



## Proposal summary

Electoral expenditure is currently unrestricted in Australia, creating an opportunity for an endless arms race of fundraising and spending in election campaigns. The Centre for Public Integrity recommends capping electoral expenditure of political parties, associated entities and third parties, and including additional restrictions on political advertising.

Spending on political advertising is the largest component of electoral expenditure. Although difficult to quantify given our weak disclosure laws, estimations based on available data have put it at over 50% of total electoral expenditure.<sup>1</sup> Therefore caps on political advertising will be an effective tool in limiting the undue influence of money in politics, but should be used in addition to expenditure caps to allow regulation of more than the half that is spent on advertising.

Political advertising can be best regulated through public funding and distribution of advertising space. The Centre for Public Integrity recommends a model whereby the Department of Finance purchases advertising space within the election period and the Australian Electoral Commission distributes it in alignment with principles similar to UK or NZ model.

This could be implemented in line with the implied freedom of political communication, and prohibition of compulsory acquisition enshrined in the Constitution.

## The need for regulation of electoral expenditure

- Rising cost of advertising and the increasing dependence on corporate donations to pay for it<sup>2</sup>
- Current ability of big spenders to sway voters and political debate<sup>3</sup> ie. Clive Palmer's \$70 million spend in 2019 election, mining industry \$20 million spend on campaign against mining tax in lead up to 2013 election

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<sup>1</sup> Young and Tham, 2006, *Political finance in Australia*, Report 7 of the Democratic Audit of Australia, Australian National University, Table 5.2 pp 105.

<sup>2</sup> Joint Standing Committee on Electoral Matters, *Who Pays the Piper Calls the Tune*, Commonwealth of Australia, Canberra, 1989

<sup>3</sup> Young and Tham, 2006, *Political finance in Australia*, Report 7 of the Democratic Audit of Australia, Australian National University, pp 93

- Over 50% of expenditure is political advertising, and is increasing – creating an arms race of fundraising and spending<sup>4</sup>
- Fair contests for new and emerging parties – current system allows major parties to outspend other candidates, and also buy out majority of available prime advertising space<sup>5</sup>
- Impact on editorial non-partisan independence – commercial media currently relies on huge political advertising revenue<sup>6</sup>

## Expenditure caps

There are caps on amounts that parties and candidates can spend in elections in NSW and the ACT. These are calculated based on the number of seats a party is contesting. In NSW each electorate in which a party is contesting a seat entitles that party to \$122,900 in electoral expenditure, with an additional \$61,500 allowed for electorate specific spending that mentions the name of the candidate or electorate. With 93 seats in a NSW state election, the total a party can spend if contesting each seat is \$11,429,700.<sup>7</sup> In the ACT the amount of expenditure allowed per seat is \$40,000, bringing the total allowed per party to \$1 million if fielding candidates in all 25 seats.<sup>8</sup> The Queensland Government announced electoral reform in October 2019 to be implemented in 2020, including expenditure caps of \$92,000 per contesting electorate. With 93 electorates in Queensland, the total expenditure cap for parties would total \$8,556,000.<sup>9</sup>

The NSW *Electoral Funding Act 2018* defines electoral expenditure as 'expenditure for or in connection with promoting or opposing, directly or indirectly, a party or the election of a candidate or candidates or for the purpose of influencing, directly or indirectly, the voting at an election'.<sup>10</sup> Electoral expenditure can only be made out of a nominated campaign account, making auditing and enforcement more feasible. The Commonwealth *Electoral Act 1918* defines electoral expenditure as 'expenditure incurred for the dominant purpose of creating or communicating electoral matter', and electoral matter as 'matter communicated or intended to be communicated for the dominant purpose of influencing the way electors vote in an election'.<sup>11</sup>

The Centre for Public Integrity recommends implementing per electorate expenditure caps at a federal level as used in NSW and the ACT, with electorate expenditure defined as any spending used for the dominant purpose of influencing how electors vote in an election (as defined by section 287AB of *Electoral Act 1918* (Commonwealth)).

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<sup>4</sup> United Kingdom Electoral Commission, 2003, *Party Political Broadcasting: Report and Recommendations*, January 2003

<sup>5</sup> Young and Tham, 2006, *Political finance in Australia*, Report 7 of the Democratic Audit of Australia, Australian National University, pp 93

<sup>6</sup> United Kingdom Electoral Commission, 2003, *Party Political Broadcasting: Report and Recommendations*, January 2003

<sup>7</sup> *Electoral Funding Act 2018* (NSW)

<sup>8</sup> *Electoral Act 1992* (ACT)

<sup>9</sup> Queensland Government, *Sweeping electoral reforms to make elections fairer and more transparent*, Media statement 29<sup>th</sup> October 2019,

<http://statements.qld.gov.au/Statement/2019/10/29/sweeping-electoral-reforms-to-make-elections-fairer-and-more-transparent>

<sup>10</sup> *Electoral Funding Act 2018* (NSW)

<sup>11</sup> *Electoral Act 1918* (Commonwealth)

## Regulation of political advertising

Both the UK and NZ have caps on political advertising, and South Australia regulates truth in political advertising.

In the UK, qualifying parties are allocated free airtime during an election period in the form of party election broadcasts (PEBs). Paid political advertising on TV or radio beyond this is banned. Public broadcast time is divided between candidates based on principles in an advertising code.<sup>12</sup>

In NZ caps on electoral expenditure are placed on candidates and parties, and additional public funding is provided for political advertising in 'election programmes'. The sum of \$3,282,000 was provided for broadcast advertising to the Electoral Commission to divide between candidates based on set criteria in the Act.<sup>13</sup> In the 2014 General Election, parties could spend up to \$1,091,000, plus \$25,700 for each candidate contesting election.<sup>14</sup>

South Australia regulates truth in political advertising. The *Electoral Act 1985* makes it an offence to publish any election material containing inaccurate or misleading statements that are purported to be statements of fact.<sup>15</sup> Penalties apply of \$5 000 for an individual (natural person) and \$25 000 for body corporates. The Court of Disputed Returns may require the advertising material to be retracted, and if it is not done so may void the election results of the particular contest.<sup>16</sup>

These models from UK, NZ and SA must be seen in the context of the implied right of political communication and the restrictions on compulsory acquisition in the Australian constitution.

## High Court challenges

While the *Australian Constitution* says little directly about political funding and disclosure, a number of High Court cases in recent years have affected the scope of the system.

Implications are that any absolute bans on political advertising would likely be seen as unconstitutional, but restrictions on electoral spending or political advertising that potentially infringes the implied freedom of political communication is valid if it serves a legitimate purpose in doing so and is proportional, or reasonably appropriate and adapted, to that legitimate purpose.

The *ACTV* decision in 1992 was made as the distribution of publicly funded advertising favouring major parties was seen as discriminatory against minor parties. The positive outcome in *McCloy* in 2015 showed that restrictions on political communication are valid if

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<sup>12</sup> Miskin & Grant, 2004, *Political advertising in Australia*, Research Brief, Parliamentary Library of Australia, 29 November 2004, no. 5, 2004-05

<sup>13</sup> New Zealand Electoral Commission, 2014, *Broadcasting allocation for the 2014 General Election*, <https://elections.nz/democracy-in-nz/historical-events/2014-general-election/broadcasting-allocation-for-the-2014-general-election/>

<sup>14</sup> New Zealand Electoral Commission, 2014, *Party expenses for the 2014 General Election*, <https://elections.nz/democracy-in-nz/historical-events/2014-general-election/party-expenses-for-the-2014-general-election/>

<sup>15</sup> *Electoral Act 1985* (SA), s 113, [http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/sa/consol\\_act/ea1985103/s113.html](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/sa/consol_act/ea1985103/s113.html)

<sup>16</sup> *Electoral Act 1985* (SA), s 107(5), [http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/sa/consol\\_act/ea1985103/s113.html](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/sa/consol_act/ea1985103/s113.html)

they are legitimate and reasonable. This decision would likely apply to regulations on political advertising, as both advertising and electoral expenditure would be seen as political communication cases.

The main points from the most relevant High Court cases are as outlined below:<sup>17</sup>

From *Nationwide News and ACTV* (1992):

- There is an implied freedom of political communication, as it is a necessary part of a system of responsible government.
- A blanket prohibition on political TV and radio advertisements during elections was found invalid as it unjustifiably infringed the freedom.
- The proposal of distributing publicly funded advertising space in favour of major parties was unfair and restricted political communication of minor parties (40% to Liberals, 40% to Labor and 10% to Democrats)

From *Lange* (1997):

- The implied freedom of political communication is limited to what is needed for the operation of our system of government, as provided by the *Constitution*.
- The test is whether a law burdens the freedom, and if so is it reasonably appropriate and adapted, or proportionate, to serve a legitimate end?

From *Unions NSW* (2013):

- A NSW provision that banned political donations from anyone other than an individual on the electoral roll was found to be invalid because it restricted political communication and was not reasonably and appropriately adapted to achieving a legitimate aim such as preventing corruption or undue influence.
- A provision that aggregated the electoral advertising expenditure caps of parties and their affiliate organisations was similarly found invalid.

From *McCloy* (2015):

- Bans in NSW on donations from specified 'prohibited donors', particularly property developers; bans on indirect campaign contributions; and caps on donations were all found to be valid as they were proportional to the legitimate purpose of preventing corruption and undue influence.
- Affirmed that any provision that potentially infringes the implied freedom of political communication is valid if it serves a legitimate purpose in doing so and is proportional, or reasonably appropriate and adapted, to that legitimate purpose.
- Decision likely to be relevant to regulations on political advertising, as both electoral expenditure caps and political advertising restrictions would be seen as political communication cases.

From *Unions NSW* (2019)

- The 2018 amendments to the NSW electoral funding laws halved the expenditure cap on third party campaigners from \$1 million to \$500,000
- The High Court found that this was an unconstitutional breach of implied right of political communication, that was not 'reasonably necessary' to achieve the purpose identified by the NSW Government of preventing the drowning out of other voices in the political process by the distorting influence of money.

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<sup>17</sup> Muller, 2017, *Election funding and disclosure in Australia*, Quick Guide Research Paper Series 2017-2018, Parliamentary Library, 10 July 2017

- Expenditure caps in third parties are constitutional if they are set at the same level as political parties and candidates, as in the ACT, or at lesser level if there is a legitimate reason that is necessary to achieving a specified purpose.

## Recommendations

Based on models from the UK, NZ and SA, applied in the context of Australia's constitution, the Centre for Public Integrity recommends a model of regulation electoral expenditure based on the following principles:

1. Caps on all electoral expenditure covering political parties, associated entities and third parties similar to *Electoral Funding Act 2018* (NSW)
2. Level set through review and tied to donations caps and public funding, so that private donation caps are set at 50% of total expenditure with the other 50% covered by public funding.
3. Electoral expenditure defined as spending for the dominant purpose of influencing how electors vote in an election ((see section 287AB of the *Electoral Act 1918* (Commonwealth)).
4. Electoral expenditure only allowed to be spent out of a separate campaign account, to allow for auditing and enforcement.
5. Caps to apply 2 years after previous election, and extend until polling day of the next election.
6. Department of Finance to purchase and distribute advertising space from commercial broadcasters and major newspapers during each election year, with limits also applied to the amount of advertising space available for each party, candidate and third-party campaigners.
7. Distribution of advertising space by independent body in accordance with set principles in advertising code including fairness, support for new and emerging parties, number of votes in previous election etc.
8. Truth in political advertising laws to be modelled on South Australia legislation.

It is important to note that these recommendations are limited in their scope for other physical forms of advertising, such as billboards, or online spaces and human-generated social media content. However, restriction and regulation of electoral expenditure, as well as improved truth measures, do apply to these modes of advertising.

## About The Centre for Public Integrity

The Centre for Public Integrity is an independent think tank dedicated to preventing corruption, protecting the integrity of our accountability institutions, and eliminating undue influence of money in politics in Australia. Board members of the Centre are the Hon Tony Fitzgerald AC QC, the Hon David Ipp AO QC, the Hon Stephen Charles AO QC, the Hon Anthony Whealy QC, Professor George Williams AO, Professor Joo Cheong Tham and Geoffrey Watson SC.

This briefing paper was prepared by the Centre for Public Integrity's Donations Committee, consisting of Hon Anthony Whealy QC, Professor Joo Cheong Tham and Tim Storer.