Commonwealth Electoral Amendment Bill 2001
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Commonwealth Electoral Amendment Bill 2001

Date Introduced: 9 August 2001
House: House of Representatives
Portfolio: Special Minister of State
Commencement: Royal Assent.

Purpose

To amend the Commonwealth Electoral Act 1918 to allow the agent of the Liberal Party of Australia (the 'Federal Secretariat') to determine the distribution of election funding between the Federal Secretariat and the State and Territory Divisions of the Liberal Party.

Background

1983

Public election funding is relatively new. In 1983 the Commonwealth Electoral Act 1918 (the Act) was amended to introduce a regime involving registration, public funding and public disclosure of donations to political parties.\(^1\) In part public funding was designed to 'assist candidates and political parties defray the direct costs incurred in a federal election campaign'.\(^2\) It was not designed to 'subsidise ongoing administration costs or provide a financial base from which future election campaigns could be fought'.\(^3\) It was also designed to ensure a degree of public accountability in the funding of political parties.

Under the new regime, the Australian Electoral Commission (AEC) was required to disburse funding to registered political parties following a general election. A party, group or candidate was entitled to 'election funding' where it received at least 4 percent of the total formal first preference votes in the relevant federal electorate. As intended, election funding was only available to reimburse 'electoral expenditure' or 'expenditure incurred in connection with the election campaign (whether or not incurred during the election period)'. Thus, to receive a reimbursement, a party, group or candidate was required to make a claim providing a range of information regarding the total electoral expenditure by the party, group or candidate. Parties were required to appoint 'agents' who would be the conduit for the election funding. Typically, the agent would be the secretary of the party.
Election funding was payable to the 'State branch' of the relevant party, the 'branch or division of the party that is organized on the basis of a particular State or Territory'. Where members of a group of candidates were endorsed by 2 or more parties, payments were to be made to the relevant State branches of those parties in such shares as were determined by an agreement between them that was signed by the agents and lodged with the AEC.

The AEC was entitled to reject claims which were not made in the prescribed form or which were not supported by sufficient evidence. Election funding that had been incorrectly paid to a party, group or candidate was recoverable as a Commonwealth debt.

1995

In 1995 the funding regime was amended to remove the requirement to submit claims, to permit one party to direct that funding be paid to another party and to permit the Australian Democrats to appoint a 'Principal Agent' to receive all of the party's funding.

As a result of these amendments, parties, groups and candidates were entitled to receive election funding as of right where they obtained 4 percent or more of the primary vote. Thus, the direct link between funding and 'costs incurred in a federal election campaign' was broken. Moreover, the scrutiny by the AEC was reduced and the distinction between reimbursement for campaign costs and subsidy for ongoing administration was blurred. However, the AEC has argued that the original justification was still relevant:

[Automatic payment] did not alter the underlying principle that funding was provided to parties and candidates as a subsidy to their costs of contesting a particular federal election campaign, although that principle is not spelled out in the Act.

Similarly, as a result of the amendments the Australian Democrats were permitted to centralise the collection of their election funding. Moreover, the Australian Labor Party and the Liberal Party of Australia were able to achieve a similar result through agreements between the State branches and the National or Federal Secretariat lodged with the AEC. To date, the Australian Democrats have appointed a Principal Agent and the Australian Labor Party has lodged an agreement providing for the payment of all entitlements to the agent of the National Secretariat. The Liberal Party has not lodged any such agreement.

2001

The Second Reading Speech for the Commonwealth Electoral Amendment Bill 2001 indicates that its purpose is to ensure that 'public funding for the Liberal Party is to be paid to the agent of the … Federal Secretariat rather than to the State and Territory Division … (that is, those State and Territory Divisions which are constitutionally linked to the Federal Secretariat)'. Essentially, the Bill achieves this by amending the Act to:

• impose a general presumption that election funding in respect of the Liberal Party is payable to the Liberal Party of Australia (the 'Federal Secretariat') as opposed to the State branches of the Liberal Party (the 'State branches').

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- allow the agent of the Federal Secretariat to issue a binding notice to the AEC which prescribes the proportional distribution of election funding between the Federal Secretariat and each of the State branches throughout Australia.

The official rationale for the amendments is that they reflect the purpose and the pattern of election funding expenditure. Thus, the Second Reading Speech asserts that 'as the Federal Secretariat of the Liberal Party is responsible for federal election campaigns', and is therefore responsible for controlling mass media coverage, etc., 'it is appropriate that all or part of the public funding be paid to the agent of the Federal Secretariat'.

At least two other rationales have been put forward by other commentators.

One rational alleges that the amendments serve to relieve the Liberal Party of an unnecessary administrative burden associated with the Goods and Services Tax (GST). Broadly, the argument is that the payment of election funding by a State Division to the Federal Secretariat, for the purposes of their managing a federal election campaign, is a 'taxable supply' under the *A New Tax System (Goods and Services Tax) Act 1999*. While the arrangement is financially neutral from the perspective of the State Division and the Federal Secretariat (because the State Division is entitled to reclaim that GST payment in the form of input tax credits) it does impose a modest compliance burden on both parties. Peter Wells, the Director of the Western Australian Division of the Liberal Party, is reported to have observed that this creates a cash-flow problem for the State Divisions and the Federal Secretariat. Moreover, he is reported to have said: 'why mess around with GST if you don't have to?'. This rationale was rejected by Lynton Crosby, Director of the Federal Secretariat, who claimed that the amendments were not related to the GST but 'more accurately reflected the purpose for which public funding is paid - that is, for federal election campaigns'.

Another rationale alleges that the amendments serve to settle an unresolved dispute among the Federal Secretariat and certain of the State and Territory Divisions. As indicated, while the State and Federal Branches of parties are entitled to determine by agreement the distribution of election funding, the State and Territory Divisions and the Federal Secretariat have not yet lodged such an agreement with the AEC. Thus, the distribution of election funding to the Federal Secretariat is effectively determined on an ad hoc State by State basis. While this autonomy is consistent with the federal structure of the Liberal Party, it has the disadvantage that a State Division may 'opt out'. In this context the Prime Minister was recently reported to have expressed concern that, following the 1996 federal election, the Queensland Division 'had reneged on handing over its share of funding'. On this basis, he was reported to have 'made it clear' the Bill was going ahead.

Not surprisingly, there have been reports suggesting divisions between certain of the State Divisions and the Federal Secretariat over the measures proposed in this Bill. One Liberal Member was reported as stating that the Bill would make State Divisions 'mendicants'. The backdrop to this comment has been a series of interventions by the Federal Secretariat in the affairs of State Divisions in Queensland, Victoria and New South Wales. In
particular, the Queensland State Division has been reportedly plagued by factional divisions, 'dire financial troubles' (debts of $300 000) with threats of a 'federal takeover'.

**Funding, Rates, Etc.**

Since its introduction in 1983, public funding for federal elections has grown significantly. As indicated, funding is determined by the number of primary votes obtained by the party. The original rate was 60c per vote in the House of Representatives and 30c per vote in the Senate. In 1995 the 60c was increased to $1.50. As at June 2001 the rate was 176.554c. The rate at the 1998 election was 162.21c. The indexation increase to June 2001 is partly a result of an inflation spike related to the introduction of the Goods and Services Tax. The growth and mix of total election funding over this period is indicated in the figures below.

**Figure 1: Total election funding disbursed by AEC (1984-1998)**

<table>
<thead>
<tr>
<th>Year</th>
<th>Funding (m)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1984</td>
<td>$7.01m</td>
</tr>
<tr>
<td>1987</td>
<td>$10.29m</td>
</tr>
<tr>
<td>1990</td>
<td>$12.88m</td>
</tr>
<tr>
<td>1992</td>
<td>$14.90m</td>
</tr>
<tr>
<td>1996</td>
<td>$32.15m</td>
</tr>
<tr>
<td>1998</td>
<td>$33.92m</td>
</tr>
</tbody>
</table>

**Figure 2: Distribution of election funding (1998 Federal Election)**

- **Labor Party**: 41%
- **Liberal Party**: 34%
- **National Party**: 7%
- **Democrats**: 7%
- **One Nation**: 9%
- **Others**: 2%

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State and Territory Provisions

Public funding for elections is also provided under legislation in New South Wales, Queensland and the Australian Capital Territory.

New South Wales

Under the Electoral Funding Act 1981 (NSW) two funds are established: the Central Fund and the Constituency Fund. These funds are drawn from a pool determined by a formula based on the total number of electors enrolled to vote, the length of the election period and a 'monetary unit' or payment rate which is periodically indexed. Two thirds of this pool is credited to the Central Fund and one third is credited to the Constituency Fund. Broadly, the Central Fund is payable to parties and the Constituency Fund is payable to candidates.

The Central Fund operates in a similar way to the federal election funding regime. Parties and groups are entitled to funding based on the proportion of primary votes obtained by the party, group or candidate. No party, group or candidate can receive more than 50% of the electoral funding available in the Central Fund. As with the federal regime, a candidate must poll at least 4 percent of the primary vote in their electorate. Where a group of candidates are endorsed by 2 or more parties, provision is made for the distribution of funding in such shares as agreed by the agents of the parties.

Queensland

The funding regime in the Electoral Act 1992 (Qld) is broadly identical to the regime in the Commonwealth Electoral Act 1918. Schedule 1 of the Queensland Act incorporates the text of the relevant provisions of the Commonwealth Act. But, the Queensland Act retains the requirement to account for electoral expenditure and limits funding accordingly. There are no provisions regarding endorsement of candidates by 2 or more parties.

Australian Capital Territory

The Electoral Act 1992 (ACT) also operates in a similar way to the federal regime. Thus, where a candidate is endorsed by a party, the funding is payable to the agent of the party. Where one or more candidates are endorsed by a 'non-party group', funding is payable to a single person nominated in writing by the group or to each member of the group in proportion to the votes cast for each member. Thus, there is no express recognition of agreements between parties for the endorsement of a single candidate. Also, a party, group or candidate need only poll 2 percent of the 'eligible votes cast in the candidate's favour'.

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Main Provisions

The key provision which deals with disbursement of election funding is section 299. Broadly, where a candidate is endorsed by a registered political party, any election funding payable to the candidate is paid to the State Branch of the party (subsection 299(1)). Similarly, where a group of candidates is endorsed by a registered political party for a Senate election, election funding is also paid to the State Branch (subsection 299(4)). Where the group was endorsed by 2 or more parties, election funding is paid to the respective State Branches in such shares as agreed by the agents of those branches, or, in the absence of agreement, in such shares as the AEC determines (paragraph 299(4)(b)).

Section 299 makes provision for the payment of election funding to a Principal Agent appointed by the Australian Democrats under section 288A.

Item 2 amends subsection 299(1) to give effect to the regime described above.

- Proposed paragraph 299(1)(b) imposes the general presumption that election funding payable to a State Branch of the Liberal Party must be paid to the agent of the Federal Secretariat.

- Proposed paragraph 299(1)(a) provides for the payment of election funding in accordance with a notice issued under proposed subsection 299(5E).

Item 3 amends subsection 229(4) in a similar way, taking into account the existence of endorsed groups for the purpose of Senate elections.

- For groups endorsed by a single registered political party:
  - Proposed paragraph 299(4)(aa) imposes the general presumption.
  - Proposed paragraph 299(4)(a) provides for the distribution of election funding between the relevant State Division and the Federal Secretariat in accordance with a notice issued under proposed subsection 299(5E).

- For groups endorsed by 2 or more registered political parties:
  - Proposed paragraph 299(4)(ad) imposes the general presumption. Thus, election funding is payable in such shares as agreed by the agents of the respective State Branches. However, the share of election funding payable to a State Branch of the Liberal Party must be paid to the agent of the Federal Secretariat.
  - Proposed paragraph 299(4)(ac) provides for the payment of election funding in accordance with a notice issued under proposed subsection 299(5E). Thus, the share of election funding payable to a State Branch of the Liberal Party must be distributed between the State Branch and the Federal Secretariat.

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**Item 6** inserts **new subsections 299(5E)–(5G)** which essentially give the agent of the Federal Secretariat the power to determine for each State branch, a specified federal percentage and a specified state percentage, effectively determining the distribution of electoral funding by the AEC.

**Concluding Comments**

**Public Accountability**

Strictly speaking, the Federal Secretariat and the State Divisions of the Liberal Party are separate entities. A law which permits the Federal Secretariat to determine the funding entitlements of a State Division would seem to be a law which gives the Federal Secretariat, a private body, the power to make an important public funding decision.

The apparent 'outsourcing' of this decision from the AEC to the Federal Secretariat raises some difficult public accountability questions. The decision has some attributes which may be considered 'legislative' in character: it establishes a rule which must be applied by a public body (the AEC) in performing its functions. Alternatively, it has attributes which may be considered 'administrative' in character: it effectively determines a private body's entitlement to a public resource in accordance with a power given in legislation.

While it is not impermissible to delegate legislative power to a non-legislative body, it is extremely unusual to delegate such a power to a non-executive or private body. Moreover, while it is not impermissible to delegate an administrative decision making power to a private body, it would seem to be unusual to do so in a situation where the private body may be a beneficiary and may not be in agreement with other beneficiaries. Significantly, the decision making power is unfettered. No guidance is given in the Bill as to the matters which the agent of the Federal Secretariat must take into account when determining the specified federal and state percentages under proposed subsections 299(5E)–(5G).

**Centralisation**

One of the key themes in the measures discussed above is the centralisation of federal election expenditure and the apparent need to centralise election funding accordingly. In the context of rising emphasis on national campaigns and national media, there may be strong arguments to adopt a 'Common Fund'/Constituency Fund' model that is used in New South Wales. In this way, a proportion of election funding is preserved for each electorate, emphasising and encouraging campaign activities at the local or state level.
The Future of Liberal Party Agreements

Significantly, it is still open for the State Division(s) and the Federal Secretariat to reach an agreement which would determine the distribution of election funding by the AEC. However, the Federal Secretariat still has the ability to issue a binding notice on the AEC. Moreover, the notice has precedence over any agreement. Thus, while an agreement may be reached, its enforceability will depend on the goodwill of the Federal Secretariat.

Endnotes

3 Australian Electoral Commission, op. cit.
5 Ibid, item 13, inserting new subsections 299(5A)-(5D).
6 Electoral And Referendum Amendment Act 1995, No. 166 of 1995, Schedule 1, item 32, inserting section 288A.
7 Australian Electoral Commission, op. cit.
8 Ibid.
9 Kirsten Lawson, 'Libs to bypass own GST woes', The Canberra Times, 08/08/01, p. 4.
10 Ibid.
11 Ibid.
12 Michelle Grattan, 'Howard vows to fight ‘unhelpful’ National assault on Liberal minister’s seat', The Sydney Morning Herald, 08/08/01.
16 Dean Jaensch, 'As the poll looms, so does a GST bonus for major parties', The Advertiser, 19/07/01.
17 Source: Australian Electoral Commission, op. cit.
18  Ibid.
19  Electoral Funding Act 1981 (NSW), section 62.
20  Electoral Funding Act 1981 (NSW), subsection 63(1).
21  Electoral Funding Act 1981 (NSW), paragraph 59(2)(e)(ii).
22  Electoral Funding Act 1981 (NSW), paragraph 59(3)(b)(ii).
23  Electoral Act 1992 (ACT), subsection 212(1).
24  Electoral Act 1992 (ACT), subsection 212(2).