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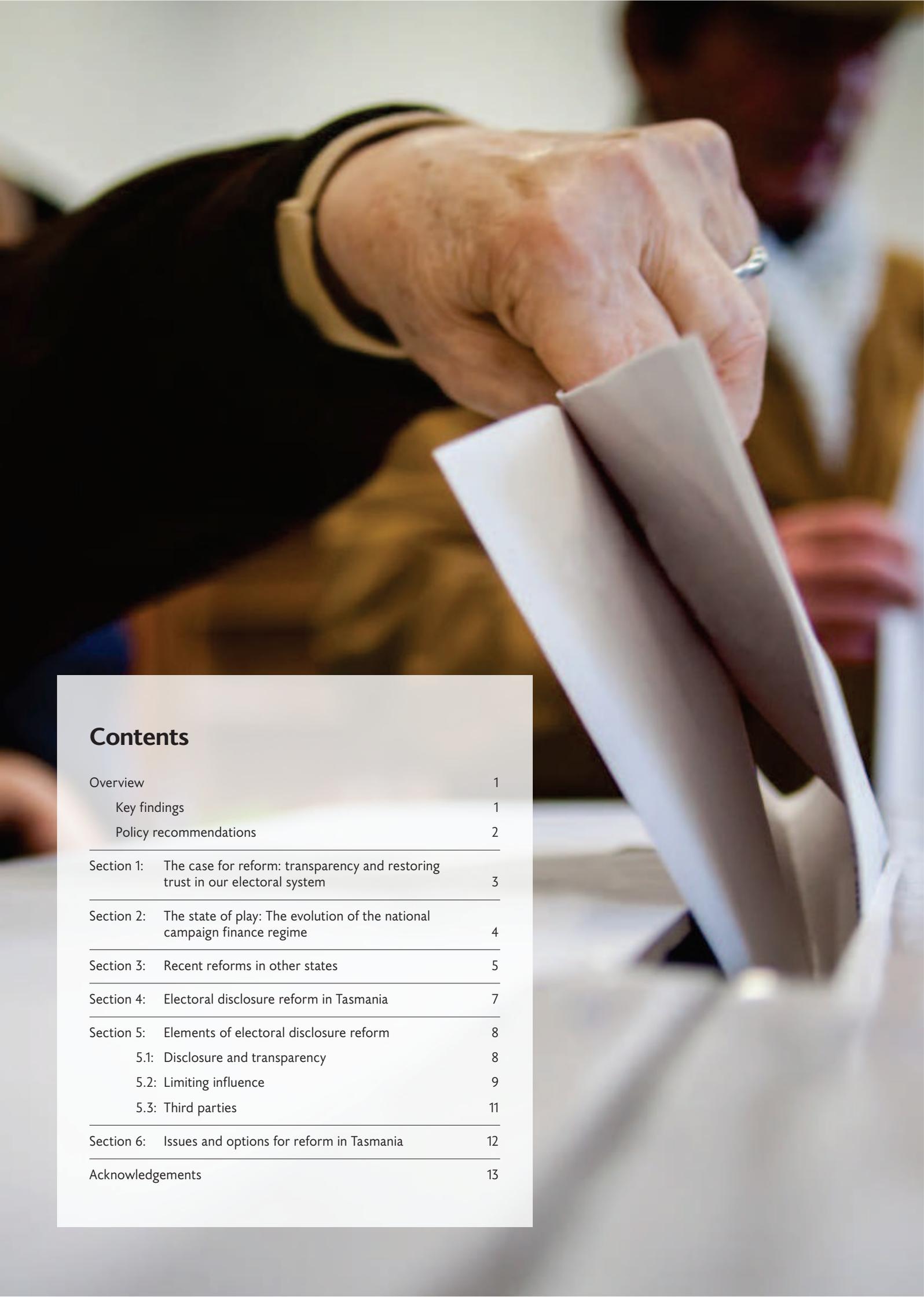
***Institute for the  
Study of Social  
Change***

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**Insight Ten**

**Campaign finance reform  
in Tasmania: issues and options**

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## Contents

Overview	1
Key findings	1
Policy recommendations	2
<hr/>	
Section 1: The case for reform: transparency and restoring trust in our electoral system	3
<hr/>	
Section 2: The state of play: The evolution of the national campaign finance regime	4
<hr/>	
Section 3: Recent reforms in other states	5
<hr/>	
Section 4: Electoral disclosure reform in Tasmania	7
<hr/>	
Section 5: Elements of electoral disclosure reform	8
5.1: Disclosure and transparency	8
5.2: Limiting influence	9
5.3: Third parties	11
<hr/>	
Section 6: Issues and options for reform in Tasmania	12
<hr/>	
Acknowledgements	13

# Overview

Tasmania has an opportunity to reform its campaign finance and donation disclosure (campaign finance) regime at a time when most Australians support greater regulation and transparency in relation to political donations and campaign spending.

Over the last decade all Australian mainland states have implemented significant reforms concerning various elements of campaign finance, from the disclosure of political donations to imposing limits on campaign spending and the political activities of third party groups.

There is evidence that now is the time to act, given increased campaign donations and associated spending at state and Commonwealth levels combined with waning confidence in Australia's democracy.

Declining trust in our politicians and system of government has many causes, but central among these is a growing perception that powerful interests can capture government and exert undue influence over political decision making.

The Tasmanian Government has responded to demands to improve the State's campaign finance regime by establishing a review of the *Tasmanian Electoral Act 2004*.

Despite the aims of campaign finance reform being straightforward, the details are complex and require careful consideration.

Campaign finance reform should begin with a concerted effort to enhance the transparency of the relationship between powerful interests, government and political parties.

There is a clear case for a more comprehensive and state-level disclosure regime for political donations and expenditure. This system would be affordable and accommodate and preserve the distinctive features of the Tasmanian electoral system and parliament.

Reflecting the Terms of Reference of the Government's review, we also consider the related issues of limiting political donations and campaign spending, whether public funding should be made available to support political campaigning and whether 'third parties' need to be subjected to tighter regulation?

These issues are more complex and less clear cut, but we do believe there is a case for extending a modified version of the spending cap which applies to Legislative Council elections to the House of Assembly.

This *Insight Report* aims to contribute to the review process and public debate on the reform of Tasmania's campaign finance regime through the analysis of recent Australian developments and relevant international research.

Our aim is to provide an evidence-based guide to reform and inform state-level policy action.

## Key findings

- In the absence of reform Tasmania will continue to have the weakest campaign finance laws of any Australian state.
- Since 2009 the source of less than 20 per cent of more than \$25 million donated to Tasmanian political parties has been disclosed.
- 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.
- Wherever possible Tasmania should share resources and administrative systems with other Australian jurisdictions.
- In addition to introducing a state-based disclosure regime, in the interests of limiting the undue influence of powerful interests, a modified version of the campaign spending limits that currently apply to Legislative Council elections should be extended to the House of Assembly.

## Policy recommendations

### Recommendations for a state-based disclosure regime

#### **Recommendation 1**

That the Tasmanian Government introduces a disclosure system that requires candidates, parties and donors to report donations in excess of \$1000, as well as spending above \$1500.

Tasmania should also consider introducing requirements that political parties disclose all sources of income, not just donations.

Whereas donations must be disclosed publicly, there is a case for limiting the disclosure of financial statements to electoral authorities to ensure compliance.

#### **Recommendation 2**

Individual candidates and parties should produce separate disclosure reports. This is important given Tasmania's candidate-based political system in which candidates receive donations and fund campaigns independently of their party.

#### **Recommendation 3**

The period for disclosing donations and spending should be as timely as possible. A seven-day disclosure period in the 12 months prior to the latest date when an election can be held (and six-monthly otherwise), will bring Tasmania in line with Queensland, South Australia and the ACT and provide near 'real time' information about political donations.

### Recommendations to limit undue influence

#### **Recommendation 4**

That campaign expenditure caps are applied to candidates and parties seeking election in the House of Assembly.

We recommend an expenditure limit of \$30,000 per individual candidate (indexed), together with a limit of \$30,000 per candidate for parties and a total cap of \$750,000 per party (five candidates per electorate, for 25 candidates in total across the State) in House of Assembly elections. In the interests of consistency, we propose that the expenditure cap for Legislative Council elections be increased to \$30,000 per candidate.

Reflecting the culture and practice of the Legislative Council, the current ban on political party spending in the Upper House election should remain.

#### **Recommendation 5**

That the Government provides modest public funding to assist candidates with the administrative costs of complying with new disclosure obligations. Such funding should be limited to actual costs incurred.

Funding for administrative support will also level the playing field between smaller parties and new or independent candidates, and established parties and incumbent candidates.

### Regulating third parties

#### **Recommendation 6**

That third parties are required to report donations worth \$1000 and above, as well as spending above \$1500 within seven days in the 12 months prior to the latest date when an election can be held (and six-monthly otherwise).

#### **Recommendation 7**

That the Government adopts a broad definition of political activity and spending. The definition should capture traditional forms of activity – aimed at directing people to vote for a specific party or candidate – as well as wider forms that focus on key election issues regardless of the parties or candidates associated with them.

# Section 1. The case for reform: transparency and restoring trust in our electoral system



Sustaining a robust and effective democracy is a balancing act which requires both compromise and vigilance. We all aspire to a democratic system where citizens have a voice and equal opportunity to influence decision making through voting and other forms of political participation. In many ways Australia, with its system of independent and impartial electoral administration and compulsory voting, is an example to the world.

While Australia's electoral systems represent best practice, there are growing concerns that our system of campaign finance needs to be subjected to greater regulation and transparency.

As political theorists have argued for over half a century, if democracies are to survive and thrive, we need to ensure that governments represent and promote the public interest over those of powerful corporations or unions.<sup>1</sup> In short, we must act to prevent groups with power and deep pockets from exerting undue influence over the political process.

Over the past decade there have been growing concerns in Australian politics about the scale and influence of money in the form of political donations and campaign spending. A national survey conducted in 2016 found that 74 per cent of Australians think big business has too

much power while 47 per cent believe that unions are too influential.<sup>2</sup> Perhaps of greater concern is that the percentage of Australians who think 'government is run for a few big interests' has increased by 20 per cent over the past decade – the tide of money in Australian politics is rising.<sup>3</sup>

Evidence of mounting concerns about the power of special interests led the Grattan Institute to conclude that ordinary Australians want government to 'drain the billabong' of vested interests which they believe exert undue influence over Australian politics. If we are to restore trust in our democracy we need to develop new ways of doing politics including leveling the playing field between powerful interests and ordinary Australian voters.

One of the challenges is that in the absence of greater transparency and associated disclosure in our political systems, we have no real way of knowing the extent to which big business and other groups fund or influence election campaigns. As Australian academic Dr Belinda Edwards argues, 'there is just so much we don't know about where political parties get their money.'<sup>4</sup> With

parties disclosing as little as 20 per cent of their funding at the federal level in recent years, the extent of political donations and their associated influence has become one of the great 'known unknowns' of Australian politics.<sup>5</sup>

Undue influence, whether real or perceived, may only be one of the challenges facing contemporary democracy, but it is a challenge we can address. A well-designed campaign finance and disclosure scheme can help restore the credibility and legitimacy of our political system, which is precisely why other Australian states and jurisdictions around the world have implemented disclosure reforms in recent years.

The principles of promoting transparency and disclosure may be straightforward, but the design of campaign finance and disclosure regimes is complex and must be calibrated to the contours of local electoral systems and political imperatives. This *Insight Report* will provide an overview of the regulation of campaign finance in Australia before focusing on Tasmanian reform.

1 Schumpeter, J. A. (1942). *Capitalism, socialism, and democracy*. New York: Harper.

2 Cameron S and McAllister I. (2016). *Trends in Australian Political Opinion: Results from the Australian Election Study 1987-2016*. Canberra: The Australian National University.

3 Ibid.

4 Edwards, B (2018). The truth about political donations: there is so much we don't know. *The Conversation*, 2 Feb 2018, <https://theconversation.com/the-truth-about-political-donations-there-is-so-much-we-dont-know-91003>.

5 Ibid.

## Section 2. The state of play: The evolution of the national campaign finance regime

The desire to influence election outcomes and political decision making through donations and other forms of campaign support is as old as democracy itself. Almost two centuries ago Andrew Jackson, the seventh President of the United States, was widely criticised for rewarding his major financial backers with Cabinet posts in his 1829 Administration. By the turn of the 20th Century the power of big business in the United States was such that Congress passed the *Federal Corrupt Practices Act (CPA)* requiring all House candidates to disclose both campaign spending and the sources of all contributions. Despite the noble intent of the CPA Act, its provisions were seldom enforced, and it ultimately ruled unconstitutional in a Supreme Court challenge.

The world's first effective campaign finance and disclosure regime arguably came into force with creation of the US Federal Election Commission in 1974 which, for the first time, established an independent agency to monitor and enforce campaign finance provisions. Like many other established democracies, Australia followed the lead of the US with the Hawke Government introducing amendments to the *Commonwealth Electoral Act 1918* in 1983, establishing formal disclosure provisions for political donations as well as public funding for political parties for the first time (see timeline on the right).

However, these provisions were watered down by the Keating Government in the mid-1990s and again by the Howard Government in 2006 when the disclosure threshold for political donations was increased to \$10,000. Despite attempts at reform under the Rudd and Gillard governments, the Federal disclosure regime has not been substantively updated since 2006 resulting in a situation where the disclosure threshold is now \$13,500 due to indexation.

As Australian campaign finance expert Professor Joo-Cheong Tham argues, Australia's current disclosure regulations 'seriously fail to provide proper transparency of private funding: they offer partial coverage, half measures and lax compliance, and their disclosure obligations sit alongside avenues for concealment and evasion.'<sup>6</sup>

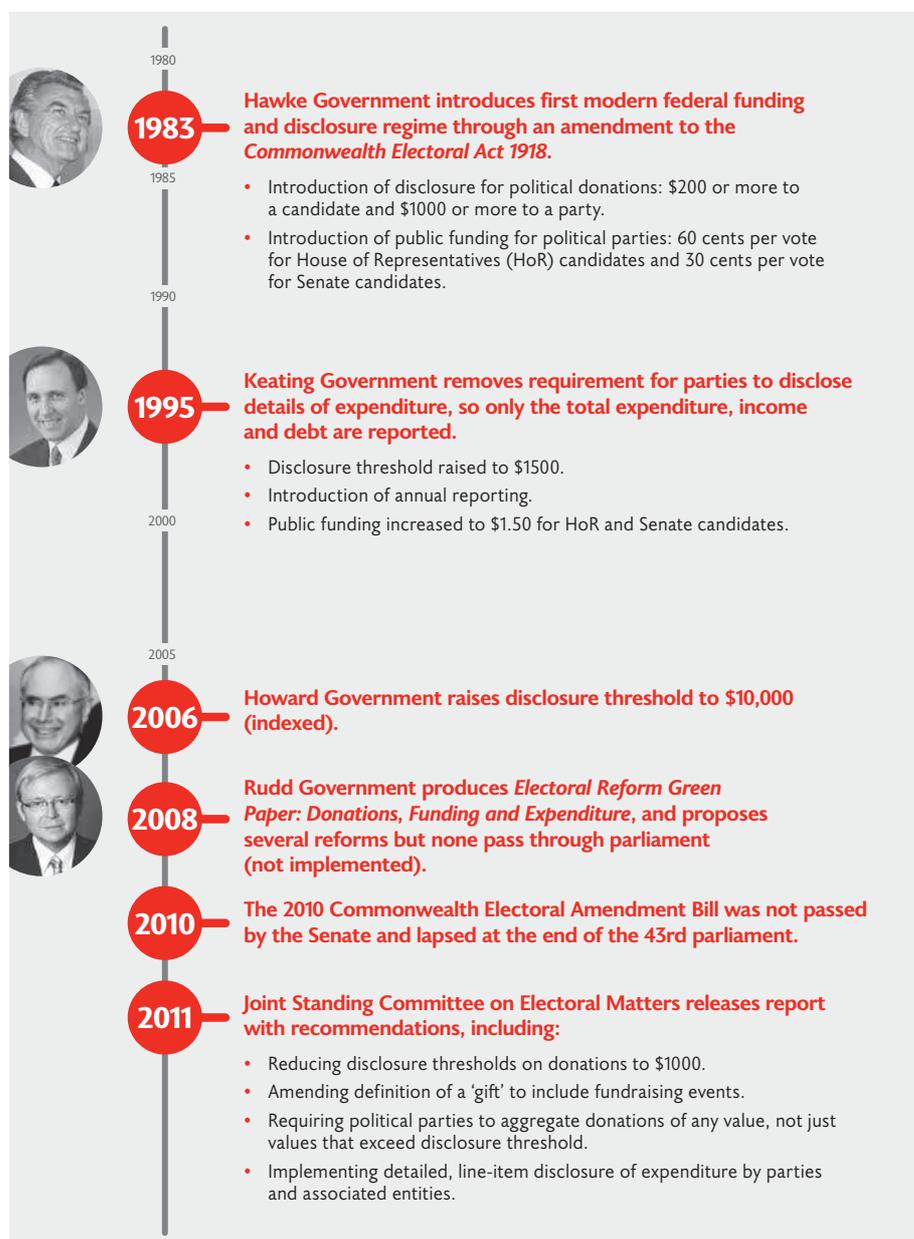
The result of these weak and inconsistent regulations is that 'the flow of private money into Australian politics remains murky and opaque.'<sup>7</sup>

In the absence of effective Commonwealth regulation all states, except Tasmania, have introduced their own campaign finance

and disclosure provisions. In the absence of state-level campaign finance laws, three quarters of income received by Tasmanian political parties in the lead up to the 2018 State Election was undisclosed.<sup>8</sup>

7 Ibid.

8 Eccleston, R (2019). We'll never know who funded 'Love Your Local'. *The Mercury*, 2 February 2019.



6 Tham, JC (2010). *Money and Politics: The Democracy We Can't Afford*. Sydney: University of New South Wales Press, 27.

Figure 1: The evolution of Australia's campaign finance regime.

## Section 3. Recent reforms in other states

In the absence of effective campaign finance and disclosure provisions at the national level and amid prominent examples of powerful interests exerting undue influence over state governments, mainland states have introduced a number of significant campaign finance and disclosure reforms.

New South Wales reforms introduced in 2011 included a cap on electoral spending for both candidates and parties. Additional reforms in 2014 required parties to disclose donations from the previous year before the start of an election, and place donation and expenditure restrictions on third parties.

Although the High Court overturned the complete ban on all corporate and union donations in 2013 (*Unions NSW v NSW – see below*), it has since upheld a ban on donations from property developers, tobacco businesses, and liquor or gambling businesses (*McCloy and Ors v NSW*).

After the 2016 inquiry by the Independent Commission Against Corruption found a number of New South Wales politicians evaded political donation laws during the 2011 State Election, New South Wales tightened its electoral funding laws – all donations over \$1000 must now be disclosed within 21 days in an election period (or six monthly otherwise).<sup>9</sup>

In Victoria, reforms introduced in 2018 transformed the State's disclosure provisions from some of the weakest in Australia to some of the strongest. These reforms included the introduction of a \$1000 disclosure threshold and a 21-day disclosure period. Victoria has also placed restrictions on donations to parties and candidates, placing a cap of \$4000 on domestic donations within a four-year period, and introducing a total ban on foreign donations.

Victorian MPs are provided with public funding as compensation for the loss of private donations and to address the administrative costs involved in meeting these new obligations.

Reforms in Queensland, South Australia and the ACT have focused on introducing stricter disclosure obligations. In Queensland and the ACT, donations over \$1000 must be declared. South Australia's laws require candidates to disclose donations over \$5000, as well as to keep a record of gifts greater than \$200 and loans over \$1000. South Australia, Queensland and the ACT have also introduced seven-day reporting periods during elections, bringing these states the closest to 'real time' disclosures. A summary of current disclosure provisions is provided in Table 1.

Given these disclosure reforms in mainland states, a recent Grattan Institute assessment of the quality of governance across the Australian states rated Tasmania (along with the Northern Territory) as the worst in the country in terms of electoral transparency.<sup>10</sup>



<sup>9</sup> Electoral Funding Act 2018 (NSW); ICAC (2016) Investigation into NSW Liberal Party Electoral Funding for the 2011 State Election Campaign and Other Matters. <https://www.icac.nsw.gov.au/investigations/past-investigations/2016/nsw-public-officials-and-members-of-parliament-operation-spicer>.

<sup>10</sup> Daley, J., Duckett, S., Goss, P., Terrill, M., Wood, D., Wood, T., and Coates, B., State Orange Book 2018: Policy Priorities for States and Territories, Grattan Institute, 2018, 102; Edwards, L., 'The Truth About Political Donations: There Is So Much We Don't Know', *The Conversation*, 2 Feb 2018, <https://theconversation.com/the-truth-about-political-donations-there-is-somuch-we-dont-know-91003>; Sawyer, M., 'Australia Trails Way Behind Other Nations in Regulating Political Donations', *The Conversation*, 2 June 2016, <https://theconversation.com/australia-trails-way-behind-othernations-in-regulating-political-donations-59597>.

	<b>Federal</b>	<b>NSW</b>	<b>Vic.</b>	<b>SA(a)</b>	<b>Qld</b>	<b>Tas.(b)</b>	<b>WA</b>	<b>ACT</b>	<b>NT</b>
Gift disclosure threshold	\$13,800	\$1,000	\$1,000	\$5,191	\$1,000	x	\$2,500	\$1,000	\$1,500
Loan disclosure threshold	\$13,800	\$1,000	\$1,000	\$5,191	\$1,000	x	–	\$1,000	\$1,500
Threshold indexed	3	X	3	3	X	–	3	X	X
Donation cap (to party)	x	\$6,300	\$4,000	x	x	x	x	x	x
Donation cap period -	Yearly	4 years	–	–	–	–	–	–	–
Donor returns required	✓	✓	✓	✓	✓	x	x	x	✓
Expenditure cap (max for party)	x	~\$11m	x	~\$4m	x	x	x	\$1m	x
Expenditure cap indexed	–	✓	–	✓	–	–	–	✓	–
Per seat expenditure cap	x	\$61,500	x	\$100k	x	x	x	x	x
Expenditure caps for third parties	x	\$500k	x	x	x	x	x	\$40,000	x
Expenditure caps for associated entities	x	X(c)	x	x	x	x	x	\$40,000	x
Third party campaigner returns	✓	✓	✓	✓	✓	x	✓	✓	x
Anonymous donations threshold	\$1,000	\$1,000	\$1,000	\$200	\$1,000	x	\$2,300	\$1,000	\$1,000
Banned donor industries	x	✓(d)	x	x	✓(e)	x	x	x	x
Foreign donation restrictions	✓	✓	✓	x	✓	x	x	x	x
Expenditure reporting	x	✓	✓	✓	✓	x	✓	✓	✓
Campaign account	x	✓	✓	✓	x	x	x	x	x
Per vote public funding	\$2.74	\$3/\$4(f)	\$6.00	\$3.19	\$3.14	x	\$1.91	\$8.24	x
Public funding vote threshold	4%	4%	4%	4%	6%	–	4%	4%	–
Public funding capped to expenditure	✓	✓	✓	✓	✓	–	✓	✓	–
Administrative funding (max)	x	~\$3.4m	~1.8	\$60,000	\$3m(g)	x	x	~\$533k(h)	x
Other public funding sources	x	✓	✓	x	x	x	x	x	x
Election donation reporting	x	21 days	21 days	Weekly	✓	x	✓(i)	Weekly	✓
Other reporting cycle	Annual	Half yearly	Annual	Half yearly	Half yearly(j)	x	Annual	Annual	Annual

Table 1. Existing Campaign Disclosure Provisions in Australia. Source: *Tasmanian Review of the Electoral Act, Interim Report*, December 2018.

Notes:

As applicable to political parties. Rules for candidates or upper-house non-party groups may vary. Indexed amounts as per November 2018 or most recent amounts as published by the relevant electoral commission. The "Federal" column indicates recent provisions that have been legislated and will take effect before the next Federal election.

(a) For parties that have opted into the SA public funding scheme.

(b) Tasmanian House of Assembly elections only. Different rules apply for Legislative Council elections.

(c) Expenditure of associated entities is aggregated with the party for which they are an associated entity for the purposes of this cap.

(d) Property developers, gambling, tobacco, liquor industries or persons closely associated.

(e) Property developers.

(f) \$4 per vote in the Legislative Assembly and \$3 per vote in the Legislative Council.

(g) Divided between eligible parties.

(h) An amount of \$21,322.64 per candidate.

(i) Gifts over the disclosure threshold at any time must be reported within seven days.

(j) Expenditure only.

## Section 4. Electoral disclosure reform in Tasmania

Following comprehensive campaign finance reforms in Victoria last year, Tasmania is the only state in Australia where lower house elections aren't subject to state-level donation disclosure laws. Tasmania may be a laggard when it comes to campaign finance and disclosure provisions, but there are established limits on candidate spending in Legislative Council elections (currently \$17,000 with a ban on party spending). As noted below, there was a belated and unsuccessful attempt to introduce state level reforms on the eve of the 2014 State Election.

The state's recent experience highlights a broader argument that donation reforms must reflect local political practices and imperatives. In Tasmania, any reforms must recognise and accommodate two distinctive features of the electoral system, that:

- Tasmania's Hare Clark electoral system is candidate, rather than party based. There is significant rivalry between candidates from the same party and, unlike other states, any finance and disclosure provisions must apply equally to both parties and candidates.
- Any reforms proposed for the House of Assembly should be able to be applied to the Legislative Council without unduly compromising the prospects of independent candidates seeking election to the Council.

The Tasmanian Government announced its plan to review Tasmania's *Electoral Act 2004* and associated campaign funding and disclosure laws in May 2018. The review and proposed reforms outline options for introducing state-based campaign donation and spending disclosure requirements to bring Tasmania in line with other states. The review also considers the introduction of caps for political donations and expenditure, as well as issues associated with the public funding for electoral campaigns and options for regulating third party campaigners and donors.

The recommendations outlined in this report are designed to inform the current Tasmanian Review.



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**2013** Labor Government tables *Electoral Amendment (Electoral Expenditure and Political Donations) Bill 2013* in parliament. Proposes reforms including:

- Expenditure cap of \$75,000 per individual candidate in HoA elections.
- Expenditure cap of \$750,000 per party in HoA elections.
- Ban on anonymous donations to individuals and parties of \$1500 or more from any single donor.
- Introduction of 'real time' (14 day) disclosure of donations of \$1500 or more from any single donor.

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**2014** *Electoral Amendment Bill* reaches second reading stage in parliament, but parliament is prorogued on 12 February 2014 for State election, and the reforms dropped.

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**2018** Tasmanian Premier Will Hodgman announces (3 May) Government review of Tasmania's *Electoral Act* and associated election laws.

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Table 2: Tasmania's electoral disclosure reform timeline.

# Section 5. Elements of electoral disclosure reform

The Tasmanian Government's Review of the Tasmanian Electoral Act 2004 focuses on several different dimensions of campaign finance reform. Before assessing options for reform and associated policy recommendations, it is useful to outline the three key elements of a comprehensive campaign funding and disclosure regime:

1. **Disclosure and transparency** measures provide a foundation for an effective campaign finance regime and are designed to ensure the public knows who is funding election campaigns before voting.
2. Once the extent of campaign funding and spending is known, regulations to **limit the influence** of donors through the introduction of caps on political donations, campaign spending and public funding of political parties and candidates may be introduced.
3. As donations to and spending by political parties and candidates is subject to greater regulation it may also become necessary to regulate the extent to which **'Third Parties'** (interest groups, corporations, unions etc.) can influence political campaigns independently of parties or candidates.

## 5.1 Disclosure and transparency

The public disclosure of political donations and electoral spending is a crucial element of a transparent democratic political system. Knowing how money is being used in politics and where it comes from helps to ensure that political parties and campaigners are accountable during elections, enabling voters to make informed decisions before going to the polls.

Campaign disclosure provisions may be applied to different types of political contributions and to a range of political actors.

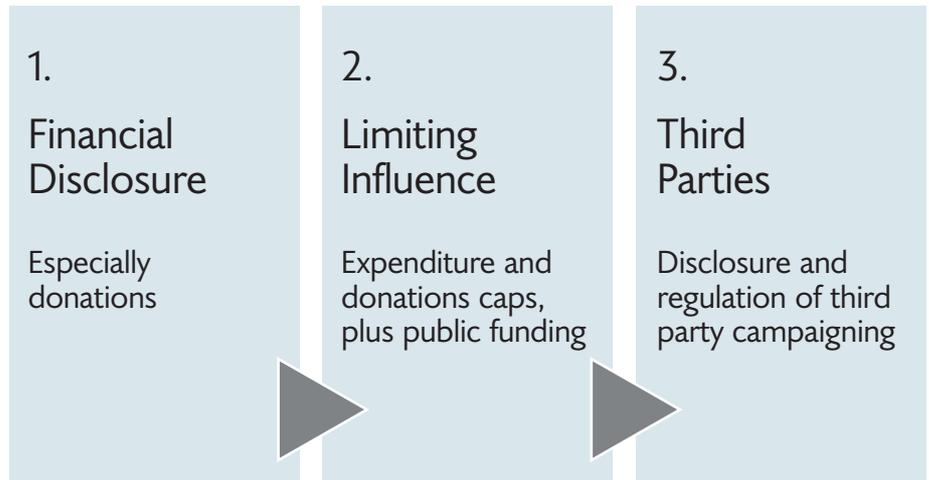


Figure 2: The three elements of campaign finance reform.

Source: Adapted from Orr 2019.

### What contributions should a disclosure regime cover?

Disclosure should include financial donations and loans, including gifts and in-kind support for political campaigning including:

- Disclosure of donations, including gifts and in-kind support, by the donors to political parties and candidates.
- Disclosure of spending undertaken for political purposes by a candidate or political parties.
- Disclosure of donations received, and spending undertaken by a third party campaigner (see below).

Across Australia and other democracies, jurisdictions are moving towards lower donation disclosure thresholds and introducing shorter reporting timeframes to provide an accurate and timely picture of the funding being received and used in political campaigns.

For similar reasons, more transparent regimes also aim to use broader and more inclusive definitions of what constitutes a political donation or gift, and what counts as political expenditure.

### Definition of gifts and donations

Under Commonwealth law, the only disclosure laws applied in the Tasmanian House of Assembly elections, a gift is 'any disposition of property made by a person to another person.'<sup>11</sup> For the purposes of reporting political donations, this includes the giving of cash, and the provision of goods and services such as paid labour.

Other sources of income such as membership dues to political parties, assets, volunteer labour, in-kind contributions, and money raised through fundraising (e.g. ticketed events and auctions) are not typically included in definitions of gifts and donations.

At the Federal level, these income sources fall under the category of 'other receipts.' They do not have to be disclosed individually, making the origins of the

<sup>11</sup> The full definition is: 'gift means any disposition of property made by a person to another person, otherwise than by will, being a disposition made without consideration in money or money's worth or with inadequate consideration, and includes the provision of a service (other than volunteer labour) for no consideration or for inadequate consideration, but does not include: a) a payment under Division 3; or b) an annual subscription paid to a political party or to a division of a state branch of a political party by a person in respect of the person's membership of the party, branch or division' (*Commonwealth Electoral Act 2018, section 287*).

money hard to trace.<sup>12</sup> Many experts argue that disclosure provisions can be compromised in the absence of information on donations and other sources of income. Tasmania should consider including requirements to disclose all campaign income, not just donations.

### Who should disclose campaign funding?

Political parties, as the primary actor in modern democracies, are the main focus of disclosure regimes and are typically required to report donations received and funds spent on political campaigning. As noted above, some campaign finance regimes also require political parties to disclose full financial accounts to authorities. Increasingly, disclosure regimes also require donors to report financial contributions made to parties and candidates as a form of verification and to promote compliance. As we have noted, Tasmanian elections for both the House of Assembly and the Legislative Council are more candidate focused than other Australian jurisdictions. Candidates are more likely to receive donations and spend funds on campaigns independently of a political party. Given this dynamic, any Tasmanian disclosure regime must include both candidate and party level returns.

### Disclosure thresholds

The clear trend in recent years has been towards lower disclosure thresholds. In Australia, mainland states allow small donations below a certain threshold to not be disclosed, and for donors making small donations to remain anonymous. In Victoria, New South Wales, Queensland and the ACT this threshold is \$1000. In the Northern Territory the threshold is \$1500. Any donations above these thresholds, including smaller donations that in aggregate exceed the threshold within a one-year period, must be disclosed and the donor identified.

### Timing

The objective of a disclosure regime is to ensure that voters, regulators, and the media are aware who has funded political campaigns before polling day. Given that the *Commonwealth Electoral Act* fails this test, mainland states have introduced more timely disclosure provisions. In Queensland, South Australia and the ACT, donations must be declared within seven days, and 21 days in New South Wales and Victoria. A seven-day disclosure period during election campaigns would bring Tasmania in line with the timeliest disclosure systems in Australia.

### The administration of disclosure regimes: Cost and compliance

The most common arguments against the introduction of a comprehensive disclosure regime relate to the cost of administering the regime and the associated compliance burden on candidates, political parties and donors. These issues were a major focus of the campaign finance workshop hosted by the Institute for the Study of Social Change in April 2019. Electoral officials from other states reported progress in terms of developing online portals for lodging and publishing donations and spending, with Queensland, South Australia and Victoria adopting similar platforms. These online systems are easier to use and more accessible for both the public, donors and candidates.

Simpler, online disclosure systems can reduce the administrative cost and compliance burden associated with disclosure, which is particularly important for Tasmania as it would allow individual candidates to submit separate disclosures from their parties. If Tasmania was to adapt platforms and administrative systems being used successfully in other states, this would reduce the administrative burden and cost of the regime. The consensus from the expert workshop was that cost wouldn't be prohibitive even for a small jurisdiction such as Tasmania. For example, in Victoria the cost of administering its recently introduced disclosure regime is a fraction of that of publicly funding political parties.

The final issue regarding the administration of disclosure provisions concerns the enforcement of the law. There is a consensus that state electoral commissions lack the capacity to conduct complex enforcement activities and their initial focus should be on education and promoting compliance with disclosure provisions.

## 5.2 Limiting influence

In addition to introducing disclosure provisions, many jurisdictions have also introduced caps or limits on both political donations and/or spending in order to reduce the influence of money on election campaigns (Figure 2). Donation and spending caps can limit the undue influence of powerful actors but also raise a range of administrative and constitutional issues which require careful consideration. Providing public funding for political campaigning is designed to reduce the demand for private donations and introduce 'clean money' into the political process, hopefully reducing the influence of private actors.

### Caps on electoral spending

Some jurisdictions impose caps or bans on certain types of political donations and electoral spending. Caps aim to limit the size of donations and spending by candidates, parties or third parties.

Expenditure caps already apply in Tasmanian Legislative Council elections. Candidates running for the Legislative Council may not exceed the expenditure limit of \$17,000 in an expenditure period (starting 1 January in an election year until the closing of the polls). Introducing a cap for candidates and parties campaigning in the Tasmanian House of Assembly elections would align the two houses and enhance the consistency of Tasmanian electoral law.

Caps on electoral expenditure have also been shown to reduce the demand for private donations and limit the influence of large private donors relative to smaller donations, which may reduce the risk of undue influence on political decision

<sup>12</sup> Grattan Institute (2018). *Who's in the Room? Access and Influence in Australian Politics*, 34.

making.<sup>13</sup> Analysis of per capita expenditure disclosed in the Australian Electoral Commission database demonstrates that Tasmania's spending during campaigns is high compared to the national average, but still within the norm for smaller states.<sup>14</sup>

However, imposing limits on political donations or spending raises a number of administrative and legal issues.

### What counts as political spending?

Debate over what constitutes political spending tends to focus on two types of definition. A narrower definition of political activity emphasises spending on any electoral material or activity designed to encourage electors to vote in a particular way. This may include advertising and other materials such as pamphlets or how-to-vote cards that encourage voters to support or

oppose a candidate, party, issue or policy. Victoria has taken this approach, defining the activity being regulated as being 'for the dominant purpose of directing how a person should vote at an election, by promoting or opposing a candidate or party.'<sup>15</sup>

A broader approach attempts to focus on any activity or material designed to influence or promote 'political issues.' While defining political issues broadly can be difficult and involve establishing objective tests, this may limit undue influence given the clear potential for carefully designed issue-based campaigns to influence voting behaviour without explicitly referring to political parties, candidates, policies or elections. A broader definition that captures issue-based political activity and spending is especially important with demand growing to regulate third party actors. The Commonwealth does not explicitly define third party.<sup>16</sup>

### Capping donations

The alternative approach to regulating campaign spending is to impose limits on political donations or complete prohibitions on donations from specific categories of donors such as property developers, gaming interests, or foreign donors. Donation caps have been introduced in Victoria and New South Wales and clearly have the potential to limit the influence of powerful actors in election campaigns, but they also raise several issues.

The main critique of this approach is that it effectively limits political expression, an argument which has been partly upheld in a series of recent High Court cases (see below). Bans on donations from specific industry sectors have only been introduced in other states after findings of systemic corruption by Queensland's Crime and Misconduct Commission and New South Wales' Independent Commission Against Corruption. The Commonwealth, Victoria, New South Wales and Queensland all regulate political donations from foreign entities while acknowledging that it

<sup>13</sup> Anderson, Tham et al (2017) 'Less Money, Fewer Donations: The Impact of New South Wales Political Finance Laws on Private Funding of Political Parties', *Australian Journal of Public Administration*, 77(4): 789.

<sup>14</sup> ISC data.

<sup>15</sup> *Electoral Act 2002 (Vic)*, section 206.

<sup>16</sup> *Commonwealth Electoral Act 1918*, section 314AEB.

## The Constitution and the implied freedom of political expression

The possibility of introducing caps on donations or expenditure raises important issues relating to the Commonwealth Constitution and implied freedom of political expression.

The High Court of Australia has heard several cases in recent years on whether campaign donations and expenditure can be legitimately restricted without limiting the right to political communication.

Most recently, the Court ruled in January 2019 in *Unions NSW & Ors v New South Wales* that two changes made in New South Wales' *Electoral Funding Act 2018* were invalid because they restricted the implied freedom of political communication.

The first amendment reduced the amount third party campaigners were permitted to spend on electoral campaigning from \$1,050,000 to \$500,000 – less than half the amount political parties can spend.

The second amendment prohibited third party campaigners from collaborating in order to exceed the cap applied to

single third party campaigners. The High Court ruled that while parliaments can choose to place restrictions on political communication, 'they have to be justifiable choices where the implied freedom is concerned.'

The Court found there was no evidence to support that the New South Wales parliament had undertaken insufficient analysis of its expenditure cap to reasonably justify the restriction on the implied freedom, and overturned the Act.

However, the Court has upheld other restrictions. In *McCloy v New South Wales (2015)* the Court ruled that the ban on donations from property developers was constitutional because it served the legitimate purpose of reducing the risk or perception of undue influence and corruption.

These cases demonstrate that there are constitutional limits to the extent to which political donations and expenditure can be capped. Any restrictions on donations or expenditure that may limit freedom of political communication has to be reasonably justified to serve a purpose.

Given the long history of spending caps in the Tasmanian Legislative Council, if the caps are set at a reasonable amount and are not applied inconsistently to different types of campaigners, the High Court's decision in the *Unions NSW* case is unlikely to impact Tasmania's reforms.

is difficult to identify foreign political donations made through Australian-based affiliates.

Finally, attempts to limit the supply of campaign funding to political parties without capping expenditure will inevitably lead to calls for public funding of political campaigns, imposing an additional financial burden on taxpayers. For these reasons we believe measures designed to limit the undue influence of powerful actors in Tasmanian election campaigns should focus on introducing caps on candidate and party expenditure.

### Public funding

Public funding is an increasingly common but contested reform.

Public funding would align Tasmania with most other Australian jurisdictions and may help ensure compliance with new disclosure provisions, by allowing the Tasmanian Electoral Commission to withhold or reduce funding in the event of a violation of the disclosure regime.

Advocates of public funding suggest that publicly financing election campaigns can reduce parties' reliance on large donations. This can minimise the risk of undue influence and allow parties to focus on policy development and communicating with the electorate rather than fundraising.

But research from other Australian jurisdictions suggests that public funding does not reduce reliance on large private donations and can inflate campaign spending.<sup>17</sup> It can also favour established parties and incumbent MPs relative to emerging parties, independents and new candidates.<sup>18</sup>

The final argument against public funding, especially in a small jurisdiction like Tasmania, is the cost. For example, if Tasmania were to introduce public funding similar to that which has recently been established in Victoria, then parties and

candidates would receive just over \$1 million in public funding per House of Assembly election. We believe that government should prioritise investing in a campaign disclosure regime.

In light of this evidence, we do not recommend general public funding for candidates or parties for political campaigning. However, we do recommend the provision of limited public funding for the purposes of assisting candidates with the administrative costs of complying with more robust disclosure requirements.

This administrative support will help to ensure that independents, new candidates or parties, and smaller, non-profit third party groups are not disadvantaged or burdened relative to larger, more established political actors with greater administrative capacity.

## 5.3 Third parties

Any comprehensive campaign finance reform regime must recognise that direct donations to and spending by political parties is only one way to influence elections and policy outcomes. Evidence suggests that direct third party campaigning on key issues is increasing in part due to greater disclosure requirements for parties and candidates. Improved third party disclosure is important but raises questions about what constitutes campaign activity as well as a range of compliance issues.

### Regulating third parties

Third party campaigners are groups or individuals that make political donations or participate in other forms of political activity such as campaigning. Examples include unions, lobby groups, not-for-profit organisations and corporations. Evidence from Australia and beyond suggests that third party campaigning has become increasingly prevalent in elections and is a common strategy for influencing election outcomes and political decision making.

Third parties pose distinct challenges to any campaign finance framework. Traditional political parties are easy to identify and regulate, but third party campaigners come in many different forms and engage in diverse methods of advocacy and political activity. Defining what constitutes a third party and third party political activity is a key issue.

Definitions must be broad enough to capture the range of political activity occurring in Australia, especially for larger actors with bigger political budgets, without imposing unreasonable administrative burdens on smaller, local charities and non-profit organisations. Instead, the aim of any third party regulation should be to limit the undue influence of well-resourced actors and interest groups without limiting broader civil society engagement in election campaigns and the political process more generally.

Existing definitions of third party political activity across Australian jurisdictions tend to focus on political advertising, communication and activity that focuses directly on a candidate, party or attempts to influence voting. International models offer definitions of third party activity which are broader than those which currently apply in other Australian states. For example, the *Canada Elections Act* defines political activity as the promotion of 'an issue with which a registered party or candidate is associated'.<sup>19</sup> The aim is to achieve disclosure of spending on relevant campaign issues without requiring disclosure of all spending in relation to a wide range of issues, given the potential for most advocacy groups to draw into a political disclosure regime.

An additional issue is that larger, national-level actors often operate from outside the jurisdictions in which they are spending and donating. This makes it difficult to identify which disclosure obligations and other regulations apply.

The rise of digital platforms in campaigns renders regulating third parties doubly challenging. However, it's important to introduce third party disclosure provisions to create a clear expectation that any

<sup>17</sup> Tham, JC and Grove, D (2004). Public Funding and Expenditure Regulation of Australian Political Parties: Some Reflections. *Federal Law Review*. 32: 397-424.

<sup>18</sup> Tham and Grove (2004); Francia, P and Herrnson, P (2003). The Impact of Public Finance Laws on Fundraising in State Legislative Elections. *American Politics Research*. 31(5): 520-539.

<sup>19</sup> *Canada Elections Act 2000*, section 319.

## Section 6. Issues and options for reform in Tasmania

organisation seeking to influence elections in Tasmania should disclose their campaign accounts and spending in a timely manner.

Currently, third party activity is only regulated in Tasmania through federal provisions, and the prohibition on third parties incurring expenditure on behalf of candidates in Legislative Council elections. There are no state-based restrictions on third parties donating or campaigning in the House of Assembly or local council elections. Third party electoral activity is regulated in all other Australian states and territories.

Applying equivalent disclosure requirements for registered political parties and third parties would ensure transparency and consistency. In most Australian jurisdictions the disclosure threshold is donations over \$1000 and spending over \$1500. Consistent disclosure regulations would also stem the flow of donations from regulated political parties to unregulated third parties by requiring all political actors to play by the same rules.

### Recommendations for a state-based disclosure regime

The first step towards creating an effective and credible campaign finance regime in Tasmania is to establish a state-based disclosure regime. As shown in Section 2, the weaknesses and gaps in Australia's federal disclosure laws mean the vast majority of campaign donations and spending go unaccounted for in Tasmanian politics.

A state-based disclosure system would address the shortcomings in the federal regime and make political donations and spending more transparent and accountable. Introducing a state-based regime will also bring Tasmania in line with other Australian states.

#### Recommendation 1

That the Tasmanian Government introduces a disclosure system that requires candidates, parties and donors to report donations worth \$1000 and above, as well as spending worth \$1500 and above.

Tasmania should also consider introducing requirements that political parties disclose all sources of income, not just donations.

Whereas donations must be disclosed publicly, there is a case for limiting the disclosure of financial statements to electoral authorities to ensure compliance.

#### Recommendation 2

Individual candidates and parties should produce separate disclosure reports. This is important given Tasmania's candidate-based political system in which candidates receive donations and fund campaigns independently of their party.

#### Recommendation 3

The period for disclosing donations and spending should be as timely as possible. A seven-day disclosure period in the 12 months prior to the latest date when an election can be held (and six-monthly otherwise), will bring Tasmania in line with Queensland, South Australia and the ACT and provide near 'real time' information about political donations.

### Recommendations to limit undue influence

The primary focus of campaign finance reform in Tasmania should be on enhancing transparency in relation to political donations through a state-based disclosure system. But introducing a cap on spending for candidates and parties seeking election in the House of Assembly will also bring the House in line with the Legislative Council. Modest public funding to enable candidates to comply with their disclosure obligations should also be considered.

#### Recommendation 4

That campaign expenditure caps are applied to candidates and parties seeking election in the House of Assembly.

We recommend an expenditure limit of \$30,000 per individual candidate (indexed), together with \$30,000 per candidate for parties, a total cap of \$750,000 per party (five candidates per electorate, for 25 candidates in total across the State) in House of Assembly elections. In the interests of consistency, we propose that the expenditure cap for Legislative Council elections be increased to \$30,000 per candidate.

Reflecting the culture and practice of the Legislative Council, the current ban on political party spending in the Upper House election should remain.

#### Recommendation 5

That the Government provides modest public funding to assist candidates with the administrative costs of complying with new disclosure obligations. Such funding should be limited to actual costs incurred.

Funding for administrative support will also level the playing field between smaller parties and new or independent candidates, and established parties and incumbent candidates.

## Regulating third parties

As highlighted throughout this report, political activity is increasingly undertaken by groups and individuals who are not affiliated with traditional political parties. As the campaigning landscape changes, Tasmania's disclosure regulations need to adapt to capture the more diverse sources of campaign finance and political activity. Third party actors should be subject to the same disclosure requirements as parties and candidates. Introducing state-based disclosure requirements for third party actors will ensure consistency across different political actors, as well as prevent candidates and parties with disclosure obligations shifting funds into the currently unregulated third party sector.

### Recommendation 6

That third parties are required to report donations worth \$1000 and above, as well as spending above \$1500 within seven days in the 12 months prior to the latest date when an election can be held (and six-monthly otherwise).

### Recommendation 7

That the Government adopts a broad definition of political activity and spending. The definition should capture traditional forms of activity – aimed at directing people to vote for a specific party or candidate – as well as wider forms that focus on key election issues regardless of the parties or candidates associated with them.

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