

Expenditure

Background

- 5.1 An increase in expenditure has been a feature of election campaigning since the introduction of the funding and disclosure scheme in 1984.¹ While parties once campaigned only in the period immediately prior to an election, they now engage in continuous campaigning between elections, with a significant increase in campaign activity in the year before an election.² Increased campaigning activity has been accompanied by an increase in overall amounts of expenditure by political parties and candidates.
- 5.2 Curtailing these rising costs – slowing what has been termed the campaigning ‘arms race’ – has been one of the motivating factors for those seeking reform of political financing arrangements. This chapter examined options for addressing concerns about costs by directly regulating expenditure under the current system, or moving to a system that involves imposing caps or restrictions on areas of high expenditure such as electronic advertising.

1 Commonwealth of Australia, *Electoral Reform Green Paper – Donations, Funding and Expenditure*, December 2008, p. 67.

2 P Van Onselen and W Errington, ‘The Democratic State as a Marketing Tool: The Permanent Campaign in Australia’, *Commonwealth & Comparative Politics*, vol. 45, no. 1, 2007, p. 78, cited in Commonwealth of Australia, *Electoral Reform Green Paper – Donations, Funding and Expenditure*, December 2008, p. 9.

5.3 While political parties' expenditure details are not readily disclosed or accessible under the current scheme, estimates may be made based on the information that is required to be provided. The *Electoral Reform Green Paper – Donations, Funding and Expenditure* (first Green Paper) cited figures based on the difference in the reported total yearly expenditures for the ALP and the Liberal Party for the years 2003-04 (a non-election year) and 2004-05 (an election year), indicating estimates of electoral expenditure at approximately \$19.4 million and approximately \$22 million respectively.

5.4 A number of submitters expressed concern about the increasing costs of political campaigning. In his submission to the first Green Paper, Mr Stephen Mills articulated the concerns of many proponents for reform of political financing arrangements, stating that:

Very high levels of campaign expenditure are unfair: they limit participation in important campaign arenas such as television advertising to the large parties, and exclude smaller parties with fewer financial resources. They are perverse: they favour groups and individuals with existing wealth and/or fundraising skills over those skilled in, for example, policy or government affairs. And they are dangerous: high levels of campaign spending require high levels of fundraising, and party reliance on private donors creates the potential for real or perceived influence on decision making, degrading public confidence in the integrity of the political process.³

5.5 The first Green Paper also highlighted the mechanisms by which political parties aim to maximise the audiences for their messages during the parliamentary cycle. A range of media is now employed, including print, radio, internet, social networking and the most expensive, television. This has had a drastic impact on the costs of elections. The first Green Paper articulated the link between 'new media' forms of campaigning and the spiralling levels of election spending, stating that:

The modern phenomenon of permanent campaigning is expensive and increasingly so. Media advertising remains a major cost, and the major political parties' expenditure on campaigning, principally through advertising, is increasing at rates far in excess of inflation.⁴

3 Mr Stephen Mills, *Submission 29* to the Electoral Reform Green Paper – Donations, Funding and Expenditure, December 2008 p. 2.

4 Commonwealth of Australia, *Electoral Reform Green Paper – Donations, Funding and Expenditure*, December 2008, p. 10.

- 5.6 The expansion of the means by which campaigning can take place has been one key factor contributing to spiralling election costs.

Current arrangements

- 5.7 Part XX of the *Commonwealth Electoral Act 1918* (Electoral Act) requires political parties and associated entities to disclose specific details of receipts and debts that exceed the applicable disclosure threshold, which was \$11 500 for the 2010-2011 financial year. The current disclosure requirements contained in Part XX of the Electoral Act do not compel parties to disclose specific details of their expenditure, electoral or otherwise, above the disclosure threshold.
- 5.8 Candidates and joint and unendorsed Senate groups in each election and by-election are required to lodge returns that include details of 'electoral expenditure' as well as donations. 'Electoral expenditure' is defined in the Electoral Act as expenditure incurred, whether or not incurred during the election period, on:
- the broadcasting, during the election period, of an advertisement relating to the election; or
 - the publishing in a journal, during the election period, of an advertisement relating to the election; or
 - the display, during the election period, at a theatre or other place of entertainment, of an advertisement relating to the election; or
 - the production of an advertisement relating to the election, being an advertisement that is broadcast, published or displayed as mentioned in paragraph (a), (b) or (c); or
 - the production of any material (not being material referred to in paragraph (a), (b) or (c)) that is required under section 328, 328A or 328B to include the name and address of the author of the material or of the person authorizing the material and that is used during the election period; or
 - the production and distribution of electoral matter that is addressed to particular persons or organisations and is distributed during the election period; or
 - the carrying out, during the election period, of an opinion poll, or other research, relating to the election.⁵

5 *Commonwealth Electoral Act 1918*, s. 308.

- 5.9 The Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010 seeks to expand the definition of 'electoral expenditure' to include additional costs such as payment of staff employed for an election campaign and travel during an election campaign.⁶
- 5.10 A survey of the candidate returns for each election on the Australian Electoral Commission (AEC) website indicates that candidates endorsed by political parties, with a few exceptions,⁷ generally lodge 'nil' returns. This is because, apart from where they use their own money or receive donations directly, all expenditure is incurred through the endorsing political party. There is thus no way in which information regarding this expenditure is made public.
- 5.11 The requirement for political parties to provide details of expenditure was in the Electoral Act from 1984 to 1996, with the exception of the 1993 election. The relevant provision was repealed prior to the 1993 federal election once more comprehensive annual disclosure laws were introduced. The requirement was reintroduced for the 1996 election and removed again.
- 5.12 The Joint Standing Committee on Electoral Matters (JSCEM) report on the conduct of the 1996 federal election recommended that section 314AD of the Electoral Act, which required the disclosure of details pertaining to amounts paid (over the \$1 500 threshold at the time, excluding amounts below \$500) annually, be repealed. This was based on recommendations to this effect made by the Australian Labor Party, the Liberal Party and supported by the AEC.⁸ The recommendation to remove the requirement stemmed from a view that the administrative burden on parties in disclosing this information outweighed the resultant benefits of the disclosure of these details.
- 5.13 However, the lack of disclosure of expenditure by political parties was raised in submissions as an issue that erodes the quality of disclosure that is obtained through the current scheme. The Commonwealth disclosure scheme has changed significantly since the requirement for political parties to disclose expenditure details was removed in 1996. For example, there is now a much higher disclosure threshold in place.
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6 Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010, item 7.

7 See further AEC website, <<http://electiondisclosures.aec.gov.au/CandidateSearch.aspx?SubmissionId=15508>> viewed 9 November 2011.

8 Joint Standing Committee on Electoral Matters, *Report on the conduct of the 1996 federal election and matters related thereto*, Commonwealth Parliament of Australia, p. 103.

5.14 The AEC noted in its submission that '[a]mendments to the original annual disclosure scheme have seen less detail required to be disclosed in the relevant returns than originally was the case'.⁹

5.15 One argument that arises in this area is that the current obligations are more onerous on Independent candidates than endorsed candidates, because Independent candidates reveal details of their expenditure that are never revealed by endorsed candidates. The AEC stated:

Since 1996, the AEC has not obtained – and there was no requirement in the legislation for us to obtain – amounts of electoral expenditure that had been incurred by the political parties and endorsed candidates. So the Act, as it stands at the moment, has a different requirement that applies to independent candidates from that that applies to endorsed candidates. We were merely raising that for the committee's consideration, and just raising: is that the policy that the committee would still wish to adopt? But that is clearly the position that is currently in the Act.¹⁰

5.16 In its third supplementary submission, the AEC also referred to comments made by the Member for Lyne during the second reading debate for the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2009:

The fact that the declaration of your expenditure happens separately for non-aligned candidates versus candidates who are members of major political parties is an issue that I would hope this government strongly considers. Surely it should be the same rule for all, and that includes the major political parties as well as Independent and unaligned candidates. The fact that the major parties can bury their figures in some sort of global expenditure at the end of the year, separate from by-election figures, which have to be declared by people such as me within a certain time frame, is an anomaly. I hope it can be corrected through what I hope is the start of a reform process.¹¹

5.17 The NSW Greens Political Donations Research Project expressed some concerns about what they described as a 'loophole' regarding disclosure by endorsed candidates following an election. The group stated that:

9 Australian Electoral Commission, *Submission 19*, p. 2.

10 Mr Paul Pirani, Chief Legal Officer, Australian Electoral Commission, *Committee Hansard*, 1 November 2011, p. 6.

11 House of Representatives Hansard 16 March 2009 at page 2684, cited in Australian Electoral Commission, *Supplementary submission 19.3*, p. 6.

...all money can be funnelled through the head office for all MPs and other candidates running for the lower house in federal parliament.¹²

5.18 The importance of the disclosure of expenditure has also been noted in the context of a more complex regulatory framework. Dr Norman Thompson has commented in reference to the NSW system that:

Without a legal requirement for parties to disclose all expenditure in individual electorates, it could be difficult and perhaps impossible to ascertain if a party has breached its electorate expenditure cap. In order for it to be adequately monitored, there must be reporting of party expenditure by each electorate.¹³

5.19 Under the current disclosure scheme there are no measures in place to curtail or limit spending on elections. Concordantly with other aspects of reform of the political financing regime, the options for change can be separated into two categories:

- the implementation of changes to the current system; or
- adopt a broader approach involving restrictions on amounts or types of expenditure.

Improving the current system

Disclosure of expenditure

5.20 The key proposal for improvement to the current system relates to enhancing the disclosure measures of political parties, associated entities (where relevant) and third parties with respect to their expenditure.

5.21 As mentioned in previous chapters, the various components of political financing arrangements are intertwined. In the context of political expenditure, the arrangements in place for regulating public funding help set the parameters within which the feasibility of expenditure reform options can be explored.

12 Dr Norman Thompson, NSW Greens Political Donations Research Project, *Committee Hansard*, 9 August 2011, p. 9.

13 Dr Norman Thompson, Democracy4sale website, <http://www.democracy4sale.org/index.php?option=com_content&view=article&id=548:nsw-electoral-funding-reform-democratic-or-enforceable&catid=1:general&Itemid=6> viewed 25 October 2011.

- 5.22 A key determining factor in relation to the desirability of inserting requirements into the Electoral Act whereby political parties and associated entities, where relevant, disclose details of their expenditure will be whether a reimbursement scheme for claiming public funding is in place.
- 5.23 Under reimbursement schemes, parties or candidates typically lodge claims that detail their expenditure to the administering body – at the federal level it would be the Australian Electoral Commission (AEC). The information contained in these reports is made publically available under section 320(1) of the Electoral Act. Accordingly, expenditure details are in effect being disclosed, and a distinct detailed disclosure obligation regarding expenditure may not be necessary.
- 5.24 However, in the absence of a reimbursement scheme, an alternative means of obtaining disclosure of details of expenditure by political parties and associated entities may be warranted.
- 5.25 The benefits to transparency and accountability in the current scheme by requiring political parties (and associated entities) to disclose details of their expenditure have been raised. However, some consideration must be given to the way in which further breakdown of the information could occur to obtain the types of information that some people may be interested in, such as the amounts that political parties spent on campaigns in particular electorates.
- 5.26 In a discussion paper prepared for the Democratic Audit of Australia, Kenneth R. Mayer identified the following run-off effect of the absence of this requirement from the Australian campaign finance regime. He argued that:
- Because parties disclose so little information, we have little understanding of how parties allocate their money, which seats they consider most important, and what the relationship is between what they spend and how their candidates do. Because so little information is revealed, the media give the annual and election disclosures only a perfunctory treatment.¹⁴
- 5.27 The AEC questioned the value that would arise from having political parties disclosing this information:

14 K Mayer, *Sunlight as the best disinfectant: Campaign finance in Australia*, Discussion Paper 31/06 (October 2006), Democratic Audit of Australia, p. 4, <<http://democraticaudit.anu.edu.au/papers/20061026mayerfin.pdf>> viewed 15 September 2011.

...when you have expenditure that covers a whole state or, indeed, a whole country, I suspect how you apportion that according to electorates would be quite difficult...

The question would be if you took overall expenditure by a party on a particular item would you divide it by 150 and, if you did, is that a particularly meaningful figure to record for expenditure in a particular seat?¹⁵

5.28 The AEC also highlighted an additional difficulty that arises in this area, noting that:

...you have the additional issue about what to do with the Senate, when that is not done on a divisional basis. It is done on a whole state basis, so are we going to aggregate that information or disaggregate it? How is that to be recorded?¹⁶

5.29 A primary consideration in the examination of the detailed disclosure of expenditure by political parties then is the type of information that would be useful to obtain. While political party expenditure on electorate basis may be of interest, it is unlikely to be an issue that will influence an elector's vote as much as knowledge of donations received by the political party. Accordingly, the issue is one for consideration, but is not crucial to transparency and accountability of the movement of funds within the political system.

5.30 There are three ways in which the disclosure of expenditure of political parties and endorsed candidates could be changed to require detailed disclosure of expenditure within a disclosure-based system:

- insert a requirement that details of all expenditure in excess of the disclosure threshold by political parties and associated entities must be disclosed in annual returns;
- political parties could be required to lodge election returns disclosing their 'electoral expenditure'; or
- political parties and associated entities could be required to lodge details of their 'electoral expenditure' in their annual returns;
 - ⇒ The definition of 'electoral expenditure' in section 308 of the Electoral Act, provides that 'electoral expenditure' need not be 'incurred' during the election period, but also states that it must relate to

15 Mr Ed Killesteyn, Electoral Commissioner, Australian Electoral Commission, *Committee Hansard*, 1 November 2011, pp. 6-7.

16 Mr Paul Pirani, Chief Legal Officer, Australian Electoral Commission, *Committee Hansard*, 1 November 2011, p. 7.

activities undertaken during the election period or 'relating to' an election. A revised definition may be necessary if political parties are to disclose details of 'electoral expenditure' in annual returns, omitting the limitation on the time period.

Detailed disclosure of expenditure by parties and entities

- 5.31 The insertion of a requirement into the Electoral Act requiring political parties and associated entities to disclose details of all expenditure above the threshold would be particularly beneficial in a system where there is no reimbursement scheme in place and with a high disclosure threshold. In this scenario, the absence of claims as a source of expenditure details and the high disclosure threshold – reducing the items of expenditure that need to be disclosed – means that less information about the general expenditure of political parties and endorsed candidates is available. A requirement for the detailed disclosure of expenditure would enhance transparency by providing a source of information on relevant spending.
- 5.32 Associated entities must also be subject to this requirement, so as not to provide a loophole allowing circumvention of the requirement by political parties.
- 5.33 At the time this requirement was deemed 'too onerous' in 1996, the disclosure threshold was at a much lower level than \$11 500 for the 2010-2011 financial year and parties did not receive any additional funding or support to ease the burden. The argument is thus less persuasive in reference to a post-2006 disclosure scheme.
- 5.34 As above, if full disclosure of expenditure was implemented where a high disclosure threshold was in place, the disclosure of expenditure by political parties and associated entities could form part of the annual return. However, the current situation whereby disclosure takes place 'after the fact' would also need to be considered. It may be that the value of disclosure of expenditure would be heightened where a contemporaneous disclosure system is in place.

Frequency of disclosure

- 5.35 Alternatively, introducing the option to require political parties to lodge specific 'election returns' disclosing expenditure pertaining to a specific election and/or to include electoral expenditure details in their annual returns submitted in relation to election years, are best suited to a system with no reimbursement scheme and a low threshold. In a system with a low disclosure threshold, a detailed disclosure requirement regarding all

expenditure may be seen as too administratively onerous without any additional support for political parties, as was the case in the past, as too many details would need to be recorded and reported.

- 5.36 Consideration would need to be given as to whether this requirement should be implemented in addition to, or instead of, the annual disclosure requirement for the financial year in which the election was held.
- 5.37 Regardless of the nature of the obligation, in this scenario, a requirement for the reporting of electoral expenditure in an election return or as part of an annual return for the relevant financial year strikes a better balance between making this pertinent expenditure information available without unduly burdening those with reporting obligations, as the requirement would only arise in years during which a federal election had been held
- 5.38 As with alternative models, other elements such as the timing of disclosure – whether it is ‘after the fact’ or contemporaneous reporting – will also influence the selection of a preferred approach.
- 5.39 The NSW Greens Political Donation Research Project recommended that political parties make detailed disclosure of all ‘electoral expenditure’ – as defined in section 308 – to the AEC, as opposed to all expenditure.¹⁷ It also recommended that the definition of ‘electoral expenditure’ be continually updated to include new and emerging forms of electronic campaigning. The justification for the implementation of provisions requiring disclosure of expenditure above the threshold is that given that such a large amount of taxpayer funds are spent on electoral expenditure, the public has a right to know about how it is being spent.¹⁸
- 5.40 The administrative burden imposed through the disclosure of only ‘electoral expenditure’ is significantly less than that connected to disclosing all payments made in a financial year that exceed the threshold.
- 5.41 If a lower disclosure threshold is in place, it may be more feasible in order to reduce the administrative burden on political parties and associated entities, to provide for the disclosure of ‘electoral expenditure’ only in each annual return, regardless of whether or not an election was held. This would be a useful move in the context of continuous campaigning. The definition of electoral expenditure would need to be amended, or an alternative definition inserted, so as not to limit the time period during which expenditure of the types defined in section 308 can be incurred and has to be disclosed.
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17 NSW Greens Political Donation Research Project, *Submission 17*, p. 2.

18 NSW Greens Political Donation Research Project, *Submission 17*, p. 4.

Relevant considerations

- 5.42 In the United States, political parties must provide certain details regarding their expenditure exceeding the threshold of \$200 as a part of their disclosure obligations. In Canada, political parties must also provide a Statement of General Election Expenses for each election in which the total amount paid in specified categories, any discount received and any remaining unpaid portion of the transaction must be provided.¹⁹
- 5.43 Consideration could be given to applying a similar approach in Australia to that applied in Canada. Such a model would involve political parties disclosing detailed information in the legislative categories of 'electoral expenditure', with details of discounts and unpaid portions in their annual returns. It may be that this information will be of greater use to the public in identifying the potential for influence, than a general disclosure of all expenditure.
- 5.44 In Australia, if there are privacy concerns in the context of expenditure disclosure, similar arrangements to those proposed in Chapter 3 regarding only publishing the name, suburb and post code of individuals where relevant could apply in relation to disclosure of expenditure.
- 5.45 In addition, political parties must be sufficiently funded and resourced to meet any additional administrative burden imposed through the imposition of additional disclosure obligations.

Conclusion

- 5.46 Comparable jurisdictions require that details of expenditure be disclosed. The disclosure of certain details of electoral expenditure above the applicable disclosure threshold enhances the transparency and accountability of the political financing scheme and the integrity of the broader democratic process. The committee believes this will be the case regardless of the level of the disclosure threshold that is in place.
- 5.47 Arguments relating to the administrative burden on political parties and associated entities in disclosing details of expenditure above a high threshold of \$11 500 are not persuasive.
- 5.48 In the case of lower thresholds, it is worth noting that in the past it was argued that the detailed disclosure requirement for expenditure was too administratively onerous for those with reporting obligations, which led to the removal of the requirement for detailed disclosure of expenditure in

19 See generally *Canada Elections Act*, division 3.

1996 when the threshold was \$1 500. However, given that making these details publically available is crucial to enhancing transparency and accountability in this area, it is worthwhile exploring ways to assist those responsible to meet this requirement.

- 5.49 Providing additional resources such as increased guidance from the AEC on what is required, and funding from the Commonwealth targeted at supporting the increased administrative burden will help to support the transition to, and ongoing provision of expenditure details. One way in which assistance could be provided is through targeted funding to support the additional administrative workload. Options for administrative funding are discussed in Chapter 6.
- 5.50 Reform along these lines to the disclosure scheme may necessitate changes to the AEC's current online lodgement scheme to increase the efficiency with which processing of returns can take place. Accordingly, the AEC must educate political parties, candidates, associated entities and any other group that may be affected by the changes.

Recommendation 13

- 5.51 **The committee recommends that the *Commonwealth Electoral Act 1918* be amended, as necessary, to require political parties and associated entities to disclose details of their expenditure above the applicable disclosure threshold in their six-monthly returns.**

Recommendation 14

- 5.52 **The committee recommends that to complement the requirement for political parties and associated entities to disclose details of expenditure above the disclosure threshold, the Australian Electoral Commission should provide guidance and enhance its online lodgement system to help ensure that those with reporting obligations have a clear understanding of, and the administrative means by which, to meet this obligation.**
- 5.53 If a high disclosure threshold remains in place, the requirement for political parties to disclose their expenditure details in annual returns should be reinstated. While detailed disclosure of expenditure is the

ultimate goal, at a minimum, political parties should be required to disclose certain details regarding electoral expenditure as defined in section 308 of the *Commonwealth Electoral Act 1918* in their annual returns. The committee sees this as a logical step in an era of continuous campaigning.

Campaign committees lodging returns

- 5.54 One of the issues raised in political financing discourse is the absence of political party disclosure on expenditure and the effect of this on transparency and accountability.
- 5.55 The AEC noted the difficulties that would arise with attempting to design a scheme that would achieve the desired ends of increasing the transparency of political party expenditure on an electorate basis, but also indicated that there would be value in the information being required to be disclosed.²⁰
- 5.56 The AEC comments were made in the context of political parties recording and disclosing the information, as opposed to each distinct campaign committee having a disclosure obligation for an election. In that context the AEC stated that they did not believe that the resolution to such an issue was 'too hard' so as not to be worth considering.²¹
- 5.57 A further option to improve the quality of disclosure regarding donations and expenditure of endorsed candidates is to require campaign committees for candidates and Senate groups to lodge separate disclosure returns.
- 5.58 A 'campaign committee' is defined in section 287A of the Electoral Act as 'a body of persons appointed or engaged to form a committee to assist the campaign of a candidate or group in an election'.
- 5.59 While the implementation of separate disclosure obligations in relation to endorsed candidates would potentially improve the amount and quality of information available in relation to individual candidates' expenditure, the benefits of this must be weighed against the administrative burden on those that work on and run campaign committees. The additional burden on the AEC during elections would also need to be considered. In

20 Mr Ed Killesteyn, Electoral Commissioner, Australian Electoral Commission, *Committee Hansard*, 1 November 2011, p. 7.

21 Mr Ed Killesteyn, Electoral Commissioner, Australian Electoral Commission, *Committee Hansard*, 1 November 2011, pp. 6-7.

particular, the AEC must have adequate resources to administer such a system.

- 5.60 An additional consideration is the precise person that would be responsible for meeting the obligation. In a political party the party agent is responsible for the disclosure obligation, and within an associated entity it is the financial controller. An equivalent position, if one exists, would have to be designated the responsibility within a campaign committee for an endorsed candidate.

Conclusion

- 5.61 Volunteers play important roles in the political process and care should be taken to ensure that changes to funding and disclosure arrangements do not discourage participation through imposing onerous obligations on those that wish to contribute in this manner.
- 5.62 The committee has recommended that detailed disclosure of expenditure be introduced. While the agent for the relevant party will be responsible for lodging this information, the campaign committees will also have a role to play in being aware of these obligations and maintaining accurate records of relevant expenditure that will need to be provided to the political parties.
- 5.63 As discussed earlier, political parties and the AEC will need to be adequately resourced to ensure this system works effectively and to minimise the potential for inadvertent or purposeful breaches. Parties and the AEC can then assist campaign committees to better understand their role in the process. Options for administration funding to political parties to help address and meet increased reporting obligations are discussed in Chapter 6.

Further reform options

Caps on general expenditure

- 5.64 There are currently no limitations on the amounts that political parties can spend either generally or specifically in relation to election campaigns. Third parties are also not subject to limitations on their expenditure. Proposals for reform in this area generally involve the implementation of measures limiting levels of election spending. The most commonly raised measure to address high levels of expenditure is the imposition of caps on

expenditure by political parties and third parties. The precise definition of 'third party' is central to the success of such schemes, but caps on expenditure generally extend to those that incur expenditure in defined categories or in advocating a vote.

- 5.65 This section deals with caps on expenditure by political parties only. An incidental matter to capping political party expenditure is the capping of third party expenditure so as to prevent circumvention of the laws. Caps on third party expenditure are addressed in detail in Chapter 7.
- 5.66 Suggestions for the implementation of caps on expenditure by political parties and third parties have permeated discussions regarding the need to curb election spending. Proponents for this reform often argue that direct entitlement public funding amounts had been included in party financial modelling as an additional stream of funding.²² The apparent failure of public funding to curb levels of election spending tends to be presented as at least one justification for caps on expenditure.
- 5.67 The first Green Paper outlined the general arguments for and against capping expenditure. The arguments for capping expenditure included:
- caps mean there is no real advantage in one candidate or party having access to greater financial resources as there is a limit on how much they can spend;
 - caps create a level of financial equality between candidates at an election;
 - caps reduce the level of election finance needed, meaning that more candidates (including less wealthy candidates) may compete at elections;
 - caps help to contain overall election costs which, in turn, reduces reliance on donations and the associated problem of private donors using donations to influence candidates or parties' policies;
 - the absence of caps encourages excessive television and other advertising; and
 - many overseas jurisdictions place limits on election expenditure.²³
- 5.68 The arguments against the implementation of expenditure caps were also outlined in the first Green Paper:
- expenditure caps are too difficult to enforce;

22 Commonwealth of Australia, *Electoral Reform Green Paper – Donations, Funding and Expenditure*, December 2008, p. 13.

23 Commonwealth of Australia, *Electoral Reform Green Paper – Donations, Funding and Expenditure*, December 2008, p. 64.

- candidates should be free to campaign in whatever manner they see fit (so long as they comply with bribery and corruption laws);
- modern electioneering practices mean that individual candidate spending is not as relevant as the spending incurred by centralised party organisations;
- caps on party expenditure need to extend to third parties, which may cause problems; and
- it is difficult to set realistic spending caps due to the changing costs of media access and electioneering techniques as well as inflation and the need to keep closing administrative loopholes once these are discovered.²⁴

5.69 In its submission to this inquiry, the Australian Labor Party indicated its support for the implementation of caps on expenditure as a measure to limit the increasing levels of election spending, commenting that:

In recent years...the size of political campaigns have grown at an alarming rate, with some in the community concerned that election spending has risen to unsustainable levels...

The ALP believes that it is now time for Australia to introduce effective expenditure caps on campaign spending which will limit the amount that parties at national level, and candidates at local level, can spend on electioneering.²⁵

5.70 The Australian Labor Party listed a number of underlying principles for the design of an effective expenditure cap, including that:

- Spending caps should apply for a set period, calculated from the last possible date for a federal election. This will give certainty to any expenditure cap given that there are not fixed terms for the Commonwealth.
- Any cap should be set at a level that provides equality between the two major grouping [sic] in Australian politics, the Australian Labor Party and the Liberal-National Coalition.
- A national expenditure cap should be set at a level that ensures no Third Party can distort the legitimate political campaign of candidates or political parties.
- Separate expenditure caps for local electorate level spending as well as national spending should be set.²⁶

24 S. Young, 'Party Expenditure' in S. Young and J-C Tham, *Political Finance in Australia: a skewed and secret system*, Democratic Audit of Australia, Report No. 7, Australian National University Canberra, 2006, p. 95, cited in Commonwealth of Australia, *Electoral Reform Green Paper – Donations, Funding and Expenditure*, December 2008, p. 64.

25 Australian Labor Party, *Submission 21*, p. 2.

26 Australian Labor Party, *Submission 21*, p. 3.

- 5.71 The Australian Greens also supported expenditure caps and suggested that lower house candidates be able to self-fund their campaign up to half the amount of the expenditure cap. They argued that candidates that form a Senate group should be able to donate collectively to the Senate campaign up to 20 per cent of the amount of the expenditure cap.
- 5.72 The first Green Paper pointed out that in the United States, political parties and candidates can undertake to cap their expenditure in exchange for the receipt of public funding.
- 5.73 The interaction between public funding and a potential expenditure cap scheme was also raised by the Accountability Round Table which indicated its support for a system of expenditure caps and argued that the level of the cap should correspond to the level of public funding to which a political party was entitled.²⁷
- 5.74 The Australian Greens believe expenditure caps should apply for a six month period to political parties, candidates, third parties and associated entities, and that they should not apply to volunteer labour. The Australian Greens argued that compliance with expenditure caps should be a condition of public funding with penalties, such as loss of public funding, large fines and in extreme cases, disqualification as a candidate or Member of Parliament, if the cap is exceeded.
- 5.75 While support for the concept of expenditure caps was evident in the submissions, there are a number of details in relation to a precise operational model for capping expenditure that need to be discerned. The first Green Paper stated that one of the difficulties in establishing effective caps on expenditure is that a clear and broadly accepted definition of 'election' and 'campaign' spending would need to be developed.
- 5.76 The first Green Paper raises the United Kingdom, Canada and New Zealand as possible starting points for this task.²⁸ The NSW and Queensland approaches could also be considered for guidance. An examination of the selected jurisdictions indicates that three primary areas need to be defined:
- the activities that are subject to the cap;
 - the period during which the activities will be regulated; and
 - the level of the applicable cap.

27 Accountability Round Table, *Submission 22*, p. 3.

28 Commonwealth of Australia, *Electoral Reform Green Paper – Donations, Funding and Expenditure*, December 2008, p. 67.

- 5.77 The Australian Greens propose a solution covering each of these categories. They suggest that a cap on expenditure should apply to defined electoral campaigning expenses, including electronic campaigning. In relation to the precise operation of a cap on expenditure, the Australian Greens recommended that a cap on election expenditure should apply on a state basis for political parties; to individual House of Representatives candidates; and to parties in respect of each House of Representatives electorate. They proposed that the party state wide cap should be based on the number of voters on the roll to prevent comparatively large sums being spent in small states.
- 5.78 The importance of effectively resolving definitional issues is evident when the United Kingdom situation is examined. There it was found by the UK Ministry of Justice that measures taken to reduce election spending had not been entirely successful. One of the reasons for this was that the definition of 'campaign' expenditure in their legislation was not wide enough.²⁹
- 5.79 Additionally, the potential for circumvention of any cap and how this could be addressed was one of the key arguments that submitters made against the implementation of caps on expenditure. The AEC raised concerns regarding the potential for political parties to endorse multiple candidates (under the model proposed by the Australian Greens, this could occur in the lower house) across electorates with the aim of maximising the allowable amount under the cap.
- 5.80 The AEC observed that provisions in the Electoral Act for unlimited registration of 'related parties' add to this potential loophole.³⁰
- 5.81 The simplicity of a cap scheme was also stated to be a key issue in its effectiveness. The AEC highlighted the general rule that:
- ...the more complex the design is for a scheme, and particularly the more exceptions to general rules that are catered for, the greater the potential for circumvention.³¹
- 5.82 For example, where certain categories of expenditure are excluded from caps, the AEC indicated that there was potential for other types to be 'repackaged under an exempt category'.³² The exemption of membership fees from disclosure laws upon their introduction in 1984 was cited as an
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29 Commonwealth of Australia, *Electoral Reform Green Paper – Donations, Funding and Expenditure*, December 2008, p. 65.

30 Australian Electoral Commission, *Submission 19*, p. 14.

31 Australian Electoral Commission, *Submission 19*, p. 8.

32 Australian Electoral Commission, *Submission 19*, p. 8.

example of some ‘quarters’ acting to create ‘tiered’ levels of membership as a mechanism to obtain private funds without being caught by disclosure laws.³³

5.83 In addition, mechanisms by which a cap scheme can be enforced lie at the heart of conceptual opposition to the idea. Enforcement and compliance issues in the context of political financing are addressed in detail in Chapter 8. However, on the issue of enforcing compliance with caps specifically under the current *ex post facto* approach to compliance, the AEC stated that:

...post-event strategy of enforcement through a penalty regime is perhaps best targeted at compliance behaviour that requires something to be done (i.e. make disclosures) rather than behaviour that requires something not be done (i.e. not exceed donation or expenditure caps).³⁴

5.84 A further general argument raised in the first Green Paper related to the potential for the restraint imposed by caps on well-resourced political parties to be considered an unwarranted and excessive interference with free speech.³⁵ The constitutional dimension of this argument is considered in detail later in this chapter. The first Green Paper also considered the effect that expenditure caps might have on new parties. It referenced the Canadian experience, stating:

After the introduction of spending caps in Canada, electoral volatility remains high, indicating that spending caps do not act as a barrier to new entrants in the political process. Instead, it is argued that incumbents are prevented from exploiting their fundraising advantages. While undoubtedly an imperfect instrument, spending caps in Canada are seen as having achieved significant successes in controlling costs and levelling the campaign playing field.³⁶

5.85 The variance in international experiences provides some indication of matters for consideration in the Australian context.

33 Australian Electoral Commission, *Submission 19*, p. 8.

34 Australian Electoral Commission, *Submission 19*, p. 4.

35 Commonwealth of Australia, *Electoral Reform Green Paper – Donations, Funding and Expenditure*, December 2008, p. 67.

36 Commonwealth of Australia, *Electoral Reform Green Paper – Donations, Funding and Expenditure*, December 2008, p. 67.

Broadcast advertising expenditure

- 5.86 The first Green Paper canvassed the notion that the most expensive element of campaign expenditure was the component that was spent on advertising.³⁷ In his submission to the first Green Paper, Stephen Mills argued that within the broad category of advertising, television advertising was the ‘largest single component of spending’.³⁸
- 5.87 Mr Mills proposes targeting the cost of electronic campaign advertising as a mechanism for reducing election spending. This is an alternative to capping overall expenditure. Mr Mills’ proposal contained seven key elements:
- the amount of allowable broadcast advertising (i.e., advocating a vote for parties or candidates) would be capped at a dollar limit and allocated among all eligible political parties;
 - the cap would be set by reference to a target relating broadcast advertising costs to public funding receipts;
 - parties would be able to use their allocation as they see fit, both as to content and broadcast schedules, up to their allocated entitlement but not beyond;
 - broadcast advertising by groups other than parties would be permitted but not if it advocated a vote for or against parties or candidates;
 - commercial broadcasters would be required as a condition of their licence to broadcast the advertising and other broadcasts at no cost;
 - commercial broadcasters would be eligible for part-reimbursement through the public funding mechanism;
 - ‘free time’ would be expanded and shared among all broadcasters.³⁹
- 5.88 Mr Mills’ proposal essentially recommended that campaign spending limits be a condition of receipt of public funding. He stated that:
- ...parties in receipt of public funding should be required to limit their campaign expenditure to a predetermined proportion of their expected public-funding receipts; that is, campaign spending limits should be made a condition of public funding.⁴⁰
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37 Commonwealth of Australia, *Electoral Reform Green Paper – Donations, Funding and Expenditure*, December 2008 p. 10.

38 Stephen Mills, *Submission 29* to the Electoral Reform Green Paper – Donations, Funding and Expenditure, pp. 2-3.

39 Stephen Mills, *Submission 29* to the Electoral Reform Green Paper – Donations, Funding and Expenditure, p. 3.

40 Mr Stephen Mills, Private capacity, *Committee Hansard*, 9 August 2011, p. 30.

5.89 Mr Mills elaborated on his proposal in his appearance before the committee and distinguished the approach from the concept of a general cap on expenditure, commenting that:

The approach, I believe, is potentially a better and more effective way of capping spending than by imposing blanket or global caps a la the recent New South Wales election. That is because such caps are essentially set in light of demand-side factors – for example, the reported costs of campaigning – and they are complex to design and enforce, with plenty of scope for loopholes and ambiguity. With public funding, on the other hand, dollars follow votes, which is a powerful principle, and the spending caps process could be designed to give parties themselves an incentive to comply, mainly by discouraging overspending through punitive reductions in their public funding receipts.⁴¹

5.90 Mr Mills suggested, while acknowledging that the precise details of such an arrangement required consideration that the AEC administer the system through using vouchers and reimbursing broadcasters for campaign advertising they undertake on behalf of political parties during the campaign.⁴²

5.91 One issue that was raised during Mr Mills' appearance was that imposing the task of allocating broadcast time to the AEC ran the risk of politicising its role. In response to questioning by the committee on this potential effect, Mr Mills responded that:

It is not any part of this proposal to politicise [the AEC], but it is certainly part of it to give it a much more difficult and central role. This is a tough job.⁴³

5.92 GetUp also proposed a detailed model for the capping of expenditure that involved a significant focus on broadcast advertising. The group proposed two alternative models:

- A 'broadcast communication expenditure cap', which would operate by capping the amount that each individual campaign organisation (political party or third party) is permitted to spend on this activity within the controlled period; or
- An expenditure cap that operates at an aggregate level by capping the total amount that can be spent by publicly funded political parties on

41 Mr Stephen Mills, Private capacity, *Committee Hansard*, 9 August 2011, p. 30.

42 Mr Stephen Mills, Private capacity, *Committee Hansard*, 9 August 2011, p. 33.

43 Mr Stephen Mills, Private capacity, *Committee Hansard*, 9 August 2011, p. 33.

electronic broadcasting (whilst leaving those political parties who are not receiving public funding and third party campaigners subject to a proportionate cap).⁴⁴ This second option is similar to the proposal by Mr Mills.

- 5.93 In the first Green Paper the merits of capping certain types of expenditure were considered. It was canvassed as a possible solution to the absence of other features in the current political financing scheme, such as fixed election dates, that may render a cap scheme difficult to administer.⁴⁵
- 5.94 The concept of imposing a cap on components of expenditure is arguably a logical solution to some of the shortfalls identified with the general blanket cap on expenditure. For example, there is seemingly less scope for circumvention of caps through, for example, third parties, where public funding is tied to expenditure limits on broadcast advertising.
- 5.95 Similarly to the blanket cap, in order to operate effectively, the scheme must be complemented by effective and workable mechanisms for enforcement. These are discussed in detail in Chapter 8, but it should be flagged as an issue from the outset.
- 5.96 In relation to the similar system that is currently in operation in New Zealand whereby broadcast time is allocated to political parties by reference to opinion polls and various other external mechanisms, Mr Mills stated that New Zealand did initially encounter some issues with their legislation, but that these were soon rectified.⁴⁶ For example, in relation to the 2005 election in New Zealand, the National Party did not account for GST when booking its election broadcast time, which led to the party spending approximately \$112 000 more in campaign advertising than was allowed under the law. Further, Andrew Geddis explained in a paper prepared for the Democratic Audit of Australia:

...because parties may only spend as much on election broadcasting as they are allocated by the Electoral Commission before the election, there is a large discrepancy between the ability of smaller and larger parties to access this medium. In 2005, for instance, Labour was entitled to spend \$1.1 million on broadcasting its campaign advertisements, while the ACT, Green, New Zealand First and United Future Parties could spend only

44 GetUp!, *Submission 23*, p. 4.

45 Commonwealth of Australia, *Electoral Reform Green Paper – Donations, Funding and Expenditure*, December 2008, p. 67.

46 Mr Stephen Mills, Private capacity, *Committee Hansard*, 9 August 2011, p. 35.

\$200 000 each. It is simply not legitimate for one party to be allowed five times more direct exposure than its competitors.⁴⁷

5.97 It is difficult to undertake a detailed critique of such proposals without fundamental details such as the way in which the scheme would be administered and the method by which the amount of airtime is calculated. It is evident that these issues themselves may cause significant difficulties. However, the first Green Paper identified the following potential results of a cap on broadcast expenditure:

- there may be an increase in expenditure on non-television advertising, or a shift in expenditure from television advertising to other media, including an increased emphasis on internet campaigning which may not be accessible by all parts of the electorate;
- an increased cost to government and hence the taxpayer (if Government funding or support was provided for television commercials);
- political parties and individual candidates could consider it unfair if their freedom to advertise was restrained, but funds were not provided to them for advertising; and
- potential constitutional difficulties in relation to the maintenance of the constitutionally prescribed system of representative and responsible government, although again it is possible these could be avoided depending on the exact nature of the scheme.⁴⁸

5.98 Further, the precise measures would need to be examined in detail to determine whether there is potential for their circumvention. The Nationals expressed their general view regarding expenditure cap schemes in this respect, submitting that:

...any system of restrictions on political expenditure in election campaigns must be approached cautiously and take into account the real cost of communicating with voters, the range of factors contributing to the cost of campaigning and the varying structures of Australia's political parties.⁴⁹

47 A. Geddis, *The Funding of New Zealand's Elections: Current problems and prospects for change*, <http://democraticaudit.anu.edu.au/papers/20070302_geddis_fundnzelect.pdf> viewed 17 October 2011.

48 Commonwealth of Australia, *Electoral Reform Green Paper – Donations, Funding and Expenditure*, December 2008, p. 76.

49 The Nationals, *Submission 24*, p. 4.

Constitutional issues

- 5.99 Similar constitutional issues exist in relation to the capping of expenditure as those discussed in Chapter 4 regarding the capping of donations. One argument may be that expenditure caps may not directly burden the freedom of political communication because the political parties' spending money is distinct from individuals contributing money as a form of support.⁵⁰
- 5.100 An alternative argument is that an expenditure cap does restrict political communication because most expenditure is in relation to communicating political matters.⁵¹ It would appear then that the level of the cap and whether it would allow for an appropriate level of communication would be primary in any assessment of its constitutional validity. This may cause difficulties with an expenditure cap meeting its aim of curbing levels of election spending.
- 5.101 The AEC also outlined the role constitutional issues could play regarding the level at which the cap should be set. It argued that:
- An expenditure cap will only be effective in reducing the 'arms race' if set significantly below historic campaign spending levels. However, reduction of costs in this manner and the oft-associated limitation on political communications carries with it certain risks of a constitutional challenge as was shown by the experience in Canada in 2004.⁵²
- 5.102 The key constitutional requirement for a law that imposes a burden on the implied freedom of communication is that it must be reasonable and appropriate and adapted to meet a legitimate need.⁵³ Professor Anne Twomey stated in relation to the capping of donations that it appears that the need to reduce corruption is accepted by Australian courts as being a legitimate one.⁵⁴ A similar argument could be applied to the capping of expenditure.
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50 D Cass and S Burrows, 'Commonwealth Regulation of Campaign Finance – Public Funding, Disclosure and Expenditure Limits', *Sydney Law Review*, vol. 22, 2000, p. 490, cited in Commonwealth of Australia, *Electoral Reform Green Paper – Donations, Funding and Expenditure*, December 2008, p. 64.

51 D Cass and S Burrows, 'Commonwealth Regulation of Campaign Finance – Public Funding, Disclosure and Expenditure Limits', *Sydney Law Review*, vol. 22, 2000, p. 490, cited in Commonwealth of Australia, *Electoral Reform Green Paper – Donations, Funding and Expenditure*, December 2008, p. 64.

52 Australian Electoral Commission, *Submission 19*, p. 3.

53 See *Australian Capital Television v Commonwealth* (1992) 177 CLR 106 and *Lange v Australian Broadcasting Corporation* (1997) CLR 520.

54 Professor Anne Twomey, Private capacity, *Committee Hansard*, 9 August 2011, p. 41.

5.103 The first Green Paper pointed out that the United States, Canada and the United Kingdom all enacted legislation to cap campaign expenditure. The legislation in each of these countries has been the subject of judicial analysis and consideration.⁵⁵ In relation to the validity of the legislation in Canada and the United Kingdom, the first Green Paper stated that:

The legislation in Canada and the United Kingdom was found valid, on the basis that though the legislation was an infringement of the right to freedom of political expression, the legislation was for the legitimate purpose of establishing a level playing field for elections.⁵⁶

5.104 However, Professor Anne Twomey expressed some reservations regarding the approach to the concept of 'equality' or 'levelling the playing field' that was likely to be applied by Australian courts. While acknowledging that her view in this respect differed from that of other constitutional lawyers, she stated in her appearance before the committee that:

I do not think that at the moment the High Court would place as much emphasis on the equality issues as some of the other constitutional lawyers do...Again, part of this is looking at what the Americans said. The point was made that in politics there is no equality. Political parties are essentially different. Some parties will have better policies, better candidates, better leadership and better management than others. Taking everybody down to a common denominator and this whole idea of using a level playing field I have some concerns about. Having said that, the other side of it is what the High Court said in the Australian Capital Television case where they were concerned about laws that favoured incumbents and limited the communications of outsiders. I think it is very difficult to say how the High Court would go on that sort of approach.⁵⁷

5.105 Professor Twomey also indicated that the level of any expenditure cap as well as its approach to the separate issue of government advertising would also have an effect on its constitutional validity. She advised that:

55 Commonwealth of Australia, *Electoral Reform Green Paper – Donations, Funding and Expenditure*, December 2008, p. 65.

56 KD Ewing, 'Promoting Political Equality: Spending Limits in British Electoral Law', *Election Law Journal*, vol. 2, no. 4, 2003, pp. 499-524, cited in Commonwealth of Australia, *Electoral Reform Green Paper – Donations, Funding and Expenditure*, December 2008, p. 65.

57 Professor Anne Twomey, Private capacity, *Committee Hansard*, 9 August 2011, pp. 40-41.

If you were going to impose expenditure caps on political parties but whoever was in government had the advantage of the use of government advertising, that may be a trigger for unconstitutionality. If you start imposing expenditure caps you also have to think about the way that you deal with government advertising, otherwise you potentially have a problem.⁵⁸

- 5.106 Naturally, details regarding the precise expenditure cap, such as its level, would have an effect on its constitutional validity. There is no doubt that taking some of these constitutional issues into account in the design of the cap should result in a greater chance of it being found to be constitutionally valid if a challenge was launched.
- 5.107 The preceding constitutional issues are of relevance in considerations regarding the more limited concept of imposing a cap on only broadcast expenditure.
- 5.108 In the *Australian Capital Television v Commonwealth* (1992) 177 CLR 106 (ACTV Case), the High Court considered the constitutional validity of Part IIID of the *Broadcasting Act 1942* (Broadcasting Act). Part IIID imposed strict limitations on political advertising during an election campaign and required broadcasters to allocate 'free-time' for political advertising during non-election periods.
- 5.109 In finding that the legislation was invalid and that it breached the implied freedom of political communication found in the Australian Constitution, Justice McHugh made the following additional points:
- There were less drastic means to address the need to prevent the potential corruption and undue influence on the political process, rather than banning political advertising during an election campaign and requiring free advertisements at other times;
 - The laws in Part IID in practice favoured incumbent members and their political parties through the way in which the scheme sought to allocate free-time for political advertising; and
 - There was no evidence that the measures sought to be implemented in Part IIID would have the desired effect of reducing the potential for corruption and undue influence.⁵⁹
- 5.110 On this reasoning, in designing a scheme that involves caps on broadcast advertising, as opposed to bans, as in Part IIID of the Broadcasting Act, it
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58 Professor Anne Twomey, Private capacity, *Committee Hansard*, 9 August 2011, p. 39.

59 *Australian Capital Television & NSW v Commonwealth* (1992) 177 CLR 106 per McHugh J.

may be more likely to be constitutionally valid if, in addition to taking into account the implied freedom of political communication, the following are considered:

- The precise design of the scheme and all its details render it ‘appropriate and adapted’ to meet its aim;
- The mechanisms that are implemented as part of the scheme do not result in favouring incumbent Parliamentarians or their political parties; and
- The presentation of convincing evidence that the measures sought to be implemented will meet their aim.

5.111 While a proponent of the notion of imposing caps on broadcast advertising, Mr Mills conceded that there were a number of issues with the concept requiring expansion, definition and consideration.⁶⁰ It appears that a more effective final model that holds up under the Australian Constitution can be designed if the lessons learned from judicial consideration of previous iterations of similar concepts are taken into account.

Conclusion

5.112 The successful operation of any expenditure cap lies in the details of its design. In the implementation of a cap on expenditure, steps should be taken to ensure its constitutional validity and to minimise the potential for either inadvertent or purposeful circumvention.

5.113 None of the selected jurisdictions appear to have comprehensively designed a cap scheme that involves minimal potential for circumvention and many have had difficulties regarding compliance with their schemes. Accordingly, there does not appear to be sufficient evidence at the current time to demonstrate that a cap scheme would be effective at the Commonwealth level in curbing election spending and reducing the perception of undue influence.

5.114 There is merit in proposals relating to caps on broadcast advertising and tying public funding to certain undertakings to limit election campaign spending. However, there are a number of administrative matters and issues regarding the precise design of a workable model to be resolved before any such proposal can progress further.

⁶⁰ Mr Stephen Mills, Private capacity, *Committee Hansard*, 9 August 2011, p. 31.