party or candidate is associated'; this allows election participants to set the agenda for the election – and if third parties wish to involve themselves, they must incur electoral expenditure.[51]

**9. An anti-circumvention offence to prevent candidates, parties, associated entities or third parties from acting in concert to circumvent their applicable cap;**

An anti-circumvention offence should be inserted into the *Electoral Act 1918* (Cth) in accordance with the law of other states and territories with expenditure cap regimes.[52]

Such an offence would penalise any attempt by a regulated entity to exceed their cap in concert with another entity. This provision would be particularly important with a narrower definition of associated entity than is currently maintained at the Commonwealth level (Recommendation 6).

As considered by Edelman J in *Unions NSW v New South Wales*, such an offence, if it is to be constitutional, must extend to all actors attempting to circumvent their applicable cap – not only third parties.[53]

**10. A double-repayment penalty for negligently exceeding the cap, a punitive financial penalty and possible imprisonment for intentionally exceeding the cap;**

Expenditure caps are measures concerned with the *effects* of excessive electoral expenditure and its effects on political equality. Unintentional or negligent exceeding of the cap should attract at least a double repayment penalty by the offending entity, as is the case in the Australian Capital Territory.[54]

There indeed may be cases where exceeding the cap is a useful strategic tool. Accordingly, intentionally exceeding the cap should attract both a multiple repayment penalty, as well as a fine and possible imprisonment.

Finally, if the Court of Disputed Returns is satisfied that exceeding of an applicable expenditure cap changed the outcome of an election in a division or Senate race, they should be empowered to void the relevant election.

[50] See *Electoral Funding Act 2018* (NSW) s 7 (definition of 'electoral expenditure').
[51] See *Canada Elections Act,* SC 2000, c 9, s 2(1) (definition of 'election advertising'). See also *Harper v Canada (Attorney-General)* 2004 SCC 33 [90] (Bastarache J).
[52] See *Electoral Funding Act 2018* (NSW) ss 35, 144; *Electoral Act 1993* (NZ) s 203F(3); *Electoral Act 1992* (Qld) s 307B; *Electoral Act 2004* (NT) s 203D.
[53] *Unions (No 2)* (n 39) 651-675 (Edelman J); see for example *Electoral Funding Act 2018* (NSW) s 35.
[54] See *Electoral Act 1992* (ACT) ss 205F-205G.

11. **Real time disclosure by parties, candidates, associated entities and third parties;**

There should be a requirement for real time disclosure as soon as is practicable by all entities incurring electoral expenditure. This allows the electorate to be informed about the sources and amounts of electoral expenditure. This requirement should only apply to third parties having reached the registration threshold. The Queensland Electoral Commission's 'Electronic Disclosure System' should be emulated in this regard. Like our proposed donations disclosure law, electoral expenditure disclosure should operate under stricter timelines during the election.

12. **A mandatory statutory review of the expenditure cap regime after its first election cycle; and**

To determine whether the regime is meeting its policy goals, there should be an ingrained mandatory statutory review after the first election cycle for which the regime is present. The review should be conducted by suitably qualified persons appointed by the Parliament, and be required to consider certain minimum issues as well as emerging best practice and take submissions from electoral participants in the previous election.

13. **Increased resourcing and funding to the AEC to manage additional educative, enforcement and compliance duties.**

To account for their additional educative and compliance responsibilities under the expenditure cap regime, the AEC should be afforded greater resources.

## Reforms to the public funding of political parties and candidates

Australia's system of public funding of political parties and candidates is, we believe, not working as it should. Indeed, it has achieved none of its purported goals of decreasing reliance on private money, restricting electoral expenditure or promoting political equality. It is tied to a weak measure of public support – first preference votes in a system of compulsory voting. The current system stands to only reimburse parties for their increasing misleading electoral expenditure, rather than their more meaningful routine activities.

### The modern role of political parties

Political parties are now an 'unavoidable part of democracy'.[55] They perform a number of key functions in modern Australian democracy. They play a crucial role in **representing** the views of their constituents and providing a forum for **participation** through activities such as volunteering and policymaking. Political parties also play an important role in **agenda-setting** throughout the electoral cycle. However, a political party's ultimate function is **to govern** according to its platform by passing laws and inhabiting executive institutions.[56]

[55] Susan Stokes, 'Political Parties and Democracy' (1999) 2(2) *Annual Review of Political Science* 243, 263.
[56] Joo-Cheong Tham, *Money and Politics* (UNSW Press 2010) 14-5.

**Why fund political parties?**

In considering the abovementioned functions, it is not difficult to see that there may be some merit in supporting the public interest functions of political parties. There are three key motives for funding political parties, including: **restricting the influence of private money, political equality and fair competition, and adequate funding to meet the rising cost of electioneering.**

The rationale of early models of public funding was to **restrict the influence of private money** on political parties.[57] Indeed, when introducing the Commonwealth's scheme in 1983, Minister Beazley commented that the funding was a small insurance to pay against the possibility of corruption'.[58] It is well understood that large private donations have the ability to at least softly corrupt parties and their parliamentary representatives. In *McCloy*, the majority noted that 'quid pro quo' corruption may emerge from bargaining between parliamentary representatives over policy matters in return for a significant donation. They also noted the potential for 'clientelism', whereby candidates and parties begin to rely on the 'patronage' of monied interests. Both were considered to 'threaten the quality and integrity of government decision-making' and even 'pose a threat to the electoral process itself'.[59] The corrupting influence of large political donations is particularly well-documented in the Australian context.[60]

Public funding also seeks to promote **political equality and fair competition.** In this sense public funding apparently seeks to 'level the playing field' by enabling newer and smaller parties to compete on a 'more equitable basis with the dominant and financially more privileged ones'.[61] Public funding for parties purports to break the tie between private funds and electoral influence,[62] and to ensure that elections do not become 'little more than an auction'.[63]

While antithetical to the spirit of the abovementioned expenditure caps, **meeting the cost of electioneering** is often cited as a reason for public funding. Despite increases in the size of the electorate, membership of both major political parties in Australia continues to decline.[64] This has left parties with a significant gap in their traditional budget. As campaigns have become more cost-intensive, parties more professional and competition for government fiercer, subsidies can be considered a 'response to the rising cost of the democratic process'.[65] Anika Gauja sees public funding as a 'mechanism to ensure parties' survival' in the face of these factors.[66]

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[57] See New South Wales, *Parliamentary Debates*, Legislative Assembly, 15 April 1981, 5944 (Neville Wran, Premier).
[58] Commonwealth, *Parliamentary Debates,* House of Representatives, 2 November 1983, 2215 (Kim Beazley, Special Minister of State).
[59] *McCloy* (n 23) 204-6 [36]-[41] (French CJ, Kiefel, Bell and Keane JJ).
[60] Select Committee into the Political Influence of Donations, Parliament of Australia, *Political Influence of Donations* (Final Report, June 2018) ch 3.
[61] Ingrid van Biezen, 'State Intervention in Party Politics: The Public Funding and Regulation of Political Parties' (2008) 16(3) *European Review* 337, 348.
[62] Richard Briffault, 'Public Funding and Democratic Elections' (1999) 148(2) *University of Pennsylvania Law Review* 563, 577-8.
[63] *R (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] 3 All ER 193, 207 (Lord Bingham).
[64] Michael Head, 'Declining memberships and Australia's political party registration test: Legal doubts and democratic principles' (2022) 47(2) *Alternative Law Journal* 130, 130-1.
[65] van Biezen (n 61) 348.
[66] Anika Gauja, *Political Parties and Elections: Legislating for Representative Democracy* (Routledge, 2016 [2010]) 162.

**The risks of public funding**

Public funding is also fraught with risks. It may serve to **fuel excessive electoral expenditure, sap the internal vitality of parties,** and **entrench incumbents.**

As has been outlined above, the Commonwealth maintains no caps on **electoral expenditure**. In the absence of caps, public funding may serve to accelerate the 'arms race' of electoral expenditure. Public funding does nothing to prevent this, and parties may continue with their previous activities - just with more resources available. As early as 2001, David Tucker and Sally Young noted that '[i]t seems that the public money is simply an add-on that allows competing political parties to spend more on advertising and other electoral purposes than they would otherwise choose to do'.[67] Indeed, public funding cannot perform its integrity function – in minimising the influence of private money – in the absence of expenditure caps.[68]

Further, public funding may also serve as a **'poison subsidy'.** Providing unconditional payouts to political parties, which were historically emanations of civil society, risks corroding the 'internal vitality of parties as forums for political participation' and 'atrophying' the grassroots of the parties.[69] Grassroots funding in the form of membership fees and small donations is an expression of citizens' political engagement, and public funding may serve to depress the supply and demand of these contributions as parties become more state dependent.[70]

All of Australia's public funding regimes reward *previous* electoral success, whether in the form of reimbursing electoral expenditure according to first preference votes or providing funds for incumbent members' administrative expenses. Both measures arguably serve to entrench incumbents and exacerbate their already heightened advantage. Graeme Orr and Joo-Cheong Tham have both observed that public funding may serve to **exacerbate political inequality and will often 'reward incumbents more than challengers'**.[71]

[67] David Tucker and Sally Young, 'Public Financing of Election Campaigns in Australia – A Solution or a Problem?' in Glenn Patmore and Gary Jungwirth (eds), *The Big Makeover: A New Australian Constitution: Labor Essays 2002* (Pluto Press Australia, 2001) 60, 67.
[68] Graeme Orr, 'Putting the cartel before the house? Public funding of political parties in Queensland' in Anika Gauka and Marian Sawer (eds), *Dilemmas of political party regulation in Australia* (ANU Press, 2016) 123, 130.
[69] Graeme Orr, 'Full public funding: cleaning up parties or parties cleaning up?' in Jonathan Mendilow and Eric Phélippeau (eds), *Handbook of political party funding* (Edward Elgar, 2018) 84, 96.
[70] Andreas Ufen, 'Asia' in Elin Falguera, Samuel Jones and Magnus Ohman (eds), *Funding of Political Parties and Election Campaigns: A Handbook on Political Finance* (International Institute for Democracy and Electoral Assistance, 2014) 83, 111.
[71] Orr (n 69) 98; Joo-Cheong Tham and David Grove, 'Public Funding and Expenditure Regulation of Australian Political Parties: Some Reflections' (2004) 32(3) *Federal Law Review* 397, 422.

**How is the current model performing?**

Considering the functions of political parties, and the known goals and risks of public funding, we can assess the current Commonwealth 'dollar-per-vote' model.

The current model **does not reduce reliance on private money.** Since collection began in 1998-99, private funding has formed a relatively stable though slightly increasing proportion of total political party receipts of the major parties during election years.

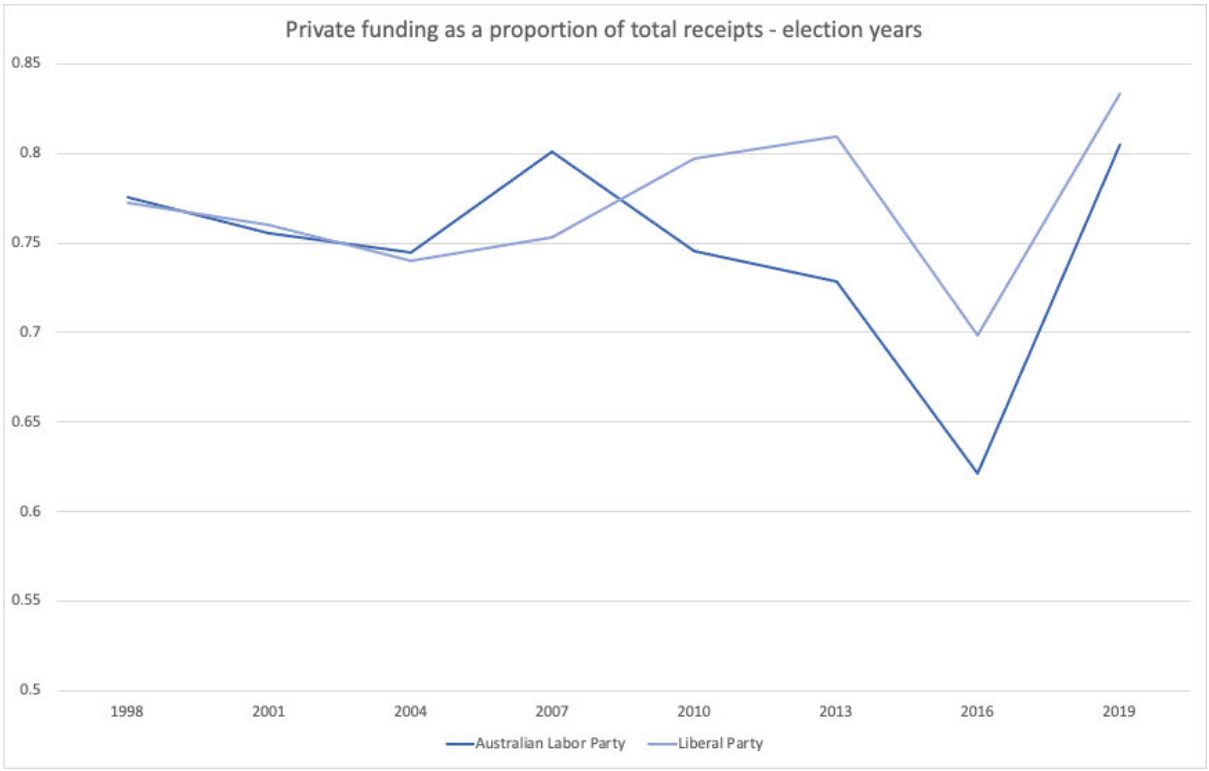


**Figure 12: Private funding as a proportional of total receipts – election years[72]**

Australia's public funding also does little to **promote political equality** in a meaningful way. While all parties and candidates can formally access public funds, the ex-post reality of the payments creates a vicious cycle which entrenches incumbents. As funding is calculated based on past electoral support, it is to be expected that 'established parties are very likely to enjoy a financial advantage over newer parties'.[73]

Smaller parties and independent candidates, particularly non-incumbents, typically have weak fundraising networks to raise the necessary funds to meaningfully compete with larger players. If these participants cannot raise and spend private funds to begin with, they will not be entitled to any significant amount of public funds *after* the election.

[72] Data Source: 'Transparency Register', *Australian Electoral Commission* (Web Page) < https://www.aec.gov.au/parties_and_representatives/financial_disclosure/transparency-register/>; Australian Electoral Commission, *Election Funding and Disclosure Report: Federal Election 2019* (Final Report, November 2020) 9-11; Australian Electoral Commission, *Election Funding and Disclosure Report: Federal Election 2016* (Final Report, May 2017) 7-10; Australian Electoral Commission, *Election Funding and Disclosure Report: Federal Election 2013* (Final Report, April 2014) 3-15; Australian Electoral Commission, *Election Funding and Disclosure Report: Federal Election 2010* (Final Report, 2011) 5-10; Australian Electoral Commission, *Election Funding and Disclosure Report: Federal Election 2007* (Final Report, 2008) 4-8.
[73] Tham (n 10) 132.

While the four per cent threshold at the Commonwealth is intended to prevent frivolous candidacies, it can serve to dissuade bona fide candidates who are hesitant about making a potentially non-recoupable financial investment in their campaign which larger players can otherwise recover.

The inability of public funding to advance political equality also plays out structurally within the data. In recent years, due in part to dissatisfaction with the major parties, there has been a proliferation of minor parties and independents contesting races. Many, however, have been unable to cross the four per cent threshold and access public funding. Major parties now receive an increasingly disproportionate amount of public funding allotted, while their primary vote continues to fall. There has been a visible *decoupling* of vote share and public funding share.

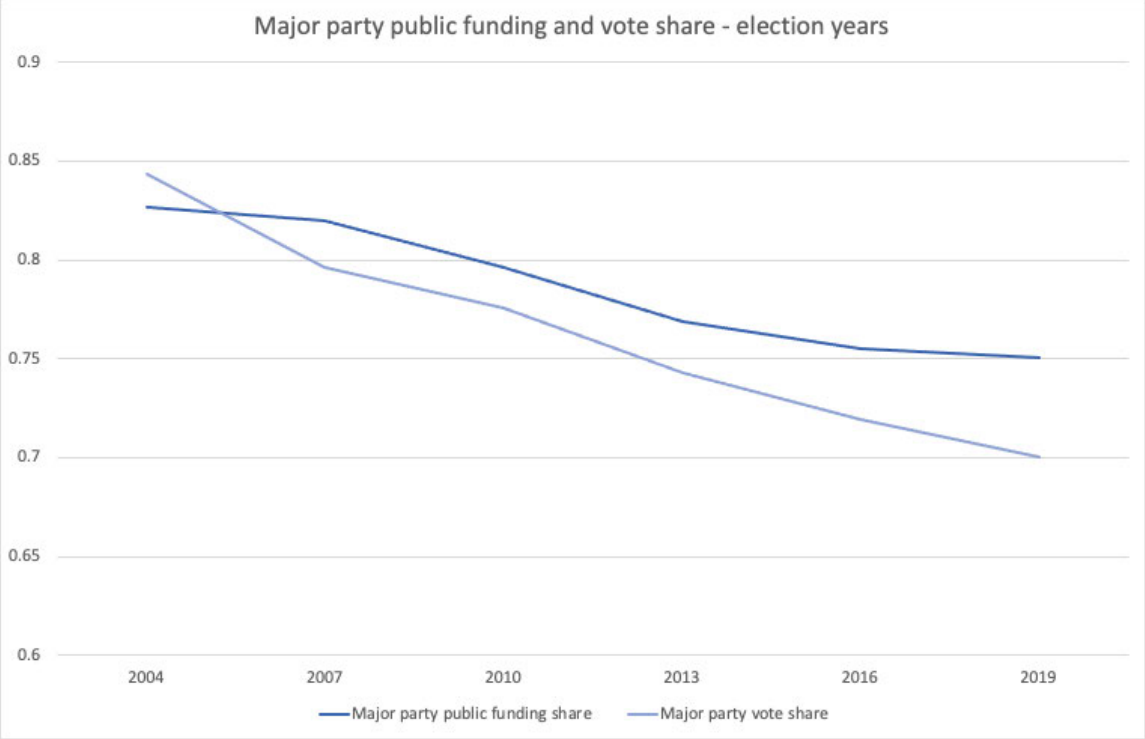


**Figure 13: Major party public funding and vote share – election years**

In Australia, it seems that public funding may also be **exacerbating excessive electoral expenditure.** Estimated Commonwealth electoral expenditure by the major parties has continued to grow with no sign of slowing down, and the additional income that public funding provides appears to be a contributor.

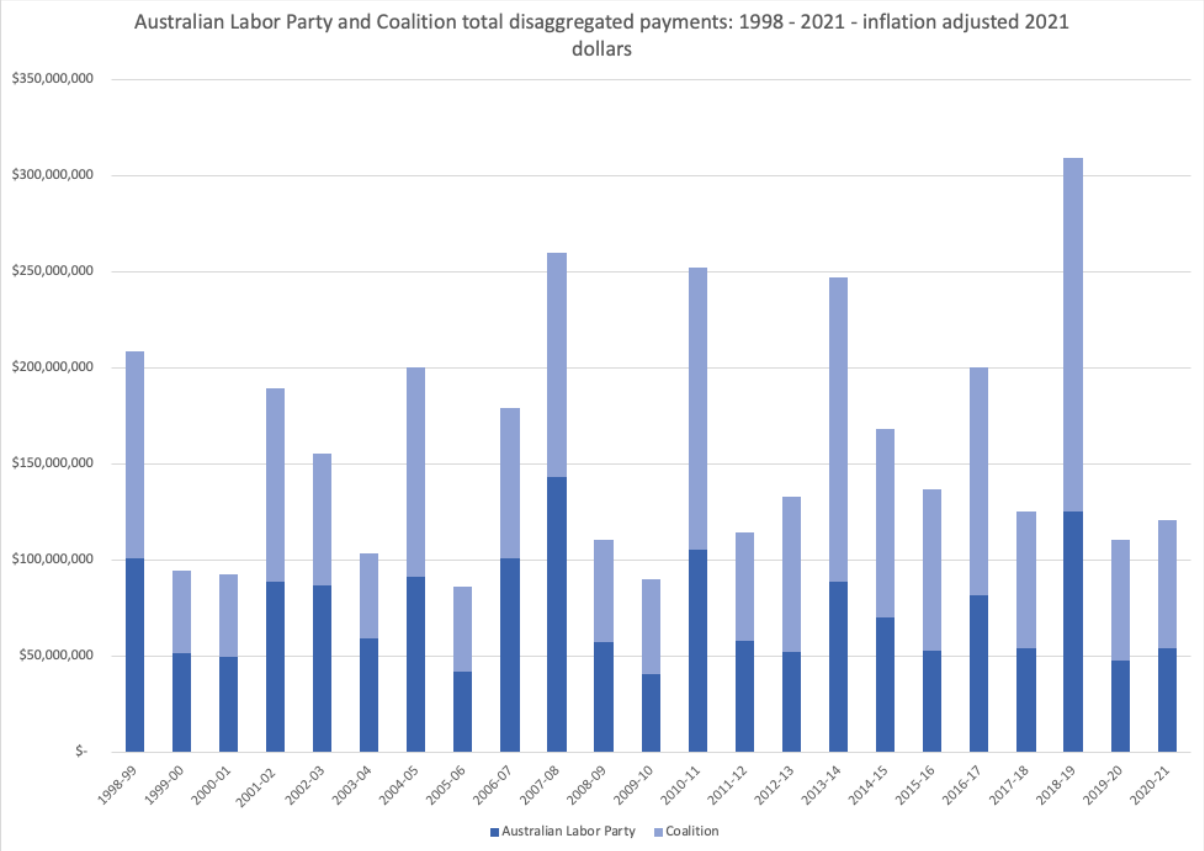


**Figure 14: ALP and Coalition total disaggregated payments: 1998 – 2021 – inflation adjusted 2021 dollars[74]**

Public funding also **reimburses expenditure largely unconnected with the key functions of parties.** As has already been outlined, the functions of political parties in modern Australian democracy are representation, participation, agenda-setting, the electoral function and, ultimately, governance. The current mode of reimbursing electoral expenditure is almost completely divorced from these functions. While electoral expenditure in the form of advertising may often overlap with agenda-setting and electoral function, these should be understood broadly as the everyday discussions and debates, rather than purely electoral communications.

Further, the majority of electoral expenditure is on advertising that is increasingly false and misleading. Without truth in political advertising laws, public funding may be doing no more than subsidising lies.[75] Reimbursing advertising expenditure has no bearing on parties' capacity to represent their constituents nor promote public participation and provides no support for parties in their governing capacities. This relates to the potential for public funding to erode grassroots support and thereby the supply of party members and private funds. Joo-Cheong Tham has noted that the current scheme does 'little to enhance the participatory function of parties' and 'may even detract from it'.[76]

[74] Data Source: 'Transparency Register', *Australian Electoral Commission* (Web Page) < https://www.aec.gov.au/parties_and_representatives/financial_disclosure/transparency-register/>;
[75] See generally Lisa Hill, Max Douglass, and Ravi Baltutis, *How and Why to Regulate False Political Advertising in Australia* (Palgrave Macmillan, 2022).
[76] Tham (n 56) 134.

Finally, we believe that the current model is linked to **'popular apathy'.** Commonwealth public funding is nominally tied to public support through first preference votes. This notion of public support is a weak one. The public funding reimbursement system does not discriminate between the first-preference vote of a zealous and engaged voter, and that of the donkey voter. Australians are generally happy with *democratic values* and the *institutional architecture* but are 'deeply unhappy' with democratic politics. Less than 41 per cent of Australian citizens were satisfied with the way democracy *works* in Australia in 2018, down from 86 per cent in 2007.[77] Considering this, it seems inappropriate to dole out funds per first preference vote under the veil of 'popular support', when many in fact are deeply dissatisfied with the political menu. In this sense, true civic participation and support is, at best, loosely tied to public funding.[78] This is amplified in Australia due to the presence of compulsory voting – whereby electors are essentially forced to allocate their preference and, in turn, some potential amount of public funding.

## 15 Recommendations for a better public funding system

### 1. A system of expenditure caps be implemented for all election participants

Public funding will best function as an integrity measure when paired with electoral expenditure caps.[79] Australia's public funding regime has failed in its integrity functions due to a lack of expenditure caps to 'inhibit growth in electioneering expenditure'.[80] Without electoral expenditure caps, public funding will not be able to dampen demand for private money to fund increasingly expensive campaigns.[81]

Accordingly, expenditure caps on parties and their endorsed candidates, as well as independent candidates, are a necessary condition for an integrity-promoting public funding system. Expenditure caps should be implemented in accordance with the abovementioned recommendations.

### 2. Quarterly scaled administrative funding be provided to parties based on their representation in Parliament and, potentially, membership

There is no Commonwealth support for parties between elections, with only electoral expenditure being subsidised. Parties are therefore forced to rely on private funds for their routine expenses. This is not the case in many other Australian jurisdictions.

[77] Gerry Stoker, Mark Evans and Max Halupka, *Trust and Democracy in Australia: Democratic decline and renewal* (Report No 1, December 2018).
[78] By way of contrast, public funds for broadcasting allocated under the *Broadcasting Act 1989* (NZ) s 78(1) include the number of votes for the party at the last general election, the number of votes for the party at the most recent by-election, the number of members of Parliament who were members of the party at the time of dissolution of Parliament, 'indications of public support' such as opinion polls and membership numbers as well as 'the need to provide a fair opportunity for each party … to convey its policies to the public by the broadcasting of election programmes on television'.
[79] Orr (n 69) 95.
[80] Orr (n 68) 130.
[81] Yee-Fui Ng, *Regulating Money in Democracy: Australia's Political Finance Laws Across the Federation* (Final Report, January 2021) 75.

For example, in New South Wales, parties can access quarterly payments from an administration fund reimbursing costs including conferences, seminars, providing information to the public about a party, providing membership information to party members and expenditure on office accommodation.[82] The funds cannot be spent on electoral expenditure. Similar schemes are offered in Victoria, South Australia, and the ACT.[83]

The Centre for Public Integrity recommends the introduction of a similar scheme at the Commonwealth level. Such routine funding would reimburse parties for key democratic functions such as constituency engagement and policy conferences without leaving them reliant on private funds. Moreover, as stronger regulation of parties' fundraising capacity via donations reform is also recommended, such lost revenue should be partially recompensed with public subventions.

Payments should be based on representation in Parliament. This appears a more valid measures of representation, and therefore ground for financial support, than first-preference votes. Joo-Cheong Tham has suggested that membership also be considered in determining administrative allowances as it 'may result in parties recruiting more members and thereby invigorating their participatory function'.[84]

The exact figure(s) for administrative allowances should be determined, and varied, by the AEC in conjunction with the Join Standing Committee on Electoral Matters (**JSCEM**). The functions and therefore financial needs of political parties are continually changing, and the AEC is best poised to determine this.

It should be noted that this recommendation is not new. Indeed, in 2011 JSCEM expressly recommended that 'the *Electoral Act 1918* (Cth) be amended to implement a scheme of ongoing administrative funding for registered political parties and independents'.[85]

### 3. Administrative funding be scaled with parliamentary representation at a decreasing marginal rate

There are several fixed costs involved with running a political party such as office rent and regulatory compliance.[86] Accordingly, funding should be scaled at a decreasing marginal rate whereby parties are reimbursed at a decreasing amount according to their representation in Parliament. In other words, the maximum administrative entitlement should be the most for the first member elected and decrease thereafter. This feature is observed in the New South Wales and Victorian administrative funding regimes,[87] partially in the South Australian regime,[88] but not the ACT regime.[89]

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[82] *Electoral Funding Act 2018 No 20* (NSW) pt 5 div 2; 'Administration Fund', *NSW Electoral Commission* (Web Page, 13 April 2022) <https://www.elections.nsw.gov.au/Funding-and-disclosure/Public-funding/Administration-Fund>.
[83] See *Electoral Act 2002* (Vic) pt 12 div 1C; *Electoral Act 1985* (SA) pt 13A div 5; *Electoral Act 1992* (ACT) pt 14 div 14.3A.
[84] Tham (n 56) 137.
[85] Joint Standing Committee on Electoral Matters, Parliament of Australia, *Inquiry into the funding of political parties and election campaigns* (Final Report, November 2011) 146 [6.129].
[86] Panel of Experts, Parliament of New South Wales, *Political Donations* (Final Report – Volume 1, December 2014) 83.
[87] *Electoral Act 2002* (Vic) s 207GA(b); *Electoral Funding Act 2018* (Vic) s 87(3).
[88] *Electoral Act 1985* (SA) s 130U(2).
[89] *Electoral Act 1992* (ACT) ss 215C, 215E.

## 4. Administrative funding be contingent on meeting basic internal democratic criteria

Administrative funding should be contingent on meeting basic internal democratic criteria. This is not to say that all parties must comply with such criteria, only that parties receiving *public funds* for administration should.[90]

Australia has historically maintained, and continues to maintain, an exceptional commitment to representative democracy. As parties become seemingly permanent fixtures of this system, it is not far-fetched to suggest that these entities which inhabit our representative institutions must also meet basic democratic and behavioural criteria to receive routine funding.

Major parties have recently been plagued by anti-democratic internal scandals. For example, Operation Watts in Victoria demonstrated the extensive branch-stacking, misuse of public funds and offices, and misallocation of grant funds in the Victorian Labor Party.[91] Similarly, the New South Wales Liberal Party's preselection 'captains picks' at the 2022 election were occasionally in direct opposition to the will of the branch members.

Administrative funding should be conditional on continual compliance with a Code of Conduct. This should be developed jointly by the AEC and proposed National Integrity Commission (**NIC**). The Code should establish an underlying set of standards regarding democratic processes, transparency, and internal accountability. As Keith Ewing observes:

> If the State is to support the parties in these ways, is the community entitled to expect something even more in return? In particular, if public money is being used to support political parties because political parties play an indispensable role in the democratic process, is the public not entitled to expect that the bodies that spend its money themselves meet some basic democratic criteria . . .?[92]

This position is well supported.[93] Professor George Williams has proposed that administrative funding could be contingent upon 'all positions of power being referrable to the members in some way, members having some form of enforceable independent complaints mechanism to actually challenge decisions' and to also provide 'an appropriate level of transparency'.[94]

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[90] Cf Graeme Orr, 'Justifications for regulating party affairs: Competition not public funding' in Keith Ewing, Jacob Rowbottom and Joo-Cheong Tham (eds), *The funding of political parties: Where now?* (Routledge, 2011) 245.
[91] Independent Broad-based Anti-corruption Commission and Victorian Ombudsman, *Operation Watts* (Final Report, July 2022) <https://www.ibac.vic.gov.au/docs/default-source/special-reports/operation-watts-special-report---july-2022.pdf?sfvrsn=ae651f80_2>.
[92] Keith Ewing, *The Cost of Democracy: Party Funding in Modern British Politics* (Hart Publishing, 2007) 244.
[93] See eg, Senator John Faulkner, 'Public Pessimism, Political Complacency: Restoring Trust, Reforming Labor' (Speech, Address to Light on the Hill Society, 7 October 2014) < https://australianpolitics.com/2014/10/07/john-faulkner-alp-reform-speech.html>; New South Wales, *Parliamentary Debates,* Legislative Council, 21 October 2014, 1407 (Luke Foley MLC); Panel of Experts – Political Donations, Academic Round Table Discussion, 'Session Three: Public Funding of Election Campaigns' (25 September 2014) 4-5.
[94] Panel of Experts – Political Donations, Academic Round Table Discussion, 'Session One: The Regulation of Political Donations and Electoral Expenditure' (24 September 2014) 13.

### 5. Administrative funding only be used to recoup verified administrative expenses

As is the case with dollar-per-vote reimbursements for electoral expenditure, parties should not be able to profit from the scheme. Accordingly, parties should be required to submit audited receipts at the end of each quarter to be able to recoup eligible expenses *after* they have been incurred.

### 6. The Australian Electoral Commission multiple match funds given to parties and candidates from individuals on the electoral roll

As has already been alluded to, private individual political donations are a symptom of a vibrant democracy. Large, transactional, and often corporate donations are unfortunately often a symptom of the opposite.

To encourage such donations, the AEC should 'multiple match' political donations given by *individuals* up to a specified and achievable amount. The Centre for Public Integrity recommends that donations of up to $200 AUD (indexed) be multiple matched at a rate of 4x – meaning any donation of up to $200 AUD would be accompanied by an AEC contribution of four times the donated amount. For example, a $50 donation would attract an additional $200 in public funds, and a $200 donation would attract $800 in public funds. Any individual donation of over $200 would attract $800 in public funds, but no more. Matched funds should subsidise electoral expenditure and should not be spent on administrative expenditure.

This matching should only be afforded to individuals on the electoral roll in recognition of their increasing inability to meaningfully compete with monied interests for political influence.[95] Other non-individual entities can and should make donations up the prescribed cap, but these voices do not need to be 'amplified' by multiple matching. In *Unions (No 1)*, the High Court held that a New South Wales provision prohibiting a non-individual from making political donations was invalid.[96] It fell foul of the implied freedom of political communication as a 'burden without justifying purpose'.[97] The multiple matching of *only* individual donations would likely be constitutional as it would serve *an anti-corruption rationale* via limiting the temptation for corruption through solicitation of large non-individual donations.[98]

Spencer Overton's 'participation theory of public financing' underpins multiple matching. This theory has two limbs. The first is that, unlike the current Australian regime, *public financing should provide incentives for public participation rather than suppress it*. Democracy, at its essence, *should reward* candidates who can mobilise individual donations.[99] Furthermore, smaller donations are often associated with other more substantial forms of political participation. Secondly, *facilitating participation should be recognised as a proper use of public resources*.[100] There is a 'democratic dividend' to be found in using appropriately public funds to promote meaningful political participation via multiple matching.

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[95] See Daniel Nyberg, 'Corporations, Politics, and Democracy: Corporate political activities as political corruption' (2021) 2(1) *Organization Theory* 1.
[96] *Unions (No 1)* (n 40) 544-8 [1]-[16] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[97] Ibid 558 [51].
[98] See *McCloy* (n 23) 204-5 [36]-[38] (French CJ, Kiefel, Bell and Keane JJ).
[99] Spencer Overton, 'Matching Political Contributions' (2012) 96(1) *Minnesota Law Review* 1694.
[100] Ibid 1708.

Multiple matching has been considered in Australia. In 2014 multiple matching was wantonly dismissed in Australia as 'very difficult to implement'.[101] The same panel brusquely and conservatively rejected it as they were hesitant to 'chang[e] the rules yet again'.[102] Multiple matching's many empirically documented merits were ignored.

New York City elections maintain a system of multiple matching whereby $6 USD are allocated for every dollar up to $175 USD. Sundeep Iyer et al's study of the New York City elections found that, compared to New York State elections (which did not have multiple matching):

- Almost 90 per cent of suburbs contained at least one person who donated to a city election candidate, compared to 30 per cent in the State Assembly;
- The neighbourhoods which donated were more representative of the lower income groups than State Assembly elections; and
- Small donor participation in more ethnically diverse neighbourhoods was more robust than State Assembly elections.

The authors ultimately concluded that multiple matching's unique incentive scheme strengthened 'the connections between public officials and their constituents'.[103]

Michael Malbin et al's analysis corroborates these findings. He finds that multiple matching increases the proportional role of small donors via decreasing the costs associated with soliciting small donations. He similarly finds that multiple matching both increases the *number* and diversifies the *profile* of donors. He concluded that New York City's regime was a 'model for jurisdictions nationally' and stimulated participation in a manner 'healthy for democracy'.[104] In a later paper, Malbin and Michael Parrott concluded:

> Tools designed to bring more small donors into the system are meant to enlarge the table – to help give more people, and different kinds of people, a meaningful voice. They work by giving those who do have the resources to mobilize – candidates, parties and other donor mobilizers – an incentive to pay attention to those who do not. This concern goes to the heart of successful democratic representation. It should not be dismissed lightly.[105]

Multiple matching presents an opportunity to promote constituent participation, decrease corruption, strengthen constituent-official relations and level the playing field without offending the implied freedom of political communication. None of these goals are achieved under the current dollar-per-vote system.

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[101] Panel of Experts (n 90) 79.
[102] See ibid.
[103] Sundeep Iyer, Elisabeth Genn, Brendan Glavin and Michael J Malbin, *Donor Diversity Through Public Matching Funds* (Report, 12 May 2012) 5 < https://www.brennancenter.org/our-work/research-reports/donor-diversity-through-public-matching-funds>.
[104] Michael J Malbin, Peter W Brusoe and Brendan Glavin, 'Small Donors, Big Democracy: New York City's Matching Funds as a Model for the Nation and States' (2012) 11(1) *Election Law Journal* 3, 20.
[105] Michael Malbin and Michael Parrott, 'Small Donor Empowerment Depends on the Details: Comparing Matching Fund Programs in New York and Los Angeles' (2017) 15(2) *The Forum.*

### 7. Electors be limited to one matched donation per election cycle

Elections should be entitled to donate to as many candidates and parties as they wish, given they are under any applicable donation cap. However, to ensure fairness between electors, the AEC should only multiple match the first donation given to a party or endorsed candidate.

### 8. Multiple matched donations be made out *either* to the party *or* their endorsed candidate

As we outlined in *A Farewell to Arms*, we recommend that parties and their endorsed candidates both face independent caps on expenditure determined by a 'bargaining system'. Accordingly, donations and therefore matched funds must be allocated to either an endorsed candidate or their political party – and directed to the relevant campaign account. Parties should be able to transfer funds matched to their endorsed candidates, but not vice versa.

### 9. Multiple matched funds constitute at most 80 per cent of electoral expenditure for parties and candidates

There is good reason to argue that there should not be 'full' public funding of political parties and their campaigns.[106] Such financing would almost completely detach parties from their roots in civil society.[107] Full public funding has been proffered as a solution to the ails of campaign finance, but is a 'deceptively simple solution' which would pose problems for 'political liberty and how parties are conceived'.[108] Quasi-full public funding is, however, increasingly coming to the fore in Australia. Graeme Orr estimates that in some jurisdictions public funding now covers between 75 and 90 per cent of campaign expenses.[109] This tendency towards full public funding should be resisted, and an effective cap placed at 80 per cent of electoral expenditure.

The bargaining system we outlined in *A Farewell to Arms* requires that parties and candidates bargain over their applicable expenditure cap. The maximum amount of matched funds available should then be determined from this allocation submitted to the AEC.

By way of example, a party with four endorsed candidates would be entitled to bargain with their candidates 4 x $250,000 = $1,000,000 in capped funds.

Imagine that the resulting bargain is that each candidate can incur $100,000 in electoral expenditure, leaving $600,000 to the party. This allocation would have to be submitted to the Australian Electoral Commission before matched funds could be accessed.

[106] See for example Mike Steketee, 'Why we need full public funding of election campaigns', *Inside Story* (online, 12 July 2017) < https://insidestory.org.au/why-we-need-full-public-funding-of-election-campaigns/>.
[107] Orr (n 69) 824.
[108] Ibid 97.
[109] Ibid 93.

The arithmetic is simple with a 4x multiple. For example, assuming there are no unmatched non-individual donations, each candidate would be entitled to receive any of the following permutations of donations with associated matching funds to maintain the 80 per cent ceiling:

| Candidate | Private Contributors | Individual Amount | Sum Private | Matched Funds (4x) | Sum Total |
|---|---|---|---|---|---|
| 1 | 100 | $200 | $20,000 | $80,000 | $100,000 |
| 2 | 200 | $100 | $20,000 | $80,000 | $100,000 |
| 3 | 400 | $50 | $20,000 | $80,000 | $100,000 |
| 4 | 800 | $25 | $20,000 | $80,000 | $100,000 |

**Figure 15: Theoretical permutations of private funding and matched funds**

The party would be able to receive any permutation of private contributions which led to at most 80 per cent matched funds. A candidate who therefore typically received donations of greater than $200 would expend a higher proportion of private funds, as they would be entitled to a maximum of $800 in public funds per donation (i.e., a private donation of both $300 and $200 would entitle the receiver to $800 in public funds).

It should be noted that parties and individuals may still solicit private donations once they have reached this cap, but they will still be confined to their expenditure cap and associated cap on matched funds. Retained non-matched private funds can obviously not be used for electoral expenditure but may be carried between election cycles or used on relevant outreach activities or administrative expenditure (see Recommendation 2).

### 10. Unspent matched funds be repaid to the AEC at the end of the election cycle

While it is likely that a candidate would maximally spend their public funds, they should not be able to hoard them between election cycles. Each matched donation *is for the purposes of the election in which it is given*. Candidates and parties can, of course, retain the private element of the donations, but should be required to repay any unspent matched funds after the close of the poll. This also serves to prevent satirical or insincere candidates from pocketing matched funds at the close of election.

### 11. Matching period commence at the issue of the writ, and end on polling day

We recommended above that the capped expenditure period commence 12 months after the previous polling day. While most campaigning occurs in the months immediately before a given election, a 12-month capped expenditure period ensures that parties do not backload expenditure to evade the cap.

However, on matching funds, we recommend that the matching period begin at the issue of the writ. By this time, candidates will have been pre-selected and bargained their portion of the applicable expenditure cap. A shorter matching funds is also consistent with the financial intensity of the late stages of campaigning.

### 12. Fraudulent unilateral claims resulting in barring the individual from matching funds, and fraudulent bilateral claims resulting in barring the party from matching funds

As with any scheme of this nature, there is ample incentive to abuse the scheme via 'channelling' donations through different individuals. Any finding of abuse by an individual should bar the individual from being able to match funds for at least one election cycle, and any finding of a party knowingly soliciting fraudulent claims should bar the party or candidate from receiving matching funds for at least one election cycle.

### 13. Parties ineligible for administrative funding have access to policy development funding

Parties with no elected members will be ineligible for administrative funding. They will have also spent or repaid all public multiple-matched funds allocated to fund electoral expenditure.

These parties should be eligible for policy development funding.[110] The funding should reimburse verified expenditure on policy development up to a specified amount based on first preference votes in the previous election. Funds should only be distributed if the party was registered more than 12 months ago, and the AEC is satisfied that it is a genuine political party. Policy development funding on this basis is provided in both New South Wales and Victoria.[111] The United Kingdom also offers funding to develop policies in election manifestos, though only to parties with incumbent members.[112]

While it is expected that policy development outlays would be a small proportion of total electoral funding,[113] the scheme would serve to promote electoral competition and ideological diversity.

### 14. The AEC establish a 'matching funds' portal to verify and distribute matched funds

The matching funds regime would require AEC verification of the identity of the donor and amount donated. The AEC should establish a centralised portal to verify and distribute matched funds. This would need to be attached to expenditure cap data to ensure maximum allocations of matched funds are not breached.

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[110] Note that the Queensland scheme of 'policy development funding' is not for the same purpose as the similarly named schemes in New South Wales and Victoria. The Queensland policy development funding regime distributes funds to parties *with* incumbent member: see *Electoral Act 1992* (Qld) pt 11 div 5.
[111] See *Electoral Funding Act 2018* (NSW) s 93; *Electoral Act 2002* (Vic) pt 11 div 2A.
[112] See 'Public funding for political parties', *The Electoral Commission* (Web Page, 7 March 2022) <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/financial-reporting/donations-and-loans/public-funding-political-parties>.
[113] For example, in New South Wales, only $41,805.18 was paid from the New Parties Fund in 2021, whereas $13,674,249.88 was paid from the Administration fund. See 'Public funding claims and payments', *NSW Electoral Commission* (Web Page, 1 September 2022) <https://www.elections.nsw.gov.au/About-us/Reports/Funding,-disclosure-and-compliance-reports-and-sta>.

15. **The AEC and proposed National Integrity Commission (NIC) be appropriately resourced to manage additional regulatory responsibilities**

The AEC are clearly capable of administering the existing public funding legislation, though they will require additional resources to manage the new administrative burden of the multiple matching and administrative funding schemes. Similar resources will need to be provided to the NIC to administer and enforce the Code of Conduct in Recommendation 4.

**Alternative submission for reforming public funding of electoral expenditure**

We appreciate that no Australian jurisdiction has experimented with multiple matching for electoral expenditure, and that such a scheme would take considerable resources to implement. Despite this, we believe that recent elections of independent candidate show that there is a public appetite for more engagement between electors and their representatives – and that public funding should scale with this engagement.

As we have shown above, Australia's dollar-per-vote system is not performing as well as it could, or indeed should, be. It has done nothing to eschew the flood of private money into our political parties' coffers. Neither has it done anything to promote political equality between major and minor parties. It has also arguably served to exacerbate worrying upward trends in electoral expenditure.

If the Committee choose to retain the Commonwealth's dollar-per-vote model for public funding, we believe that there are steps which can be taken to improve the scheme:

1. **Decrease the threshold to two percent of the vote subject to the Electoral Commission being satisfied the party is genuine**

Australian Electoral Commission data shows that there has been a decoupling between the primary vote share and the proportion of public funds allotted (see Figure 12). This decoupling is largely due to increased electoral competition from minor parties and independents. The Centre for Public Integrity believes that such electoral competition is healthy for democracy and should be rewarded by the public funding system. Minor parties and independents ought not be dissuaded from running by prohibitively high thresholds.

Accordingly, the Centre for Public Integrity recommends that the threshold for dollar-per-vote public funding be reduced to **two per cent** of the primary vote per elections (electoral division or state) contested.

Parties and candidates can currently access an automatic entitlement of up to $10,656 before funds are paid on a 'reimbursement' basis.[114] This provides some ability for participants to profit from the scheme. The Centre for Public Integrity therefore recommends that the decreasing of the threshold be accompanied by a requirement that dollar-per-vote public funding only be paid if the electoral commissioner is satisfied that either the party is 'a genuine political party', or in the case of a candidate, that they conducted a 'bona fide candidacy'.[115]

[114] *Electoral Act 1918* (Cth) div 3 sub-div BA.
[115] See for example *Electoral Funding Act 2018* (NSW) s 93(2)(b).

### 2. Allow all successful candidates to access public funding irrespective of meeting the threshold

A peculiar feature of Australia's Senate elections is that it is not uncommon for candidates to be elected without reaching the applicable threshold due to preference flows.[116] The Centre for Public Integrity recommends that the candidates be able to access dollar-per-vote upon *either* reaching the two per cent threshold or being elected. As with administrative funding, successful election is undoubtedly a sufficient indicator of public support (however diluted by preferences) for the candidates.

### 3. Increase funding rates for the first 10 per cent of the total primary vote received

The current dollar-per-vote model does not discriminate between the funding allocated for the first vote received and the millionth vote received. The promotion of political equality requires that these votes *are discriminated against* in terms of their pecuniary value to candidates and parties.

South Australia is a national innovator in this regard. Their public funding regime provides $4.09 per vote for the first 10 per cent of the vote, and $3.51 thereafter.[117] Graeme Orr has observed that this scheme 'provides an element of affirmative action' and makes up for the parties' lower likelihood of wielding executive power and decreased ability to attract donors.[118] Similarly, Yee-Fui Ng has recommended that 'consideration […] be given towards adopting the progressive model of paying a higher-fixed dollar amount for the first tranche of the vote a party attracts'.[119]

Accordingly, the Centre for Public Integrity recommends that, in the interest of political equality, there be a higher applicable rate for the first 10 per cent of the vote that a party attracts.

### 4. An applicable rate of $1.85 for votes falling within the first 10 per cent of the total primary vote, and a rate of $1.50 thereafter

While we mentioned that a figure of 80 per cent public funding would be desirable if multiple matching were used to fund electoral expenditure, we do not believe the same for dollar-per-vote reimbursements. While the public funding premium on multiple matching should be allowable based on the way in which it promotes engagement with constituents, this is not the case for dollar-per-vote funding. Dollar-per-vote public funding should seek to provide only circa 50 per cent of electoral expenditure.

The Centre for Public Integrity recommends that the current funding rate of $3.016 should be decreased to $1.85 for votes falling within the first 10 per cent of the primary vote in any given race, and $1.50 thereafter. These amounts would broadly accord with providing 50 per cent public funding under the above proposed expenditure cap regime (see **Appendix 2**).

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[116] See Joint Standing Committee on Electoral Matters, Parliament of Australia, *Report on the Funding of political parties and election campaigns* (Final Report, November 2011) 136.
[117] *Electoral Act 1985* (SA) s 130P(2)(a)-(b); 'Indexed Amounts', *Electoral Commission South Australia* (Web Page) <https://www.ecsa.sa.gov.au/parties-and-candidates/funding-and-disclosure-state-elections/indexed-amounts>.
[118] Orr (n 69) 92.
[119] Ng (81) 112.

5. **Breaches of electoral offences and/or disclosure obligations leading to cuts in applicable rate**

Dollar-per-vote funding being paid after the election means that it can be used to incentivise appropriate behaviour during the election itself. To incentivise compliance with other aspects of the electoral integrity regime, the committee should consider decreasing the applicable rate for offences or systematic breaches of:

- Electoral expenditure caps;
- Donations caps;
- Disclosure requirements; and
- Truth in political advertising provisions.

The system should be built on a 'strike' system whereby the applicable funding rate is gradually reduced per individual incident.

## Conclusion

The wide terms of reference present the Committee with a never-before-seen ability to reform Australia's political finance system. Our detailed recommendations for donation disclosure reform and caps, electoral expenditure caps, and a complete overhaul of public funding are a suite of recommendations designed to promote Australia's vibrant yet increasingly challenged democracy. Democratic politics as we know it is under threat around the world, and Australia cannot expect to emerge unscathed without taking action to protect its democratic architecture. There is no time to lose.

## About The Centre for Public Integrity

The Centre for Public Integrity is an independent think tank dedicated to preventing corruption, protecting the integrity of our accountability institutions, and eliminating undue influence of money in politics in Australia. Board members of the Centre are the Hon Stephen Charles AO KC, the Hon Anthony Whealy KC, Professor George Williams AO, Professor Joo Cheong Tham, Geoffrey Watson SC and Professor Gabrielle Appleby. Former directors include the Hon Tony Fitzgerald AC KC and the Hon David Ipp AO KC. More information at www.publicintegrity.org.au.

## Appendix 1 – Senate expenditure caps

For the 2023 New South Wales State election the cap for a party which endorses a Legislative Council grouping but endorses Legislative Assembly candidates in 10 or less districts is 12 per cent of the maximum cap for a party running in all 93 electoral districts. The figure is the same for independent Legislative Council groupings.

Accordingly, 12 per cent of the maximum party calculated spend with 151 endorsed House candidates (See Recommendation 1) is roughly **$4,658,885**. The Senate election, as opposed to the New South Wales Legislative Council, is eight independent state races rather than one single race and must also be concerned with its federalist justification.

While unlikely to occur in practice, it would be unfair if a Senate-concentrated party running in six states and two territories were subject to the same cap as a Senate-concentrated party running in only one state. The applicable cap should be apportioned equally between the states, and equally between the territories, with the relevant party able to access the relevant proportion of the cap for electoral expenditure *in that state* if they choose to endorse a group of candidates.

For example, if the above calculated figure were rounded up to $4,700,000, then the applicable cap-per-state could be $700,000, with a residual $250,000 left for each of the territories.

Senate groups without endorsed candidates should remain exempt from the bargaining system proposed in Recommendation 2. Parties are already required to submit lists with their preferred candidates for election, and with over 90 per cent of electors voting above the line at the 2016 and 2019 elections,[120] it is electorally unwise and unlikely that there would be 'personalised' campaigns for party-endorsed Senate candidates in the presence of a pre-determined list. All spending should therefore remain with the party. For the most part, Senate elections for parties tend to be impersonal affairs, and it is unlikely that there would ever be a party that only ran Senate candidates and did so in multiple states. Consequently, the Centre for Public Integrity recommends that once a party with an endorsed Senate grouping endorses three or more candidates in the House of Representatives (pushing their aggregate bargained spend over $700,000), their cap should be wholly determined based on the number of endorsed House of Representatives candidates. As such, the bargaining system between endorsed House candidates and their parties should only commence when there are three endorsed candidates – with House candidates being allocated no candidate spend before this. From this point, the party concerned can easily expand their expenditure cap by endorsing more candidate in the House of Representatives – which both increases their electoral prospects and expands the choices of the electors in each division.

[120] Antony Green, '2019 Senate Election – Above and Below the Line Vote Breakdown', *Antony Green's Election Blog* (Web Page) <https://antonygreen.com.au/2019-senate-election-above-and-below-the-line-vote-breakdown/>.

## Appendix 2 – Calculating applicable dollar per vote public funding rates

Assuming a party runs in all 151 House of Representatives seats, they will face an applicable expenditure cap of $38,824,039. A 50 per cent target for this expenditure would therefore be $19,412,019.

The current size of the electoral roll is 17,259,041.[121] There would therefore be twice this number of first preference House and Senate votes to allocate (34,518,028).

If each major party wins 35 per cent of the total primary vote between the House and Senate:

The first 10 per cent of the vote would therefore be 3,451,808 primary votes for *both* the Senate and the House of Representatives.

The latter 25 per cent would therefore be 8,629,520.

These provide the following equation:

$$\$19.413{,}019 = 3{,}451{,}808 * \text{Rate}_{\text{High}} + 8{,}629{,}520 * \text{Rate}_{\text{Low}}$$

Where $\text{Rate}_{\text{High}} > \text{Rate}_{\text{Low}}$ there will be a higher reimbursement value for the first 10 per cent and a lower thereafter, and the rough 50 per cent of total expenditure constraint will be satisfied. The high rate of $1.85 and low rate of $1.50 satisfy this equation.

[121] 'Size of the electoral roll and enrolment rate 2022', *Australian Electoral Commission* (Web Page, 29 July 2022) < https://www.aec.gov.au/Enrolling_to_vote/Enrolment_stats/national/2022.htm>.