Political finance

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Key issue

The federal parliament has recently engaged in minor reforms of the federal political finance system, such as banning foreign donations.

The continuing reform of political finance laws in the states and territories is leading to an ever-increasing divergence of laws between jurisdictions.

A High Court decision resulting from a challenge to a Queensland law that found an aspect of the federal law to be unconstitutional has implications for the federal political finance regime.

Political finance broadly encompasses regulation and disclosure of donations by candidates, parties and donors; disclosure of certain other information by candidates and parties; and the payment of election funding to candidates and parties.

The 45th Parliament saw more political finance legislation passed than at any time since the Howard government. Most of the changes were evolutionary, rather than revolutionary.

Public funding

Parties and candidates that receive more than four per cent of the primary vote are entitled to public election funding of an indexed amount multiplied by the number of votes they receive. The per-eligible vote public funding amount for the 2019 federal election is $2,756.

In recent federal elections, public funding was paid as an entitlement, with all candidates and parties that received more than the four per cent threshold automatically receiving the full amount, unless they opted not to.

Following legislative change in the 45th Parliament, parties and candidates who received at least four per cent of the vote will now receive an automatic payment of $10,000 (indexed). Any additional public funding beyond this will be capped at the per-eligible vote public funding rate, or the claimed electoral expenditure of the party or candidate, whichever is less. The AEC has the power to refuse to pay public funding for any expenditure which it is not satisfied is electoral expenditure.

Political parties are not required to otherwise disclose their electoral expenditure, so at the time of publication it is not clear to what extent this new rule will affect the amount of public funding paid following the 2019 election. The total amount of public funding paid in respect of the 2016 federal election was just over $62.7 million.

Foreign political donations

As part of its inquiry into the 2016 federal election, the Joint Standing Committee on Electoral Matters recommended that donations from foreign citizens and entities to political parties should be banned.

In late 2018 the Parliament passed legislation to ban political donations of $1,000 or more from foreign sources. The ban came into effect on 1 January 2019, so while it was in place for the 2019 federal election, it only applied to the second half of the 2018–19 donation reporting period.
The new rules ban donations from foreign donors: a person who does not have a connection to Australia, such as a person who is not an Australian citizen or an entity that does not have a significant business presence in Australia. Receiving a banned donation could incur a fine of up to $42,000 or three times the amount of the donation (other penalties may also apply for donors).

The legislation also changed the registration and reporting requirements of certain political actors. A new category, ‘political campaigner’, was created, focusing on organisations that are not political parties but that incur significant electoral expenditure. Political campaigners now have similar reporting and disclosure obligations to political parties.

Political parties, associated entities and political campaigners are required to register on the Transparency Register, which is maintained by the AEC. Previously, entities other than political parties had reporting obligations but were not required to register.

State and territory reforms

During the period of the 45th Parliament a number of states reformed their political finance laws. Victoria undertook an extensive reform of its laws, introducing caps on donations and substantially increasing its public funding levels. Queensland banned donations from property developers. NSW reduced the expenditure cap for third parties as part of a re-write of its political finance legislation.

These reforms happened in the wake of two key High Court decisions relating to political finance:

- in 2013 the High Court found, in the Unions NSW decision, that restricting political donations only to voters on the roll, and aggregating spending caps between parties and their associated entities, was an unconstitutional restriction on freedom of political communication.
- in 2015 the High Court found, in theMcCloy decision, that bans on donations from property developers and caps on donations were permissible restrictions on the freedom of political communication as they served a valid and legitimate purpose and were proportional and reasonably appropriate to that purpose.

These cases clarified considerably the scope of restrictions that could be placed on political finance without breaching the implied freedom of political communication.
Both the QLD and the NSW reforms ended up before the High Court, with the QLD case directly affecting the Commonwealth political finance regime, as explained below.

**Unions NSW v NSW (2019)**

In 2018 NSW passed new political finance legislation, mainly serving to tidy the much-amended legislation it was replacing, rather than radically reforming their political finance system. One new feature of the legislation, however, was a reduction in the expenditure cap for third-party campaigners, from approximately the amount that political parties could spend to half that amount.

The High Court has previously considered challenges to expenditure caps and has found that while they are a burden on freedom of political communication, they may be justified and thus not unconstitutional.

In challenging this legislation in the High Court Unions NSW argued that the new expenditure cap for third parties impermissibly burdened their freedom of political communication compared to political parties. The High Court agreed, noting that the government had failed to justify the reduction in the expenditure cap, and struck down that aspect of the law.

Notably, the reasons provided by several of the justices stated that political parties and candidates did not have a privileged position in election campaigns over third parties, and that parties and candidates were not entitled to a more prominent voice in the campaign.

As this decision came shortly before the 2019 NSW state election, the effect was that third parties were not subject to an expenditure cap for the election, unlike political parties and candidates.

**Spence v. State of Queensland (2019)**

Following the 2015 QLD state election, the incoming Government commenced a major overhaul of the state’s political finance laws. This continued into Labor’s second term after the 2017 state election, with the passage in 2018 of a law banning political donations by property developers. The effect of the law was that the ban applied to any political donation by a property developer, regardless of whether that donation was eventually used in a state or federal campaign.

As part of its legislation banning foreign political donations, the Federal Government passed amendments to federal electoral legislation providing that, in effect, when a donor in a state jurisdiction makes a political donation, unless the donor or the recipient indicate that the donation will be used for state political purposes, federal law rather than state law would apply to those donations. This would mean, for example, that a property developer could still donate in QLD, provided that they did not specify that the donation was for a state election campaign.

In challenging this legislation in the High Court, Gary Spence, a former president of the LNP of QLD, and a property developer, argued that the QLD ban was unconstitutional, and conflicted with the new federal law.

The High Court upheld the Queensland ban, and found that the federal legislation relating to how state and federal laws covered donors was unconstitutional as it went beyond the Commonwealth’s legislative power. The High Court’s decision was delivered after the issue of the writ for the 2019 federal election, hence the Parliament has not yet had an opportunity to consider a legislative response, and it is unclear what the impact might be on the 2019 federal election.
Impact on federal laws and reform options

Recent political finance reforms in the states and territories (and, potentially, reforms being examined by the Tasmanian Government following the 2018 Tasmanian state election) have left a significant disconnect between federal and state law:

- NSW, Victoria, QLD and South Australia all require near real-time disclosure during elections, whereas under federal law disclosures are by financial year and are not reported until the February after the financial year (donations for the 2019 federal election will not be made public until February 2020)
- NSW and QLD now ban donations from certain industries, such as property developers, and Victoria and NSW cap donations
- the disclosure threshold, the amount at which a donation must be declared, is indexed and currently $13,800 for federal elections. In NSW, Victoria and QLD the cap is $1,000 (non-indexed).

Currently, for example, a property developer cannot donate to campaigns for any level of government in QLD, can only donate to federal campaigns in NSW, and can donate to federal (any amount) or state (capped at $4,000) campaigns in Victoria. A donation of $5,000 is illegal in Victoria if it is for a state campaign, must be declared weekly in QLD for a state or federal campaign, and does not need to declared at all in Tasmania.

The Spence decision appears to affirm the ability of states and territories to regulate political donations that are made in their jurisdictions, provided that it is otherwise consistent with the freedom of political communication, without Commonwealth interference. It also potentially allows the other states and territories to further expand disclosure obligations and restrictions on donors in a way that might impact on political parties’ ability to fundraise for federal elections.

These inconsistencies may prove to be an incentive for harmonisation of federal and state and territory political finance laws.

The ALP and the Australian Greens each introduced legislation in the 45th Parliament that would have reduced the donation disclosure threshold to $1,000 and required more real-time disclosure of donations. Such reforms would enhance the compatibility of the federal political finance system with those of the states and territories.

The advertising campaign by Clive Palmer for his United Australia Party at the 2019 federal election reportedly cost $60 million, and failed to win the party any seats in the lower house, or, at the time of publication, the Senate. The spending by Mr Palmer has led to calls for limits on expenditure in federal election campaigns.

Further reading

