

# Public Education Funding in New South Wales: A Silver Bullet?

Andrew J Roberts

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Andrew J Roberts is a second year Juris Doctor student, having previously completed a Bachelor of Arts with Honours in International Relations at UNSW. He is also a volunteer legal assistant with the Aboriginal Legal Service and editor of the UNSW Law Journal. On the rare occasions that he is not studying, he likes to enjoy the simple pleasures of natural light.

## I. INTRODUCTION

For modern democracy to function, voters must be aware of who is standing for election and what they stand for so that they are able to make an informed decision. However, transmitting this information — be it in print media, online, by telephone or in person — necessarily involves expense and somebody must foot the bill. The NSW Independent Commission Against Corruption (ICAC) has notched up remarkable successes of late in publicly revealing corrupt conduct in NSW politics. Political donations and election funding has been a recurring theme. In response, the NSW government has convened a panel of experts to review election funding laws in NSW.<sup>1</sup> The panel has been given a wide ambit, but is to consider the best approach to ‘remove any corrosive influence of donations in New South Wales.’<sup>2</sup> Particular attention is to be given to the suitability of full public funding of elections.<sup>3</sup> While consideration should be given to possible public funding models, so too should their potential limitations. This essay addresses three key issues with public election financing: constitutional validity, efficacy and the complexity of developing a fair funding model.

## II. THE CONSTITUTIONALITY OF CAMPAIGN FINANCING

Full public funding of election campaigns may not be constitutionally valid. The 2012 amendments to the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) (*EFED Act*) restricted eligibility to make donations to individual enrolled voters (precluding businesses and unions, among others) and to aggregate political communication expenditure of parties and their affiliated organisations.<sup>4</sup> These provisions were struck down by the High Court in *Unions NSW v New South Wales* on the basis that they impinged on the implied freedom of communication.<sup>5</sup> The court applied the two-staged test from *Lange v Australia Broadcasting Corporation*.<sup>6</sup> The

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first limb asks whether the provision ‘burdens the freedom of political communication either in its terms, operation or effect’.<sup>7</sup> The second asks whether the burden is ‘reasonably appropriate and adapted, or proportionate, to serve a legitimate end’ in maintaining representative government.<sup>8</sup> It was found in *Unions NSW* that restricting funding to candidates burdened the freedom of political communication in a way that did nothing to achieve the anti-corruption purpose of the EFED Act.<sup>9</sup>

Full public election funding would go much further than the provisions struck down in *Unions NSW* by effectively banning all donations. It is difficult to see how a more restrictive arrangement could survive the High Court. However, the court did leave the possibility open. In obiter, the court suggested that full funding may better achieve the anti-corruption objective of the EFED Act.<sup>10</sup> However, it would be necessary to justify public funding as a proportionate response to the risk that any donation, regardless of its source, may engender some impermissible level of corruption.<sup>11</sup> The constitutional validity of public campaign financing is to be specifically addressed by the panel of experts.<sup>12</sup>

### III. THE EFFICACY OF PUBLIC CAMPAIGN FINANCING

In the context in which public funding has been proposed, public financing would need to successfully limit the corrupting influence of political donations on the democratic process. However, it is presumptive to assume that precluding legal donations would prevent money from influencing politics. The resignation of Newcastle MP Tim Owens and Charlestown MP Andrew Cornwell concerned allegations as part of an ICAC enquiry that they had accepted money from banned donors.<sup>13</sup> Their alleged conduct is already outside the bounds of existing campaign finance regulation.<sup>14</sup> While banning all political donations may reduce the *reliance* on political donations that currently characterises the NSW system, it would not necessarily negate the advantage that superior electoral spending may have on candidates’ prospects of electoral success. That is, there may remain a strong incentive for candidates to seek or accept illicit donations regardless of the funding model in an attempt to gain a competitive advantage. Thus, while decreasing the reli-

ance on donations may reduce this incentive, it is unlikely that a full public funding model would completely remove it. Many of the difficulties that currently exist in enforcing the restrictions under the EFED Act would likely remain.

#### IV. DEVELOPING A FAIR PUBLIC MODEL

While political donations are criticised for their influence on the democratic process, similar distortions may exist in a public funding model. The challenge is to develop a mechanism that fairly distributes funding. Some of these difficulties are manifest in the Commonwealth model for partial public funding of elections. At a national level, public funding at a set amount per voter is provided to each candidate who secures at least 4 per cent of the first preference votes.<sup>15</sup> While such a system purportedly directs funds where they are most deserving, this funding is paid after the election and is most likely directed to future campaigns and general political activity.<sup>16</sup> Thus, a proportional electoral funding mechanism based on previous electoral sentiment has two important limitations. Firstly, incumbent parties are advantaged through retrospective funding even where they no longer reflect electoral sentiment. Secondly, serious minor parties are excluded from public funding until they can obtain a 4 per cent share of primary votes, a task made more difficult by the lack of public funding. Most importantly, both of these issues serve to reinforce the status quo by consolidating funding to those already in power. The risk is that it creates a system where the relative lack of funding provided to certain players, including those more responsive to the electorate, may be disadvantage through an inability to effectively communicate their message.

While it is not necessary that NSW would develop a funding model based on the Commonwealth's 'per voter' approach, it is illustrative of the complexity of public financing. Finding an appropriate system will be difficult. Where all candidates and parties are reliant on public funds, the pressure to ensure fairness will be crucial to its success. However, when decision making around campaign financing is decided by the government of the day there is capacity and incentive to develop a system that is favourable to the incumbent.

#### V. CONCLUSION

Election funding is a complicated legal challenge. It is beleaguered by the self-interest of those required to change it and the vested interests of those who seek to capitalise on it. What is required is the development of a legislative framework which balances democratic rights within a sensible regulative framework in which the overall goal of ensuring confidence in a firmly democratic electoral process is maintained. While fully public electoral funding may have some capacity to achieve

these goals, it also involves a range of risks and potentially adverse outcomes. That is, it may not be the silver bullet that some hope it can be.

#### REFERENCES

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