

7 July 2023

Chair
Expert Review Panel
By email

Dear Ms Williams,

Review of aspects of the *Electoral Act 2002 (Vic)*

The Centre for Public Integrity welcomes the opportunity to make a submission to the Panel's review of the 2018 reforms introduced to the *Electoral Act 2002 (Vic)* (***Electoral Act***).

The Centre for Public Integrity is a non-partisan think tank led by integrity experts from academia, public policy, and the judiciary. Since our establishment in 2019, one of our primary research focuses has been money in politics. Noting the Panel's key matters for consideration, our submission addresses:

- Elements of Victoria's donations regime, including caps and disclosure requirements
- Expenditure caps
- Electoral funding

While we welcome the improvements made to Victoria's regulation of political donations in 2018, we are concerned that the *detail* and *interaction* of some of the reforms may be having an adverse impact on political equality. In particular, our concerns relate to what is currently excluded from the definition of 'gift' under the Electoral Act, as well as the absence of electoral expenditure caps and the current structure of the public funding scheme.

We consider that the exclusion from the donations disclosure and cap regime of affiliation fees, subscription fees, fundraising attendance fees and payments from a nominated entity to its party operate to substantially benefit the major parties. This is inequitable and should be remedied.

We are also concerned that the absence of electoral expenditure caps in a jurisdiction where donations caps are in place, as in Victoria, risks entrenching incumbency. Moreover, we believe that electoral expenditure caps are the only way to:

- halt the established electoral expenditure 'arms race';
- prevent money distorting election outcomes;
- promote political equality; and
- encourage elected members to represent their constituencies' interests (and, where applicable, exercise their ministerial responsibilities) rather than focus on raising campaign funds.

We acknowledge and support the recommendations made by the Independent Broad-based Anti-corruption Commission in its 2022 special report on corruption risks associated with political donations and lobbying. We also acknowledge and support the recent recommendations of the Commonwealth Joint Standing Committee on Electoral Matters (**JSCEM**) in its interim report following its inquiry into the 2022 federal election.

A significant portion of this submission is drawn from our recent submission to the inquiry by the Commonwealth JSCEM into the 2022 election, though we have adapted it to Victoria.

We would be pleased to be of any further assistance to the Panel in its important work.

Sincerely,

Catherine Williams
Dr Catherine Williams
Research Director

Victorian donations disclosure and cap regime

What do the data tell us?

In preparing this submission, we found it instructive to consider the composition of the income of Victoria's major parties. Our analysis of the annual returns of the Labor Party and Coalition over the past three years has found that on a yearly basis, an average of 65 per cent of the income of the state's two major political parties is of unidentified provenance (given that the disclosure regime commenced in FY 2018-19, we have only considered the previous three years of data). On average, 48 per cent of Labor's income, 71 per cent of the Liberal Party's income and 76 per cent of the National Party's income is unexplained: see Figures 1 – 4.

There are at least three possible explanations for this, none of which is nefarious. The first is that this income includes some portion of administrative expenditure funding, which the VEC is yet to report. The second is that it includes donations made for federal purposes which are not disclosed as donations in Victoria. The third is that it is comprised at least to some extent of payments which do not fall within the Victorian definition of donation and which are therefore not disclosed as such: that is, fundraising event attendance fees, affiliation fees, subscription fees and payments from parties' nominated entities. While we do not suggest that any of this income is of questionable provenance, a scenario in which an average of 65 per cent of the income of the state's major political forces is unidentified is hardly tenable. The opacity of income sources should be remedied.¹ Recommendations 1(a)-(d), set out below and centred around the definition of 'gift', are designed to achieve this objective.

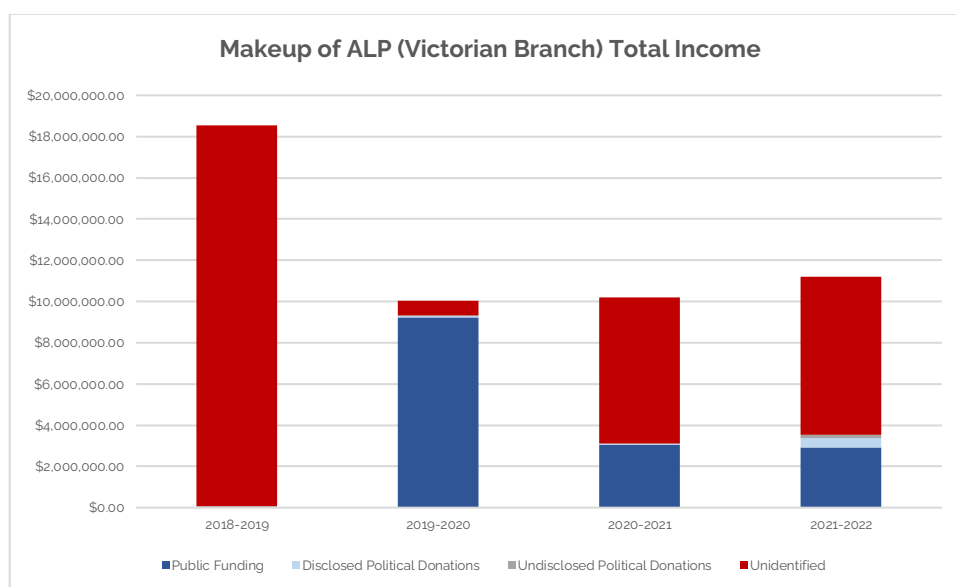


Figure 1: Total ALP (Victorian branch) income as disclosed to VEC

¹ When the VEC releases its administrative expenditure funding data, this percentage will presumably be reduced.

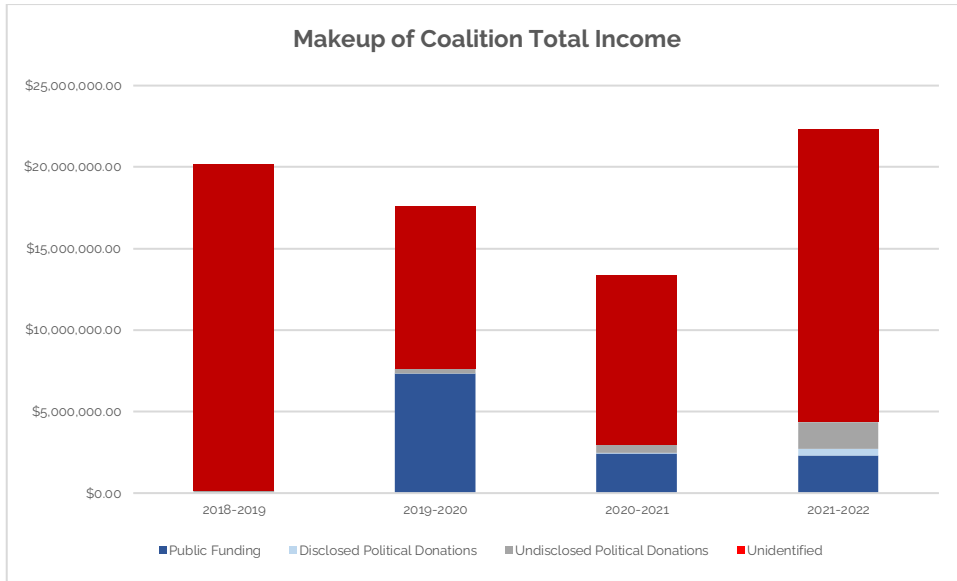


Figure 2: Total Victorian Coalition income as disclosed to VEC

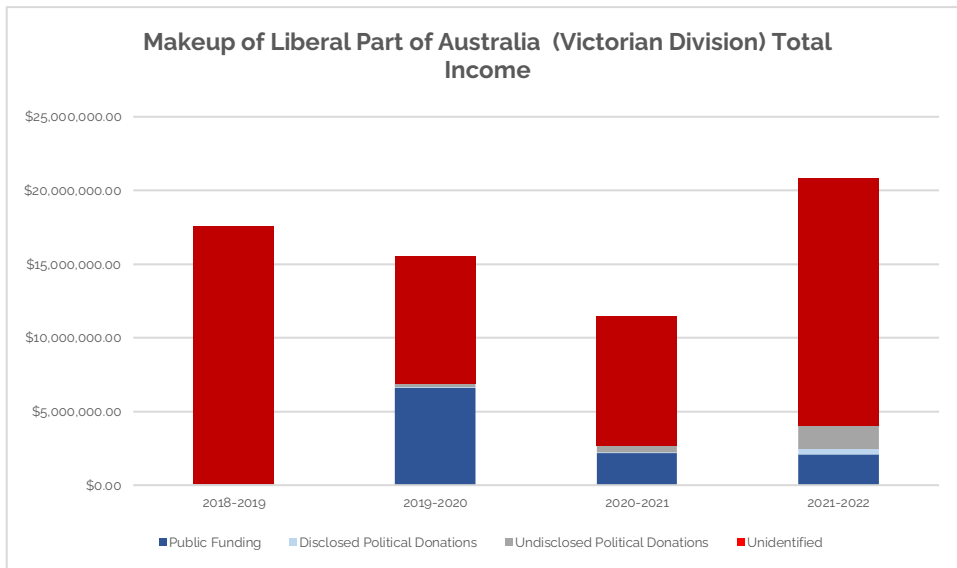


Figure 3: Total Liberal Party of Australia (Victorian branch) income as disclosed to VEC

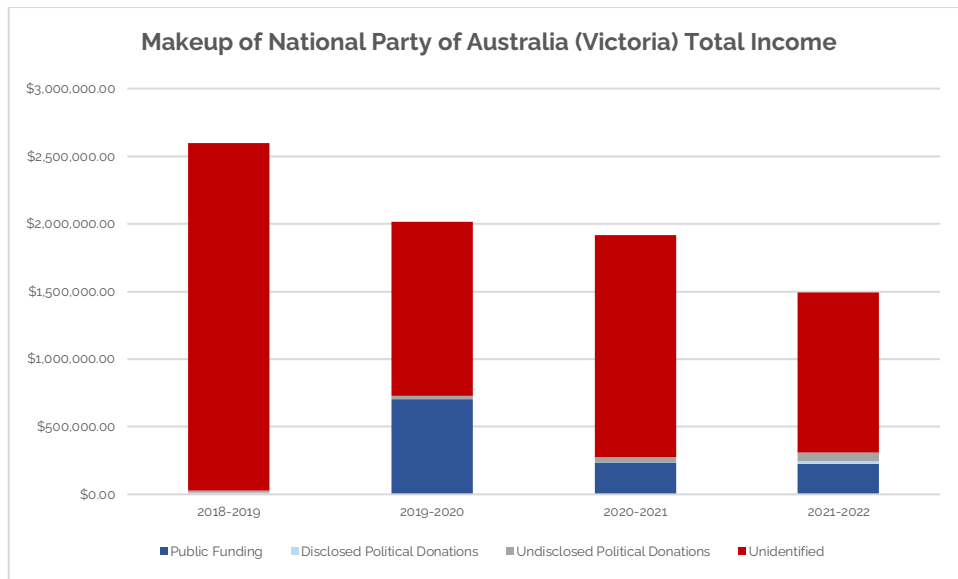


Figure 4: Total National Party of Australia (Victorian branch) income as disclosed to VEC

1. Broadening the definition of 'gift'

Currently, the Electoral Act in Victoria excludes fundraising events, affiliation fees, subscription fees and payments between a nominated entity and its party from the definition of 'gift'. We note that the Commonwealth JSCEM in its recent interim report recommended that *'the Australian Government gives consideration to amending the definition of 'gift' in the Electoral Act to ensure it meets community expectations of transparency in political donations'*.²

a. Fundraising events

Pursuant to s 206 of the *Electoral Act 2002* (Vic), a 'political donation' is a gift made to any of the following: a political party, a candidate, a group, an elected member and (in some circumstances) an associated entity or third-party campaigner. The same section defines a 'gift' as *'any disposition of property otherwise than by will made by a person to another person **without consideration in money or money's worth or with inadequate consideration** [emphasis added]'*.

The effect of this wording is that payments such as attendance fees for events are not necessarily captured by the definition of 'political donation', because payment is made in exchange for access which may be claimed to constitute adequate consideration (while s 206 is expressed to include 'the making of a payment or contribution *at* a fundraising event [emphasis added]', this clearly does not apply to fees paid *ahead of* such an event). This unfortunate exclusion could be easily remedied by the inclusion of a clarifying paragraph at s 206, similar to that found at s 5(2) of the *Election Funding Act 2018* (NSW):

An amount paid by a person as a contribution, entry fee or other payment to entitle that or any other person to participate in or otherwise obtain any benefit from a fundraising venture or function (being an amount that forms part of the gross

² Joint Standing Committee on Electoral Matters, Parliament of Australia, *Conduct of the 2022 federal election and other matters: interim report* (2023), recommendation 3.

proceeds of the venture or function) is taken to be a gift for the purposes of this section.

b. Affiliation fees

Paragraph (h) of the s 206 definition of 'gift' specifically excludes '*an annual affiliation fee paid to a registered political party by an associated entity*'. While the nature of affiliation fees means that they should be treated differently from other kinds of payments, there is no justification for excluding them entirely. Insofar as this exclusion operates to the benefit of the Labor Party, it is inequitable. The Electoral Act should be amended in line with the *Election Funding Act 2018* (NSW), which specifically captures affiliation fees. These are then exempted from donations caps up to a threshold of \$2,000 per member of the affiliated organisation: ss 5(3), 26(1) and (8)).

c. Subscription fees

Paragraph (g) of the s 206 definition of 'gift' specifically excludes '*an annual subscription paid to a registered political party by a person in respect of the person's membership of the registered political party*'. The exclusion of subscription fees from the definition of 'gift' allows unscrupulous players to funnel unlimited funds to their party of choice, in flagrant breach of the spirit – if not letter – of Victoria's donations caps. The Centre for Public Integrity considers that the Electoral Act should be amended to capture all subscription fees within the definition of 'gift'. In respect of the inclusion of subscription fees above certain thresholds within the donations cap regime, we note that fees over \$250 are captured in the Australian Capital Territory, whereas fees above \$2,000 are captured in New South Wales (s 198AA of the *Electoral Act 1992* (ACT); ss 26(1) and (8) of the *Election Funding Act 2018* (NSW)).

d. The 'nominated entity' exemption

Under ss 222F and 206(j) of the *Electoral Act 2002* (Vic), a registered party is able to nominate one entity from whom payments do not count as political donations. This option is not available to independent candidates, and the fact that only the major parties have registered nominated entities suggests that minor parties do not see it as of benefit to them to justify registration of such an entity.

The operation of the nominated entity exemption means that currently, the Labor Party, the Liberal Party and the National Party are receiving payments that are not subject to the donations caps and disclosure requirements to which other payments are subject. Insofar as the 'nominated entity' exemption, unique amongst Australian jurisdictions, operates to the exclusive benefit of Victoria's 'legacy parties' and is therefore inequitable, it should be abolished.

e. Gifts to associated entities and third party campaigners

We also have reservations about the s 206 definition of "political expenditure", insofar as it is used to determine when a payment to an associated entity or third party campaigner is a "gift" (paragraphs (e) and (f) of the s 206 definition of "political donation"). The narrow definition of "political expenditure" excludes issues-based campaigning: it should be broadened to capture the kinds of expenditure we describe below in recommendation 8 in respect of electoral expenditure caps.

2. Real-time disclosure of donations

Best practice donations disclosure regimes provide for 'real time' disclosure, with 'real time' functioning as shorthand for disclosure that is relatively immediate after the making of a donation.³ As Figure 5 shows, there is no agreed definition in respect of precisely what constitutes 'real time': while a 7-day requirement constitutes 'real time' in Queensland, a disclosure period three times that is described as 'real-time' in Victoria.⁴

Requiring the disclosure of donations to be as proximate as possible to their making is an important scrutiny measure: it enables interested parties to examine whether there may be, for example, a correlation between the making of a donation by a donor, and the making of a controversial regulatory decision in that donor's favour by the donee.

The importance of timely disclosure is heightened in elections, when voters have a legitimate interest in knowing how much has been donated to candidates, and by whom. The special importance that disclosure assumes during elections is recognised by the approach taken in New South Wales, Queensland, South Australia and the ACT, where the disclosure period during elections is shorter than the otherwise applicable disclosure period (in Queensland, the 7-day disclosure period reduces to 24 hours during elections).

In New South Wales and South Australia, the general half-yearly disclosure requirement reduces to 21 days and 7 days respectively, and the ACT's general disclosure requirement also reduces to 7 days.

Out of all Australian jurisdictions, Queensland is the exemplar in respect of disclosure immediacy: donations received must be disclosed by candidates, parties and associated entities within 7 days, except for in the week prior to election day, when disclosures must be lodged in the state's Electronic Disclosure System within 24 hours (ss 8A, 10 and 10A *Electoral Regulations 2013* (Qld)).

Victoria's 21-day disclosure requirement is the next best general (non-election) disclosure requirement amongst Australian jurisdictions. Under s 216 of the *Electoral Act 2002* (Vic), donors, candidates, parties, groups, nominated entities, associated entities and third-party campaigners must all make disclosure returns within 21 days of an over-threshold donation. In our view, however, 21 days is substantially longer than is ideally required to promote transparency and accountability, and it would be preferable to adopt the standard set by Queensland.

	QLD	VIC	ACT	NSW	NT	WA	SA	TAS
Disclosure time* (for non-donors)	7 days (24 hours during election) ⁵	21 days ⁶	7 days during election ⁷	Half-yearly (21 days)	Various timeframes established under the	Up to 17 months (for parties and	Half-yearly (7 days during	NA* (*reform Bill currently before the Parliament) ¹²

³ Insofar as the focus of this term of reference is on 'real time' disclosure, we have not dealt at with annual return disclosure requirements. For example, in addition to its disclosure returns Victoria requires annual returns to be made under Division 3C of the *Electoral Act 2002* (Vic). Queensland also requires candidates to disclose donations within 15 weeks after an election, as well as in election summary returns (ss 261(3) and 262(3) of the *Electoral Act 1992* (Qld). Parties and associated entities are required under ss 290(4) and 294(4) to make periodic returns.

⁴ 'Victoria To Have Nation's Strictest Donation Laws', *Premier of Victoria* (Web Page) <<https://www.premier.vic.gov.au/victoria-have-nations-strictest-donation-laws>>.

⁵ *Electoral Act 1992* (Qld) div 7.

⁶ *Electoral Act 2002* (Vic) s 216.

⁷ *Electoral Act 1992* (ACT) div 14.4. Note that in an election year, donations that reach the threshold between 30 April-1 July are to be disclosed by 7 July; donations that reach the threshold after 1 July are to be declared within 7 days.

¹² See *Electoral Disclosure and Funding Bill 2022*.

				during election) ⁸	relevant Act ⁹	associated entities) ¹⁰	election. Gifts over \$2,500 within 5 days of receipt) ¹¹	
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Figure 5: Time to disclosure in Australian States and Territories

Electoral expenditure caps

We note that the Commonwealth JSCEM in its recent interim report recommended that 'the Australian Government introduce expenditure (also known as spending) caps for federal elections'.¹³ If the Federal Government adopts this recommendation, and electoral expenditure caps are legislated, Victoria will have the ignominious status of being one of only two jurisdictions in the country without expenditure caps of some kind (the other is Western Australia).

It is impossible to estimate electoral expenditure in Victoria for political parties and their endorsed candidates, because no useful data are publicly available. While *total* expenditure is disclosed by parties and candidates in their annual returns, no distinction is made between electoral expenditure and other kinds of expenditure; in addition, data relating to the 2022 election does not need to be disclosed until 20 October 2023.

Nonetheless, to the extent it allows tracking of *at least* electoral expenditure up until 30 June 2022, we have included at Figure 6 inflation-adjusted reported expenditure by Victoria's major parties since 2018-19.

⁸ *Electoral Funding Act 2018* (NSW) s 13

⁹ *Electoral Act 2004* (NT) ss 191-192.

¹⁰ *Electoral Act 1907* (WA) pt VI div 3.

¹¹ *Electoral Act 1985* pt 13A div 7.

¹³ Above n 2, recommendation 5.

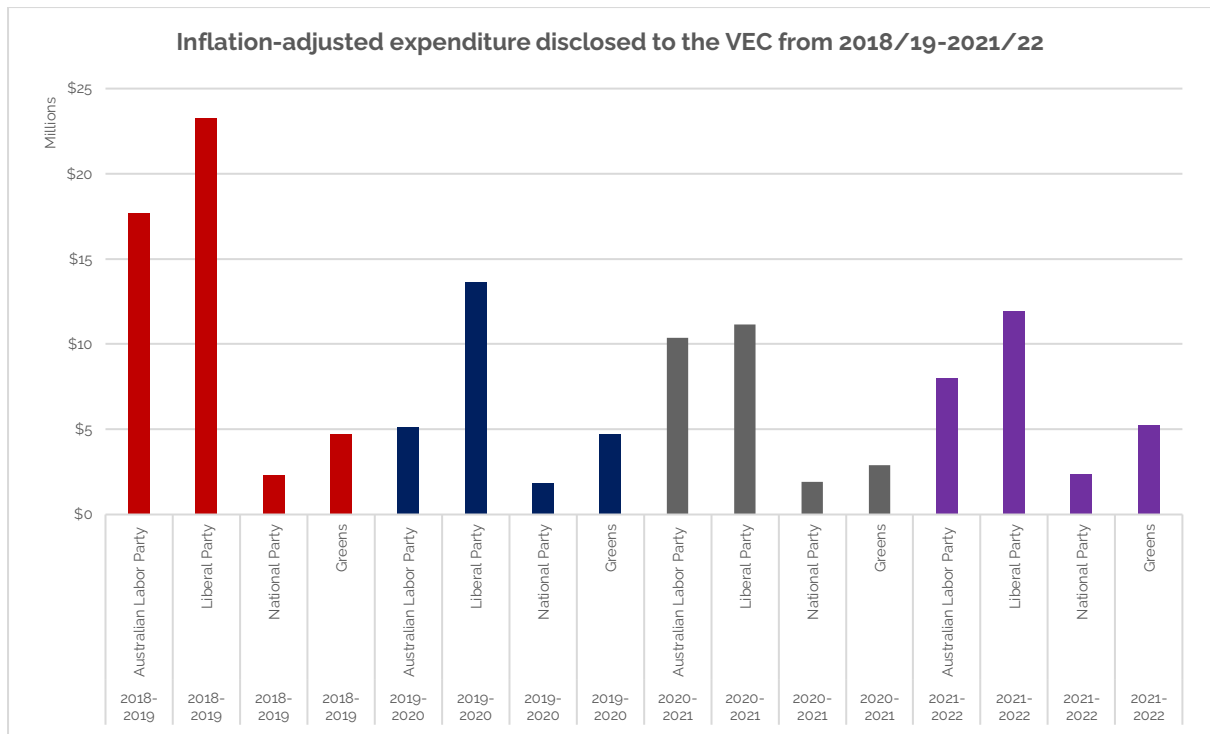


Figure 6: Expenditure as disclosed to VEC by the Labor party, Liberal party, National party and Greens over the period 2018/19-2021/22 – Inflation adjusted 2023 dollars

These figures reveal that in financial year 2018-19 (when the 2018 election was held), expenditure by the Liberal Party far surpassed that of Labor. Over the following three years the Liberal Party continued to outspend Labor, with the gap between the two at its narrowest in 2020-21. Both major parties spent have consistently spent substantially more than the Greens (in 2018-19, Labor outspent them by 276.5 per cent and the Liberal Party outspent them by 395.1 per cent).

The problem with uncapped electoral expenditure

Uncapped, unequal and excessive electoral expenditure has implications for **political equality**. Large amounts of spending by established payers may dissuade potential candidates from entering the race and serve to entrench incumbents with more established fundraising networks. An election must be, to the greatest practical extent, a competition of ideas rather than of dollars. A plurality of competitive candidates should and would be promoted by capping expenditure. This is well recognised as a constitutional prerogative by the High Court. In *McCloy*, French CJ, Kiefel, Bell and Keane JJ held that '*the equality of opportunity to participate in the exercise of political sovereignty is ... guaranteed by our Constitution*'.¹⁴

Excessive electoral expenditure also has implications for **fundraising, decision-making and resourcing**. We expect our elected members to represent their constituencies' interests and, where applicable, exercise their ministerial responsibilities. If they are focussed on raising funds for the next campaign on the 'permanent campaign' – then they are distracted from their core responsibility as representatives. Moreover, as campaign costs increase and the 'low hanging fruit' of campaign funds dries up, the search for more campaign funds may leave candidates and incumbents facing re-election vulnerable to quid pro quo corruption from large donors with ulterior motives.

¹⁴ *McCloy* (n 23) 207 [45] (French CJ, Kiefel, Bell and Keane JJ).

Finally, excessive third-party expenditure allows interested third parties to exercise a disproportionate and **undue influence** on the preferences of electors. While third party participation should be largely welcomed – specifically from civil society – unions and large corporations protecting their pecuniary interests should not be able to shout down potentially good public policy to protect their bottom line.

Expenditure caps as a potential solution

In 2010, 2011 and 2012 respectively, New South Wales, Queensland and the Australian Capital Territory each introduced electoral expenditure caps. A simple analysis of electoral expenditure data from each, shown at Figures 7-10, demonstrates the potential for expenditure caps to decrease demand for funds, to arrest the arms race and to broadly equalise spending between the major political parties, reasserting the primacy of the *contest of ideas* rather than dollars.

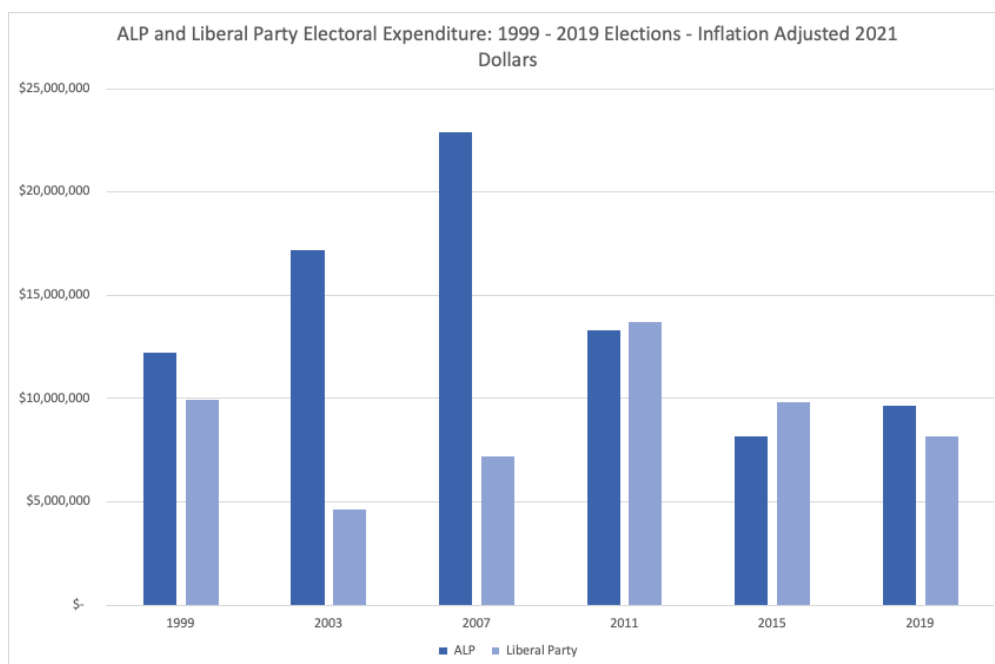


Figure 7: New South Wales: ALP and Liberal Party Total Electoral Expenditure: 1999 – 2019 Elections – Inflation Adjusted 2021 Dollars¹⁵

¹⁵ Data Source: 'View disclosures', *NSW Electoral Commission* (Web Page, 30 August 2021) <<https://www.elections.nsw.gov.au/Funding-and-disclosure/Disclosures/View-disclosures>>.

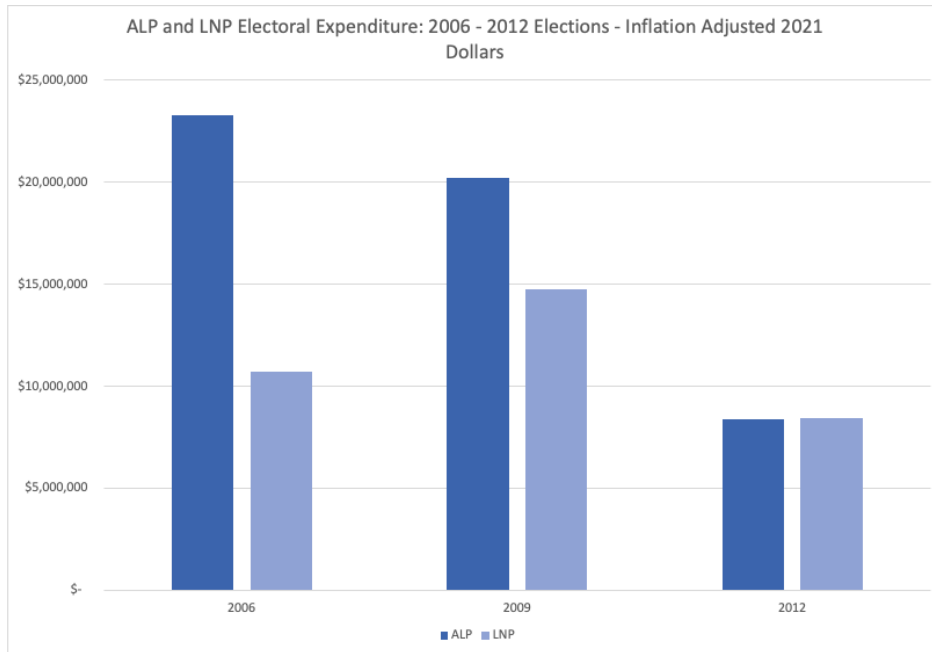


Figure 8: Queensland: ALP and Liberal National Party Total Electoral Expenditure: 2006 – 2012 Elections – Inflation Adjusted 2021 Dollars¹⁶

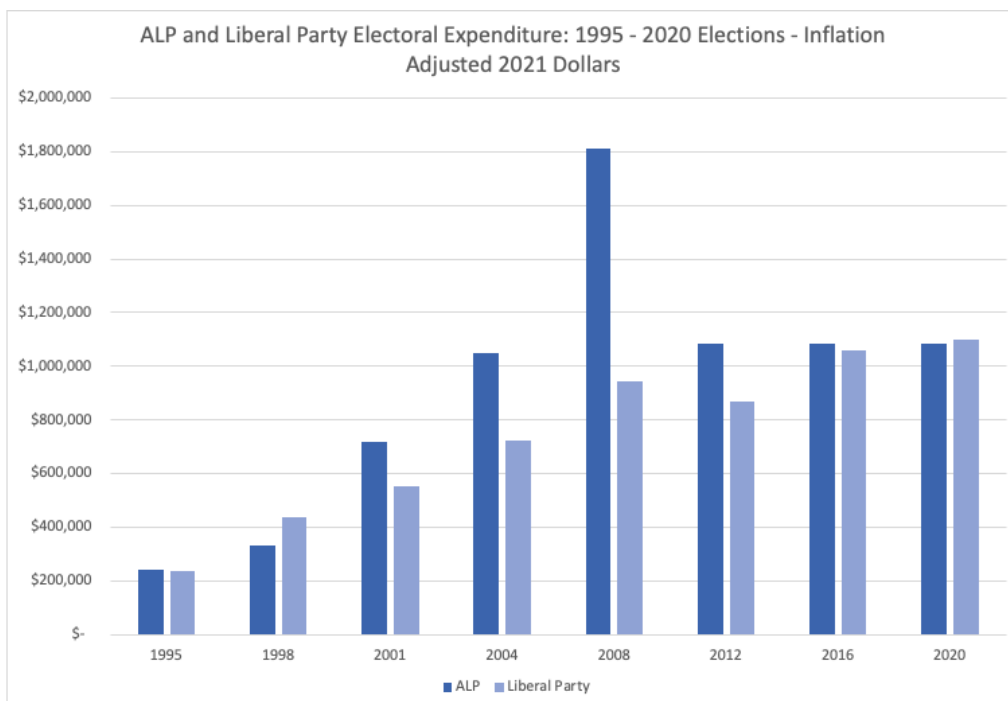


Figure 9: Australian Capital Territory: ALP and Liberal National Party Total Electoral Expenditure: – Inflation Adjusted 2021 Dollars¹⁷

¹⁶ Data Source: Jennifer Rayner, 'More regulated, more level? Assessing the impact of spending and donation caps on Australian State elections' in Anika Gauka and Marian Sawyer (eds), *Dilemmas of political party regulation in Australia* (ANU Press, 2016) 147.

¹⁷ Data Source: 'Financial disclosure returns – election returns', *Elections ACT* (Web Page) <https://www.elections.act.gov.au/funding_and_disclosure/financial_disclosure_returns/financial-disclosure-returns-election-returns>.

Western Australia provides a useful counterfactual for electoral expenditure dynamics without expenditure caps. There is a stark difference between Western Australia and the capped jurisdictions. Electoral expenditure in aggregate continues to largely climb in accordance with the arms race, and the spends between the major parties tend to be vastly different – indicating a level of political inequality at election time.

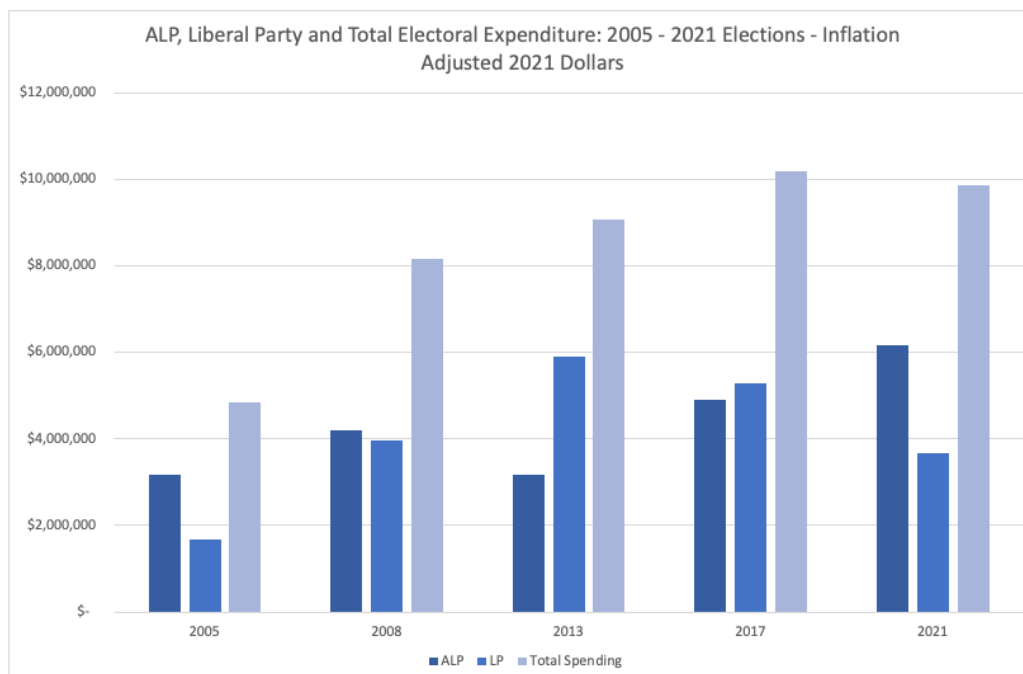


Figure 10: Western Australia: ALP and Liberal Party Total Electoral Expenditure: 2005 – 2021 Elections – Inflation Adjusted 2021 Dollars¹⁸

Research in overseas jurisdictions suggests that caps on electoral expenditure increase the size of the pool of candidates, the diversity of candidates, and competitiveness of elections.¹⁹

The Centre for Public Integrity's recommendations for effective expenditure caps

In designing an appropriate regime for expenditure caps, Victoria has the advantage of being able to select best practice from other domestic and international jurisdictions. The Centre for Public Integrity suggests the following 13 principles for guiding a best-practice expenditure cap regime. These are:

1. A capped expenditure period commencing 12 months prior to election

Pursuant to s 38A of the *Constitution Act 1975* (Vic), Victorian elections are held on the last Saturday of November every four years. Accordingly, electoral expenditure should

¹⁸ Data Source: 'Elections Returns', *Western Australian Electoral Commission* (Web Page) <<https://www.elections.wa.gov.au/candidates-and-parties/funding-and-disclosure/elections-returns>>.

¹⁹ Alexander Fourinaies, 'How Do Campaign Spending Limits Affect Elections? Evidence from the United Kingdom 1885-2019' (2020) 115(2) *American Political Science Review* 395; Eric Avis, Claudio Ferraz, Frederico Finan and Carlos Varjão, 'Money and Politics: The Effects of Campaign Spending Limits on Political Entry and Competition' (2022) *American Economic Journal: Applied Economics* (forthcoming); Nikolaj Broberg, Vincent Pons and Clemence Tricaud, 'The Impact of Campaign Finance Rules on Candidate Selection and Electoral Outcomes: Evidence from France' (NBER Working Paper 29805, February 2022) <<https://www.nber.org/papers/w29805>>.

be capped for the period commencing 12 months prior to that date.

2. Caps on electoral expenditure for political parties proportional to the number of electoral divisions in which they endorse candidates;

There should be caps on electoral expenditure for political parties determined by the number of divisions in which parties run candidates. The Centre for Public Integrity recommends an extrapolation of the New South Wales caps, which would result in an endorsed candidate cap of \$130,758.23, and a proportionally higher independent cap.²⁰

Accordingly, this would impose a cap of \$130,758.23 per seat aggregating to \$12,160,515.65 for a party running in every seat. This figure should be indexed to inflation.

It is unlikely that general caps on electoral expenditure will offend the *Australian Constitution*. They exist in some form in New South Wales, Queensland, South Australia, the ACT, the Northern Territory and Tasmania. Indeed, they have been in place in New South Wales since 2011 and only in the decision of *Unions NSW v New South Wales* ('*Unions (No 2)*') has the High Court found a cap to be an impermissible burden on the implied freedom of political communication.²¹ However, it is critically important to note that in the *Unions (No 2)* case, the High Court was concerned not with the validity of expenditure caps *generally*. Rather, it was specifically concerned with the validity of a New South Wales law which reduced the electoral expenditure cap applicable to third parties by 50 per cent, setting it at half the cap of parties and candidates. In their joint judgment, Kiefel CJ, Bell and Keane JJ noted that the general purpose of expenditure caps had been accepted in *Unions NSW v New South Wales (Unions (No 1))*:²²

The amount of money available for campaign expenditure is linked with what is received by way of political donations. In *Unions NSW (No 1)*, the general purpose of the provisions of the EFED Act which imposed caps on that receipt and expenditure was not in issue. The purpose was to secure the integrity of the legislature and government in New South Wales, which was at risk from corrupt and hidden influences of money.²³

The insurmountable problem in *Unions (No 2)* was that New South Wales was unable to justify why preventing voices other than third parties from being drowned out required the halving of the pre-existing cap on third-party expenditure. In particular, the Court noted that a relevant expert report contained no basis for such a recommendation, and there had been no inquiry made in respect of the level of expenditure that third parties required in order to reasonably communicate their message.

In our view, the approach previously taken by the High Court in dealing with challenges to the efforts of Parliaments to promote a level playing field –in the form of both donation caps and expenditure caps – means that appropriately designed, evidence-based expenditure caps are likely to survive any constitutional challenge on the basis of the implied freedom of political communication.

3. A bargaining system between endorsed candidates and political parties to determine the allocation of their applicable expenditure cap;

²⁰ *Electoral Funding Act 2018* (NSW) s 29.

²¹ (2019) 264 CLR 595.

²² *Unions NSW v New South Wales ('Unions (No 1)')* (2013) 252 CLR 530.

²³ *Unions (No 2)* (n 39) 604 [5] (Kiefel CJ, Bell and Keane JJ).

There should be no separate candidate expenditure cap for endorsed candidates, additional the party cap. Instead, there should be a single 'pot' from which the cap is allocated based on bargaining between the party and the candidate – consistent with the South Australian legislation.²⁴ The maximum allocation per candidate should be \$130,758.23, and the minimum reserve allocation in the event of disagreement \$50,000. It should be noted that the maximum allocation should be below the ideal expenditure cap for an independent candidate (see Recommendation 5).

This distinction would require a differentiation between 'candidate spending' and 'party spending'. Candidate spending should be defined in accordance with the Queensland definition as spending which:

- (a) is communicated to electors in the candidate's electoral division; and
- (b) is not mainly communicated to electors outside the candidate's electoral division.²⁵

For parties with less than 10 endorsed candidates in the Assembly but endorsing a Council group, or only running in the Council, the Centre for Public Integrity recommends a similar extrapolation of the New South Wales caps in the Legislative Council.²⁶

4. Aggregation of associated entity electoral expenditure with party expenditure;

Expenditure by associated entities should be captured for the associated party's expenditure cap.

5. Caps on electoral expenditure for independent candidates which are proportionally higher than those for endorsed candidates and parties to account for the positive externalities of general party advertising;

There are undoubtedly positive externalities to general party advertising. Radio, television and social media advertisements are usually of benefit to all party endorsed candidates. Parties also maintain a distinct organisational and fundraising advantage compared to independent candidates.

To account for this, the independent candidate cap must be proportionally higher than the endorsed candidate cap.

6. Moderate third-party expenditure caps with a requirement to register with the Victorian Electoral Commission (VEC) when intending to, or having reached, a threshold level of electoral expenditure;

There should be a cap on third-party electoral expenditure, and a requirement to register with the Victorian Electoral Commission when a third party intends to exceed, or has already exceeded, such an amount. The registration threshold should be sufficiently

²⁴ *Electoral Act 1985* (SA) div 6.

²⁵ *Electoral Act 1992* (Qld) s 281B.

²⁶ *Electoral Funding Act 2018* (NSW) ss 29(4)-(5), 29(7).

high to encourage participation by smaller organisations and civil society without being an undue administrative burden. It should not deter participation, and the VEC should play a role in providing informal advice to organisations seeking to incur electoral expenditure.

A third-party cap is not as easily determined or extrapolated as a party or candidate cap. In *Unions (No 2)* the High Court held that the effective halving of the New South Wales third-party expenditure cap infringed the implied freedom of political communication. According to the majority, this was because the New South Wales Parliament had failed to justify the burden of halving the cap as necessary to fulfil its intended purpose of levelling the playing field and preventing the drowning out of other voices.²⁷ Gageler J further held that a valid third-party cap should 'at the very least, leave a third-party campaigner with an ability meaningfully to compete on the playing field'.²⁸

Accordingly, any third-party cap and associated registration threshold requirement should be determined by an inquiry by suitably qualified persons appointed by the Parliament to be consistent with the findings in *Unions (No 2)* and therefore the Constitution – and should be periodically reviewed to ensure its ongoing compatibility. Irrespective of the final amount, it should be considerably lower than the cap for a party contesting all electoral divisions – as was the New South Wales cap before it was halved and subsequently voided.²⁹

7. Capped in-electorate spending by third parties;

While capped in-electorate spending by endorsed candidates and their parties is captured by the bargaining process in Recommendation 2, third parties must also be captured by a limit on in-electorate spending to prevent the flooding of specific races. The definition of in-electorate spending should accord with Recommendation 2.

8. A definition of electoral expenditure sufficiently broad to capture most third-party issues-based advertising campaigns;

The definition of electoral expenditure should be sufficiently broad as to capture third-party issues-based advertising campaigns which seek to influence voting at an election. One example is the definition found in New South Wales, which captures a broad range of 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*'.³⁰

Alternatively, the Canadian definition of 'election advertising' would prove useful in measuring and capping third party electoral expenditure. The definition includes 'taking a position on an issue with which a registered party or candidate is associated'; this

²⁷ *Unions (No 2)* (n 39) 611 [30] (Kiefel CJ, Bell and Keane JJ).

²⁸ *Unions (No 2)* (n 39) 633-4 [101] (Gageler J).

²⁹ For example, at the 2015 New South Wales State Election, the cap was \$1,166,000 for a registered third-party campaigner whereas the cap for a party running candidates in all 93 electoral districts was \$10,341,600.

³⁰ See *Electoral Funding Act 2018* (NSW) s 7 (definition of 'electoral expenditure').

allows election participants to set the agenda for the election – and if third parties wish to involve themselves, they must incur electoral expenditure.³¹

9. An anti-circumvention offence to prevent candidates, parties, associated entities or third parties from acting in concert to circumvent their applicable cap;

An anti-circumvention offence should be inserted into the *Electoral Act 2002* (Vic) in accordance with the law of other states and territories with expenditure cap regimes.³²

Such an offence would penalise any attempt by a regulated entity to exceed their cap in concert with another entity.

As considered by Edelman J in *Unions NSW v New South Wales*, such an offence, if it is to be constitutional, must extend to all actors attempting to circumvent their applicable cap – not only third parties.³³

10. A double-repayment penalty for negligently exceeding the cap, a punitive financial penalty and possible imprisonment for intentionally exceeding the cap;

Expenditure caps are measures concerned with the *effects* of excessive electoral expenditure and its effects on political equality. Unintentional or negligent exceeding of the cap should attract at least a double repayment penalty by the offending entity, as is the case in the Australian Capital Territory.³⁴

There may, indeed, may be cases where exceeding the cap is a useful strategic tool. Accordingly, intentionally exceeding the cap should attract both a multiple repayment penalty, as well as a fine and possible imprisonment.

Finally, if the Court of Disputed Returns is satisfied that exceeding of an applicable expenditure cap changed the outcome of an election in a division or Senate race, it should be empowered to void the relevant election.

11. Real time disclosure by parties, candidates, associated entities and third parties;

There should be a requirement for real time disclosure as soon as is practicable by all entities incurring electoral expenditure. This allows the electorate to be informed about the sources and amounts of electoral expenditure. This requirement should only apply to third parties having reached the registration threshold. The Queensland Electoral Commission's 'Electronic Disclosure System' should be emulated in this regard. Like our proposed donations disclosure law, electoral expenditure disclosure should operate under stricter timelines during the election.

³¹ See *Canada Elections Act*, SC 2000, c 9, s 2(1) (definition of 'election advertising'). See also *Harper v Canada (Attorney-General)* 2004 SCC 33 [90] (Bastarache J).

³² See *Electoral Funding Act 2018* (NSW) ss 35, 144; *Electoral Act 1993* (NZ) s 203F(3); *Electoral Act 1992* (Qld) s 307B; *Electoral Act 2004* (NT) s 203D.

³³ *Unions (No 2)* (n 39) 651-675 (Edelman J); see for example *Electoral Funding Act 2018* (NSW) s 35.

³⁴ See *Electoral Act 1992* (ACT) ss 205F-205G.

12. A mandatory statutory review of the expenditure cap regime after its first election cycle; and

To determine whether the regime is meeting its policy goals, there should be a mandatory statutory review after the first election cycle for which the regime is present (similar to that currently being undertaken by the Expert Panel). The review should be conducted by suitably qualified persons appointed by the Parliament, and be required to consider certain minimum issues, as well as emerging best practice, and take submissions from electoral participants in the previous election.

13. Increased resourcing and funding to the VEC to manage additional educative, enforcement and compliance duties.

To account for their additional educative and compliance responsibilities under the expenditure cap regime, the VEC should be afforded greater resources.

Perceived flooding risk

Concerns have been raised about the potential for expenditure caps to allow major parties to flood target seats. There is no evidence to suggest that this is happening in New South Wales, where we have most recently seen the operation of expenditure caps. Still, at least in that state flooding is hypothetically possible because of the fact that the expenditure cap system in that State provides for two separate 'pots' of money from which party-endorsed candidates may benefit (candidate spend and party spend), and the operation of sections 12 and 13 of the *Electoral Funding Act (2018) NSW*.

Section 12 provides for an additional cap on party and third-party campaigner spend in individual Assembly seats, while section 13 exempts from the cap expenditure on matter which does not mention the name of the candidate or the seat. Technically, this allows parties to spend up to the maximum state-wide cap within one seat, as long as the expenditure does not mention the name of the candidate or the seat:

*(12) **Additional cap for individual Assembly seats** The applicable cap for parties and third-party campaigners is subject to an additional cap (within the overall applicable cap) in relation to State general elections, or by-elections in more than one electoral district, for electoral expenditure incurred substantially for the purposes of the election in a particular electoral district, being—*

- (a) in the case of a party—\$61,500 in respect of each such electoral district, or*
- (b) in the case of a third-party campaigner—\$24,700 in respect of each such electoral district.*

(13) For the purposes of subsection (12), electoral expenditure is only incurred for the purposes of the election in a particular electoral district if the expenditure is for advertising or other material that—

- (a) explicitly mentions the name of a candidate in the election in that electoral district or the name of the electoral district, and*
- (b) is communicated to electors in that electoral district, and*
- (c) is not mainly communicated to electors outside that electoral district.*

In designing an expenditure cap model that would genuinely level the playing field without entrenching incumbency, the Centre for Public Integrity has been careful to avoid the potential flooding risk. The features of our model are as follows:

- one cap for all candidates, whether party-endorsed or independent (that is, there would be no additional 'pot of money' for parties).
- in the case of party-endorsed candidates, a negotiation system would be used to distribute cap between the candidate themselves, and the party (with a minimum reserve allocation of \$50,000).
- any money a party didn't allocate to its candidates to spend within their seats could be used for state-wide, non-seat specific expenditure (this money would not be able to be used on matter that is communicated to electors in a specific seat, and not mainly communicated to electors outside that seat)
- a higher cap for independents, in order to compensate for the undoubted positive externalities to general party advertising

The hypothetical scenarios below illustrate how our proposed model would function.

Hypothetical scenario 1:

A party is running a candidate in all 88 Assembly seats. If the party allocates the maximum \$130,758.23 cap each of its candidates (to spend within the seat they are contesting), the party would have **no money** to spend at the country-wide, non-seat specific level.

Hypothetical scenario 2:

A party is running a candidate in all 88 Assembly seats. If the party allocates the minimum \$50,000 to each of its candidates (to spend within the seat they are contesting), The party would have \$7,106,724.24 to spend at the state-wide, non-seat specific level. **None of that amount is able to be spent on anything that is communicated to electors in a specific seat and not to electors outside a specific seat.**

Reforms to the public funding of political parties and candidates

Political parties and candidates in Victoria may be eligible for three kinds of public funding: dollar-per-vote public funding, administrative expenditure funding and, for those not eligible for any other funding, policy development funding. Figure 11 shows recipients and total amounts of dollar-per-vote public funding distributed for the 2022 State election (in advance payments)

Recipient name	Total
Australian Labor Party - Victorian Branch	\$13,508,174.00
Liberal Party of Australia - Victorian Division	\$9,675,428.09
The Australian Greens - Victoria	\$3,233,117.06
National Party of Australia - Victoria	\$1,031,690.30
Shooters, Fishers and Farmers Party Victoria	\$356,558.13
Animal Justice Party	\$243,217.28
Liberal Democratic Party	\$132,194.80

Suzanna Sheed	\$97,355.84
Ali Cupper	\$74,785.20
Victorian Socialists	\$70,002.58
Darryn Lyons	\$62,591.16
Transport Matters Party	\$31,487.05
Robert (Bob) Turner	\$25,223.12
Damien Cole	\$22,711.86
Jarrold Bingham	\$17,449.88
Sustainable Australia Party - Stop Overdevelopment/Corruption	\$16,579.48
Kevin Quoc Tran	\$16,565.72
Gaetano Greco	\$15,779.80
Hung Vo	\$13,769.55
Craig Langdon	\$12,089.66
Michael James Gardner	\$11,230.06
Richard Lawrence	\$10,450.28
Total	\$28,678,450.90

Figure 11: Public funding recipients for 2022 Victorian election (advance payments)

That is, over the relevant period the Labor Party received 47.1% of total dollar-per-vote funding, the Coalition received 37.3% (the Liberal Party received 33.7% and the National Party 3.6%), and the Greens received 11.3%.

How much each party received in administrative expenditure funding is currently unknown; none has received policy development funding over the period analysed.

We are concerned that by providing a rate of return for Assembly seats that is double the rate of return for Council seats, Victoria in effect disadvantages the minor parties that focus on the Council. As Figure 12 shows, no other jurisdiction around the country takes such an approach to public funding.

Figure 12: Public funding of election campaigns by the Commonwealth, States and Territories

	Cth³⁵	NSW	QLD	Vic	SA	ACT	WA
Threshold % to receive funding	4% of the total first preference votes	4% of total first preference votes	4% of formal first preference votes	4% of total first preference votes or elected	4% for lower House; 2% for upper House	4% of total first preference votes	4% of total first preference votes.
Rate for a candidate	\$2.91 per vote received by endorsed candidates, unendorsed candidates and parties	\$4.66 per vote in the lower House; \$3.50 for the upper House	\$3 per vote where candidate is entitled;	\$7.01 in the lower House; \$3.50 in the upper House	0 – 10% of total primary vote: \$4.41 10.01%-100% of total primary vote: \$3.78	980.406 cents per vote	\$2.26 per vote
Rate for a party (where different from candidate rate)	-	\$5.25 in the Council for certain parties ³⁶	\$6 per eligible vote	-	-	-	-
Indexation	Indexed twice annually	Indexed every four years following an election	Indexed annually	Indexed annually	Indexed annually	Indexed twice annually	Indexed annually

³⁵ There is also an automatic payment to the agent of each eligible party, candidate or Senate group, as soon as practicable after 20 days after polling day – currently \$10,499. If they receive automatic payment and then claim election funding, the funding will be reduced by the amount paid as automatic payment).

³⁶ \$5.25 per first preference vote received by the endorsed candidates of the party in the Legislative Council, for A party that does not satisfy category 'A' or 'B' that has less than 10 (including zero) endorsed candidates in the Legislative Assembly election. Category A: A party that has at least one Legislative Assembly candidate elected, or the party's endorsed candidates in the Legislative Assembly received, in total, at least four per cent of the total first preference votes in the electoral districts for which the candidates were nominated. Category B: A party that does not satisfy category 'A' but that has 10 or more endorsed candidates in the Legislative Assembly election

Because of the absence of data, we are unable to conclusively determine whether Victoria's system of publicly funding political parties and candidates is working as it should. That is, we are unable to determine whether it has decreased reliance on private money, and whether it has restricted electoral expenditure. What we do know, however, is that it does not appear to have promoted political equality and is tied to a weak measure of public support – first preference votes in a system of compulsory voting. The current system stands to only reimburse parties for their increasing, and potentially misleading, electoral expenditure, rather than their more meaningful routine activities.

The modern role of political parties

Political parties are now an 'unavoidable part of democracy'.³⁷ They perform a number of key functions in modern Australian democracy. They play a crucial role in **representing** the views of their constituents and providing a forum for **participation** through activities such as volunteering and policymaking. Political parties also play an important role in **agenda-setting** throughout the electoral cycle. However, a political party's ultimate function is **to govern** according to its platform by passing laws and inhabiting executive institutions.³⁸

Why fund political parties?

In considering the abovementioned functions, it is not difficult to see that there may be some merit in supporting the public interest functions of political parties. There are three key motives for funding political parties, including: **restricting the influence of private money, enhancing, political equality and fair competition, and ensuring adequate funding to meet the rising cost of electioneering.**

The rationale of early models of public funding was to **restrict the influence of private money** on political parties.³⁹ Indeed, when introducing the Commonwealth's scheme in 1983, Minister Beazley commented that the funding was a small insurance to pay against the possibility of corruption'.⁴⁰ It is well understood that large private donations have the ability to at least softly corrupt parties and their parliamentary representatives. In *McCloy*, the majority noted that 'quid pro quo' corruption may emerge from bargaining between parliamentary representatives over policy matters in return for a significant donation. They also noted the potential for 'clientelism', whereby candidates and parties begin to rely on the 'patronage' of monied interests. Both were considered to 'threaten the quality and integrity of government decision-making' and even 'pose a threat to the electoral process itself'.⁴¹ The corrupting influence of large political donations is particularly well-documented in the Australian context.⁴²

Public funding also seeks to promote **political equality and fair competition.** In this sense public funding apparently seeks to 'level the playing field' by enabling newer and smaller parties to compete on a 'more equitable basis with the dominant and financially

³⁷ Susan Stokes, 'Political Parties and Democracy' (1999) 2(2) *Annual Review of Political Science* 243, 263.

³⁸ Joo-Cheong Tham, *Money and Politics* (UNSW Press 2010) 14-5.

³⁹ See New South Wales, *Parliamentary Debates*, Legislative Assembly, 15 April 1981, 5944 (Neville Wran, Premier).

⁴⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 1983, 2215 (Kim Beazley, Special Minister of State).

⁴¹ *McCloy* (n 23) 204-6 [36]-[41] (French CJ, Kiefel, Bell and Keane JJ).

⁴² Select Committee into the Political Influence of Donations, Parliament of Australia, *Political Influence of Donations* (Final Report, June 2018) ch 3.

more privileged ones'.⁴³ Public funding for parties purports to break the tie between private funds and electoral influence,⁴⁴ and to ensure that elections do not become 'little more than an auction'.⁴⁵

While antithetical to the spirit of the abovementioned expenditure caps, **meeting the cost of electioneering** is often cited as a reason for public funding. Despite increases in the size of the electorate, membership of both major political parties in Australia continues to decline.⁴⁶ This has left parties with a significant gap in their traditional budget. As campaigns have become more cost-intensive, parties more professional and competition for government fiercer, subsidies can be considered a 'response to the rising cost of the democratic process'.⁴⁷ Anika Gauja sees public funding as a 'mechanism to ensure parties' survival' in the face of these factors.⁴⁸

The risks of public funding

Public funding also carries risks. It may serve to **fuel excessive electoral expenditure, sap the internal vitality of parties,** and **entrench incumbents.**

As has been outlined above, Victoria imposes no caps on **electoral expenditure**. In the absence of caps, public funding may inadvertently serve to accelerate the 'arms race' of electoral expenditure. Public funding does nothing to prevent this, and parties may continue with their previous activities - just with more resources available. As early as 2001, David Tucker and Sally Young noted that 'it seems that the public money is simply an add-on that allows competing political parties to spend more on advertising and other electoral purposes than they would otherwise choose to do'.⁴⁹ Indeed, public funding cannot perform its integrity function - in minimising the influence of private money - in the absence of expenditure caps.⁵⁰

Further, public funding may also serve as a '**poison subsidy**'. Providing unconditional payouts to political parties, which were historically emanations of civil society, risks corroding the 'internal vitality of parties as forums for political participation' and 'atrophying' the grassroots of the parties.⁵¹ Grassroots funding in the form of membership fees and small donations is an expression of citizens' political engagement, and public funding may serve to depress the supply and demand of these contributions as parties become more state dependent.⁵²

⁴³ Ingrid van Biezen, 'State Intervention in Party Politics: The Public Funding and Regulation of Political Parties' (2008) 16(3) *European Review* 337, 348.

⁴⁴ Richard Briffault, 'Public Funding and Democratic Elections' (1999) 148(2) *University of Pennsylvania Law Review* 563, 577-8.

⁴⁵ *R (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] 3 All ER 193, 207 (Lord Bingham).

⁴⁶ Michael Head, 'Declining memberships and Australia's political party registration test: Legal doubts and democratic principles' (2022) 47(2) *Alternative Law Journal* 130, 130-1.

⁴⁷ Above n 43, 348.

⁴⁸ Anika Gauja, *Political Parties and Elections: Legislating for Representative Democracy* (Routledge, 2016 [2010]) 162.

⁴⁹ David Tucker and Sally Young, 'Public Financing of Election Campaigns in Australia - A Solution or a Problem?' in Glenn Patmore and Gary Jungwirth (eds), *The Big Makeover: A New Australian Constitution: Labor Essays 2002* (Pluto Press Australia, 2001) 60, 67.

⁵⁰ Graeme Orr, 'Putting the cartel before the house? Public funding of political parties in Queensland' in Anika Gauka and Marian Sawyer (eds), *Dilemmas of political party regulation in Australia* (ANU Press, 2016) 123, 130.

⁵¹ Graeme Orr, 'Full public funding: cleaning up parties or parties cleaning up?' in Jonathan Mendilow and Eric Phélippeau (eds), *Handbook of political party funding* (Edward Elgar, 2018) 84, 96.

⁵² Andreas Ufen, 'Asia' in Elin Falguera, Samuel Jones and Magnus Ohman (eds), *Funding of Political Parties and Election Campaigns: A Handbook on Political Finance* (International Institute for Democracy and Electoral Assistance, 2014) 83, 111.

All of Australia's public funding regimes reward *previous* electoral success, whether in the form of reimbursing electoral expenditure according to first preference votes or providing funds for incumbent members' administrative expenses. Both measures arguably serve to entrench incumbents and exacerbate their already heightened advantage, ensuring that 'established parties are very likely to enjoy a financial advantage over newer parties'.⁵³ Graeme Orr and Joo-Cheong Tham have both observed that public funding may serve to **exacerbate political inequality and will often 'reward incumbents more than challengers'**.⁵⁴

Smaller parties and independent candidates, particularly non-incumbents, typically have weak fundraising networks to produce the necessary funds to meaningfully compete with larger players. If these participants cannot raise and spend private funds to begin with, they will not be entitled to any significant amount of public funds *after* the election.

While the four per cent threshold in Victoria is intended to prevent frivolous candidacies, it can serve to dissuade *bona fide* candidates who are hesitant about making a potentially non-recoupable financial investment in their campaign which larger players can otherwise recover.

The inability of public funding to advance political equality also plays out structurally within the data. In recent years, due in part to dissatisfaction with the major parties, there has been a proliferation of minor parties and independents contesting races. Many, however, have been unable to cross the four per cent threshold and access public funding.

While no data are available to enabling testing, we hypothesize that public funding may also be **exacerbating excessive electoral expenditure**.

Public funding also **reimburses expenditure largely unconnected with the key functions of parties**. As has already been outlined, the functions of political parties in Victorian democracy are representation, participation, agenda-setting, electoral competition and, ultimately, governance. The current mode of reimbursing electoral expenditure is almost completely divorced from these functions. While electoral expenditure in the form of advertising may often overlap with agenda-setting and electoral function, these should be understood broadly as the everyday discussions and debates, rather than purely electoral communications.

Further, the majority of electoral expenditure is on advertising that is increasingly false and misleading. Without truth in political advertising laws, public funding may be doing no more than subsidising lies.⁵⁵ Reimbursing advertising expenditure has no bearing on the capacity of parties to represent their constituents nor promote public participation and provides no support for parties in their governing capacities. This relates to the potential for public funding to erode grassroots support and thereby the supply of party members and private funds. Joo-Cheong Tham has noted that the current scheme does 'little to enhance the participatory function of parties' and 'may even detract from it'.⁵⁶

⁵³ Above n 38, 132.

⁵⁴ Above n 51, 98; Joo-Cheong Tham and David Grove, 'Public Funding and Expenditure Regulation of Australian Political Parties: Some Reflections' (2004) 32(3) *Federal Law Review* 397, 422.

⁵⁵ See generally Lisa Hill, Max Douglass, and Ravi Baltutis, *How and Why to Regulate False Political Advertising in Australia* (Palgrave Macmillan, 2022).

⁵⁶ Above n 38, 134.

Finally, we believe that the current model is linked to '**popular apathy**'. Victorian public funding is nominally tied to public support through first preference votes. This notion of public support is a weak one. The public funding reimbursement system does not discriminate between the first-preference vote of a motivated and engaged voter, and that of the donkey voter. Australians are generally happy with *democratic values* and the *institutional architecture* but are 'deeply unhappy' with democratic politics. Less than 41 per cent of Australian citizens were satisfied with the way democracy *works* in Australia in 2018, down from 86 per cent in 2007.⁵⁷ Considering this, it seems inappropriate to dole out funds per first preference vote under the veil of 'popular support', when many in fact are deeply dissatisfied with the political offering. In this sense, true civic participation and support is, at best, loosely tied to public funding.⁵⁸ This is amplified in Australia due to the presence of compulsory voting – whereby electors are essentially forced to allocate their preference and, in turn, some potential amount of public funding.

Recommendations for a better public funding system

1. A system of expenditure caps be implemented for all election participants

Public funding will best function as an integrity measure when paired with electoral expenditure caps.⁵⁹ Without electoral expenditure caps, public funding will not be able to dampen demand for private money to fund increasingly expensive campaigns.⁶⁰

Accordingly, expenditure caps on parties and their endorsed candidates, as well as independent candidates, are a necessary condition for an integrity-promoting public funding system. Expenditure caps should be implemented in accordance with the abovementioned recommendations.

2. Administrative funding be contingent on meeting basic internal democratic criteria

Administrative funding should be contingent on meeting basic internal democratic criteria. This is not to say that all parties must comply with such criteria, only that parties receiving *public funds* for administration should.⁶¹

Australia has historically maintained, and continues to maintain, an exceptional commitment to representative democracy. As parties become seemingly permanent fixtures of this system, it is not far-fetched to suggest that these entities which inhabit our representative institutions must also meet basic democratic and behavioural criteria to receive routine funding.

⁵⁷ Gerry Stoker, Mark Evans and Max Halupka, *Trust and Democracy in Australia: Democratic decline and renewal* (Report No 1, December 2018).

⁵⁸ By way of contrast, public funds for broadcasting allocated under the *Broadcasting Act 1989* (NZ) s 78(1) include the number of votes for the party at the last general election, the number of votes for the party at the most recent by-election, the number of members of Parliament who were members of the party at the time of dissolution of Parliament, 'indications of public support' such as opinion polls and membership numbers as well as 'the need to provide a fair opportunity for each party ... to convey its policies to the public by the broadcasting of election programmes on television'.

⁵⁹ Above n 51, 95.

⁶⁰ Yee-Fui Ng, *Regulating Money in Democracy: Australia's Political Finance Laws Across the Federation* (Final Report, January 2021) 75.

⁶¹ Cf Graeme Orr, 'Justifications for regulating party affairs: Competition not public funding' in Keith Ewing, Jacob Rowbottom and Joo-Cheong Tham (eds), *The funding of political parties: Where now?* (Routledge, 2011) 245.

Major parties have recently been plagued by internal scandals involving violations of democratic norms. For example, Operation Watts demonstrated the extensive branch-stacking, misuse of public funds and offices, and misallocation of grant funds in the Victorian Labor Party.⁶² Similarly, the New South Wales Liberal Party's preselection 'captain's picks' at the 2022 election were sometimes in direct opposition to the will of the branch members.

Administrative funding should be conditional on continual compliance with a Code of Conduct. This should be developed jointly by the VEC and Independent Broad-based Anti-corruption Commission. The Code should establish an underlying set of standards regarding transparency, internal accountability impartiality, due process and other democratic values. As Keith Ewing observes:

*If the State is to support the parties in these ways, is the community entitled to expect something even more in return? In particular, if public money is being used to support political parties because political parties play an indispensable role in the democratic process, is the public not entitled to expect that the bodies that spend its money themselves meet some basic democratic criteria . . . ?*⁶³

This position is well supported.⁶⁴ George Williams has proposed that administrative funding could be contingent upon '*all positions of power being referable to the members in some way, members having some form of enforceable independent complaints mechanism to actually challenge decisions*' and to also provide '*an appropriate level of transparency*'.⁶⁵

3. Administrative funding only be used to recoup verified administrative expenses

As is the case with dollar-per-vote reimbursements for electoral expenditure, parties should not be able to profit from the scheme. Accordingly, parties should be required to submit audited receipts at the end of each quarter to be able to recoup eligible expenses *after* they have been incurred.

4. Multiple matching:

For the reasons set out below, we are of the view that Victoria should work towards a multiple matching model of public funding. However, we appreciate that no Australian jurisdiction has experimented with multiple matching for electoral expenditure, and that such a scheme would take considerable resources to implement.

For this reason, while we have set out what a multiple matching model should look like (recommendation 4), we have also devised an alternative set of principles to improve the

⁶² Independent Broad-based Anti-corruption Commission and Victorian Ombudsman, *Operation Watts* (Final Report, July 2022) <https://www.ibac.vic.gov.au/docs/default-source/special-reports/operation-watts-special-report---july-2022.pdf?sfvrsn=ae651f80_2>.

⁶³ Keith Ewing, *The Cost of Democracy: Party Funding in Modern British Politics* (Hart Publishing, 2007) 244.

⁶⁴ See eg, Senator John Faulkner, 'Public Pessimism, Political Complacency: Restoring Trust, Reforming Labor' (Speech, Address to Light on the Hill Society, 7 October 2014) <<https://australianpolitics.com/2014/10/07/john-faulkner-alp-reform-speech.html>>; New South Wales, *Parliamentary Debates*, Legislative Council, 21 October 2014, 1407 (Luke Foley MLC); Panel of Experts – Political Donations, Academic Round Table Discussion, 'Session Three: Public Funding of Election Campaigns' (25 September 2014) 4-5.

⁶⁵ Panel of Experts – Political Donations, Academic Round Table Discussion, 'Session One: The Regulation of Political Donations and Electoral Expenditure' (24 September 2014) 13.

current public funding scheme in the event that the Parliament ultimately chooses to retain Victoria's dollar-per-vote model for public funding (recommendation 5).

a. the Victorian Electoral Commission multiple match funds given to parties and candidates by individuals on the electoral roll

As has already been alluded to, private individual political donations are a symptom of a vibrant democracy of engaged citizens; large, transactional, and often corporate donations are unfortunately often a symptom of the opposite. To encourage the former, the VEC should 'multiple match' political donations given by *individuals* up to a specified and achievable amount. The Centre for Public Integrity recommends that donations of up to \$200 AUD (indexed) be multiple matched at a rate of 4x – meaning any donation of up to \$200 AUD would be accompanied by a VEC contribution of four times the donated amount. For example, a \$50 donation would attract an additional \$200 in public funds, and a \$200 donation would attract \$800 in public funds. Any individual donation of over \$200 would attract \$800 in public funds, but no more. Matched funds should subsidise electoral expenditure and should not be spent on administrative expenditure.

This matching should only be afforded to individuals on the electoral roll in recognition of their increasing inability to meaningfully compete with monied interests for political influence.⁶⁶ Other non-individual entities can and should make donations up the prescribed cap, but these voices do not need to be 'amplified' by multiple matching. In *Unions (No 1)*, the High Court held that a New South Wales provision prohibiting a non-individual from making political donations was invalid.⁶⁷ It fell foul of the implied freedom of political communication as a 'burden without justifying purpose'.⁶⁸ The multiple matching of *only* individual donations would likely be constitutional as it would serve an *anti-corruption rationale* via limiting the temptation for corruption through solicitation of large non-individual donations.⁶⁹

Spencer Overton's 'participation theory of public financing' underpins the idea of multiple matching. This theory has two limbs. The first is that, unlike the current Victorian regime, *public financing should provide incentives for public participation rather than suppress it*. Democracy, ideally, *should reward* candidates who can mobilise individual donations.⁷⁰ Furthermore, smaller donations are often associated with other more substantial forms of political participation. Secondly, *facilitating participation should be recognised as a proper use of public resources*.⁷¹ There is a 'democratic dividend' to be found in using appropriately distributed public funds to promote meaningful political participation via multiple matching.

Multiple matching has previously been considered in Australia, when it was dismissed without sufficient consideration in 2014 as 'very difficult to implement'.⁷² The same panel brusquely rejected it on the rather unconvincing grounds that they were hesitant to 'chang[e] the rules yet again'.⁷³ The many empirically documented merits of multiple matching were ignored.

⁶⁶ See Daniel Nyberg, 'Corporations, Politics, and Democracy: Corporate political activities as political corruption' (2021) 2(1) *Organization Theory* 1.

⁶⁷ *Unions (No 1)* (n 40) 544-8 [1]-[16] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

⁶⁸ *Ibid* 558 [51].

⁶⁹ See *McCloy* (n 23) 204-5 [36]-[38] (French CJ, Kiefel, Bell and Keane JJ).

⁷⁰ Spencer Overton, 'Matching Political Contributions' (2012) 96(1) *Minnesota Law Review* 1694.

⁷¹ *Ibid* 1708.

⁷² Above n 65, 79.

⁷³ See *ibid*.

New York City elections maintain a system of multiple matching whereby \$6 USD is allocated for every dollar up to \$175 USD. Sundeep Iyer et al's study of the New York City elections found that, compared to New York State elections (which did not have multiple matching):

- Almost 90 per cent of suburbs contained at least one person who donated to a city election candidate, compared to 30 per cent in the State Assembly;
- The neighbourhoods which donated were more representative of the lower income groups than State Assembly elections; and
- Small donor participation in more ethnically diverse neighbourhoods was more robust than State Assembly elections.

The authors ultimately concluded that multiple matching's unique incentive scheme strengthened 'the connections between public officials and their constituents'.⁷⁴

Michael Malbin et al's analysis corroborates these findings. He finds that multiple matching increases the proportional role of small donors via decreasing the costs associated with soliciting small donations. He similarly finds that multiple matching both increases the *number* and diversifies the *profile* of donors. He concluded that New York City's regime was a 'model for jurisdictions nationally' partly because it stimulated participation in a manner 'healthy for democracy'.⁷⁵ In a later paper, Malbin and Michael Parrott concluded:

*Tools designed to bring more small donors into the system are meant to enlarge the table – to help give more people, and different kinds of people, a meaningful voice. They work by giving those who do have the resources to mobilize – candidates, parties and other donor mobilizers – an incentive to pay attention to those who do not. This concern goes to the heart of successful democratic representation. It should not be dismissed lightly.*⁷⁶

Multiple matching presents an opportunity to promote constituent participation, decrease corruption, strengthen constituent-official relations and level the playing field without offending the implied freedom of political communication. None of these goals is achieved under the current dollar-per-vote system.

b. Electors be limited to one matched donation per election cycle

Electors should be entitled to donate to as many candidates and parties as they wish, given they are under any applicable donation cap. However, to ensure fairness between electors, the VEC should only multiple match the first donation given to a party or endorsed candidate.

c. Multiple matched donations be made out *either* to the party or their endorsed candidate

⁷⁴ Sundeep Iyer, Elisabeth Genn, Brendan Glavin and Michael J Malbin, *Donor Diversity Through Public Matching Funds* (Report, 12 May 2012) 5 < <https://www.brennancenter.org/our-work/research-reports/donor-diversity-through-public-matching-funds>>.

⁷⁵ Michael J Malbin, Peter W Brusoe and Brendan Glavin, 'Small Donors, Big Democracy: New York City's Matching Funds as a Model for the Nation and States' (2012) 11(1) *Election Law Journal* 3, 20.

⁷⁶ Michael Malbin and Michael Parrott, 'Small Donor Empowerment Depends on the Details: Comparing Matching Fund Programs in New York and Los Angeles' (2017) 15(2) *The Forum*.

As previously outlined, we recommend that parties and their endorsed candidates both face independent caps on expenditure determined by a 'bargaining system'. Accordingly, donations and therefore matched funds must be allocated to either an endorsed candidate or their political party – and directed to the relevant campaign account. Parties should be able to transfer funds matched to their endorsed candidates, but not vice versa.

d. Multiple matched funds constitute at most 80 per cent of electoral expenditure for parties and candidates

There is good reason to argue that there should not be 'full' public funding of political parties and their campaigns.⁷⁷ Such financing would almost completely detach parties from their roots in civil society.⁷⁸ Full public funding has been proffered as a solution to the ills of campaign finance, but is a 'deceptively simple solution' which would pose problems for 'political liberty and how parties are conceived'.⁷⁹ Quasi-full public funding is, however, increasingly coming to the fore in Australia. Graeme Orr estimates that in some jurisdictions public funding now covers between 75 and 90 per cent of campaign expenses.⁸⁰ This tendency towards full public funding should be resisted, and an effective cap placed at 80 per cent of electoral expenditure.

The bargaining system we outlined earlier requires that parties and candidates bargain over their applicable expenditure cap. The maximum amount of matched funds available should then be determined from this allocation submitted to the VEC.

By way of example, imagine that a party with four endorsed candidates was entitled to bargain with their candidates 4 x \$250,000 = \$1,000,000 in capped funds.

Imagine that the resulting bargain is that each candidate can incur \$100,000 in electoral expenditure, leaving \$600,000 to the party. This allocation would have to be submitted to the Victorian Electoral Commission before matched funds could be accessed.

The arithmetic is simple with a 4x multiple. For example, assuming there are no unmatched non-individual donations, each candidate would be entitled to receive any of the following permutations of donations with associated matching funds to maintain the 80 per cent ceiling:

Candidate	Private Contributors	Individual Amount	Sum Private	Matched Funds (4x)	Sum Total
1	100	\$200	\$20,000	\$80,000	\$100,000
2	200	\$100	\$20,000	\$80,000	\$100,000
3	400	\$50	\$20,000	\$80,000	\$100,000
4	800	\$25	\$20,000	\$80,000	\$100,000

Figure 13: Theoretical permutations of private funding and matched funds

The party would be able to receive any permutation of private contributions which led to at most 80 per cent matched funds. A candidate who therefore typically received donations of greater than \$200 would expend a higher proportion of private funds, as

⁷⁷ See for example Mike Steketee, 'Why we need full public funding of election campaigns', *Inside Story* (online, 12 July 2017) < <https://insidestory.org.au/why-we-need-full-public-funding-of-election-campaigns/>>.

⁷⁸ Above n 51, 824.

⁷⁹ *Ibid* 97.

⁸⁰ *Ibid* 93.

they would be entitled to a maximum of \$800 in public funds per donation (i.e., a private donation of both \$300 and \$200 would entitle the receiver to \$800 in public funds).

It should be noted that parties and individuals may still solicit private donations once they have reached this cap, but they will still be confined to their expenditure cap and associated cap on matched funds. Retained non-matched private funds can obviously not be used for electoral expenditure but may be carried between election cycles or used on relevant outreach activities or administrative expenditure (see Recommendation 2).

e. Unspent matched funds be repaid to the VEC at the end of the election cycle

While it is likely that a candidate would maximally spend their public funds, they should not be able to hoard them between election cycles. Each matched donation *is for the purposes of the election in which it is given*. Candidates and parties can, of course, retain the private element of the donations, but should be required to repay any unspent matched funds after the close of the poll. This also serves to prevent satirical or insincere candidates from pocketing matched funds at the close of election.

f. Matching period commence at the issue of the writ, and end on polling day

We recommended above that the capped expenditure period commence 12 months after the previous polling day. While most campaigning occurs in the months immediately before a given election, a 12-month capped expenditure period ensures that parties do not backload expenditure to evade the cap.

However, on matching funds, we recommend that the matching period begin at the issue of the writ. By this time, candidates will have been pre-selected and bargained their portion of the applicable expenditure cap. A shorter matching funds is also consistent with the financial intensity of the late stages of campaigning.

g. Fraudulent unilateral claims resulting in barring the individual from matching funds, and fraudulent bilateral claims resulting in barring the party from matching funds

As with any scheme of this nature, there is ample incentive to abuse the scheme via 'channelling' donations through different individuals. Any finding of abuse by an individual should bar the individual from being able to match funds for at least one election cycle, and any finding of a party knowingly soliciting fraudulent claims should bar the party or candidate from receiving matching funds for at least one election cycle.

h. The VEC establish a 'matching funds' portal to verify and distribute matched funds

The matching funds regime would require VEC verification of the identity of the donor and amount donated. The VEC should establish a centralised portal to verify and distribute matched funds. This would need to be attached to expenditure cap data to ensure maximum allocations of matched funds are not breached.

i. The VEC and IBAC be appropriately resourced to manage additional regulatory responsibilities

The VEC are clearly capable of administering the existing public funding legislation, though they will require additional resources to manage the new administrative burden of the multiple matching and administrative funding schemes. Similar resources will need to be provided to the IBAC to administer and enforce the Code of Conduct in Recommendation 4.

5. Alternative submission for reforming public funding of electoral expenditure

If the Parliament ultimately chooses to retain Victoria's dollar-per-vote model for public funding, we believe that there are steps which can be taken to improve the scheme:

a. Decrease the threshold to two per cent of the vote subject to the Electoral Commission being satisfied the party is genuine

The Centre for Public Integrity believes that electoral competition is healthy for democracy and should be rewarded by the public funding system. Minor parties and independents ought not be dissuaded from running by prohibitively high thresholds.

Accordingly, the Centre for Public Integrity recommends that the threshold for dollar-per-vote public funding be reduced to **two per cent** of the primary vote per election (electoral division or state) contested.

We also recommend that the decreasing of the threshold be accompanied by a requirement that dollar-per-vote public funding only be paid if the electoral commissioner is satisfied that either the party is 'a genuine political party', or in the case of a candidate, that they conducted a 'bona fide candidacy'.⁸¹

b. Allow all successful candidates to access public funding irrespective of meeting the threshold

A peculiar feature of Victoria's Council elections is that it is not uncommon for candidates to be elected without reaching the applicable threshold due to preference flows.⁸² The Centre for Public Integrity recommends that the candidates be able to access dollar-per-vote upon *either* reaching the two per cent threshold or being elected. As with administrative funding, successful election is undoubtedly a sufficient indicator of public support (however diluted by preferences) for the candidates.

c. Increase funding rates for the first 10 per cent of the total primary vote received

The current dollar-per-vote model does not discriminate between the funding allocated for the first vote received and the millionth vote received. The promotion of political equality requires that these votes *are discriminated against* in terms of their pecuniary value to candidates and parties.

South Australia is a national innovator in this regard. Their public funding regime provides \$4.41 per vote for the first 10 per cent of the vote, and \$3.78 thereafter.⁸³ Graeme Orr has observed that this scheme 'provides an element of affirmative action'

⁸¹ See for example *Electoral Funding Act 2018* (NSW) s 93(2)(b).

⁸² See Joint Standing Committee on Electoral Matters, Parliament of Australia, *Report on the Funding of political parties and election campaigns* (Final Report, November 2011) 136.

⁸³ *Electoral Act 1985* (SA) s 130P(2)(a)-(b); 'Indexed Amounts', *Electoral Commission South Australia* (Web Page) <<https://www.ecsa.sa.gov.au/parties-and-candidates/funding-and-disclosure-state-elections/indexed-amounts>>.

and makes up for the parties' lower likelihood of wielding executive power and decreased ability to attract donors.⁸⁴ Similarly, Yee-Fui Ng has recommended that 'consideration [...] be given towards adopting the progressive model of paying a higher-fixed dollar amount for the first tranche of the vote a party attracts'.⁸⁵

Accordingly, the Centre for Public Integrity recommends that, in the interest of political equality, there be a higher applicable rate for the first 10 per cent of the vote that a party attracts.

d. Dollar-per-vote funding be set to provide only around 50 per cent of electoral expenditure

While we mentioned that a figure of 80 per cent public funding would be desirable if multiple matching were used to fund electoral expenditure, we do not believe the same for dollar-per-vote reimbursements. While the public funding premium on multiple matching should be allowable based on the way in which it promotes engagement with constituents, this is not the case for dollar-per-vote funding. Dollar-per-vote public funding should seek to provide only around 50 per cent of electoral expenditure.

e. Breaches of electoral offences and/or disclosure obligations leading to cuts in applicable rate

Dollar-per-vote funding being paid after the election means that it can be used to incentivise appropriate behaviour during the election itself. To incentivise compliance with other aspects of the electoral integrity regime, the Panel should consider decreasing the applicable rate for offences or systematic breaches of:

- Electoral expenditure caps;
- Donations caps;
- Disclosure requirements; and
- Truth in political advertising provisions.

The system should be built on a 'strike' system whereby the applicable funding rate is gradually reduced per individual incident.

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 Stephen Charles AO KC, the Hon Pamela Tate AM KC, the Hon Anthony Whealy KC, Professor George Williams AO, Professor Joo Cheong Tham, Professor Gabrielle Appleby and Geoffrey Watson SC. Former board members include the Hon Tony Fitzgerald AC KC and the Hon David Ipp AO KC. More information at www.publicintegrity.org.au.

⁸⁴ Above n 51, 92.

⁸⁵ Above n 60, 112.