

## Submission to the review of the *Tasmanian Electoral Act 2004*

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### Executive Summary

This submission to the Tasmanian Government's review of the *Tasmanian Electoral Act 2004* makes 17 recommendations which, once implemented, would ensure that Tasmania has among the most the transparent campaign disclosure frameworks in Australia. This would help ensure the legitimacy and integrity of the electoral process. Our recommendations are based on recent reforms in other Australian jurisdictions and international best practice.

Our key findings and recommendations include:

- In the absence of reform Tasmania is likely to have the weakest campaign finance laws of any Australian state and Territory if legislation currently before the Victorian Parliament is passed;
- Between 2009 and 2015 the source of only 16.4% of the \$21.5 million donated to Tasmanian political parties was disclosed;
- A new state-based disclosure regime should report donations to political parties above \$1000 and spending above \$1500 with disclosures being reported publically on a fortnightly basis in the 12 months prior to an election;
- Third party groups should be required to disclose political spending above \$2000 (while noting the challenges associated with defining political spending);
- Section 198 (1) (b)(ii) of the *Tasmanian Electoral Act* should be abolished to allow newspapers to provide election coverage on polling day. This will ensure consistency between print media and digital platforms
- Other Australian jurisdictions have introduced spending caps and public funding for political parties contesting election campaigns. We don't believe that such reforms are a priority in Tasmanian and that the focus for the current review should be on enhancing transparency and improving campaign disclosure.
- Implementing a more robust and effective disclosure regime will require a modest investment but this is necessary to ensure the integrity of the electoral process in Tasmania. Where ever possible Tasmania should share resources and administrative systems with other Australian jurisdictions.

Naturally we are happy to discuss any of the recommendations presented in this submission.

Richard Eccleston and Nicholas Gribble, July 20 2018

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\* This submission reflects the views of the authors and not those of the University of Tasmania

## Part 1: Analysis of issues identified in the Terms of Reference

### 1. Disclosure Laws

#### Summary

The disclosure of political donations is common in democracies around the world. There is a strong consensus that establishing high levels of transparency in relation to the quantum and sources of electoral funding limits the scope for external parties to exert undue influence over the democratic process while preserving their right to participate in election campaigns.

#### 1.1 Disclosure in Tasmania

Disclosure laws are non-existent in Tasmania at the State level. The only disclosure required in Tasmanian elections is that mandated by Federal laws under which donations in excess of \$13,800 (2018-19) must be disclosed (see the *Commonwealth Electoral Act 1918* and relevant amendments). If legislation currently being considered by the Victorian Parliament is enacted Tasmania will have the weakest disclosure laws of any state or territory. In the absence of reform, the current situation whereby less than 25% of all political donations are disclosed because the vast majority of donations are below the Federal threshold (Table 1) will be perpetuated.

Within the 6 year period between the financial years 2009-10 and 2014-15 the following disclosures were made by political parties represented in the Tasmanian House of Assembly:

	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	TOTAL
<b>LIB receipts</b>	\$1,983,859	\$1,443,988	\$1,039,162	\$1,593,072	\$4,237,261	\$2,066,635	<b>\$12,363,977</b>
<b>LIB disclosed (%)</b>	\$355,432 (17.9%)	\$340,601 (23.59%)	\$35,000 (3.37%)	\$45,000 (2.82%)	\$560,058 (13.2%)	\$210,000 (10.16%)	<b>\$1,546,091 (12.5%)</b>
<b>ALP receipts</b>	\$2,133,649	\$665,350	\$621,657	\$746,331	\$1,516,986	\$567,279	<b>\$5,505,998</b>
<b>ALP disclosed (%)</b>	\$628,162 (29.44%)	\$69,235 (10.41%)	\$14,176 (2.28%)	\$94,990 (12.7%)	\$250,076 (16.5%)	\$45,798 (8.07%)	<b>\$1,102,437 (20%)</b>
<b>GREEN receipts</b>	\$737,739	\$833,037	\$421,389	\$488,826	\$907,425	\$318,603	<b>\$3,677,019</b>
<b>GREEN disclosed (%)</b>	\$75,955 (10.3%)	\$360,501 (43.28%)	\$14,026 (3.33%)	\$18,642 (3.81%)	\$369,328 (40.7%)	\$50,455 (15.84%)	<b>\$888,907 (24.17%)</b>

Source: AEC Database

In total, the three parties declared receipts of \$21,546,994 and disclosed \$3,537,435 (approximately 16.4% of receipts). This low level of disclosure under the existing regime prevents the public identifying the source of political donations on which political parties depend. This lack of transparency in relation to sources of campaign funding has the potential to undermine the legitimacy of the electoral process.

Transparency is further limited by the fact that disclosed figures include significant receipts from Federal party counterparts, the original sources of which are difficult to trace. If these numbers are excluded from the total of disclosed funds the disclosure rate is closer to 12.2%.

- Over the 6 years, the Liberals received \$176,478 from the Federal branch, Labor received \$360,062 from the Federal branch and from funds disclosed as 'party funds', and the Greens received \$373,183 from the Federal branch.

## 1.2 Major Issues

### *Timeliness*

Disclosure laws are only effective if they provide information in a timely fashion, allowing voters, regulators and the media to scrutinise and analyse disclosures prior to polling day.

- Federal laws (which are all that currently apply in Tasmania) only mandate annual disclosure each financial year, which must be released by the February of the following year (i.e for the 2017-18 financial year, disclosure will be due by February 2019). Donations can therefore be concealed from the public for up to 19 months.
- Advances in technology allow for rapid or 'real-time' disclosure systems. Examples include:
  - New York<sup>i</sup> and Ontario<sup>ii</sup> both have real-time systems<sup>1</sup>;
  - ACT has a hybrid system – quarterly disclosure apart from July-October of an election year, when disclosure is weekly<sup>iii</sup>.

### *Public access to disclosure data*

Disclosure systems only work when the information disclosed is easily accessible and understandable.

- Information has to be present in a form which can easily be analysed by the voting public.
  - Some systems have disclosure that is highly technical and can only be interpreted by trained professionals, which is of little use to the general public.
- Disclosure systems must be easily navigable.
  - Donors must be easily identifiable and traceable by necessary authorities.
    - Information such as legal name, address and occupation should be collected.
  - Multiple donations from a single source should be linked and displayed as both an aggregate total and in their component parts.

### *Coverage and Thresholds*

Disclosure laws concerning political donations should be as broad as possible to ensure maximum transparency and to promote compliance.

- The Hare-Clarke electoral system in Tasmania means any State based disclosure system would require different elements to those seen in other Lower House jurisdictions around Australia. Specifically, given candidates from the same party are in direct competition, candidates as well as parties should prepare separate disclosure reports.
- To ensure minor parties and individual candidates are able to comply with disclosure requirements consideration should be given to providing limited financial or administrative support to candidates.
- Non-monetary and indirect forms of funding should be covered, requiring the disclosure of (among others):
  - In-kind donations
  - Sources of funding gathered by external fundraising bodies
  - Payments for political access including dinners and meetings.

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<sup>1</sup> 'Real-time' systems are designed to disclose donations as soon as they can be processed. The time period given to do so varies from a few days to several weeks, but is usually either one or two weeks.

- There is an active debate concerning the monetary threshold below which disclosures would not be required. The international trend has been to lower disclosure thresholds in the interest of promoting transparency. At present the lowest disclosure threshold in Australia is \$1000, in New South Wales, Queensland, and the Australian Capital Territory<sup>iv</sup>. We believe this threshold should also apply in Tasmania.

### 1.3 Expenditure Disclosure:

All State and Territory jurisdictions in Australia bar Tasmania (with the exception of expenditure disclosure in the Legislated Council – see 1.4 below) have expenditure reporting incorporated into their disclosure systems. This ensures political parties remain accountable to the public and that electoral practices/spending can be effectively scrutinised. A lack of transparency in relation to campaign spending became an issue during the 2018 Tasmanian election. Benefits of expenditure reporting include:

- Maintaining a level playing field between different political actors, parties and third party interest groups.
- Allowing scrutiny of spending on advertising, which is a major issue in most democracies.

In line with legislation in other states political parties and candidates in Tasmania should disclose *individual expenses totalling over \$1500 (and any aggregate expenses on the same product/service totalling over \$1500)*.<sup>v</sup>

### 1.4 Disclosure in Legislative Council Elections

While Legislative Council elections are more regulated than Legislative Assembly elections, there is no existing requirement for Legislative Council candidates to submit a disclosure statement which covers donations or sponsorship.

Expenditure disclosure is mandatory: Section 161 of the Electoral Act requires each candidate to complete an election expenditure return covering all expenses greater than \$20.

To ensure consistency, any disclosure regime implemented should apply in Legislative Council elections as well as Legislative Assembly elections. Due to the difference in the scale of spending, the thresholds should be tailored to ensure Council members are adequately covered by the regime.

### 1.5 Other Considerations

Improving Tasmanian campaign disclosure laws should be a priority for the current review of the Electoral Act. However such reforms should potentially be considered as part of a wider reform agenda. Additional considerations relating to campaign disclosure include:

- Any state-level disclosure regime must include appropriate enforcement mechanisms. Disclosure regimes can be manipulated or avoided by political parties/candidates to obscure some sources of funding sources. In NSW a lack of enforcement capabilities was noted in major corruption cases investigated by the Independent Commission Against Corruption (ICAC)<sup>vi</sup>.
- Disclosure statements should be verified by an impartial body to ensure all requirements are being met and all parties are submitting the correct reports. In most jurisdictions, the relevant Electoral Commission has such powers.
- Consideration should also be given as to whether more rigorous disclosure provisions should be paired with caps on campaign spending (see below).

### *Anonymous Donations*

In the interests of reducing administrative and compliance costs most democratic regimes allow anonymous donations below a very low threshold. Given there is little evidence of donors exploiting these provisions to make large anonymous donations we suggest introducing a disclosure threshold of \$200 which, along with South Australia would be the lowest threshold in Australia.

### **1.6 Recommendations for improving campaign disclosure in Tasmania**

We recommend the current review should consider the following reforms concerning campaign disclosure:

- 1) *State-based disclosure laws for political donations and expenditure should be introduced.*
- 2) *Disclosure should be timely and occur at least fortnightly in the 12 months preceding an election ('real time').*
- 3) *Parties and their candidates should have to submit separate disclosure statements.*
  - a) *Disclosure statements should be presented through a publically accessible portal in plain, understandable language to maximise scrutiny.*
- 4) *Disclosure of donations should include:*
  - a) *\$1000 threshold for individual donation disclosure aggregated over the financial year.*
  - b) *Loans and non-monetary/atypical donation types.*
  - c) *A separate disclosure statement filed by the donor to ensure consistency.*
    - i) *Donor disclosure should declare any previous donations within the past 12 months.*
- 5) *Expenditure disclosure should include individual expenses totalling over \$1500 (and any aggregate expenses on the same product/service totalling over \$1500).*
- 6) *An independent regulator should be granted powers to ensure all requirements are met.*
  - a) *The TEC should be empowered as regulator, as is common in most other Australian jurisdictions.*
- 7) *Anonymous donations should be limited to a threshold of no more than \$200.*
- 8) *Legislative Council candidates should abide by the above rules apart from where legislation already exists; in such cases, existing laws should prevail.*

## **2. Third Parties and Affiliate Groups**

### *Summary*

Tasmania has little regulation in relation to the participation of third party interest groups and lobbyists in elections. In Legislative Council elections it is an offence for third parties to incur expenditure designed to influence an election result. However, in both House of Assembly and local council elections third parties are free to participate, including unlimited spending on political advertising. Third party involvement was evident in both the 2016 Federal Election and in the 2018 Tasmanian Election. Major third party campaigns have also become more common across the country in recent years.

In other jurisdictions, the regulation of third party involvement in elections is designed to prevent external organisations exerting undue influence in election campaigns. The aim is to ensure that third parties with vested interests do not drown out political parties and candidates seeking election or less well resourced interest groups or citizens. Attempts to introduce third party regulation are often more contentious than disclosure provisions applying to political parties and candidates due to arguments around freedom of speech (as seen in recent debates over proposed Victorian legislation).

## 2.1 Types of Third Party Regulation

There are several types of regulation placed on third party activities. The two most common are:

### *Disclosure*

Disclosure regimes for third parties are similar to disclosure regimes for political parties and candidates. They generally require the disclosure of political spending and activities, both in terms of party/candidate cooperation (donations, lending office space/materials, logistical support, etc.) and independent spending (on advertising and campaigning).

A disclosure regime for third parties in Tasmanian elections would improve transparency, although there are administrative challenges concerning what constitutes political advertising or spending.

### *Spending Limits*

Spending limits are a more stringent form of regulation on third parties and are not common in other Australian jurisdictions. Given the rise of third party spending, limits may have to be considered in the future.

## 2.2 The Challenges of Regulating Third Parties

As third parties become increasingly active in election campaigns there are growing calls to regulate their involvement.

In response to such demands the draft Victorian legislation has proposed a \$4000 limit (over each 4 year parliamentary term) on donations/contributions to a political party or affiliate organisation. Third parties and affiliate groups will also be required to disclose spending over \$2000 on local campaigning (although there has been no attempt to limit spending by these organisations).

NSW and Victoria also ban certain types of donors depending on the interest or industry they represent. In NSW banned donors include property developers and members or representative of the gambling, tobacco or liquor industries, while Victoria bans donations from the gambling industry totalling over \$50 000. Queensland has recently been debating proposed legislation to ban property developers from donating to political campaigns.

There are viable models in other Australian states for regulating third parties but a number of challenges remain.

## 2.3 Efficacy

Systems that attempt to limit political spending are prone to exploitation by third parties determined to influence the political process. Third parties with a significant interest in skirting limitations can usually find loopholes, which allow them to have an electoral impact.

### *'Political Spending'*

Determining what constitutes 'political spending', which must be disclosed, is problematic. There is always a blurred line between spending that is inherently political, and spending that is not designed to be political but may impact an election anyway.

As this submission only argues for disclosure requirements on third parties, the regulation requirements are not particularly restrictive or costly. As such, a broader definition of 'political spending' would be appropriate.

## 2.4 Affiliated Groups

So far, this section has discussed 'third parties' in politics including businesses, unions and not-for-profit organisations that are separate from the political parties. Affiliate groups are fundamentally

different from other third parties due to being controlled by or acting specifically to promote the interests of a particular party, rather than being an independent organisation. Third parties such as businesses and unions have their own goals and sources of income which they may choose to spend in the political sphere, while the *raison d'être* of affiliated organisations is to benefit a political party. As such, affiliated organisations are usually required to submit to the same disclosure regime as political parties, rather than the slightly less stringent third party regulations. Enforcement problems arise in trying to determine what is an 'affiliate group' and what is simply a 'third party'.

In cases where doubt occurs, the TEC should be granted the appropriate investigatory powers to make an accurate determination as to whether a group is a third party or affiliate organisation.

## 2.5 Third Parties in Legislative Council Elections

Third parties are highly regulated in Legislative Council elections (1.5 above); they are prohibited from incurring expenses campaigning for a candidate or on behalf of a candidate. Regulations also prohibit political parties from spending on Legislative Council elections.

- Such restrictions are strongly supported by members of the Legislative Council to protect its status as a relatively independent, party-free house of review.
- While third parties and political parties can still influence Legislative Council elections via several means (including through 'volunteers' for the parties discussing Council matters, or providing cost price services), the regulations do prevent campaigning by non-candidates to a significant extent.

Due to the strong history of independence in the Legislative Council and the lack of public campaigning for the electoral system to be opened up in such elections, the existing system of regulation of political and third parties in Legislative Council elections should remain in place.

## 2.6 Recommendations for the regulation of Third Parties in Tasmania

The review should consider the following reforms concerning Third Party regulation:

- 9) *Third parties should be required to disclose all political spending over \$2000 at least fortnightly in the 12 months prior to an election. Disclosure should include monetary, non-monetary and atypical donations.*
- 10) *All third parties should be equally obliged to submit disclosure statements.*
- 11) *Affiliate groups should be required to submit the same statements as political parties and candidates (both income and expenditure).*
  - a) *In cases where doubt as to whether a group is an affiliate group or a third party, the regulator should be empowered to investigate and make an accurate determination.*

## 3. Media Laws

### Summary

Laws regulating media activity immediately before elections are designed to prevent last minute political advertising and coverage to which a candidate or party has no effective right of reply.

### 3.1 Media Laws in Tasmania

Tasmania has comparatively strict laws around pre-election media activities. There are however elements of the existing act which should be reviewed and amended.



### 3.2 Blackout laws

Section 198 (1) (b) of the Electoral Act prohibits the publication in a newspaper of advertising, content, or comment related to a candidate or party on the day of an election. The original intent of this total ban was to prevent a story from being published without a party or candidate having an ample opportunity to respond.

This is in addition to the blackout on election advertising via television and radio in the *Commonwealth Broadcasting Services Act 1992*, which extends for a short period prior to election day. Like Section 198 (1) (b), the intent of this provision is to provide voters with a brief reprieve from political advertising prior to casting their ballot.

We argue the Tasmanian laws are no longer fit for purpose and are problematic in the social media era. As seen at the 2018 Tasmanian Election, voters were subject to saturation advertising and commentary on several online platforms on election day, while the state's main newspapers were unable to publish campaign coverage.

The rise of new media and social media both undermines the current legislation and the necessity for it.

Given these developments we argue that:

- Only banning newspapers from publishing editorial content related to the election on polling day is anachronistic as it disadvantages one media platform while digital and social media platforms can publish contrary to the intent of the original Act.
- The ban prevents the publication of important news stories on election day.
- The *Commonwealth Broadcasting Services Act 1992* could serve as a model for more effectively limiting political material in the lead-up to an election, and could be expanded to limit advertising in newspapers and online without preventing news content.

### 3.3 Regulation of Internet Publication

So called "authorisation laws" in Section 191 (1) (b) of the Electoral Act prohibit any person from publishing (or authorising another to publish) any electoral matter on the internet without the name and address of the responsible person appearing at the end of the matter. The rise of social media has undermined both the purpose and enforceability of the law.

- Authorisation laws must be retained to ensure that anonymous advertising (and the ensuing risk of misinformation, defamation, and slander) is kept to a minimum. However, in the age of social media, blanket authorisation requirements are no longer feasible.
  - This section of the Act should be reviewed to focus on prohibiting unauthorised coordinated campaigns, with allowance made for general political discussion among members of the ordinary voting public.

### 3.4 Recommendations concerning the media in Tasmanian election campaigns

The review should consider the following reforms concerning the regulation of the media in relation to Tasmanian election campaigns:

- 12) *Section 191 (1) (b) should be amended to take into account the role of social media in contemporary society.*
- 13) *Section 198 (1) (b) (i) should be amended to target advertising on all platforms in a manner similar to the Commonwealth Broadcasting Services Act 1992.*



*14) Section 198 (1) (b) (ii) should be repealed to allow newspapers to provide editorial comment and coverage of election campaigns.*

#### 4. Resourcing electoral reforms

Implementing and administering an effective disclosure regime will require an investment of public resources. Based on evidence from other jurisdictions, such costs would be modest and the systems outlined would be an essential investment in protecting and promoting democracy in Tasmania.

- Both Victoria and Queensland are implementing real-time disclosure regimes and are constructing the necessary systems to do so.
  - It may be possible to ‘piggyback’ off the systems of one of these states, as the volume of Tasmanian reporting will likely be much lower than local levels and should be unlikely to overload the systems.

## Part 2: Issues for consideration beyond the Terms of Reference

In addition to the issues specifically identified in the Terms of Reference a range of additional measures are used in other Australian jurisdictions to regulate the conduct of elections. In the interest of providing a more comprehensive assessment of contemporary trends in electoral governance and their possible relevance to Tasmania we have provided a brief overview of these issues.

### Spending Caps

Placing spending caps on political parties and third parties is a common measure used to curb political spending, and ensure that parties and candidates with access to significant financial resources and backing cannot dominate election advertising and political debate.

A brief comparison of per capita expenditure disclosed in the AEC database demonstrates that Tasmania’s spending, while high compared to the national average, is not outside the norm for smaller states.<sup>vii</sup> Reflecting trends in other Australian jurisdictions we believe that the focus of reform should be on the disclosure of donations and spending rather than on imposing spending caps on political parties and candidates contesting Legislative Assembly elections.

### Spending Caps in Legislative Council Elections

There is currently a stringent spending cap in Legislative Council elections, which was set at \$15,000 in 2015 and is indexed annually. As noted above, we do not believe that the reforms resulting from this review of the Electoral Act should compromise the character and independence of the Legislative Council. We would note that current cap on campaign spending for Legislative Council elections is inconsistent with the approach taken in the Legislative Assembly and most likely benefits sitting members who have a community profile at the expense of challengers.

- We recommend increasing the spending cap for candidates contesting Legislative Council elections to provide an even playing field for incumbents and challengers.

### Donation Caps

Donation caps are designed to limit the influence an individual or entity can have over political parties and policies, and encourage parties to pursue broad community support rather than the favour of big donors.

- Some jurisdictions also use caps or bans on certain types of donors (see 2.2 above).

As with spending caps, without better data on political spending in Tasmania it is hard to justify placing a cap on donations. However, considering the role of several major groups (both business and union) in recent elections such a measure might be reasonably applied to Tasmania.

### Public Funding

Public funding occurs in all jurisdictions around Australia bar Tasmania and the Northern Territory. The broad arguments for such funding are based on claims that such funding promotes fairness and equality between political competitors. However, critics note that such schemes typically favour the dominant parties while noting there is little evidence that access to public funding reduces demand for private donations and associated influence <sup>viii</sup>.

Given the expense associated with public funding combined with limited evidence that public funding limits the influence of private donors we do not believe that providing public funding for election campaigns is a priority in Tasmania. If it were to be introduced in the future it must be paired with more stringent regulation of campaign activity including spending caps and donation caps.

### Other Sources of Electoral Funding

#### *Incumbency*

The benefits of incumbency – including public profile, printing allowances, electoral staff and access to government resources (amongst others) – confer significant electoral advantages on members of parliament and members of the governing party in particular. The benefits to Cabinet ministers are even greater.

The most significant issue here concerns the growing partisanship in government advertising and information campaigns since the 1990s. While all government advertising is supposed to be apolitical and purely informative, there has been an increasing trend of incumbent parties using government advertising for partisan purposes (albeit in a less direct manner than regular party-funded election advertising).

Tasmania has no legislation or framework to review government funded advertising and information campaigns. Reflecting practices in other Australian jurisdictions guidelines should be developed in relation to the scope and timing of publically funded advertising campaigns and independent processes established for assessing whether government advertising complies with these guidelines.

#### *Foreign Donations*

Foreign donations are not inherently undemocratic, but raise similar issues to third party donations in politics. They are both harder to trace and may promote policies that are not in the interest of the Australian public. NSW and Queensland (and the proposed Victorian legislation) have strict controls/bans on foreign donations. We believe that the Australian government is best placed to assess whether the involvement of foreign interests in election campaigns is contrary to the national interest and that the Commonwealth is best placed to regulate (in cooperation with the states) such activity.

## Part 3: Legal Considerations

In addition to the principles of electoral reform which should be considered in the current review of the Electoral Act, it is necessary to consider a number of legal considerations concerning the

constitutionality and enforcement of any reforms arising from the review. These legal considerations are reviewed below.

### *Regulatory History*

Up until 1980 Australia had federally legislated spending limits, which applied to individual candidates, and other measures designed to ensure that political spending remained manageable.

- Despite their existence in law, these regulations were largely ignored and political parties/candidates acted as they liked.
- Commonwealth and Tasmanian House of Assembly spending limits were abolished in 1980, after a successful Supreme Court Challenge to the 1979 election result in the electorate of Denison because a candidate exceeded the spending limits.
- There have been efforts in several jurisdictions around the country to restructure electoral spending through regulation, including most recently in Victoria, NSW and Queensland.
- Several senior Federal politicians have made comments about election finance regulation, including senior Liberal figures such as Prime Minister Malcolm Turnbull and Minister for Defence Industry Christopher Pyne. The Select Committee into the Political Influence of Donations tabled its report to the Senate on 6 June 2018.

### *Recent Controversies and Challenges*

In designing a framework for electoral reform it is useful to consider how past and present reforms have been treated by the courts. Challenges to regulations that are particularly noteworthy include the High Court Cases of:

- *Australian Capital Television Pty Ltd v Commonwealth* [1992] HCA 45
- *David Lange v Australian Broadcasting Corporation* [1997] HCA 25
- *Unions New South Wales v New South Wales* [2013] HCA 58
- *McCloy v New South Wales* [2015] HCA 34.

A common legal argument against electoral finance regulation in such cases is the constitutionally implied freedom of speech in Australia, with political donations argued to be an act of speech. The judgement in the defamation case of *David Lange v Australian Broadcasting Corporation* sets out a two-part test for determining the validity of laws argued to burden the implied freedom of political communication as follows (in paraphrased form):

- 1) Does the law burden the freedom of political communication?
- 2) If the law does burden that freedom, does it:
  - a) Serve a legitimate end?
  - b) Is it reasonably and appropriately adapted to that end?
  - c) Is the manner the law serves constitutionally aligned?

The ruling in *McCloy v NSW*, which arose from the ICAC investigations into party funding in NSW, introduced what is known as ‘proportionality testing’ to determine the validity of laws, similar to that applied in Germany, Canada and the UK. While most regulatory measures have been upheld in Australia, successful challenges are more common in jurisdictions such as the US.

### *Political Institutions and Legal Accountability*

It is historically difficult to prosecute or penalise Australian political parties for breaches of legislation due to their status as unincorporated (essentially voluntary) organisations.

- Senior officeholders are not subject to the statutory duties of company or not-for-profit directors.
- Political parties and candidates regularly shift responsibility for meeting legal obligations to 'agents' engaged to control political spending and ensure electoral regulations are being met, although in reality the parties and candidates retain significant control.
- Regulators need to be given sufficient power to investigate potential breaches, and a reasonable mix of criminal and civil sanctions must be used for maximum effectiveness.
- The regulator should be required to provide adequate education to political candidates and actors to ensure that such responsibilities are understood, with corresponding requirements for those candidates to undertake the requisite education.
  - Compulsory education would help protect against a 'lack of knowledge' defence, which was used several times during the ICAC investigations in NSW.

## Recommendations

We recommend the current review should consider the following reforms concerning enforcement of election finance regulation:

- 15) Steps should be taken to ensure political parties have the legal status so that regulators to impose sanctions following systemic illegal behaviour.*
- 16) Party figures should have responsibility for obeying the regulations and liability if they do not.*
- 17) The regulator should be tasked with an educative role to ensure all candidates and parties have access to the requisite regulatory information in an understandable, accessible form.*

## Summary of Recommendations

### Recommendations for improving campaign disclosure in Tasmania

- 1) *State-based disclosure laws for political donations and expenditure should be introduced.*
- 2) *Disclosure should be timely and occur at least fortnightly in the 12 months preceding an election ('real time').*
- 3) *Parties and their candidates should have to submit separate disclosure statements.*
  - a) *Disclosure statements should be presented through a publically accessible portal in plain, understandable language to maximise scrutiny.*
- 4) *Disclosure of donations should include:*
  - a) *\$1000 threshold for individual donation disclosure aggregated over the financial year.*
  - b) *Loans and non-monetary/atypical donation types.*
  - c) *A separate disclosure statement filed by the donor to ensure consistency.*
    - i) *Donor disclosure should declare any previous donations within the past 12 months.*
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- 6) *An independent regulator should be granted powers to ensure all requirements are met.*
  - a) *The TEC should be empowered as regulator, as is common in most other Australian jurisdictions.*
- 7) *Anonymous donations should be limited to a threshold of no more than \$200.*
- 8) *Legislative Council candidates should abide by the above rules apart from where legislation already exists; in such cases, existing laws should prevail.*

### Recommendations for the regulation of Third Parties in Tasmanian election campaigns

- 9) *Third parties should be required to disclose all political spending over \$2000 at least fortnightly in the 12 months prior to an election. Disclosure should include monetary, non-monetary and atypical donations.*
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### Recommendations concerning the role of the media in Tasmanian election campaigns

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- 14) *Section 198 (1) (b) (ii) should be repealed to allow newspapers to provide editorial comment and coverage of election campaigns.*

### Other Recommendations for consideration

- 15) *Steps should be taken to ensure political parties have the legal status so that regulators can impose sanctions following systemic illegal behaviour.*
- 16) *Party figures should have responsibility for obeying the regulations and liability if they do not.*
- 17) *The regulator should be tasked with an educative role to ensure all candidates and parties have access to the requisite regulatory information in an understandable, accessible form.*

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<sup>i</sup> New York State Board of Elections (2017). Campaign Finance Handbook. New York: New York State Board of Elections.

<sup>ii</sup> Election Finances Act R.S.O 1990, available at <https://www.ontario.ca/laws/statute/90e07>

<sup>iii</sup> Australian Parliament House Parliamentary Library (2017). Election funding and disclosure in Australian states and territories: a quick guide. Australian Parliamentary Library, accessed at [https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp1718/Quick\\_Guides/ElectionFundingStates](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1718/Quick_Guides/ElectionFundingStates)

<sup>iv</sup> Australian Parliament House Parliamentary Library (2017). Election funding and disclosure in Australian states and territories: a quick guide. Australian Parliamentary Library, accessed at [https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp1718/Quick\\_Guides/ElectionFundingStates](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1718/Quick_Guides/ElectionFundingStates)

<sup>v</sup> An expenditure disclosure of \$2000 has been proposed in draft Victorian Legislation. Given the small scale of Tasmanian politics and the lower costs of advertising a \$1500 threshold would be appropriate.

<sup>vi</sup> Schott, K., Tink, A. and Watkins, J. (2014). Political Donations Final Report - Volume 1. [online] Sydney: NSW Department of Premier and Cabinet. Available at: <https://www.dpc.nsw.gov.au/updates/2014/05/27/panel-of-experts-political-donations/> [Accessed 1 Jul. 2018].

<sup>vii</sup> Based on available data from the most recent election period in each jurisdiction per capita spending in Tasmania was \$12.47 per capita. The comparable spend in other jurisdictions was: NT \$13.763; ACT ~\$11.28; South Australia and Western Australia \$8.3; Queensland \$7; Victoria a little \$6.7 and NSW \$5.1.

<sup>viii</sup> See, for example, concerns raised in :Joint Standing Committee on Electoral Matters (2011) *Report on the Funding of Political Parties and Election Campaigns*. Commonwealth of Australia, accessed at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Completed\\_Inquiries/em/political\\_funding/Report/index](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Completed_Inquiries/em/political_funding/Report/index), and