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Irwin, Debbie (REPS)

From: Graeme Orr [g.orr@mailbox.gu.edu.au]
Sent: Friday, 21 September 2001 5:56 PM
To: JSCEM@aph.gov.au
Subject: FAD inquiry - submission



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Dear Committee Secretary

Please find attached a short submission to the postponed FAD inquiry.

I am writing a paper for a planned Oxford Uni Press book on Comparative Electoral Funding, and didn't think I should purport to comment on the FAD issues until I had the benefit at least of getting feedback on that paper at a conference on electoral finance law which is being held overseas in late October.

But on reading the AEC's supplementary submission several days ago I discovered that that submission broadens the issues to party registration.

There is one issue relevant to the supplementary submission and party funding which I wished to comment on, hence this late submission.

I apologise for the delay and hope it is not too tardy to be included.

Yours
Graeme Orr



**SUBMISSION to
JOINT STANDING COMMITTEE on ELECTORAL MATTERS (JSCEM)
FUNDING and DISCLOSURE INQUIRY 2000/01**

Background

I have been researching, commenting and advising on electoral law for some five years now: an overview of my work in this field is appendicised to establish my credentials.

Overview of this Submission

This submission is limited to the issue of the payment of public funding in respect of federal elections *as of right*, and is raised in the context of recent concerns regarding party registration.

Submission

1. Public funding was introduced federally in 1983 on the recommendation of the Joint Select Committee on Electoral Reform, as a system in which 'parties and candidates [would] be required to furnish evidence of expenditure incurred in the actual running of [the] campaign'.¹ But in 1995 it became 'as of right' (ie candidates/parties do not need to prove or receipt expenditure in a reimbursement process).² The only qualification to funding is achieving a threshold of 4% of the primary vote.
2. It is well documented (eg in JSCEM and predecessor reports) that public funding was designed:
 - (i) to *defray campaign costs* (primarily to minimise dependence on large donors with attendant corruption risks, and secondarily to recognise the public nature of politics and by setting the threshold at a moderately low hurdle, to provide some institutional support to a range of parties), and
 - (ii) to defray them on the basis of *past* expenditure, by measuring entitlement against electoral support in the immediate preceding election ('funds must not exceed election related expenditure'³).It was *designed neither*:
 - (a) to subsidise ongoing organisational costs;⁴ nor, least of all
 - (b) to create windfall gains.

¹ Joint Select Committee on Electoral Reform, *First Report* (1983) p 160: enacted as *Commonwealth Electoral Act 1918 (Cth)* ss 153(8) and 153C (re-numbered as ss 295(8) and 298). These provisions required claims to document, to the AEC's satisfaction, the electoral expenditure authorised by the branch (or candidate) and ensured that the total reimbursable was capped by the amount of actual expenditure.

² *Commonwealth Electoral Amendment Act 1995* repealed ss 295 and 298.

³ *Ibid*, pi 56

⁴ *Ibid*, p 154.

3. Parliamentary debates and reform in 2000-01, have targeted a need to tighten party registration procedures. (It may not be coincidental that the growth in the number of distinct, federally registered parties has been halted).

In particular, allegations were raised that former One Nation Party luminaries had sought to register 'slogan' parties with a view to attracting naive protest votes and windfall public funding.

4. These debates echoed widely held concerns that the One Nation party received very significant public funding in both Qld and federal elections in 1998, on the back of a large protest vote; but that the party had not expended equivalent monies in those campaigns (in addition, at the time, to lacking a democratically accountable structure for the proper handling of those monies).
5. Tightening party registration procedures will do nothing to address the concerns that sloganeering/protest parties that exist only on paper could achieve attract windfall funding. *On the contrary:* a proliferation of small parties, all things being equal, splinters the non-major party and protest vote, tending if anything to *limit* the number of candidates or groups achieving the 4% threshold.

By way of example, witness the infamous 1998 NSW Legislative Council results. Whatever problems the 'tablecloth ballot' posed for rational voting and counting, of the 80 groups that stood, *only 4* achieved the equivalent of the 4% threshold (not coincidentally the NSW threshold is the same as for federal elections). Together, those 4 parties represented just 70% of the primary vote. If anything, a proliferation of registered, ballot-labeled parties saves consolidated revenue!⁵ It does this by reducing the amount of the primary vote going to parties who meet the threshold - albeit without necessarily significantly reducing the number of parties who meet the threshold (eg the number of parties which reached the threshold at the 1998 Senate election was only slightly higher at 4-5 per state).

Please note, I am not saying that these effects of the combination of the threshold and the number of small/minor parties is in itself a good thing. Several well established minor parties in NSW (eg CTA, Greens) won Council seats in 1998, but qualified for no funding. In fact, five minor parties had members elected (a quarter of the Council seats involved), yet would have received no funding.

Rather, I simply wish to point out that any proliferation in new and small parties cannot rationally be linked to a hope to gain windfall funding.

6. Instead, the underlying problem is that *payment as of right is inappropriate*. In my experience, both of following public debates and discussing electoral law around the country, this view is widely shared.

Payment as of right may be administratively convenient to parties and the AEC, but:

(i) it cuts across the underlying purposes of public funding (see 2 above). But, perhaps more seriously for democratic governance and legitimacy:

⁵ By the same token, the larger the number of candidates standing, the greater the number of deposits that will be forfeited to the Commonwealth.

(ii) it creates an impression that the system of public funding is a 'snout-trough', with the unfortunate collateral effect of bringing long-suffering politicians and parties into (further) disrepute.

7. Remembering that candidates' campaign expenditure is tax deductible,⁶ and that our tax laws and the ATO insist on strict records and receipts to account for actual expenditure to support deduction claims, it seems odd that parties should not have to receipt expenditure to claim public funding. Indeed, across the workforce (both public and private) and particularly where public monies are involved (eg grants and subsidies), a process of strict accounting for and receipting of expenditure is a fundamental requirement.

So widespread, understood, accepted and expected is this norm, that its absence in the electoral funding system - whatever arguments are made about efficiency of administration⁷ - strikes those outside the system as outrageous. Alongside the common sense clarity of this view, the complexities and alleged trickery involving the disclosure provisions pale by comparison. Or to put it another way, whilst lawyers, the media and elites (rightly) worry about improving the disclosure system, ordinary perceptions are more likely to be corroded by this hole in the administration of the funding system. The hole is unnecessary, given that simple and well understood systems of documenting and auditing expenditure are easily available.

Recommendations

That:

1. **The system of public funding based on reimbursement for actual, receipted and audited campaign expenditure be re-instituted;** and, to that end,
2. The JSCEM seek submissions from the AEC, auditor-general and registered parties as to the detailed processes necessary to achieve a workable system comparable to those applying in other areas of public funding.

I thank the Committee for the chance to make this submission.

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⁶ *Income Tax Assessment Act 1936 (Cth)* ss 74-74B.

⁷ The justification for the removal of the reimbursement requirement was to simplify procedures for the parties and the AEC by removing the detail from the claims/reporting process: Hon Frank Walker MHR, 2nd Reading Speech, House of Representatives, 9 March 1995.

Appendix
Relevant Electoral Law Work

"The Choice Not to Choose: Commonwealth Electoral Law and the Withholding of Preferences". (1997) 23(2) *Monash University Law Review* 285.

"Ballotless and Behind Bars: Commonwealth Electoral Law and the Denial of Votes to Prisoners" (1998) 26 *Federal Law Review* 55.

"Tinkering with Convention: Voluntary Voting at Australia's 1997 Constitutional Convention Election". (1998) 17 *Electoral Studies* 574.

"The Cinderella Status of Electoral Law as a Field of Study in Australia" (1998) 7 *Griffith Law Review* 166-173. Special edition on Electoral Regulation and Representation, which I commissioned and edited.

"Of Electoral Jurisdiction, Senate Ballot Papers and Fraudulent Party Registrations: New Developments in Electoral Case Law" (1999) 2 *Constitutional Law and Policy Review* 32.

"Local Government Title: Council Elections and Polls" chapter for Halsbury's *Laws of Australia* vol 17, pp 488,531-488,600 (Butterworths, 1999).

"The Conduct of Referenda and Plebiscites in Australia: a Legal Perspective" (2000) 12 *Public Law Review* 89.

"Electoral Challenges: Judicial Review of Parliamentary Elections in Australia" (2000) 23 *Sydney Law Review* 53 (With Professor George Williams)

'Electoral Law' entry, Blackshield, Coper and Williams (eds), *Oxford Companion to the High Court of Australia* (forthcoming).

'The Law Comes to the Party: The Continuing Juridification of Political Parties in Australia' (under review by *Constitutional Law and Policy Review*)

'The Currency of Politics: Australian Election Funding and Disclosure Law' - invited paper for MPI conference on comparative international political finance law, Florence, October 2001. (Papers to be published by Oxford University Press).

Grants Awarded

'Australian Electoral Law: Building a System for the 21st Century', ARC Linkage Project, 2002-3. Co-chief investigator with Professor George Williams, and partner body the Electoral Council of Australia. Grant total: \$170 000 (cash); \$55 490 (kind).

Consultancies/Advice Work I have provided consultancy advice to solicitors representing the ALP, CLP and others; provided pro bono work to electoral litigants (eg in the One Nation de-registration case) and to overseas experts (eg in current Supreme Court litigation for the Canadian electoral commission).

PhD in Progress 'Dealing in Votes: the Regulation of Electoral Bribery'.

Media Commentary. I regularly comment on electoral law developments, particularly for ABC radio in Queensland, and have appeared on or written electoral law explanation and education for: ABC Radio National's *The Law Report*, *The Courier-Mail*, *The Australian*, ABC radio JJJ, ABC television; commercial radio in Sydney and Perth.