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# **Democracy and Money: The Dangers of Campaign Finance Reform**

Andrew Norton

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# **Democracy and Money: The Dangers of Campaign Finance Reform**

Andrew Norton

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## Executive Summary

The rules of Australian politics are in the process of being rewritten. NSW and Queensland have imposed radical new restrictions on political campaign donations and expenditure, with more to come in NSW. Federal Parliament is considering less significant reforms, but the government has announced a further wide-ranging parliamentary review of campaign finance regulation.

The stated goals of campaign finance reform are to restrict the 'undue influence' of private money on political and policy outcomes, and to prevent the loud voices of wealthy organisations and individuals drowning out other views.

But the actual effects of campaign finance reform are to protect those in power from criticism and accountability, and make political activity so complex and bureaucratic that it poses significant risks for ordinary citizens.

This gap between goals and effects is due to a mix of questionable assumptions and practical difficulties.

The idea of 'undue influence' assumes an already-known public interest threatened by donations or campaign spending. However, in a liberal democracy the 'public interest' is not known before or above the political process. Politics is instead a continuing debate about the public interest. In practice, most political debates are conducted in a grey area where private interests intermingle with broader justifications such as assisting the needy, protecting jobs, or saving the environment. Banning or capping donors and campaign spending means those in power manipulate these debates to suit their own interests.

In NSW, the former Labor government selectively banned donations from industries it disapproved of, including tobacco, property development, and for-profit liquor and gambling. The dubious distinction between for-profit and not-for-profit liquor and gambling is a sign of how quickly this process turns to favouritism. It is a dangerous precedent that should concern the staff, customers and shareholders of controversial industries, from carbon-intensive energy to junk food. The new NSW Coalition government proposes banning all organisational donors.

All campaign finance reform proposals target 'foreign' donations, but the foreign/Australian distinction is in most cases too blurred for it to matter. NSW has removed the rights of non-citizen residents to donate to political parties or third parties (groups that campaign but do not run for office) for NSW elections. The large numbers of permanent and other long-term residents who live in Australia and pay taxes in Australia should be able to express their political views through donations. For example, organisations representing the interests of overseas students could have their fundraising restricted by third party laws. Proposed federal laws aimed at foreign-sourced donations would ban expatriate Australians from voting if they don't have Australian bank accounts.

NSW and Queensland cap third-party expenditure in ways that, if applied federally, could seriously limit opposition to government policies. The anti-WorkChoices and the anti-mining tax campaigns would have been limited to a fraction of their actual size. While it is easy to see why politicians want to control campaigns against their policies, these examples highlight different assumptions in the campaign finance debate. Those in favour of regulation see government as representing good policies challenged by 'vested interests,' while those sceptical of regulation see government as threatening elements of Australian society. In a liberal democracy, the central political problem is not 'vested interests' but the power of the state. Groups facing significant threats should be able to fight back against state attacks.

Allowing big campaigns against governments does not mean that interest groups are unchallenged. The democratic system itself provides a strong counter-balance, since votes rather than donations are the key incentive for politicians. Often campaigns are met with counter-campaigns: business against the unions over WorkChoices, government advertising against the mining industry on the resources rent tax, GetUp! against the pokies lobby.

Public funding does not solve the problems of banning or capping donations. It only applies to political parties, not third parties. New political parties often struggle to reach the threshold voting level to be eligible for public funding, which helps shield existing parties from

challengers. It also leaves minor political parties dangerously dependent on the major parties for their campaign funding. A NSW proposal that would have reduced funding for the Greens while increasing it for the ALP and the Liberals did not make it to the final legislation, but it is a sign of the risks to minor parties.

Donations disclosure is the mildest form of campaign finance regulation, but it too has significant problems. As with bans and caps, it assumes that the major political problem is donors corrupting government, rather than government threatening civil society. Donations disclosure gives the government something it would never otherwise have: a convenient list of people who support its opponents. Though fears about government disfavours may not always be well-founded, disclosure has a ‘chilling effect’ on legitimate political participation. Some donors may also suffer social or commercial disadvantages if they are forced to reveal political allegiances that their friends or customers dislike. The federal threshold for disclosure should be kept at around the current \$11,500 rather than reduced to \$1,000 as proposed.

The lower the thresholds for reporting requirements or restrictions, the more campaign finance law acts as a deterrent to political participation. This is not just fear of political reprisals. Complex rules and requirements divert energy and resources from activism to paperwork, with penalties for getting it wrong. Third parties in NSW face 23 potential breaches of campaign finance law with penalties ranging from fines to jail. Political amateurs would be well-advised to avoid organising their own campaigns.

Overall, campaign finance laws undermine rather than enhance the mechanisms for keeping governments under scrutiny and accountable to the electorate. Campaign finance reforms consistently benefit one or all of the existing parliamentary parties over any group that would criticise or challenge them. Australia should preserve a liberal democratic system of open political competition.

## Key Points

- Campaign finance law covers the role of money in politics; this paper focuses on donations to political parties and third parties (organisations or individuals involved in politics without standing for election).
- The most radical campaign finance reform is to ban private money entirely, but this is probably unconstitutional.
- NSW bans particular industries and non-citizens, and the new O’Farrell government is likely to ban all organisations from donating.
- A federal bill would ban foreign-sourced donations.
- More limited reforms cap how much any one individual or organisation can give; this is reform is already in place in NSW and Queensland.
- There are existing national and state schemes for disclosing donations to political parties and third parties; the main issue is whether disclosure should continue to be required above \$11,500 a year or reduced to \$1,000 every six months.
- One major goal of campaign finance law is to limit ‘undue influence’ of donors on political decisions.
- However, a key issue is how we decide what is ‘undue’ influence; bans on particular donors result in politicians prejudging the issue of whose influence is legitimate.
- A more democratic system lets everyone contribute to the political process, with debate, public opinion and elections sorting out what is in the ‘public interest’ at any given time.
- Attempts to ban ‘foreign’ donors rely on unjustifiable or impractical distinctions, depriving non-citizen residents of Australia of legitimate political rights and/or preventing expatriate Australians from contributing to political activity at home.

- A second major goal of campaign finance law is to not let the loudest and most moneyed voices drown out other voices.
- In practice, campaign finance law makes political activity far more difficult for ordinary people by subjecting them to complex and bureaucratic rules.
- The main beneficiaries of campaign finance law are those who are already in power, as the laws undermine the capacity of others to organise against them.
- A liberal democracy should have minimal campaign finance law; the freedom to give and spend money for political reasons is part of the small-c constitutional framework that diversifies sources of power and influence and holds governments accountable.

<b>Major electoral law provisions discussion in <i>Democracy and Money</i></b>			
	<b>Commonwealth</b>	<b>NSW</b>	<b>Queensland</b>
<b>Banned donors – current</b>	None	Property developers, tobacco industry, for-profit liquor and gaming industry. Individuals not on the electoral roll.	Foreign-sourced donations
<b>Banned donors – proposed by government</b>	Foreign-sourced donations	All donors other than individuals on the electoral roll.	No further prohibitions
<b>Banned donors – this paper</b>	None	None	None
<b>Donations caps – current</b>	None	\$5,000 to registered political parties, \$2,000 to unregistered political parties, candidates and third parties. Applies only to NSW state elections.	\$5,000 to registered political parties, \$2,000 to unregistered political parties, candidates and third parties. Applies only to Queensland state elections.
<b>Donations caps – proposed by government</b>	None	No further caps	No further caps
<b>Donations caps – this paper</b>	None	None	None
<b>Donations disclosure – current</b>	\$11,500 or more in a year to political parties, candidates or third parties.	\$1,000 or more in a year to political parties, candidates or third parties.	\$1,000 or more in a six month period to political parties, candidates or third parties.
<b>Donations disclosure – proposed by government</b>	\$1,000 or more in a six month period to political parties, candidates or third parties.	No change	No change
<b>Donations disclosure – this paper</b>	\$11,500 or more in a year to political parties, candidates or third parties.	\$11,500 or more in a year to political parties, candidates or third parties.	\$11,500 or more in a year to political parties, candidates or third parties.



## Introduction

Campaign finance laws are part of Australia's small-c constitution. Like the formal Constitution, campaign finance laws set out rules and rights in the political game. The laws don't prescribe winners but can influence parliamentary and policy outcomes. Campaign finance laws can cover who can donate money, who they can give it to, how much they can give, how much can be spent on elections, how much giving or receiving of political money must be disclosed, and how entitlements to state funding are determined.

For the main political players—political parties, interest groups, advocacy organisations, and individuals interested in politics—campaign finance laws can be critical to their prospects. At its most radical, as in New South Wales, campaign finance law substantially restricts the political rights and capacities of some individuals and organisations. But even in milder forms, campaign finance laws change the balance of political capacities. Typically, they weaken political actors who have or can raise money, and strengthen political actors who are in office, have connections to office-holders, have access to the media, or can draw on volunteers, whose in-kind contributions are typically less regulated than monetary donations.

Given the high stakes, campaign finance laws have frequently been matters of political contention. The federal Parliament is considering Labor's third attempt to pass wide-ranging reforms to current laws, including more disclosure of donors to political parties and other organisations involved in politics, but also banning some currently permitted donations. The Gillard government has announced a parliamentary review to investigate more far-reaching changes. New NSW and Queensland campaign finance laws cap political donations and expenditure, and in NSW impose more wide-ranging donor prohibitions than yet contemplated in Canberra. The new O'Farrell government in NSW promises still further restrictions. A major change in Australia's political system is underway.

**Campaign finance law is about the dilemma posed by money in democratic politics.**

## Money in politics

Campaign finance law is about the dilemma posed by money in democratic politics. Nobody argues that policy or elections should be for sale, so that those with the most money win. Yet democracy is an expensive form of decision-making that requires mass communication and persuasion. Much political communication is carried by the media without charge to political actors, supported by advertising, sales and subsidies. But political actors also need direct ways of speaking to potential supporters without the filters of media news judgment or the biases of journalists and media proprietors. Advertising campaigns and direct communication aimed at large audiences are necessarily expensive; a \$1 per voter national campaign would cost \$14 million. To finance their campaigns, political parties and third parties (groups active in politics but not standing for office) draw on donated money and their own financial resources.

Campaign finance law assumes that relying on private money to fund political parties and third parties is problematic. The most common goal of campaign finance regulation is to limit 'undue influence' on government decisions by donors, particularly those advancing their commercial or institutional interests.<sup>1</sup> The biggest private political spenders in Australia are companies, unions, and their peak bodies. The intuition behind restricting their donations and campaign spending—both unions and businesses run issue-based campaigns as well as give money to political parties—is that this money distorts policy decisions away from the public interest.

A related goal is to create a 'fairer' political contest more broadly.<sup>2</sup> Former NSW Premier Kristina Keneally said in state parliament during 2010 that she wanted to limit a political arms race where 'those with the most money have the loudest voice and can simply drown out the voices of all others.' University of Melbourne academic Joo-Cheong Tham, a leading proponent of campaign finance reform, sees restricting money in politics as only one element of more radical measures needed to ensure the 'fair value of political freedoms' when

‘social and economic inequalities undermine the value of those freedoms for those who are marginalised.’<sup>3</sup>

Indeed, it would be a problem if policymaking just went to the highest bidder; there should be wide opportunities to participate in the political process. But to choose a campaign finance system, we need a wider view on the liberal democratic political system as a whole, and how in practice campaign finance law affects the distribution of political opportunities. From this broader perspective, arguments for the campaign finance reforms recently enacted or proposed in Australia—discussed in detail in subsequent sections—look much less compelling.

From a liberal democratic perspective, private money is not the main political problem. It is the vast concentration of resources and power in the state that gives those in government great control over the lives of others. Creating checks and balances on that power is the key goal of liberal-democratic constitutionalism through devices such as regular elections, formal limits on legislative power, an independent judiciary, and federalism. Political rights and freedoms, including giving and spending money for political reasons, are a necessary element of this system. They enable individuals and organisations to criticise and oppose the

government of the day by using the electoral process to check government power. These rights and freedoms are partly protected by the High Court’s reading of the Constitution, but unprotected freedoms are still important to the small-c constitution.<sup>4</sup> Without them, the rules of the game are tilted towards those in power.

This is why liberal democrats should see state controls on political donations and spending as deeply suspicious. These controls limit the capacity of people who are not in power to

oppose the people in power. Donations disclosure intimidates the government’s opponents by opening donors to retribution through lost income or unfavourable regulation. Donations caps limit the fundraising potential of opposition parties or candidates. Donations bans partially strip some organisations and individuals of political rights to oppose the government: already a reality in NSW. General limits on ‘third party’ political expenditure protect governments from big campaigns against them.

Politicians understandably dislike the loud voices of big campaigns. But to cap the funding or spending of the people who run these campaigns undermines the checks and balances of the liberal-democratic system. Governments need to fear the democratic sanctions of loss of seats or office. We need organisations capable of running large campaigns if the need arises, and/or helping oppositions to secure office through providing money or other resources. The anti-WorkChoices campaign run by the Australian Council of Trade Unions (ACTU) is an interesting example. The Liberal Party’s 2007 election campaign director characterised this as an ‘extremely unhealthy development’ intervention by a ‘third external force’ with greater resources than either major political party.<sup>5</sup> But this was the liberal democratic system working as it should. A government had legislated against the interests of a major institution in Australian society and contrary to public opinion.<sup>6</sup> The government and its supporters could reasonably claim they were right on the substantive policy issues. But they cannot reasonably complain that their actions prompted a vigorous political response.

Capping donations or campaign spending would make the political system more lopsided in favour of the government of the day. Campaign finance laws restrict private political actors but not governments, the biggest political advertisers. The High Court has upheld the federal government’s power to advertise as it chooses. Though there are codes of practice for government advertising, except in the ACT these have no legislative basis.<sup>7</sup> Promises to restrict taxpayer-funded political advertising have little credibility. When the Rudd government’s proposed mining tax hit political trouble, a broad exemption provision in the government advertising guidelines was used to authorise a \$38 million campaign.<sup>8</sup> The Gillard government has not ruled out an advertising campaign in favour of its proposed carbon tax.

Underlying objections to private money in politics is an implicit assumption that politicians would legislate in the public interest, if only they were not swayed by donations or backlash campaigns against their policies. Senior journalists, for example, object to a campaign finance

**Liberal democrats should see state controls on political donations and spending as deeply suspicious.**

system that allows taxpayers to campaign against tax increases. George Megalogenis of *The Australian*, Peter Hartcher of the *Sydney Morning Herald*, and Katharine Murphy of *The Age* have all taken this view of anti-government campaigns.<sup>9</sup>

However, the public interest is not something into which the ‘political class’—political insiders including ministers and MPs, party activists, lobbyists, interest groups, and the media—has privileged insight. In a democracy, the public interest is not a clear and stable concept that can be identified before or above the political process. It is a vague and shifting concept that is produced by the political process through debating alternative policies. In Australia, as in other Western democracies, these debates are typically conducted in a grey area where private and broader interests intermingle. Few policies or decisions are unambiguously corrupt. Most policies favour private interests, but with non-corrupt supporting arguments: assisting needy groups, creating or protecting jobs, defending the country, saving the environment, promoting education, and so on. Part of the purpose of the political process is to decide—temporarily, given shifting debates and political fortunes—which of these arguments are most convincing.

The fluid nature of the relationship between democratic preferences and the public interest can be seen in issue polling. Tariffs seem like a clear example of interest groups influencing politicians contrary to the public interest: most people pay more for goods to support the employees and owners of inefficient protected industries. But there is a long history of public opinion supporting tariffs and other forms of industry protection despite evidence that many people understand the costs involved.<sup>10</sup> Similarly, interest groups are not necessarily viewed unfavourably. Trade unions are substantial ALP donors and the biggest non-party campaign spenders. Their money was a factor in the Howard government’s 2007 defeat. Yet a public opinion survey conducted soon after the 2007 election showed that less than 40% of voters believed that unions had too much power.<sup>11</sup>

**The public interest is not a clear and stable concept that can be identified before or above the political process.**

In the contest to shape public policy, gaps left by restricted or prohibited interest and advocacy group spending would not be filled by the voices of ‘marginalised’ citizens. Complex systems of political regulation work against participation by ordinary citizens of any kind. The NSW Election Funding Authority (EFA) issues lengthy guides to the rules for political activism: 15 pages for donors, 28 pages for third parties, and 47 pages for political parties. Understanding and complying with all these rules would be very challenging for people without high levels of education and organisational ability. Given the penalties for non-compliance, political amateurs face significant difficulties and risks in organising their own political activity in NSW.

The big winners from more restrictive campaign finance law are elements of the existing ‘political class,’ principally the political parties but also the media. NSW is the best example. Though political parties lose donations, they are compensated through increased public funding. Their third-party critics and rivals receive no compensation for lost donations, and are also restricted in how much they can spend. Political outsiders will have less access to politicians through purchasing places at functions, increasing the value of personal connections to politicians, political advisers, and public servants. The media will gain more power by deciding which voices the public will hear (though the media may lose financially through less paid campaign advertising). If we can assume that the political class governs better without strong external political pressures—and that they can intuit and implement the public interest—then there is something to be said for campaign finance law. But if we assume that this puts too much power and trust in a small group of people, we need a different approach to the problems of money and politics.

A ‘laissez-faire’ system of minimal campaign finance law does not mean watching helplessly as private money shapes policy in its own interests. The democratic system itself imposes substantial restrictions on money’s influence. A politician’s incentive structure is to maximise votes, not donations. Donations are a means to an end, a way of financing election campaigns that politicians hope will attract voter support. Donation with quid pro quos that cost votes

make little sense for politicians. Unsurprisingly from this theoretical perspective, many American studies examining money in politics have found that for legislature votes, ideology and constituent views are much more predictive of outcomes than donations.<sup>12</sup>

**Political competition is another important check on the influence of money.**

Political competition is another important check on the influence of money. Political parties compete with each other for votes, and subject their opponents' views to critical scrutiny. In the third party space, different interest and advocacy groups compete with each other to influence the public and governments. In April 2011, for example, the Australian Hotels Association and GetUp! jostled through paid advertising over proposed pokies regulation. Political competition can neutralise or counteract campaign spending. This helps explain why big-spending campaigns can sometimes have little apparent impact. The millions of dollars spent by the major parties during election campaigns rarely shift party preferences by more than few percentage points because voters go in both directions (though a few percentage points can decide who forms government). The three-way contest between unions, business and the government over WorkChoices resulted in a public opinion stalemate. Polling on a basic 'for or against' question showed no significant change over nearly two years. The unions won because they tapped into existing opinion and kept the issue prominent in people's minds.<sup>13</sup>

Given the radical measures being proposed against private money in politics, it is a pity that we are relying on intuition and anecdote to demonstrate that it is a problem. One statistical study examined corporate donations between 1998–89 and 2004–05, but did not link these donations to policy outcomes.<sup>14</sup> The democracy4sale.org website classifies donations by industry but uses different categories to the Productivity Commission's analysis of industry protection and budgetary assistance.<sup>15</sup> However, complications in any straight money-policy link are immediately apparent. For example, the motor vehicle industry receives more combined budgetary and tariff assistance than any other industry. Yet two of its three big players, Holden and Toyota, made no donations in the 1998–99 to 2009–10 period, according to democracy4sale.org; Ford last gave money in 2004–05.

The moderating and correcting processes built into a liberal democratic political system make it very unlikely that strong statistical relationships exist between political spending and political outcomes. As American researchers have found, there is too much interaction with and dilution by other factors for money in itself to be decisive. This is not to say that money is unimportant. For organisations presenting a new case to the public or facing strong competition from other elements of civil society or an attack by the state, money is often crucial to their prospects. Without it, they may not be able to reach a mass audience. But money alone cannot persuade.

The campaign finance law reform agenda is multi-pronged; the following discussion is divided into three broad categories of donations regulation: bans, caps and disclosures. Sometimes the problems of campaign finance law reform become fully apparent only when we move away from high-level principles to practical realities.

## **Banning donors**

The most radical approach to the 'problem' of private money in politics is to ban it. The risks involved would be very high: every opposition party would be dependent on decisions of the governing party for its campaign funding. Only the federal Greens seem to have this trust in the major parties,<sup>16</sup> and it is unlikely that the High Court would uphold a full ban. So I will not discuss this option in detail. The High Court is, however, likely to allow more limited restrictions on donations.<sup>17</sup> NSW electoral law already forbids political donations from property developers, tobacco companies, and the for-profit liquor and gambling industries.<sup>18</sup> It may soon prohibit all donors other than individuals on the electoral roll. Victorian electoral law limits the size of donations from holders of gaming licences.<sup>19</sup> Queensland and NSW restrict foreign donations, and the Commonwealth electoral reform legislation seeks to do the same.<sup>20</sup>

## **Governments picking losers**

Existing NSW donor bans substantially restrict political activity. The law bans gifts from targeted organisations and individuals to political parties and third parties. During an election campaign, for example, the tobacco industry cannot financially support an organisation defending the rights of smokers if this could influence voting. The for-profit liquor industry cannot support an organisation calling for liquor licensing liberalisation if this could influence voting. Though representatives of the banned industries can still meet with politicians, ‘political donations’ are defined to include tickets to political party events and fundraisers. If industry representatives are refused appointments, their options for face-to-face lobbying are limited. They can however still personally join political parties.<sup>21</sup>

Selective bans on donations are more likely to survive constitutional challenge if they are seen as addressing specific problems.<sup>22</sup> Perhaps this is what NSW is trying to do. It has a history of property developers trying to corrupt the planning system through financial relationships with politicians.<sup>23</sup> The alcohol, gambling and tobacco industries are all big, long-term donors to political parties, which is possible evidence of excessive influence. But donations may signal politicised industries more than inherently corruption-prone industries. It is a chicken and egg problem. When governments make regulation and licensing key factors in industry profitability, industry leaders cannot ignore politics. Lobbying, donations and political campaigns may be business expenses they would much rather avoid. But once a status quo favours a business or its competitors, it is hardly surprising that both take a keen interest in politics. We cannot expect them to stand aside for a rival, in regulation or in the market.

**Existing NSW donor bans substantially restrict political activity.**

Bans on interest group donations or political expenditure may freeze the status quo rather than fix the problem: a special deals political culture in which politicians believe that some firms or industries deserve government protection or assistance. The main political obstacle to industry reform isn’t lost donations. It is workers and business owners, and sometimes consumers, who are negatively affected. They vote and attract sympathetic media coverage, which are more important political considerations than donations. Breaking the special deals culture requires accepting that the long-term gains of reform outweigh the short-term social and political costs. Banning donations is not necessary to that political judgment. In the 1980s and 1990s, Australian politicians made significant progress in industry reform without any controls on donations other than disclosure.<sup>24</sup>

A political culture that supports a ‘no special deals’ approach to industry helps avoid issues arising from business involvement in politics. But some industries—including alcohol, gambling and tobacco—are always going to be sources of political contention, even when governments are neutral between companies. The potential harmful effects of these ‘sin’ industries create pressure to curb their operations. This pressure is resisted by the people who enjoy these activities, the companies that produce them, and supporters of individual freedom. These political conflicts will exist regardless of how policymakers behave.

The rules of the political game should not be—as they have been in NSW—rewritten to favour one side of the inevitable debates surrounding ‘sin’ industries. It sets a dangerous precedent: governments legislating to reduce the political options of industries that it dislikes or sees as troublesome or unpopular. ‘Junk’ food manufacturers, retailers, and carbon-intensive industries are the obvious next candidates for such treatment. Rather than picking winners, government picks losers by using its power to politically disable organisations opposed to it and its allies.

The legislative process that introduced the restrictions on donations from alcohol, gambling and tobacco interests shows how quickly this process descends into shabby favouritism. The bill was amended to cover only for-profit enterprises, so exempting Clubs NSW and other non-profit clubs that are traditional political donors and major operators in NSW’s alcohol and gaming industries.<sup>25</sup> If alcohol and gambling are problems to be better addressed

without donations from interest groups, it hardly matters whether profits are retained in clubs or distributed to shareholders.

The alternative is to leave the issue of ‘sin’ industry donations to the normal free political process. Before the ban, the Labor Party voluntarily refused to take donations from the tobacco industry.<sup>26</sup> Presumably it hoped to receive political credit from having no financial connection to an industry that sells an unhealthy product. The Liberal Party has been criticised as being in ‘league with the devil’ and ‘disgraceful’ for continuing to accept tobacco donations, possibly inflicting some political costs on it.<sup>27</sup> In the gambling industry, Labor returned donations from Hong Kong-based casino operator Stanley Ho and his wife Angela Leong.<sup>28</sup> Reportedly Ho would like an Australian casino licence but has previously been blocked because of alleged links with organised crime in Asia.<sup>29</sup> Given their particular version of a ‘sin’ industry, the Greens’ donations webpage says it does not accept gifts from ‘big polluters.’<sup>30</sup> These are examples of the political system self-regulating, with politicians responding to public perceptions of particular industries or individuals. But it leaves the political rights of affected donors intact.

### ***Only allowing individuals to donate***

One way to avoid government singling out some organisations for disfavour is to limit the activities of all organisations in a consistent way. In NSW, Barry O’Farrell as opposition leader unsuccessfully moved an amendment to ban all but individual donations, and as premier seems set to make this change.<sup>31</sup> This is also the policy of the NSW Greens.<sup>32</sup> Consistency, however, is the only virtue of this proposal.

**Voting is the only political activity primarily done alone, because successful political activity needs organisation.**

It is true, as O’Farrell told the NSW Parliament in support of his amendment, that organisations don’t vote, only individuals do. But voting is the only political activity primarily done alone, because successful political activity needs organisation. People form organisations to concentrate resources and access specialised knowledge and skills. Ordinary citizens don’t usually have the time or ability to present their concerns and arguments to politicians or the public. They cannot afford the money

it takes to run a major political campaign. So they join or donate to political parties, unions or third parties to act politically on their behalf. They can achieve more together than alone. Limits on pooling resources through organisational donations ultimately undermine the political capacities of individuals. As with much of campaign finance law, it leaves the state’s powers intact but weakens challengers.

Despite the apparent simplicity of banning a whole class of donor, O’Farrell’s proposal is still plagued with the complexity that almost invariably accompanies campaign finance law. Third parties often have multiple activities, with donations income spread between them by the third party itself rather than the donor. Neither the donor nor the third party may know at the time of the donation that the money is destined for NSW campaign activities, making it very difficult to know whether the donation is banned or not.<sup>33</sup> A campaign intended by the third party to be non-partisan may end up influencing votes if a political party subsequently takes a stance on this issue. Complexity means that third parties are likely to err on the side of caution, restricting donations and campaigns. Small organisations cannot afford to argue their case in the courts.

In another typical aspect of campaign finance law, O’Farrell’s proposal would have arbitrary effects on the distribution of political resources. Organisations that self-fund their campaigns can bypass laws prohibiting donations. For example, unions and business have income streams from their own operations, which they can spend directly or coordinate campaigns through a peak group without actually giving it any money. But if organisational donors are banned, third parties reliant on donated money to run campaigns will have more difficulty securing the necessary campaign funding. Ironically, non-government organisations with public interest objectives will be more affected than the traditional vested interests that campaign finance law seeks to control.

## **Foreign donors and donations**

Under current federal law, there are no special restrictions on foreign donors or foreign-sourced donations. They can freely give money to Australian political and third parties, with the same disclosure requirements as any other donor. We don't know exactly how common this is, as donors do not declare their citizenship (for individuals) or ownership (for companies). However, addresses on declared donations can be used to identify donors from overseas locations who gave more than the threshold amount. With the caveat that not all donors make the required notifications, an analysis of donor returns since 2004–05 shows that 0.2% of declared donations were from foreign sources, representing 3% of declared donations by value (see appendix A for details). As noted above, some of these overseas gifts were subsequently returned. The proposed federal legislation bans donations from foreign sources, but not foreign individuals or corporations with Australian addresses. Queensland's current legislation mirrors the proposed federal legislation.

Current NSW law prohibits foreign individuals but not foreign companies from donating to political parties or third parties for state elections. This is because individuals who are not on the electoral roll cannot donate, but entities with an Australian Business Number (ABN) can. To operate in Australia, foreign companies routinely acquire an ABN, which also allows them to donate. However, foreign companies would lose their right to donate if NSW bans all non-individual donors.

Most opponents of foreign donations offer nationalistic reasons. The parliamentary committee that examined the current federal reform bill's first version supported a 'ban on foreign donations so that the domestic political environment is not influenced by overseas persons or corporations, who should not be entitled to participate in Australian elections by secret means or otherwise.'<sup>34</sup> Special Minister of State Gary Gray offered a similar though broader justification when reintroducing the bill in late 2010, saying that prohibiting foreign donations would help 'remove a perception that foreign donors could exert influence over the Australian political process.'<sup>35</sup>

The likely effects of laws restricting foreign donors raise questions about their conceptual foundations. Because the NSW legislation requires donors to be on the electoral roll, non-citizens in that state can no longer make direct donations to third parties for election campaign purposes or to political parties. This affects a large number of people. Each year, more than 200,000 people are granted permanent residence in Australia, including more than 60,000 in NSW. They must have been living in Australia for at least four years, and been permanent residents for at least one year, before they can become citizens and be added to the electoral roll. In addition, more than one million people in Australia have long-term residence rights without permanent residence status, including students, work visa holders, and New Zealanders.<sup>36</sup>

These are people who work in Australia, pay taxes in Australia, and are directly affected by Australian governments. In recent years, there have been serious issues surrounding crimes against international students, exploitation of foreign workers, and collapsed education providers offering courses to international students. Yet because foreign students and workers lack citizenship, their organisations would have to tread carefully to avoid being classified as third parties. If their concerns become matters of contention between political parties, they could be caught under state and/or federal third-party rules. If this occurred, foreign students and workers would be committing an offence under NSW law if they gave money to their own lobby organisation. The proposed federal law on foreign-sourced donations would let foreign students and workers fund their own lobby groups from onshore money. But donations sourced from parents or other overseas supporters would be banned.

While citizen and non-citizen interests may not coincide on all matters, it is difficult to see any benefits in depriving non-citizens of political rights. If we allow them to come

**NSW law prohibits foreign individuals but not foreign companies from donating to political parties or third parties for state elections.**

to Australia, they should have the right to organise politically and express their views. Non-citizens remain vastly outnumbered by citizens, so it is very unlikely that policies seriously contrary to citizen interests could emerge from permitting foreign resident donations. Until very recently, these donations have been legal throughout Australia with few if any problems, let alone systematic problems warranting a ban. Rather than reducing the rights of permanent residents, we should consider increasing their political rights. There is precedent for this in other countries, as New Zealand lets permanent residents vote, and the United Kingdom allows resident Commonwealth citizens to vote.<sup>37</sup>

Despite statements by politicians against donations from overseas corporations, neither actual nor proposed campaign finance law distinguishes between companies in Australia based on their ultimate ownership. Both locally and foreign-owned companies have ABNs and Australian bank accounts, which allow them to donate under current NSW and Queensland restrictions (and would do so federally if the reform bill passes). Introducing a corporate nationality distinction would encourage Australian companies to use political and third-party

**While citizen and non-citizen interests may not coincide on all matters, it is difficult to see any benefits in depriving non-citizens of political rights.**

donations to disadvantage their foreign competitors, to the likely detriment of Australian consumers and the Australian employees of the foreign company. Without this perverse incentive, whether foreign or Australian, most companies have very similar broad goals and incentives. They aim to make profits and will seek business environments where that is possible. In predicting overall donation patterns, industry is likely to be more useful information than nationality. Politicised industries need to invest in politics in a way that other industries do not (Stanley Ho was not mistaken in thinking that gambling is a politicised industry).

If Australian residents and companies should be allowed to donate, that leaves the question of non-resident donors. For example, the largest 'foreign' political donor, Chau Chak Wing, gives via Hong Kong based companies. Though the media portray Chau Chak Wing as a foreign donor, he is an example of how blurred the categories of foreign and Australian have become. Though he mostly works overseas and uses Hong Kong companies to make donations, he has strong links to Australia. He is an Australian citizen, his wife and two of his three children live in Sydney, and he owns a Chinese-language newspaper in Sydney, along with some commercial properties.<sup>38</sup> His family or his Australian companies could make local donations within NSW or federal law. If he is on the electoral roll, he could also make a personal donation from overseas for a NSW election. The only potential barrier is a proposed ban on transferring money from overseas with the intention of using it for a donation.<sup>39</sup> But given the normal money flows within families and companies, a breach would be very difficult to prove.

Though Chau Chak Wing's donations could survive foreign donor bans, he otherwise has much in common with the main category of overseas persons affected by banning 'foreign' donations: Australians living overseas are the largest non-resident group with a strong interest in Australian politics. If Australians abroad are not still on the electoral roll, they cannot donate to a NSW political party or a third party for NSW election purposes. If they no longer have an Australian credit card or bank account, they will not under proposed federal law be allowed to make a donation. Though the disadvantaged Australian diaspora is probably a smaller group than non-citizens living in Australia, a 2003 publication put the number of Australians living overseas at about 800,000 people.<sup>40</sup> Many would have friends and family in Australia, and/or plan to return to Australia in the future. They have a legitimate interest in Australian politics. While some supporters of bans on foreign donors acknowledge this,<sup>41</sup> the Australian diaspora could become collateral damage in an attempt to limit foreign-citizen and non-resident donors. Possibly the restriction on foreign-sourced donations could be limited to non-citizens. However, this distinction would create significant compliance problems. There is no public database of Australian citizens against which political and third parties could check potential donors.



If the problem of ‘foreign’ donors includes only non-resident non-citizens, a lot of effort will be put into regulating a small number of people. Few people without direct connections to Australia are interested enough in Australian politics to want to make a donation. A \$1 million gift to the Liberal Party from the British Conservative donor Lord Michael Ashcroft in 2004–05 is the example commentators keep going back to, notable in its scale as well as its source.<sup>42</sup> Ideological and personal factors seem to be behind his gift.<sup>43</sup> Ashcroft was helping the Liberal Party put its views to the Australian people. As Ashcroft’s influence is mediated through Australian political judgments of the Liberal Party, it seems a less direct foreign influence on Australian politics than the foreign ideas and views imported every day via television, radio, the internet, newspapers, magazines and books. Nothing in current or proposed campaign finance law would stop Ashcroft directly purchasing media space to promote his views. Prohibiting just one form of political activity—donations to political and third parties—seems arbitrary.

One practical justification for the federal legislation does not rely on distinctions between foreign and local donors. The Australian Electoral Commission (AEC) believes that jurisdictional issues make it hard to trace the ultimate source of overseas donations. Domestic donors could route their donations through foreign entities to avoid disclosure.<sup>44</sup> So the legislation targets foreign-sourced donations rather than foreign donors

**Prohibiting just one form of political activity—donations to political and third parties—seems arbitrary.**

as such. While in theory domestic donors may use foreign entities to evade domestic disclosure rules, the political rights of Australians living abroad need to be balanced against the actual compliance risks. Despite the apparent disclosure loophole, a Google search finds no phantom companies or mysterious individuals among foreign-sourced donors since 2004–05. The AEC has investigative powers on any suspected Australian end of a donations chain. Successfully achieving undue influence via this route would require an elaborate conspiracy involving the donor, the overseas entity, party officials, and politicians. Given the danger of leaks, it seems unlikely that foreign front companies or individuals pose a major threat to election law compliance.

The idea that ‘foreigners’ should be denied the right to donate does not reflect the realities of modern globalised society, with many non-citizens living and investing in Australia and many Australian citizens living abroad. A small number of non-citizen, non-resident donors pose no plausible threat to the integrity of Australian politics. They are certainly not sufficient cause to justify taking political rights away from hundreds of thousands of others with a legitimate interest in Australian politics. Banning foreign donations would create far more problems than it would solve.

## Capping donors and donations

As alternatives to bans, caps on how much any one individual or entity can donate have merit. Modest donations are unlikely to sway government decisions, given all the other policy and political considerations involved. So caps can achieve one claimed goal of the claimed goals of campaign finance law, limiting or preventing undue influence, without the problems inherent in selective donation bans. Caps also reduce political inequality as the wealthy cannot give vastly more than the poor or the middle class. At least on the surface, caps on donations seem to deal with key concerns about campaign finance while leaving largely in place political rights and checks and balances on those in power.

Though caps and bans are alternatives in theory, they appear together in NSW. That state combines absolute bans on donations (discussed above) with caps on the remaining potential donors. In each financial year, a donor can give a maximum of \$5,000 to a registered political party, and up to \$2,000 for an unregistered political party. There are also \$2,000 caps for candidates or groups of candidates. Donations to candidates count towards the party cap if they are linked to a party. Donations to third parties are capped at \$2,000, with no

more than three third parties to be supported by a single donor in any one financial year. For the purposes of the cap, third parties are defined as entities spending \$2,000 or more promoting or opposing, either directly or indirectly, a party or candidate at a NSW state election. Third-party donors can still give more for other purposes, and outside of the election period from 1 October the year before the election to election day.<sup>45</sup>

In legislation passed in May 2011, Queensland capped donations for Queensland state elections. Donors can give up to \$5,000 to political parties and up to \$2,000 to candidates or to third parties.<sup>46</sup> The federal parliamentary review of political donations will consider caps. Greens leader Bob Brown is on the public record supporting a \$1,000 cap.<sup>47</sup>

**For established parties,  
donations restrictions  
largely trade private for  
public money.**

As well as capping donations, the trend in campaign finance is to restrict expenditure. In NSW, registered political parties can spend up to \$9.3 million if they contest all seats. In Queensland, the cap is \$11.6 million. Third parties are limited to spending \$1.05 million in NSW and \$500,000 in Queensland.<sup>48</sup> As NSW and Queensland also have generous public campaign funding, fundraising capacity may sometimes exceed fundraising needs.

### ***Implications for micro-parties***

Then NSW Premier Kristina Keneally's claimed that the NSW reforms would 'provide for a more level playing field for candidates seeking election.'<sup>49</sup> This may be true for major party candidates. But it is not true for new parties or micro-parties. If capping spreads throughout the Australian political system, it will become more difficult for new and/or small political parties to campaign effectively.

For established parties, donations restrictions largely trade private for public money. Additional public funding will fill much, or potentially more, than the gap left by reduced donations. Increased public funding exists in NSW and Queensland, and was suggested in a federal green paper on donations reforms. Though methods for calculating how much public funding a party receives differ between jurisdictions, typically parties must first receive at least 4% of the vote. Parties falling below the 4% threshold receive no public funding.<sup>50</sup> This is not a serious risk for Labor, the Liberals, the Nationals, or the Greens in most seats. But it is a big challenge for small parties. Unless they are very confident of making the 4% threshold, they must be able to fund all their campaign expenditure themselves.

Yet the new NSW and Queensland rules make campaign fundraising more difficult for small than large parties. Micro-parties with too few members for registration have the lowest donations caps (minimum 500 members in Queensland, 750 members in NSW). Unregistered parties cannot receive donations exceeding \$2,000, compared to the \$5,000 for registered political parties. The different cap is aimed at front parties set up to evade campaign finance restrictions. Yet it affects all unregistered parties, who must raise funds in maximum \$2,000 blocks—and of course most donors will give less than that. Even if sufficient small donors exist, the cap forces micro-party officials to devote much more time than major party officials identifying donors, persuading them to give, and complying with the bureaucratic recording and reporting requirements of electoral law.

Donations caps most hurt parties in the crucial early stages of trying to build their public profile and credibility. While established parties may be able to build a substantial campaign fund from many small donors, that is less likely to be the case for new parties, especially if they are not emerging from existing organisations or social movements. In his study of American campaign funding, Bradley A. Smith notes that new political movements often initially rely on a small number of large donors to provide the 'seed money' that gets them started.<sup>51</sup> In Australia, it is unlikely that we would have had a strong social democratic party without the union movement's resources. Though the early Liberal Party did have a large base of individual members, it also received substantial business donations.<sup>52</sup>

Capping will make it more difficult for new parties to raise enough money to get noticed in an election campaign. However (as always in campaign finance law), new parties will be

affected differently in ways that lack a principled rationale. NSW and Queensland candidates can spend their own money without it being counted as a donation.<sup>53</sup> So rich individuals can outspend parties and candidates limited to maximum \$2,000 donations. High-profile candidates who can attract free media coverage to support their campaign will also be able to mitigate the cap's effects. For example, Pauline Hanson's candidacy in the 2011 NSW election attracted extensive media coverage, and she came close to winning a Legislative Council seat.<sup>54</sup> The Australian experience with capping donations is likely to very similar to the American experience.<sup>55</sup> It will favour established parties, the wealthy, and the well-known. It will disadvantage new parties, those without large amounts of spare money, and low-profile candidates.

### ***Implications for minor parties***

Though the Greens are the strongest supporters of restricting political donations, a more state-controlled political system has significant risks for them. Though the final NSW legislation does not disadvantage the Greens, an earlier proposal would have reduced public campaign funding for parties receiving less than 20% of the vote.<sup>56</sup> When both major parties have an interest in crippling minor party challengers—for example, a One Nation style party threatening the Liberal or National vote, and the Greens undermining Labor—it would be in their mutual interest to change the public funding system. A combination of low public funding and restricted private fundraising would prevent the Greens and other minor parties from financing high-profile election campaigns.

While donations remain uncapped, large white knight donors can give enough to finance viable campaigns. During the 2010 election, the Greens received a record individual donation of \$1.6 million from businessman Graeme Wood.<sup>57</sup> In deciding how much to give, Wood had investigated how much it would cost to make a difference with TV advertising. Wood claims that other potential generous Greens donors exist, but the disclosure regime made them reluctant to donate

(an issue discussed in more detail below). An uncapped donations system is a check against the major parties using their parliamentary numbers to disadvantage minor party opponents.

**An uncapped donations system is a check against the major parties using their parliamentary disadvantage minor party opponents.**

### ***Implications for third parties***

The new NSW and Queensland campaign finance law have major implications for third parties. In both states, a \$2,000 cap on donations now applies to third parties for state election campaigns. As with micro-parties, the low third party cap is to prevent people forming new organisations to bypass donations limits placed on political parties.<sup>58</sup> But the inevitable effect is to constrain fundraising by bona fide third parties. Their maximum campaign donation is only 40% of the maximum donation permitted for political parties.

Campaign finance law is more complex for third parties than political parties. Political parties exist to contest elections, but most third parties do not. Elections are typically incidental to third party operations, and occasional rather than routine. Unions and business, for example, are the biggest third-party spenders federally (see appendix B), but election campaigning is not their main purpose. Federal third party expenditure disclosure shows that while some third parties are active in every election, others campaign only when an election issue happens to concern them. Campaign finance law becomes very complex as it tries to regulate organisations set up for other purposes.

To protect donations for other third party purposes, NSW and Queensland law tries to isolate donations for state campaign activity, with only the latter counted towards the cap. But donations to third parties are often general, and not for any specific activity. Donors to organisations with minor or irregular political activity may not know that their money could be spent on an election campaign. Even highly political third parties like GetUp! encourage general donations. Donors may prefer not to choose exactly how their money is used.

They delegate decisions about how to best utilise the organisation's resources to the third party's officials.

In Queensland, donors must now specifically indicate that their donation can be used for 'campaign purposes', the direct or indirect influence of voting. Third parties can only finance campaign spending from a dedicated bank account, and donations can be placed in that account only if donors indicate their intentions.<sup>59</sup> In Queensland this means that donor-reliant third parties must fundraise specifically for Queensland state elections. In NSW, the test of when a donation counts towards the political donations cap is less clear. Political donations received for the purposes of financing electoral communication expenditure must be paid into a dedicated bank account. However the legal definition of a political donation refers not to the donor's intention but to how the third party uses the donation. Donors must be informed, but their consent is not clearly required. This could cause problems for non-consenting donors, who may unintentionally reach or exceed the maximum of three third parties they can support each year. Donations classified as political donations must also be reported separately by the donor to the NSW electoral authorities.<sup>60</sup>

**Clearly the law weakens  
third parties relative to  
political parties.**

NSW third parties will need systems for checking that donors are on the electoral roll, identifying donors who have given to more than two other third parties, recording donors' names and addresses, and coding donations into multiple categories. There are specific requirements on the accounting processes of third parties.

Though an exemption is possible, disclosures must be checked by a registered company auditor, a substantial expense for small organisations. The EFA guide for third parties lists 23 separate breaches that third parties risk committing, with penalties including substantial fines, and up to 12 months jail in one case.<sup>61</sup> In Queensland, some of the routine bureaucracy should be simpler than in NSW (though as their legislation has just passed, how it will be administered remains to be seen). There is a clearer test of whether a donation falls within the law, and there are no bans on donors for third parties. However, because Queensland's capping and disclosure rules operate on different principles, there is likely to be confusion between 'campaign purposes' (capping) and 'political purposes' (disclosure).<sup>62</sup>

Cumulatively, these restrictions and requirements are substantial obstacles to ordinary political activity. Small third parties—spending as little as \$200 in Queensland and \$2,000 in NSW—need to understand sometimes very complex rules and spend a substantial amount of time meeting compliance requirements. For third parties reliant on volunteers, this will require a significant diversion of time and energy from activism to bureaucracy. We can hope that the electoral authorities will use commonsense in dealing with inadvertent breaches of the law. But state governments should not strangle election campaigns with red tape or punish their citizens for political activity without paperwork.

The most serious injustices of the new laws will be felt by small third parties. But politics will be most influenced by how the third-party laws affect the larger interest groups and activist organisations. Some will suffer more than others, depending on how much they rely on donations. Political donations law covers gifts from one person or entity to another. Wealthy third parties that can finance their own campaigns without seeking gifts will be least affected. Unions and business have their own resources, so their income is unregulated by donations laws. However, during the campaign period their ability to pool resources in donation-reliant peak organisations would be restricted. Third parties that need to raise funds externally will be more seriously affected as no donor will be able to give more than \$2,000; and in NSW they will lose donors who are not on the electoral roll or are firms in prohibited industries.

Third parties also face new rules in how much they can spend during election campaigns. In NSW third parties can spend up to \$1,050,000 on statewide campaigns, and within the general cap up to \$20,000 in each electorate where the name of the electorate or candidate is mentioned.<sup>63</sup> So third parties are limited to around one-ninth of a registered political

party's statewide spend, and one-fifth of a major party candidate's electorate spending. In Queensland, the third-party cap is \$500,000 on statewide campaigns and within the general cap no more than \$75,000 in each electorate where the name of the electorate or candidate is mentioned. Statewide, Queensland third parties are restricted to spending only one-23rd of a party that contests very seat. They can however devote more resources than in NSW to specific seats. Third-party spending caps can be partly avoided by multiple third parties running similar campaigns, a point the Liberals make in relation to unions. But clearly the law weakens third parties relative to political parties.

## Disclosing financial relationships

### *Disclosing donors*

Disclosure of donors to political parties is a long-established feature of Australian electoral law, as it is in many other Western countries. NSW, Queensland, Western Australia, the Northern Territory, and the Australian Capital Territory have their own disclosure systems, with donation disclosure thresholds ranging from \$1,000 to \$2,100.<sup>64</sup> NSW also requires disclosure of donations to third parties. Thresholds are much higher under federal law. For the 2010–11 financial year, any donation to a candidate, political party, or 'associated entity' (an organisation operating for the benefit of a party) exceeding \$11,500 has to be disclosed to the Australian Electoral Commission (AEC). Donations to third parties commenting on election issues also need to be reported. There are separate disclosure requirements for the donor and recipient.<sup>65</sup> The election campaign finance reform bill currently before federal Parliament would reduce the disclosure threshold to \$1,000 each six months and end its inflation indexation, so that the real value of the threshold will further decline over time.<sup>66</sup>

**Disclosure lets the public decide the propriety of a donation's scale or source.**

Donations disclosure is aimed at minimising undue influence on government decisions.<sup>67</sup> For politicians, donations disclosure increases the chance that decisions favouring donors will be criticised. For donors, the incentive to give is reduced because politicians who fear exposure offer less value for money. When donations are stigmatised as promoting corruption, donors may suffer reputational costs. There is evidence that some donors are deterred for these reasons. A newspaper report citing anonymous corporate affairs officers argued that one reason for their reluctance to make political donations was the risk of negative publicity.<sup>68</sup> Political parties also sometimes return donations from people who attract media controversy.<sup>69</sup> On the other hand, groups with financial interests in policy outcomes remain substantial donors to political parties.<sup>70</sup>

Unlike bans or caps on donations, disclosure lets the public decide the propriety of a donation's scale or source. Though donations have not been of great interest to pollsters, the issue of special treatment for a donor was tangentially covered in a 2009 controversy about alleged favours to a Brisbane car dealer, John Grant, who had donated a vehicle to Kevin Rudd's election campaign. By a margin of more than 2 to 1, Newspoll respondents rejected the idea that Grant had received preferential treatment due to his association with Rudd.<sup>71</sup>

Though donation information can sometimes be useful, it is only a small part of the liberal democratic system of the different political players helping keep each other in check. Even strong supporters of greater disclosure admit that it is hard to prove impropriety.<sup>72</sup> Motives are much easier to impugn than to establish, as various join-the-dots newspaper stories on political donations have shown.<sup>73</sup> Reflecting the public interest grey area in which Australian politics is conducted, it is rare that an improper consideration is the only plausible explanation for why a politician acted the way he or she did. The few donations persuasively shown to be improper tend to involve property developers.<sup>74</sup> Unlike policies setting out

general rules or favouring broad categories of beneficiaries, property development approvals benefit specific individuals, with minimal or no general public benefit.

Fortunately for debates about policy and the public interest, it matters little that a donor's motives are hard to discern. What we most need to know is who benefits and the reasons why they should benefit. Who benefits from a policy is often obvious—the policy's advocates point it out. To reap their political rewards, politicians make voters aware of policies that will deliver benefits. But to persuade people other than the beneficiaries of a policy, politicians need to explain why it is a good idea. If there is no good reason this is hard to hide, even if the real reason cannot be proved. The media, the opposition, and interest and advocacy groups all have strong incentives to monitor government decisions, question motives, and examine consequences.

This focus on a policy's merits is why, outside of the annual release of donations information, political donors are only occasionally part of political reporting on policy issues. A possibly associated donation will not derail a policy that otherwise has good arguments in its favour. A bad idea policy won't be redeemed by the absence of any sign of undue influence. Each side of a debate focuses on what it believes to be its strongest arguments. A possible shady link to a donor is very rarely one of them.

### ***Disclosure as a source of political pressure***

The push to increase donations disclosure revisits one of the oldest issues of Australian democratic design: whether citizens should have to publicly reveal their political allegiances. Victoria, South Australia and Tasmania introduced the secret ballot in 1856 so people could express their political views without intimidation. Before this, voters declared their choice verbally to electoral officials in the presence of the supporters of candidates. The secret ballot was an electoral innovation that subsequently spread to other colonies and countries.<sup>75</sup>

**Business leaders believe that the federal government bullies people who challenge its agenda.**

The campaign for secret voting had started in England, where electoral intimidation by landowners of voters who depended on them financially was widespread. Australian electoral law recognises that private pressure is a potential issue with disclosure, and blatant intimidation of or discrimination against donors is illegal.<sup>76</sup> But many people could reasonably be concerned that employers, clients or customers would view them less favourably due to their political views. Opinion surveys show that a significant minority of Australians deliberately purchase or boycott products for political, ethical or environmental reasons.<sup>77</sup> When newspapers gave prominent coverage to Wotif founder Graeme Wood's \$1.6 million donation to the Greens, a Facebook page was established encouraging people to boycott Wotif.<sup>78</sup> Such boycotts could affect employees and other shareholders, a concern that might cause donors to reconsider giving. There are also potential social costs in having unfashionable or controversial political views. Private donations allow people to express their political beliefs at low risk to other aspects of their lives, or to the lives of people associated with them.

Though the original English push for secret voting was a response to private pressure, in Australia the risks posed by government were more prominent. William Nicholson, who in 1855 moved in the Victorian Parliament to make voting secret, was quick to spot the political dangers of big government. He noted that the Victorian government was already a large employer, running the police (a local responsibility in England) and railways. This created opportunities for intimidation.<sup>79</sup> Though open threats of using state power for political punishment are rarely made in contemporary Australian politics, compulsory donations disclosure gives political parties something they would not otherwise possess: names of their opponents' financial supporters.

I have argued elsewhere that donations disclosure to third parties exists to make donors accountable for their spending. In other words, the purpose of disclosure is to pressure donors not to give money to anti-government political organisations.<sup>80</sup> The Liberal Party has long been concerned that third party campaign activity tends to favour left-wing politics, with business only episodically involved in political campaigns when its interests are seriously threatened (see appendix B for third-party expenditure classifications). Labor has been less blatant about its self-interested reasons for manipulating campaign finance law. However, Liberals allege that Labor wants to intimidate the Liberal Party's business supporters by reducing the political party donation disclosure threshold from \$11,500 to \$1,000.<sup>81</sup>

Business leaders believe that the federal government bullies people who challenge its agenda. In October 2010, NAB and Woodside chairman Michael Chaney criticised the federal government for being 'thin-skinned' and 'threatening' people who spoke out; BlueScope and Brambles chairman Graham Kraehe claimed to have 'experienced retribution' after being critical of the government.<sup>82</sup> In an editorial, the *Australian Financial Review* warned that macroeconomic and policy modelling firms are reluctant to advise oppositions because of past threats of reprisals by government.<sup>83</sup> Similar concerns have been expressed by the non-government sector. In a 2004 Australia Institute survey of non-government organisations, a large majority believed that 'dissenting organisations and individuals risk having their government funding cut.'<sup>84</sup>

These claims are not supported by specific instances or evidence, and may not always distinguish carefully between robust disagreements and actual threats or punishment. For the ordinary business of implementing government policy, bureaucrats operate under procurement rules that focus only on relevant concerns.<sup>85</sup> Political donations are unlikely to have negative or positive effects on most government purchasing or contracting. But the absence of conclusive evidence may not allay concerns.

Other-side donor disfavours—some penalty for opposing the government—are harder to prove or disprove than own-side donor favours—some reward for supporting the government. Own-side donor favours usually require a positive decision than benefits the donor. Such decisions generally leave a public trace. Other-side donor disfavours can be more subtle: decisions not taken, appointments not made, or grants not given. For organisations with government as funders or clients, fear and concern can fill this evidentiary vacuum. These fears and concerns clearly exist despite the lack of strong evidence. The result is a 'chilling effect' on political activity, deterring political speech and political donations.

The 'chilling effect' problem grows with government. As more people depend on government for their livelihoods, fewer people feel they can openly express their political views. There is a practical question of how big government can co-exist with a strong system of political competition. Private donations are part of the answer. Donations let people participate in politics without fear of harming their businesses.

**The proposed \$1,000 threshold would catch very minor political activity individuals or small groups.**

### ***The donations disclosure threshold***

The donations disclosure threshold needs to balance competing policy considerations. The threshold needs to catch donations that could influence government decisions, while minimising negative effects on political participation. The lack of Australian empirical research on whether donations influence government decisions means that we cannot put social science behind a threshold that signals risk of undue influence. However, there is little reason to believe that the current \$11,500 threshold is too low. A donation at this level or below represents a very small percentage of total income for the major parties, whose support is necessary for government decisions. In 2009–10, an \$11,500 donation would have been

0.04% of Labor's total income and 0.03% of the Liberal Party's total income.<sup>86</sup> In an election year, with more donations and public funding, \$11,500 is a much lower proportion of total income. Parties can afford to lose donors at this level, limiting any leverage an individual donor might hope to exercise. And cynically assuming that policy is for sale, we would expect the price to be much higher than \$11,500.

An \$11,500 threshold poses a minimal risk of leaving suspicious donations undisclosed, while having significant benefits for political participation. It removes most individuals and small businesses from compulsory disclosure, sparing them concerns about loss of government benefits, consumer boycotts, and social disapproval. The current threshold also eliminates or substantially reduces compliance complexity and costs for small political groups and their supporters. At \$11,500, most groups will have no donors they need to declare. The donors themselves do not have to report separately to the AEC (even at \$11,500 many donors are unaware of their obligations, and there is significant non-compliance). The donations range of \$1,000 to \$11,500 comes with little bureaucracy or personal risk and gives political and third parties a stronger fundraising base than one that relies on small donors and larger donors not worried by publicity. This is good for a competitive political system.

In federal legislation, the donations threshold is also the threshold for expenditure reporting requirements. The proposed \$1,000 threshold would catch very minor political activity by individuals or small groups. Activism on this scale poses no plausible threat to the integrity of policy processes. Yet the \$1,000 threshold poses significant risks to activists who may not understand that political activity exposes them to conviction and other serious penalties. Current federal law makes it an offence not to keep the required records, not to submit the required returns, or to file an incomplete return. Fines range from \$1,000 for individuals and third parties to \$5,000 for political parties. The reform bill would increase these fines to \$13,200.<sup>87</sup> Under NSW law, failure to submit the required paperwork is also an

**A focus on money over other political resources introduces biases.**

offence, with penalties of up to \$22,000.<sup>88</sup> Though in practice Australian campaign finance law is not ruthlessly enforced, a low threshold exposes small-scale political activists to heavy penalties. An \$11,500 threshold minimises their risks.

Keeping the \$11,500 current threshold rather than lowering it to \$1,000 is fairer to people who want to express their political views, is less costly to run, and strengthens the overall political system by making fundraising easier for opposition parties and third parties. Rather than the Commonwealth moving to a lower disclosure threshold, the states should follow its example and increase their thresholds.

## **Conclusion: Preserve the liberal democratic system of accountability**

The debate on campaign finance law is a debate about the distribution of political power and influence in Australian society. Some people want to use campaign finance law to reduce the political influence of money in Australian politics. They believe, almost certainly correctly, that greater donations disclosure will deter donors. Caps and prohibitions would constrain those donors unfazed by disclosure. The big effects for the political system will be on the organisations that once received these donations, especially small political parties and third parties. They will not have their lost donations income replaced with public funding.

One hope of campaign finance reform is that it will leave more political space for the 'marginalised,' the people whose voices are not often heard in Australian politics. But in between theory and practice, lawmakers have completely lost sight of this goal. Attempts to close off the myriad different ways in which money might make a difference lead to a regulatory cascade of complex rules and reporting requirements. In some states, political parties and third parties face different state and federal campaign finance laws. Campaign finance regulation is a maze that even educated and politically experienced people should enter with caution. The AEC itself seems unsure what the current federal third-party laws mean,



and cannot clearly explain them to the organisations that are supposed to stay within them.<sup>89</sup> High levels of English-language literacy and at least basic accounting skills are now required to operate a political party, and in several jurisdictions these de facto entry requirements exist for all but very small third parties. Lax enforcement has avoided absurdities of American campaign finance law, such as prosecuting a housewife for handing out leaflets concerning her son's school.<sup>90</sup> But staying within the rules requires skills many 'marginalised' people lack.

In NSW and Queensland, new political parties that master the bureaucracy of campaign finance regulation still face formidable obstacles to electoral success. Though they have long struggled without the benefits of incumbency or assured access to public funding, now their private fundraising has also been restricted. Unregistered political parties with no capacity as conduits for undue influence have much lower maximum donation caps than the major political parties. The role of the NSW Greens in supporting campaign finance law is noteworthy. It is as if having established themselves in the political system, they are pulling up the drawbridge behind them. It will be harder for micro-parties to turn themselves into minor parties under these rules.

Rather than extending the possibility of political influence to those who currently lack it, campaign finance rules redistribute it around the existing political class. In NSW and Queensland, third parties with their own financial resources are advantaged relative to third parties that rely on donations.

Candidates with their own money are advantaged relative to candidates who must fundraise (they always were, but fundraisers now have to find many small donors instead of a smaller number of large donors). In NSW, permitted donors are advantaged relative to the banned donors: non-citizens, select 'sin' industries, and property developers.

The express purpose of campaign finance law is to limit the political influence of money, but a focus on money over other political resources also introduces biases. People with personal connections to politicians are advantaged over those who contact politicians by buying tickets to fundraisers or other party events (they can still attend these, but in NSW the entry fee is included in their total donations cap).<sup>91</sup> Campaign finance restrictions favour celebrities and others who can attract media attention over those who use paid advertising to put their case. The media is advantaged over the rest of the political class, as it alone remains entirely unrestricted in how much it can spend advancing its views on NSW or Queensland politics. None of these power shifts within the political class self-evidently make the NSW or Queensland political systems better, from any principled perspective in this debate.

Campaign finance reform is based on a theory of political behaviour that is, at best, doubtful: that the integrity of government decisions is best protected by controlling one temptation to impropriety, political donations. But it is not clear that donations reliably signal impropriety. In the public interest grey area that is most government policymaking in Australia, a perspective cannot be disqualified simply because it represents a private interest. Almost every claim for special treatment is accompanied with appeals to justice or to the public interest. Rather than selectively limiting how some groups advance their claims, it is better to subject policy to debate and criticism, with the ultimate sanction of defeat for governments that fail too many political tests. We need many different groups involved in the political process so that none can dominate.

From a liberal democratic perspective, campaign finance law reforms undermine rather than enhance these mechanisms for keeping governments under scrutiny and challenge. The consistent pattern to campaign finance reforms is that they benefit one or all of the existing parliamentary parties over any group that might challenge them. New parties and third parties face the most severe restrictions, even though they are in the weakest position to exercise any undue influence. As Adam Smith famously observed, people of the same trade rarely get together without the conversation ending in some conspiracy against the public. If our major political parties were companies, they would be referred to the competition regulator for setting up a cartel.

**Without political donations, Australia would be a less free and less democratic country.**

Australia has only partial formal constitutional protections of political freedom. We have relied on a culture that is wary of imposing limits on political freedom. But this culture isn't working as well as it should on campaign finance laws. Unions have been alert to the dangers of third party laws, the federal Liberal Party realises that greater disclosure threatens their funding, and the Queensland Liberal Nationals opposed their state's reforms. But the rest of the political class has been silent on or supportive of moves to restrict political freedom. In NSW, draconian campaign finance laws were passed with significant tri-partisan consensus, and worse is to come. The media continue to greet the annual donations disclosure with stories suggesting they signal an obvious problem, and election law academics almost uniformly support more regulation. Their intuitions and arguments are mistaken. Individual political donations are sometimes suspicious, but collectively donations finance much of the civil society's contribution to public debate. Without political donations, Australia would be a less free and less democratic country.

## Appendix A: Source of donors

	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10	Total
<b>Total donations</b>	4,921	1,822	2,303	2,640	1,706	1,633	15,025
<b>Total value (\$)</b>	30,033,022	12,227,955	18,077,190	26,460,607	11,672,453	11,839,539	110,310,766
<b>Overseas donations</b>	3	0	1	19	3	0	26
<b>Overseas value (\$)</b>	1,009,854	0	100,000	1,702,501	120,000	0	2,932,355
<b>Overseas donations (%)</b>	0.06%	0.00%	0.04%	0.72%	0.18%	0.00%	0.17%
<b>Overseas value (%)</b>	3.36%	0.00%	0.55%	6.43%	1.03%	0.00%	2.66%
<b>Source countries</b>	2 UK	n/a	1 Hong Kong	15 Hong Kong	3 Hong Kong	n/a	19 Hong Kong
	1 USA			2 UK			4 UK
				2 USA			3 USA
<b>Australian citizens</b>	0	n/a	1	11	3	n/a	15
<b>Australian citizens (%)</b>	0.00%	n/a	100.00%	57.89%	100.00%	n/a	57.69%

**Source:** Australian Electoral Commission, Summary of Donor Returns

**Note:** Not all donors comply with requirement to report donations.  
Australian citizenship calculated when known

## Appendix B: Political expenditure by ideological affiliation

	2006-07	2007-08	2008-09	2009-10	Total	% of total 2006-2010
<b>Unions</b>	23,679,102	27,825,532	6,147,032	3,235,158	60,886,824	55%
<b>Environmental groups</b>	432,951	2,102,549	98,173,00	243,918	2,877,590	3%
<b>GetUp!</b>	555,234	1,277,011	237,183	1,962,406	4,031,834	4%
<b>Miscellaneous left-wing groups</b>	186,824	35,066	0	15,773	237,663	0%
<b>Miscellaneous right-wing groups</b>	17,035	1,366,338	0	78,441	1,461,814	1%
<b>Business and industry groups</b>	32,070	16,341,962	11,170	22,207,532	38,592,734	35%
<b>Liberty Party associated entities</b>	28,527	2,004,066	0	0	2,032,593	2%
<b>Pollsters</b>	132,831	0	0	0	132,831	0%
<b>Unclassified individuals and organisations</b>		381,465	0	0	381,465	0%
<b>Total</b>	25,064,574	51,333,987	6,493,558	27,743,228	110,635,347	100%

**Source:** Australian Electoral Commission, Summary of Political Expenditure Returns, Classifications by Andrew Norton

## Endnotes

- 1 See Joo-Cheong Tham, *Money and Politics: The Democracy We Can't Afford* (Sydney: UNSW Press, 2010), 3–9 and Chapter 3; *Electoral Reform Green Paper: Donations, Funding and Expenditure* (Canberra: Government of Australia, 2008), 47; Kristina Keneally, debate on Election Funding and Disclosures Amendment Bill 2010 (NSW Hansard, 28 October 2010. 'Undue influence' does not require any transactional approach; there is no specific payment for a specific policy. Rather the donation is part of a broader relationship which is mutually beneficial to donor and recipient.
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- 15 Productivity Commission, *Trade and Assistance Review 2008–09* (Canberra: 2010).
- 16 Australian Greens, Constitutional reform and democracy policy, <http://greens.org.au/policies/human-rights-democracy/constitutional-reform-and-democracy>.
- 17 On a complete ban see Anne Twomey, 'Reform of political donations,' as above, 16–17; on a complete ban and the lesser options, Graeme Orr, *The Law of Politics*, as above, 246–248.
- 18 *Election Funding, Expenditure and Disclosures Act 1981* (NSW) (sections 96GAA–96GE).
- 19 *Electoral Act 2002* (Victoria) (sections 206, 216–217).
- 20 *Electoral Act 1992* (Queensland) (sections 306–306AC) (the numbering will change when the *Election Reform and Accountability Amendment Act 2011* comes into force); *Election Funding, Expenditure and Disclosures Act 1981* (NSW) (section 96D); Commonwealth Electoral Act (Political Donations and Other Measures) Bill 2010 (sections 306–306AD). The Queensland legislation mirrors the proposed Commonwealth legislation, with the exception of third parties.
- 21 *Election Funding, Expenditure and Disclosures Act 1981* (NSW) (section 96GD).
- 22 Graeme Orr, *The Law of Politics*, as above, 247.

- 23 See NSW Legislative Council Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales* (Sydney: Legislative Council, 2008), 6–12.
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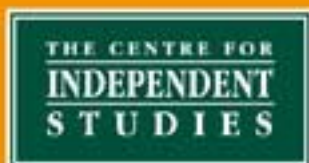
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- 64 Joo-Cheong Tham, *Money and Politics*, as above, 34–35.
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