

Review of the 2023 NSW election Submission

NSW political donations laws are opaque; truth in political advertising laws are missing; and donation caps, spending caps and public funding overwhelmingly favour incumbents over new entrants. The major parties are majority publicly-funded, but without the transparency and governance conditions that are placed on other quasi-NGOs.

Submission

Bill Browne

March 2024

ABOUT THE AUSTRALIA INSTITUTE

The Australia Institute is an independent public policy think tank based in Canberra. It is funded by donations from philanthropic trusts and individuals and commissioned research. We barrack for ideas, not political parties or candidates. Since its launch in 1994, the Institute has carried out highly influential research on a broad range of economic, social and environmental issues.

OUR PHILOSOPHY

As we begin the 21st century, new dilemmas confront our society and our planet. Unprecedented levels of consumption co-exist with extreme poverty. Through new technology we are more connected than we have ever been, yet civic engagement is declining. Environmental neglect continues despite heightened ecological awareness. A better balance is urgently needed.

The Australia Institute's directors, staff and supporters represent a broad range of views and priorities. What unites us is a belief that through a combination of research and creativity we can promote new solutions and ways of thinking.

OUR PURPOSE - 'RESEARCH THAT MATTERS'

The Institute publishes research that contributes to a more just, sustainable and peaceful society. Our goal is to gather, interpret and communicate evidence in order to both diagnose the problems we face and propose new solutions to tackle them.

The Institute is wholly independent and not affiliated with any other organisation. Donations to its Research Fund are tax deductible for the donor. Anyone wishing to donate can do so via the website at <https://www.australiainstitute.org.au> or by calling the Institute on 02 6130 0530. Our secure and user-friendly website allows donors to make either one-off or regular monthly donations and we encourage everyone who can to donate in this way as it assists our research in the most significant manner.

Level 1, Endeavour House, 1 Franklin St
Canberra, ACT 2601
Tel: (02) 61300530
Email: mail@australiainstitute.org.au
Website: www.australiainstitute.org.au
ISSN: 1836-9014

Contents

Summary	1
Introduction	6
Advantages of incumbency.....	8
Election campaign funding.....	12
NSW political parties as quasi-NGOs	15
Donation and spending caps.....	20
Political finance transparency.....	31
Full preferential voting	34
Truth in political advertising	38
Conclusion.....	46
Appendix: Recommendations for addressing cash-for-access.....	47

Summary

The 2023 state election served to highlight some of the fundamental issues with the electoral system in New South Wales. The Australia Institute welcomes the inquiry into the election, and our submission to the inquiry builds on existing research to examine several of these issues in detail:

- The enormous advantages enjoyed by incumbent MPs and established political parties;
- The way in which donation and spending caps favour major parties;
- The lack of transparency and effective regulation around political finance;
- NSW’s failure to implement measures used successfully elsewhere in Australia, including the state’s continued use of optional preferential voting, and its lack of truth in political advertising laws.

Advantages of incumbency

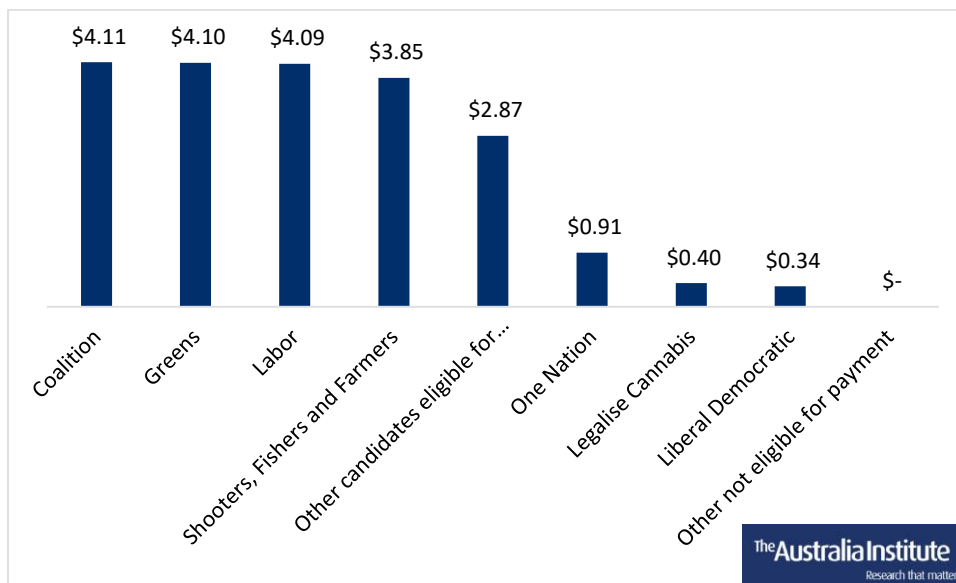
A conservative estimate values the advantages an incumbent Member of the Legislative Assembly (MLA) enjoys at well over \$2 million per electoral cycle. This gives incumbents an enormous advantage over challengers, including candidates from new parties and independent candidates.

Incumbent MLAs and MLCs (collectively, parliamentarians or “MPs”) also generate administrative funding entitlements for the parties to which they belong: \$16.2 million in entitlements last year, of which \$15.9 million was claimed—mostly by the major parties.

In addition to these advantages for individual parliamentarians, established parties enjoy financial advantages that make it more difficult for new parties to enter the political arena. Parties and candidates that win above 4% of the vote receive election campaign funding after each election. For the 2023 state election, this amounted to \$14.0 million for Labor, \$12.5 million for the Coalition and \$3.6 million for the Greens. This equates to about \$4.10 per vote received.

Parties that did not pass the 4% threshold in every race received much less per vote – and sometimes nothing. If minor party and independent votes were all worth \$4.10, over \$5 million in additional election campaign funding would go to non-major party candidates.

Figure: Dollars per vote, 2023 funding



The effect of generous public funding is that the NSW branches of the major parties receive about two-thirds of their known revenue from public sources but little is expected of them in return in terms of governance or transparency.

Donation and spending caps favour incumbents and registered parties

The advantages of incumbency mean that large, established parties both need to raise less money than smaller participants, and need to spend less money. While NSW legislation includes caps on donations and spending during a given election cycle, these caps serve only to further entrench the position of large, established players.

A fair donation cap would account for the fact that entities that receive public funding and the advantages of incumbency, particularly the major parties, are less dependent on donations than smaller parties and independent candidates.

Instead, NSW's donation caps have major exceptions for registered parties, including a built-in higher cap for parties than for other entities. This means that independent candidates and new parties operate with much stricter fundraising constraints than large, established parties and incumbent candidates. Caps are imposed annually, and over a four-year election cycle, a single donor can give \$60,800 to a registered party and its candidates without exceeding the cap (\$121,600 if local government is included). By contrast, an independent whose campaign and fundraising efforts start six months before an election cannot raise more than \$3,600 from a single donor.

Similarly, the spending caps for parties and candidates during an election cycle mean that major parties can spend more in an electorate than their independent competitors. Once

the ability to “pile in” funding on target seats is accounted for, parties can effectively outspend an independent candidate almost five-to-one in key seats.

Political finance transparency and regulation are poor

NSW’s real-time disclosure of political donations is at least hypothetically useful in exposing the use of political contributions to purchase access to politicians or sway decision-making. However, the extremely patchy nature of disclosures and poor online functionality mean that in practice, how parties and candidates are funded is obscured almost as effectively as if the information were not available in the first place.

More broadly, the picture of democratic integrity and political finance in NSW is not a happy one. Changes promoted as improving transparency and leveling the playing field appear to have had the opposite effect: they have entrenched incumbents and turning the state branches of major parties into quasi-NGOs (non-government organisations) at the cost of their history as mass-member organisations, while doing little or nothing to stop the use of cash to purchase access.

NSW retains optional preferential voting and lacks truth in advertising laws

NSW is the last remaining jurisdiction to use optional preferential voting for its lower house. This encourages cynical “Just Vote 1” and “Put X Last” campaigns, often issued under the guise of being official communications, rather than being presented as party-political material. This also makes it harder for coalitions to run three-headed contests, and risks voting in the state becoming de facto “first past the post”. In practice, optional preferential voting is also less representative of the will of voters.

NSW also lacks truth in political advertising laws. Such laws, as proven to work in South Australia, prompt the withdrawal and correction of misleading political advertising, and set an expectation that political communication should be truthful. They should be adopted in NSW.

RECOMMENDATIONS

1. Consider a referendum to adopt full preferential voting for NSW elections (or to remove the requirement of optional preferential voting from the state constitution).
2. Reform donation and spending caps to be compatible with the nine principles for fair political finance reform, for example by limiting them to entities that accept public funding only, or abolish them if they remain unfair.
3. If donation caps are retained, they should be intuitive and fair, applying to all contributions to a party and its candidates and members.
4. If spending caps are retained, they should account for the benefits of incumbency and the ability of state-wide organisations to concentrate spending on target seats.
5. Assess all campaign finance reforms against the nine principles for fair political finance reform.
6. Introduce constructive reforms to stop cash-for-access, as described in *Securing transparency and diversity in political finance* (and the appendix to this submission).
7. Conduct an inquiry into how public funding can be reformed to make it accessible to new entrants, with the baseline being that the major parties receive \$2,000–\$2,600 per election per party member.
8. Consider whether it is feasible to improve access to election campaign funding by replacing the 4% threshold for election campaign funding with a tapered model and capping election campaign funding based on the higher of lower house votes received and upper house votes received.
9. Conduct an inquiry into what the public expects from parties that are majority taxpayer funded, including but not limited to (a) transparency, whistleblower protections and freedom of information laws, (b) democratic internal structures and (c) governance.
10. Require parties that are publicly funded to publish audited annual reports in accordance with the Australian Accounting Standards that present fairly the agency's financial position, financial performance and cash flows.¹
11. Legislate truth in political advertising laws along the South Australian model, in time for the next state election.
12. Introduce political finance transparency reforms so that:
 - Parties and candidates disclose their revenue, expenditure, loans and assets at least annually.
 - Political contributions of all sorts are disclosed at least quarterly, and more frequently ahead of an election.
 - Political contributions are disambiguated so there is no risk of double-counting between state and federal disclosures.

¹ See for comparison *Government Sector Finance Act 2018* (NSW), sec.7.6, <https://legislation.nsw.gov.au/view/whole/html/inforce/current/act-2018-055>

- All forms of political contribution above the threshold are disclosed, not just “donations” or “gifts”.
- All political contributions by corporations and all cash-for-access payments are disclosed, even if they are below the disclosure threshold.
- “Other receipts” like asset sales and dividends above the threshold are disclosed, including their source and circumstances.
- The nature of a payment (for example, a membership fee or affiliation fee) is published as well as the size of the payment.
- All disclosures are searchable, filterable, exportable and queryable, so simple questions like “Which political contributions did a party and its candidates receive in the four years leading up to the 2023 election” can be answered with a single search.
- The NSW Electoral Commission to publish annually a summary of political finances, including the total funding for each party and its sources and an explanation of how this relates to federal disclosures by NSW-based parties, candidates and entities.
- The NSW Electoral Commission to publish quarterly a summary of political contributions, including the top contributors to each political party and its candidates.

Introduction

The Australia Institute welcomes the opportunity to make a submission to the inquiry into the administration of the 2023 NSW election and other matters. This submission builds on the Institute's existing research on political donations, campaign finance, truth in political advertising and the conduct of elections.²

Some of the analysis in this paper is reproduced from *Money and power in Victorian elections* and *Submission: 2022 Victorian state election inquiry*.³ Thank you to the co-authors on those papers: Claire Connelly and Elizabeth Morison; and to Ben Walters for writing an internal brief that forms the basis of the section on the Misinformation Bill.

² See for example Browne (2019) *We can handle the truth: opportunities for truth in political advertising*, <https://australiainstitute.org.au/report/we-can-handle-the-truth-opportunities-for-truth-in-political-advertising/>; Browne and Connolly (2023) *Submission: Money and power in Victorian elections*, <https://australiainstitute.org.au/report/submission-money-and-power-in-victorian-elections/>; Browne and Shields (2022) *Fortifying Australian democracy: submission to the inquiry into the 2022 election*, <https://australiainstitute.org.au/report/fortifying-australian-democracy/>; Morison and Browne (2023) *Submission: 2022 Victorian state election inquiry*, <https://australiainstitute.org.au/report/submission-2022-victorian-state-election-inquiry/>

³ Browne and Connolly (2023) *Submission: Money and power in Victorian elections*; Morison and Browne (2023) *Submission: 2022 Victorian state election inquiry*

PRINCIPLES FOR FAIR POLITICAL FINANCE REFORM

In 2023, The Australia Institute identified nine principles for fair political finance reform.⁴ It is with them in mind that we assess NSW's campaign finance rules. They inform the analysis in this submission, and the issues on which we focus.

The principles can be divided into two broad categories: those that deal with fairness for all candidates in/contributors to an election, and those that aim to ensure that any reforms are targeted and effective.

Fairness for all candidates and contributors

To ensure that all candidates and contributors are treated fairly, political finance reform should:

1. Give voters a range of choices about who represents them;
2. Not make it harder for new candidates to compete with incumbents;
3. Provide a level playing field regardless of whether candidates are members of a political party or independents;
4. Factor in the significant taxpayer-funded advantages of incumbency, with an eye to reducing disadvantages already faced by challengers; and
5. Account for spill over effects and economies of scale.

Targeted and effective political finance reforms

For reforms to political finance to be targeted and effective, such reforms should:

6. Focus on those who most clearly threaten democracy and accountability;
7. Ensure that public funding is fit for purpose;
8. Strive for fairness and increased transparency; and
9. Distinguish between bona fide contributions and "cash for access".

⁴ Browne (2023) *Principles for fair political finance reform*, <https://australiainstitute.org.au/report/principles-for-fair-political-finance-reform/>

Advantages of incumbency

One of the two fundamental concepts that informs the principles for fair political finance reform is that all candidates and contributors are treated fairly. As such, a key area for reforms should be accounting for the significant taxpayer-funded advantages of incumbency, with an eye to reducing the disadvantages faced by challengers.

MP ENTITLEMENTS

Some of the financial advantages of incumbency can be enumerated. Last year, the Australia Institute released research finding that federal MPs and senators receive at least \$2.9 million and \$2.6 million respectively in incumbency advantages, including entitlements, staff and salary, over the three-year electoral cycle. This gives them a head start in any election that can be almost insurmountable, as demonstrated by the fact that 90% of incumbent MPs have held their seats across the last three elections.⁵

At a state level, Victorian MPs receive incumbency advantages of over \$2 million over a four-year electoral cycle.⁶ The Australia Institute has conducted a preliminary analysis of the equivalent entitlements for an incumbent NSW MLA or MLC. Our analysis in Table 1 below finds that NSW's MLAs receive at least \$604,002 in incumbency advantages per annum, while MLCs receive at least \$368,070. Over a four-year electoral cycle, that is well over \$2 million for MLAs and almost \$1.5 million for MLCs.

The provision of resources is necessary and appropriate to facilitate the parliamentarian's duty to represent their constituents. However, most of the resources provided remain available to parliamentarians during election campaigns and can assist them directly or indirectly with those campaigns. This provides incumbents with an advantage over challengers, who have no such resources available to them.

⁵ Morison and Browne (2023) *Advantages of incumbency*, <https://australiainstitute.org.au/report/advantages-of-incumbency/>

⁶ Morison and Browne (2023) *Submission: 2022 Victorian state election inquiry*

Table 1: Annual entitlements for an incumbent NSW MLA or MLC

Entitlements	Incumbency benefit	
Salary	\$172,576 12.5% superannuation <i>MPs with additional responsibilities receive higher salaries</i>	
Base electoral allowance	\$57,810 to \$162,445 (Legislative Assembly) \$67,705 (Legislative Council)	
Additional electoral allowance	\$17,445 to \$33,635 (Legislative Assembly) \$18,375 to \$23,935 (Legislative Council)	
Communications Allowance	\$20,850 + \$1.54 per elector (\$83,728 to \$97,176) (Legislative Assembly) \$5,315 (Legislative Council)	
Travel Allowance	\$7,085 to \$112,755 (Legislative Assembly) \$7,085 to \$17,715 (Legislative Council)	
Skills Development Allowance	\$1,695 (MPs) \$565 per full-time equivalent staff member	
Telephone, internet, office, equipment, member and staff travel	Some costs are covered by the Parliament	
Fitted out, equipped and maintained electorate office and secretarial services	One to three offices per member	
Recognised Office Holder Allowance	\$4,500 for recognised office holders who are not independents	
Independent Allowance	\$2,245 for independents	
Sydney Allowance and Electorate Travel (non-metropolitan members only)	\$356 per night for 105 or 135 nights per annum depending on distance from Parliament House (\$37,380 or \$48,060) 104 single economy class journeys per annum	
Staff	3 staff members (4 for independents) (LA) 1 staff member (2 for crossbenchers) (LC) Relief arrangements when staff on approved leave Paid between \$73,182 and \$99,432 per annum	
	MLA	MLC
Minimum total	\$604,002	\$368,070
Maximum total	\$1,073,252	\$560,812

Note: Minimum and maximum totals are calculated for parliamentarians with no additional responsibilities or discretionary allowances. International travel allowance not included.

Sources: Mason-Cox and O’Dea (2021) *Members’ staff conditions of employment: Determination of the presiding officers*, p. 27, NSW Parliament; Parliament of NSW (2022) *Salaries and allowances for members*, <https://www.parliament.nsw.gov.au/members/Pages/salaries-and-allowances-for-members.aspx>; Parliamentary Remuneration Tribunal (2023) *Report and determination of salary and additional entitlements for the Members of the Parliament of New South Wales pursuant to the Parliamentary Remuneration Act 1989*, pp. 82–113, <https://www.remtribunals.nsw.gov.au/parliamentary/current-prt-determinations>; Trustees of the

Parliamentary Contributory Superannuation Fund (2022) *Thirty eighth annual report*, p. 5, <https://www.parliament.nsw.gov.au/tp/files/83517/Parliamentary%20Contributory%20Superannuation%20Fund%20Annual%20Report%202021-22.pdf>

Some of these advantages are unique to NSW, or at least not replicated throughout the country. In Victoria, for example, electorate officers are not permitted to perform “party-specific activity”.⁷ No such rule appears to apply to political staff in NSW, although the major parties are reportedly leery of using publicly-funded staff to dig up “dirt” on opponents.⁸

There are also many advantages of incumbency that cannot be enumerated, some of which are listed in the Australia Institute’s earlier work.⁹

The advantages of incumbency mean challengers in elections start in a worse position than incumbents. Donation and expenditure caps can exacerbate this problem by preventing challengers from raising or spending the extra money they need to catch up. The effect of these caps is discussed in a later section.

ADMINISTRATIVE FUNDING

Independent parliamentarians and parties with sitting parliamentarians are entitled to public funding to reimburse administrative costs. Each independent MP is entitled to up to \$68,600 per quarter, while parties are entitled to \$106,100 per quarter if they have one MP, and up to \$1,029,800 per quarter if they have 25 or more MPs.¹⁰ This works out to a maximum entitlement about \$16 million each per four-year electoral cycle for the Labor and Liberal parties.

The total amount claimed by parties and independent MPs in the 2023 calendar year was \$15,861,305 of a possible \$16,185,200.¹¹

There is also a New Parties Fund, which reimburses “actual policy development expenditure” conducted by registered parties not entitled to administration funding (in other words, parties without elected MPs). Parties less than eight years old are capped at \$14,300 per year; older parties are entitled to \$0.75 per primary vote received at the last

⁷ Parliament of Victoria (n.d.) *The role of an electorate officer*, <https://new.parliament.vic.gov.au/about/careers/electorate-officers/>

⁸ Baker (2023) *‘It’s a job that rewards cold patience’: Inside the party dirt units*, <https://www.smh.com.au/national/nsw/it-s-a-job-that-rewards-cold-patience-inside-the-party-dirt-units-20230228-p5co9e.html>

⁹ Morison and Browne (2023) *Advantages of incumbency*, pp. 20–21

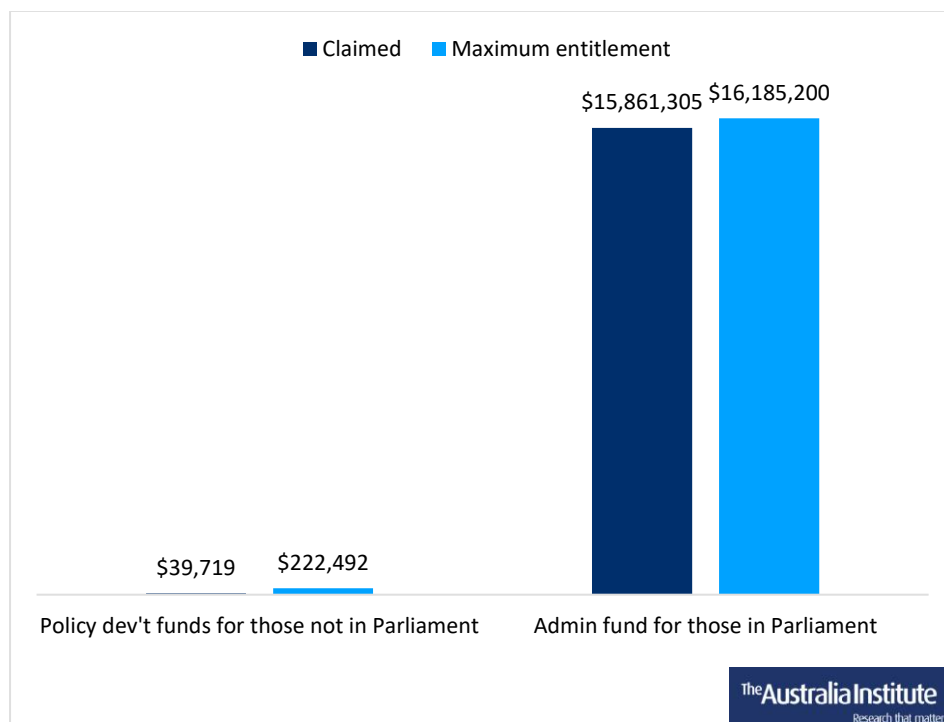
¹⁰ NSW Electoral Commission (2023) *Administration Fund*, <https://elections.nsw.gov.au/funding-and-disclosure/public-funding/administration-fund>

¹¹ At the time of writing; some claims may still be coming in. NSW Electoral Commission (2024) *2023 Administration Fund entitlements and payments*, <https://elections.nsw.gov.au/about-us/reports/public-funding-claims-and-payments/2023-administration-fund-entitlements-and-payments>

election per year. In the financial year ending 30 June 2023, only two of six eligible parties claimed any funding; they claimed a total of \$39,719.¹²

As shown in Figure 1, admin funding for MPs in Parliament is 399 times larger than policy development funding for parties not in Parliament.

Figure 1: Annual admin funding and policy development funding



Sources: NSW Electoral Commission (2024) *2022 New Parties Fund entitlements and payments for the period 1 July 2022 to 30 June 2023*, <https://elections.nsw.gov.au/about-us/reports/public-funding-claims-and-payments/new-parties-fund-entitlements-and-payments-for-the-period-1-july-2022-to-30-june-2023>; (2024) *2023 Administration Fund entitlements and payments*, <https://elections.nsw.gov.au/about-us/reports/public-funding-claims-and-payments/2023-administration-fund-entitlements-and-payments>; (n.d.) *New Parties Fund*, <https://elections.nsw.gov.au/funding-and-disclosure/public-funding/new-parties-fund>

Note: Policy development funding is for the financial year ending 30 June 2023, while administrative funding is for the 2023 calendar year.

¹² NSW Electoral Commission (2024) *2022 New Parties Fund entitlements and payments for the period 1 July 2022 to 30 June 2023*, <https://elections.nsw.gov.au/about-us/reports/public-funding-claims-and-payments/new-parties-fund-entitlements-and-payments-for-the-period-1-july-2022-to-30-june-2023>; (n.d.) *New Parties Fund*, <https://elections.nsw.gov.au/funding-and-disclosure/public-funding/new-parties-fund>

Election campaign funding

A particularly substantial advantage of incumbency is the election campaign funding provided to parties and candidates that have run in earlier elections, sometimes called “public funding” although technically other payments like administrative funding are also forms of public funding.

Campaign finance rules should give voters a range of choices about who represents them, not make it harder for new candidates to compete with incumbents. Funding that is only available to those who have already run for office excludes new entrants, however deep their support from the community may be. Furthermore, public funding should be fit for purpose, not a windfall for established parties and incumbent parliamentarians.

HOW ELECTION CAMPAIGN FUNDING WORKS IN NSW

Parties in NSW elections are eligible for election campaign funding if they have one or more candidates elected, or if they win 4% or more of the vote; individual candidates are eligible for election campaign funding if they are elected, or if they win 4% or more of the vote. Funding per vote depends on whether the recipient is a political party or a candidate and whether they were running in the Legislative Assembly or Legislative Council; for the 2023 NSW election, the figure amounted to between \$3.50 and \$5.25 per vote.¹³ Election campaign funding is provided as a refund for actual campaign expenditure; a party or candidate cannot claim more election campaign funding than they spent.

The NSW Electoral Commission publishes the amount of election campaign funding that it pays to each party and candidate and (separately) the number of votes each party and candidate received. Comparing election campaign funding payments to parties and candidates for the 2023 state election to the votes received by parties shows that election campaign funding favours the major parties (including, in this context, the Greens).

As shown in Table 1, Labor, the Coalition and the Greens receive about the same amount of election campaign funding per vote: about \$4.10. This is close to the average of \$3.50 per Legislative Council vote and about \$4.66 per Legislative Assembly vote, skewing slightly higher to reflect that each major party won more votes in the lower house than the upper house.

¹³ NSW Electoral Commission (2023) *Election Campaigns Fund*, <https://elections.nsw.gov.au/funding-and-disclosure/public-funding/election-campaigns-fund>; (2023) *Amounts payable for parties*, <https://elections.nsw.gov.au/funding-and-disclosure/public-funding/election-campaigns-fund/amounts-payable-for-parties>

The Shooters, Fishers and Farmers received \$3.85 per vote. Other candidates eligible for the payment received \$2.87 per vote. One Nation, Legalise Cannabis and the Liberal Democratic Party each received less than one dollar per vote. A further 150,413 votes were cast for parties and independent candidates not eligible for election campaign funding, because they did not reach the 4% threshold. If minor party and independent votes all contributed \$4.10, over \$5 million in additional election campaign funding would go to non-major party candidates.

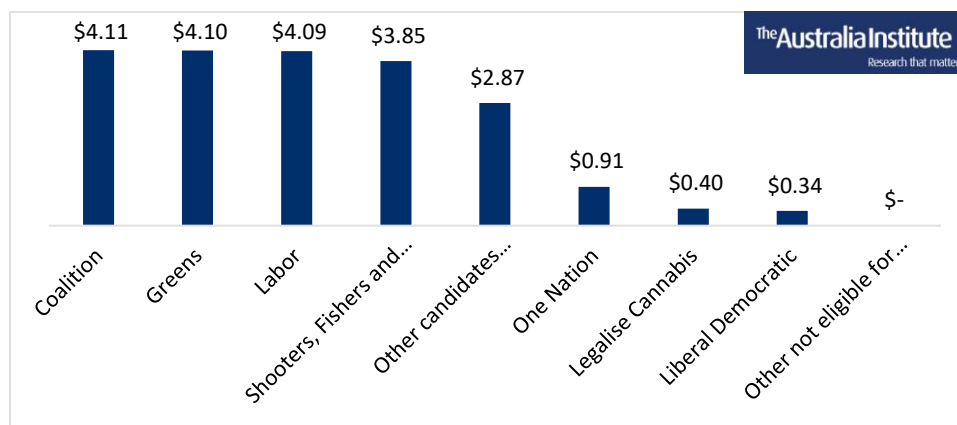
Table 1: Election campaign funding and performance at the 2023 election

Party name	LA and LC votes	Max entitlement	Paid	\$ / vote
Labor	3,428,526	\$14,016,015	\$14,016,015	\$4.09
Coalition	3,038,072	\$12,488,925	\$12,488,925	\$4.11
Greens	875,306	\$3,592,485	\$3,592,485	\$4.10
Other candidates eligible for payment	436,682	\$2,034,938	\$1,254,819	\$2.87
One Nation	358,179	\$1,351,859	\$325,273	\$0.91
Legalise Cannabis	229,539	\$873,053	\$91,383	\$0.40
Shooters, Fishers and Farmers	217,402	\$837,028	\$837,028	\$3.85
Liberal Democratic	202,235	\$753,619	\$69,628	\$0.34
Other not eligible for payment	532,847	\$ -	\$ -	\$ -
Total	9,318,788	\$35,947,922	\$32,675,556	\$3.51

Sources: NSW Electoral Commission (2023) *NSW state election results 2023*, <https://pastvtr.elections.nsw.gov.au/SG2301/LA/results>; (2024) *2023 NSW State election public funding claims and payments*, <https://elections.nsw.gov.au/about-us/reports/public-funding-claims-and-payments/2023-nsw-state-election-payments>

Note: Payments calculated at the time of writing; some claims may still be incoming.

Figure 2: Dollars per vote, 2023 funding



Source: See Table 1

CAMPAIGN FUNDING FAVOURS CERTAIN GROUPS

As already discussed, election campaign funding necessarily favours those who have run in earlier elections over new parties and candidates, because it is allocated based on performance at the last election.

However, as shown in Figure 2 above, election campaign funding also favours state-wide, established parties with large campaigning budgets over others who ran in the same election. This is a consequence of several features of NSW election campaign funding.

Falling below the threshold for funding

A minor party or independent candidate is more likely than a major party to fall below the 4% threshold, and thus miss out on election campaign funding relative to their share of the vote.

Not being able to claim the full entitlement

In NSW, parties and candidates cannot claim more election campaign funding than they spend. Major parties reliably spend enough to claim back their full entitlement.

Meanwhile minor parties and independents cannot predict how many votes they will receive or even whether they will cross the vote threshold to receive any election campaign funding. There is a catch-22 where parties and candidates do not spend a lot of money, so they are not reimbursed much, so they cannot spend a lot of money at the next election. A new entrant that is a break-out success despite a cheap campaign—like Legalise Cannabis at this election—is not given the funds to consolidate and expand.

State-wide parties are funded for votes in both houses

The variable rates of election campaign funding per vote depending on whether the recipient is a party or a candidate, and whether they are running in the Legislative Assembly or the Legislative Council, seem designed to reflect the fact that major parties tend to spend more on lower house campaigns, while upper house campaigns are more expensive for micro-parties and independents.

That said, the system does still favour major parties. Parties that run in both houses campaign for both types of votes at the same time (in practice, it appears they campaign mostly for lower house votes, and can rely on a portion of upper house votes following). Winning over a voter is “worth” \$8.16 to a political party because most vote the same way on both ballots. Independents only run in one house, so they receive less funding—but must reach the same number of voters.

NSW political parties as quasi-NGOs

In the four years between 2019–20 and 2022–23, the NSW branch of the Labor Party reported \$16.9 million in political contributions (not including loans) at the state level. During the same period, it received \$29.6 million in public funding (administrative funding and election campaign funding).

The Coalition received \$17.4 million in political contributions (not including loans) at the state level over the four years, and \$39.0 million in public funding.

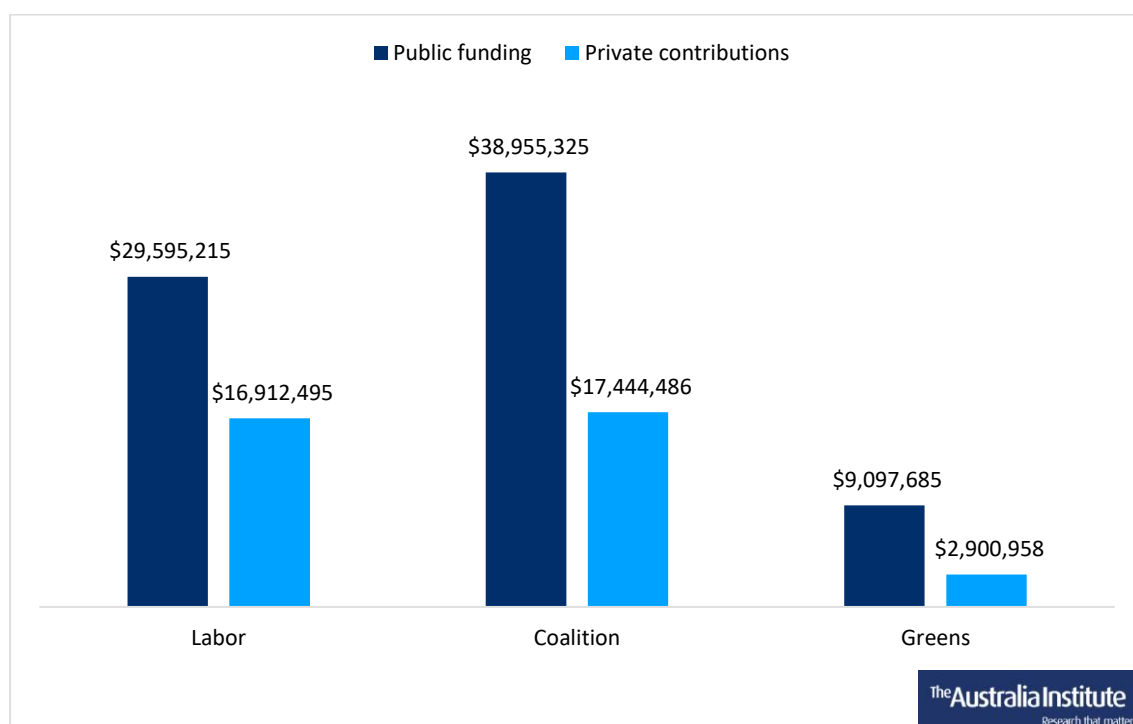
In other words, private sources of money are only responsible for about 31 to 36% of the funding that NSW’s major parties disclose at the state level.

The Greens NSW received \$2.9 million in contributions and \$9.1 million in public funding, making them 24% privately funded.

These figures do not include contributions to candidates. Judging by disclosures for the 2023 election, including candidates would somewhat increase the sum of private contributions for Labor, but otherwise not affect the party totals.

The figures are conservative in counting all contributions as being from “private” sources (for example, levies paid by parliamentarians to the party have been counted as “private contributions” even though they are ultimately taxpayer-funded).

Figure 3: Party funding over four-year election cycle



Source: NSW Electoral Commission (2024) *2023 NSW State election public funding claims and payments*; (2024) *2023 Administration Fund entitlements and payments*; (n.d.) *Disclosures lodged*, <http://searchdecs.elections.nsw.gov.au/search.aspx>

Note: Public funding is administrative funding (calculated by multiplying 2023 funding by four) and election campaign funding received following the 2023 state election; private contributions are the sum of “Total received” for each party branch, less “Reportable loans”, for the four years 2019–20 to 2022–23.

By revenue share, the state branches of the major parties are more heavily reliant on public funding (including election campaign funding and administrative funding) than some key public cultural institutions. For example, in 2022–23 the National Gallery of Australia received 37% of its revenue from private sources, making it less reliant on public funding than NSW Labor or the NSW Coalition. The Art Gallery of NSW was even less reliant on public funding, receiving only 35% of its revenue from government grants (65% from other sources).¹⁴

In exchange for public funding, these cultural institutions are expected to follow strict governance standards. They publish detailed annual reports, including audited financial statements. They are subject to freedom of information laws and whistleblower protections. They outline and commit to a code of ethics and varied policies, including work health and safety, corruption prevention, right to information and archives.¹⁵

By contrast, NSW has embarked on an experiment where most of the funding for its major parties comes from the public purse, without any debate on what the public can reasonably ask of the major parties in return for that funding. Over 99% of NSW residents are not members of political parties but are nevertheless providing most of the funding for those parties.

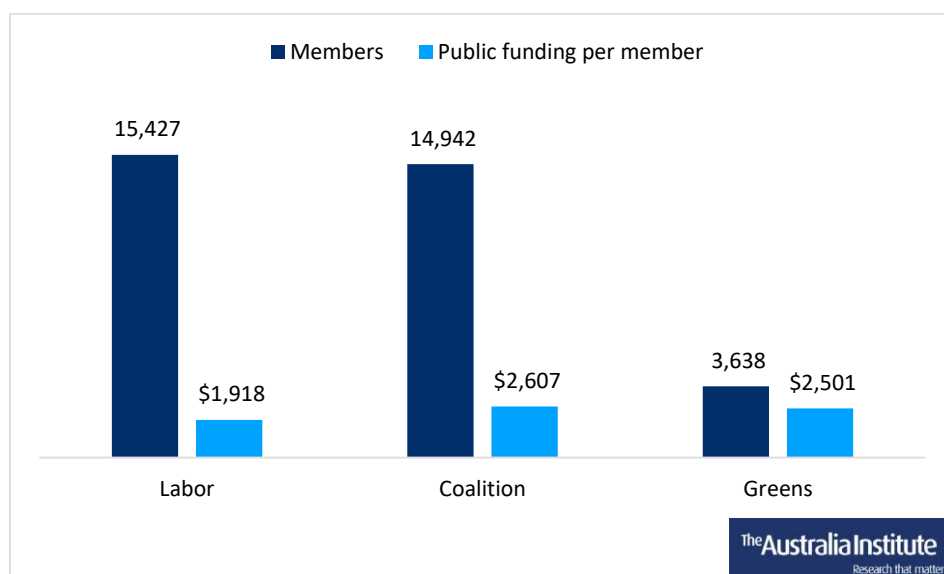
Another way of measuring the public funding of political parties is examining it in relation to party membership. Figures from the Grattan Institute in 2020 suggest that Labor, the Coalition and the Greens have an aggregate total of 34,000 members (out of a state population exceeding 8 million).¹⁶ Over the four year electoral cycle, the Labor Party receives about \$1,918 in public funding per party member. The Coalition receives about \$2,607 per party member. The Greens NSW receive about \$2,501 per party member.

¹⁴ Art Gallery of NSW (2023) *Annual report 2022-23*, p. 94, <https://www.artgallery.nsw.gov.au/about-us/corporate-information/annual-reports/agnsw/>; National Gallery of Australia (2023) *Annual report 2022-23*, p. 122, <https://nga.gov.au/about-us/reports/>

¹⁵ See for example Art Gallery of NSW (n.d.) *Policy documents*, <https://www.artgallery.nsw.gov.au/about-us/corporate-information/policy-documents/>; National Gallery of Australia (n.d.) *Policies & plans*, <https://nga.gov.au/about-us/policies-and-plans/>; (n.d.) *Governance*, <https://nga.gov.au/about-us/governance/>

¹⁶ Hardaker (2021) *National party membership tumbles in NSW, Greens now have more*, <https://www.crikey.com.au/2021/07/30/national-party-nsw-membership-numbers/>

Figure 4: Party members and taxpayer funding per member, over four-year election cycle



Source: Hardaker (2021) *National party membership tumbles in NSW, Greens now have more*, <https://www.crikey.com.au/2021/07/30/national-party-nsw-membership-numbers/>; NSW Electoral Commission (2024) *2023 NSW State election public funding claims and payments*; (2024) *2023 Administration Fund entitlements and payments*; (n.d.) *Disclosures lodged*

ALTERNATIVE FUNDING MODELS

Addressing the inequities created by public funding does not necessarily mean scrapping public funding of parties, candidates and MPs. Fairer alternatives are available and should be considered.

Democracy vouchers

In the “democracy voucher” or “democracy dollar” model, eligible voters are sent vouchers with a certain amount of public funding that they can send to the candidate or party of their choice. For example, a voter may get four \$25 vouchers to distribute.¹⁷

The results in Figure 4 above that Labor, the Coalition and the Greens receive about \$2,000 to \$2,500 per party member make a good starting point for how new parties and independents should be funded. Parties and candidates that opt out of receiving public funding could instead receive a sum of money per party member/unique supporter ahead of each state election.

¹⁷ For more on democracy vouchers, see Morison and Browne (2023) *Submission: 2022 Victorian state election inquiry*, pp. 17–19

Alternative thresholds for campaign funding eligibility

There are certainly good reasons to limit election campaign funding based on vote share; amongst other things, doing so:

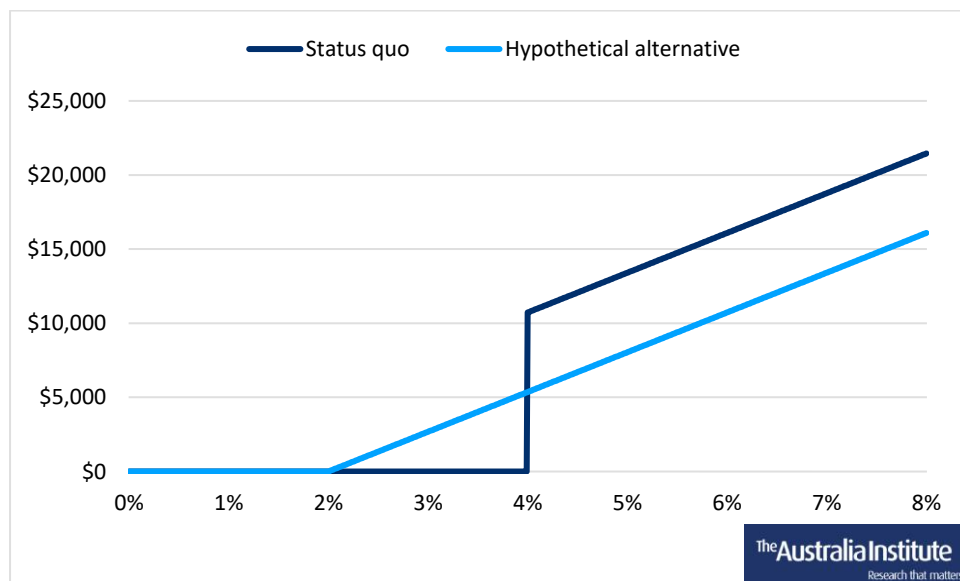
- Discourages people from running if they do not have a base of popular support;
- Limits administration costs for the electoral commission; and
- Discourages people from running for office just to raise money.

However, the use of an absolute threshold of 4% means that a few votes can make the difference between a candidate receiving over \$10,000 versus receiving nothing.

One solution could be to use a tapered system. For example, setting the threshold for receiving election campaign funding to 2% of the vote, but only funding candidates based on every vote received *after* the 2% threshold, creates a steadier progression, shown in Figure 5 below.

This still leaves legislators to figure out the desirable threshold for receiving election campaign funding, but it reduces the impact of whichever threshold legislators choose.

Figure 5: Effect of a “tapered” election campaign funding model (Legislative Assembly)



Source: Authors' calculations

This hypothetical model would result in significantly less election campaign funding for some parties and candidates (\$5,400 less for each candidate who passed the threshold). This is not necessarily a flaw. However, it would be easy to tweak the hypothetical model to narrow this gap or remove it altogether while keeping the calculation simple and tapered—for example, by using an accelerated rate between 2% and 6%.

RECOMMENDATIONS

- Conduct an inquiry into how public funding can be reformed to make it accessible to new entrants, with the baseline being that the major parties receive \$2,000–\$2,600 per election per party member.
- Consider whether it is feasible to improve access to election campaign funding by replacing the 4% threshold for election campaign funding with a tapered model and capping election campaign funding based on the higher of lower house votes received and upper house votes received.
- Conduct an inquiry into what the public expects from parties that are majority taxpayer funded, including but not limited to (a) transparency, whistleblower protections and freedom of information laws, (b) democratic internal structures and (c) governance.
- Require parties that are publicly funded to publish audited annual reports in accordance with the Australian Accounting Standards that present fairly the agency's financial position, financial performance and cash flows.¹⁸

¹⁸ See for comparison *Government Sector Finance Act 2018* (NSW), sec.7.6 <https://legislation.nsw.gov.au/view/whole/html/inforce/current/act-2018-055>

Donation and spending caps

NSW’s current system of donation caps and spending caps has failed to rein in cash-for-access and the influence of vested interests on the parties of government and has had perverse outcomes—including reducing competition by raising barriers to new entrants.¹⁹

This submission builds on *Security, transparency and diversity in political finance* by providing more details about how caps operate in NSW.

DONATION CAPS

How donation caps work in NSW

In NSW, political donations to parties, candidates, associated entities and third-party campaigners are capped if they are for the purpose of a local government election, state election or other electoral purpose (other than donations for federal campaigns, which are uncapped).

Parties that have been registered for 12 months or more and groups of candidates have a donation cap that is twice as generous as the cap for individual candidates, unregistered or newly registered parties, elected members, associated entities and third-party campaigners. Currently, a donor can give \$7,600 per financial year to a party or group of candidates but only \$3,600 per financial year to anyone else (the numbers are indexed to inflation).²⁰

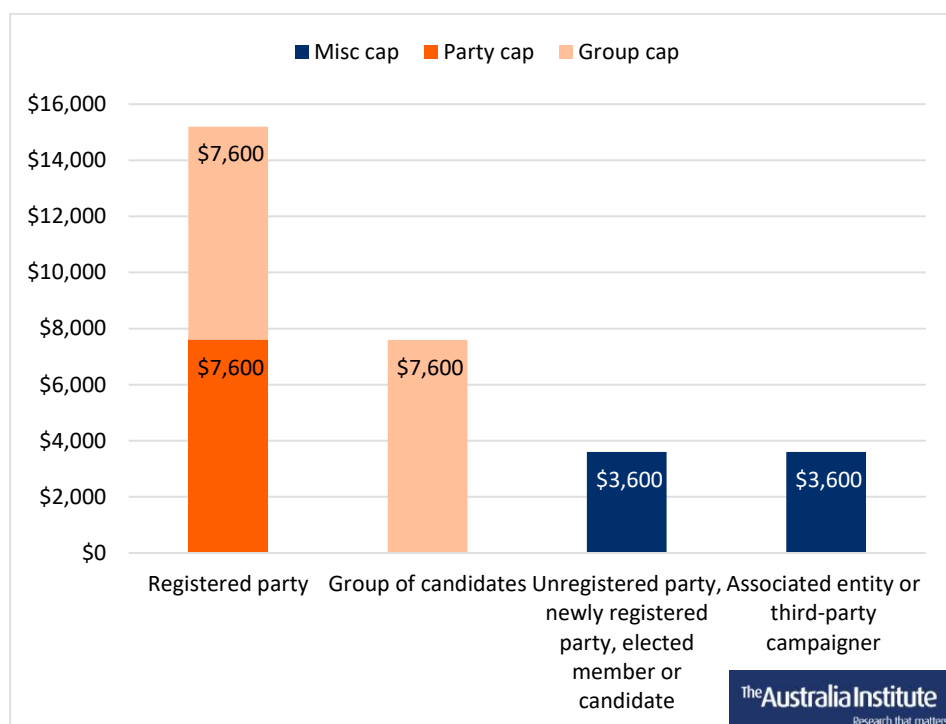
In addition, donations to a party’s candidates and elected members are aggregated separately to donations to the party itself, subject to the “group of candidates” cap.²¹ In other words, while a donor can give no more than \$3,600 to a political party candidate or elected member, they can spread a total of \$7,600 across that party’s candidates and members, and give a further \$7,600 to that party directly.

¹⁹ Browne & Walters (2023) *Securing transparency and diversity in political finance*, <https://australiainstitute.org.au/report/securing-transparency-and-diversity-in-political-finance/>

²⁰ NSW Electoral Commission (2023) *Caps on political donations*, <https://elections.nsw.gov.au/funding-and-disclosure/political-donations/caps-on-political-donations>

²¹ *Electoral Funding Act 2018* (NSW), sec.23(3), <https://legislation.nsw.gov.au/view/whole/html/inforce/current/act-2018-020>; Personal communication with NSW Electoral Commission, February 23, 2024

Figure 6: Donation caps by recipient



Source: NSW Electoral Commission (2023) *Caps on political donations*, <https://elections.nsw.gov.au/funding-and-disclosure/political-donations/caps-on-political-donations>

Indirect campaign contributions are capped at the same level as political donations.²²

Exceptions to the donation cap

The current regime makes exceptions for some contributions, either by not counting them as political donations at all, or by counting them as political donations but allowing a higher cap. Many of these exceptions are available only to political parties, not to groups or independent candidates:

- Contributions from a candidate to finance their own election campaign are not political donations;
- On top of unlimited contributions to their own campaign, a Legislative Assembly candidate can donate \$75,500 to their party, in the financial year in which the election is held;
- A Legislative Council candidate can donate \$59,900 to their party or group, in the financial year in which the election is held;
- Party levies paid by elected members and candidates are donations, but are not capped;
- Party membership fees below \$2,000 are not capped;

²² NSW Electoral Commission (2023) *Caps on political donations*

- Party affiliation fees below \$2,000 are not capped. If a fee is charged based on the number of members, the cap is equal to \$2,000 times by the number of members the affiliate has.²³ In practice this allows trade unions to pay very large affiliation fees.

There are good reasons to allow membership based organisations to donate more, provided the donations are made with the prior informed consent of members,²⁴ but that logic applies to all recipients, not just political parties.

How does aggregation work in practice?

To give a sense of the magnitude of the extent of the exceptions to donation caps, donations in the six months leading up to the NSW state election are called “pre-election donations” and are disclosed separately in a more usable form than other disclosures. During this time, a donations cap of \$7,000 applied.

In just this six-month period, NSW Labor and its candidates received \$2.7 million in disclosable donations. If every donor were capped at donating \$7,000 to the party and its candidates, Labor would only have raised \$1.7 million.

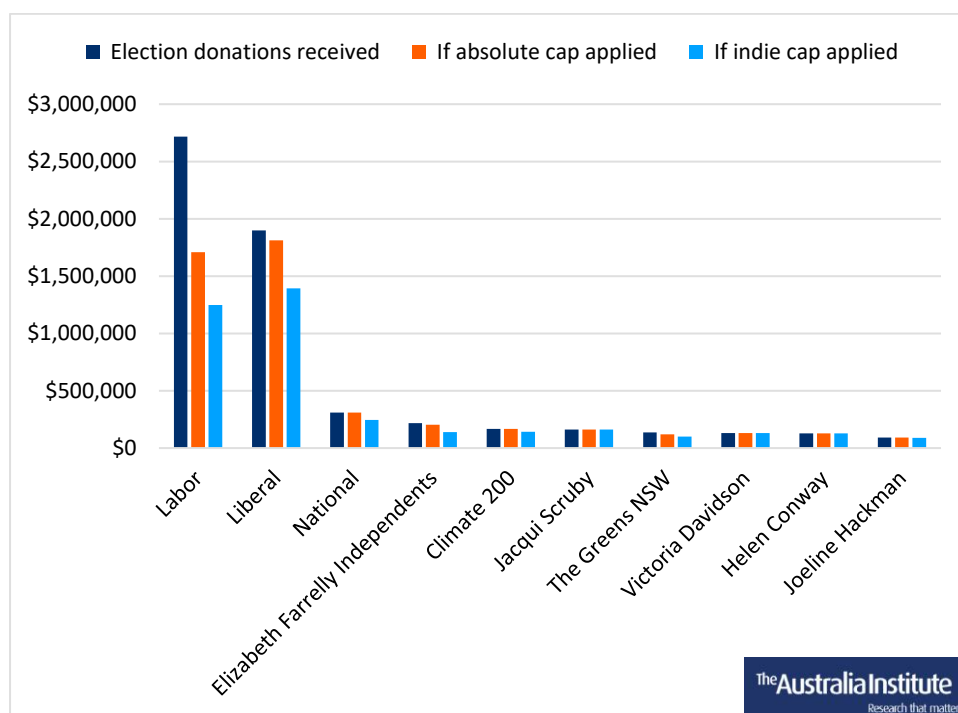
The NSW Liberals disclosed \$1.9 million over the same period. If every donor were capped at donating \$7,000 to the party and its candidates, the Liberals would only have raised \$1.8 million.

On the other hand, if the parties were subject to the \$3,300 cap that applies to candidates, unregistered or newly registered parties, elected members, candidates, associated entities and third-party campaigners, NSW Labor would have only raised \$1.2 million and the NSW Liberals \$1.4 million.

²³ NSW Electoral Commission (2023) *Caps on political donations*

²⁴ For more discussion see Browne & Walters (2023) *Securing transparency and diversity in political finance*, pp. 12, 23

Figure 7: Top recipients of election donations



Source: NSW Electoral Commission (2023) *2023 NSW State election donations*, <https://elections.nsw.gov.au/funding-and-disclosure/disclosures/pre-election-period-donation-disclosure/2023-nsw-state-election-donations>

The effect of NSW’s patchy donation cap rules is that established parties can raise much more money than new parties and independent candidates.

The effect of an annual cap and a local government exception

Political parties operate continuously, allowing them to collect four financial years’ worth of donations for every election. Most independent candidates begin running at most a year out from an election, giving them one just one year’s worth of donations capped at \$3,600 each compared to four years’ worth of donations capped at \$15,200 per annum for parties and their candidates and elected members.

Furthermore, donations for local government election purposes are aggregated separately. A donor can therefore give \$7,600 to the party and to its candidates, at the state level and at the local level, or \$30,400 per year or \$121,600 per electoral cycle. What may appear at first glance to be a cap of \$7,600 is far from it, even before the other exceptions to the donation cap are considered.

The effective donation cap across a party is \$30,400 per year, compared to a cap of \$3,600 in an election year for an independent candidate.

Caps do nothing to stop cash-for-access

Although the effective cap for a party is \$30,400, even the nominal cap of \$7,600 does nothing to deter cash-for-access. Access to senior politicians can cost less than a thousand dollars, and contributions at one level of government can buy access at another level.²⁵

According to Labor MLAs, four donors paid \$18,000 in total for dinner with then Premier Gladys Berejiklian. The donations for the latter dinner reportedly went to Stephen Bromhead MLA's election campaign,²⁶ which only serves to underscore how separating donations to a party and donations to a candidate is a legal figment that does not capture how the parties operate in practice.

Registered charities have paid between \$1,790 and \$2,970 to have breakfast, dinner or a conversation with Berejiklian.²⁷

A 100-person dinner featuring Berejiklian and 19 cabinet ministers reportedly cost as little as \$650 for a corporate seat; "premium" and "VIP" tickets (\$950 and \$1,500 respectively) included pre-dinner drinks with "the ministerial team". Neither the corporate nor premium tickets would need to be disclosed as they were below the \$1,000 threshold.²⁸

While examples of Berejiklian charging cash-for-access were easier to find than examples for other premiers, it seems unlikely that the practice was limited to her time in power. Nonetheless, the numerous examples from the time of the Berejiklian Government make it clear that the NSW donation cap is incapable of preventing cash-for-access—especially as some cash-for-access is not even subject to disclosure.

²⁵ Browne & Walters (2023) *Securing transparency and diversity in political finance*, pp. 9–10

²⁶ Davies (2020) *Gladys Berejiklian says she can't recall if she was at dinner where Labor claims illegal donations were made*, <https://www.theguardian.com/australia-news/2020/nov/11/gladys-berejiklian-says-she-cant-recall-if-she-was-at-dinner-where-labor-claims-donations-were-made>

²⁷ West (2020) *Charities pay top dollar for dinner with Gladys Berejiklian despite regulator's no-no to political donations*, <https://michaelwest.com.au/charities-pay-top-dollar-for-dinner-with-gladys-berejiklian-despite-regulators-no-no-on-political-donations/>

²⁸ Herald Sun (2018) *Big price tag for 'intimate dinner' with Gladys*, <https://dailytelegraph.com.au/news/nsw/invitationonly-fundraising-dinner-with-premier-gladys-berejiklian-being-sold-for-1500-a-seat/news-story/729a518de719ab517bee8ccb2364ecab>

SPENDING CAPS

How spending caps work in NSW

In New South Wales, parties with more than 10 endorsed Legislative Assembly candidates can spend \$150,700 per district in which they have endorsed a candidate—or \$14.0 million for a party running in every district.²⁹ Each party-endorsed Legislative Assembly candidate can spend a further \$150,700, for a total of \$301,400 per district.³⁰

Independent candidates are subject to a slightly higher spending cap than party-endorsed candidates (\$225,800), but they are behind in aggregate terms when the party spending cap is included.³¹

The costs for a party or candidate to establish an office, up to \$20,000, are excluded from the cap.³²

NSW does stop parties from double-dipping in one aspect: the Legislative Assembly cap also applies to Legislative Council spending.³³

The “electoral district cap” for a party is \$75,500 within the party’s overall expenditure cap, but this applies only to expenditure that mentions the candidate or district and that is mainly communicated to electors in that district. Party-political advertising does not need to name individual candidates to be effective, and in urban areas even targeted advertising is likely to cross several districts.

²⁹ NSW Electoral Commission (2023) *What are the expenditure caps for state elections?*, <https://elections.nsw.gov.au/funding-and-disclosure/electoral-expenditure/caps-on-electoral-expenditure/what-are-the-expenditure-caps-for-state-elections>

³⁰ See note in *Electoral Funding Act 2018* (NSW), sec.29(2), <https://legislation.nsw.gov.au/view/whole/html/inforce/current/act-2018-020>

³¹ NSW Electoral Commission (2023) *What are the expenditure caps for state elections?* <https://elections.nsw.gov.au/funding-and-disclosure/electoral-expenditure/caps-on-electoral-expenditure/what-are-the-expenditure-caps-for-state-elections>; (2023) *Aggregation of electoral expenditure for state elections*, <https://elections.nsw.gov.au/funding-and-disclosure/electoral-expenditure/caps-on-electoral-expenditure/aggregation-of-electoral-expenditure-for-state-elections>

³² NSW Electoral Commission (2023) *Introduction*, <https://elections.nsw.gov.au/2023-nsw-state-election-information-for-candidates/introduction>

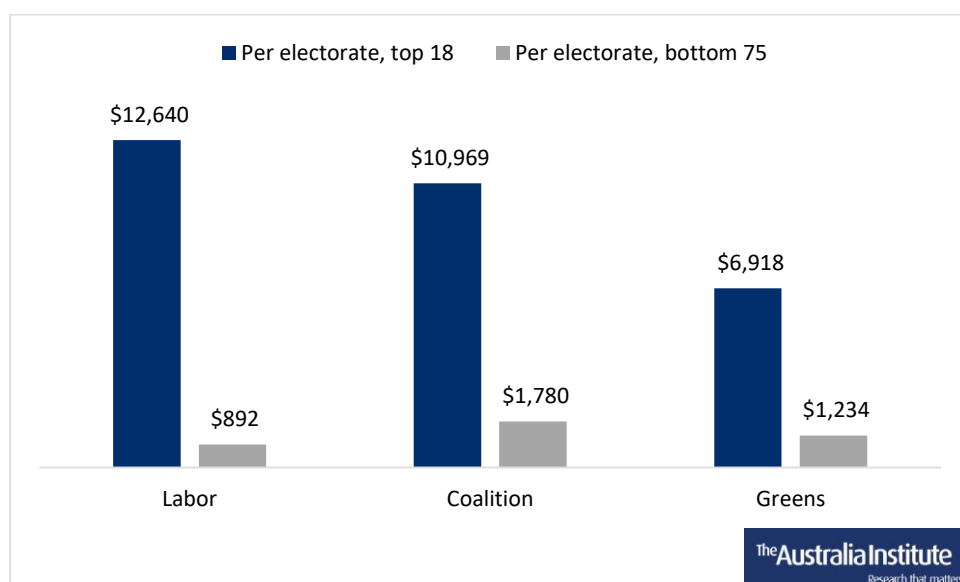
³³ NSW Electoral Commission (2023) *What are the expenditure caps for state elections?*; (2023) *Aggregation of electoral expenditure for state elections*

Reflecting party and incumbency advantages

If spending caps are to be fair, they must reflect the benefits incumbents receive over new entrants, and those that parties that run across the state and in both houses receive over independent and minor party candidates.

Parties concentrate their expenditure on target seats. Political strategy company Populares published the Meta (Facebook/Instagram) advertising spend per electorate for the 2023 NSW election. Using this data, the authors identified the top 18 seats (20% of all seats) by Meta spending per party. As shown in Figure 8 below, each party spent far more in each of these seats than it did in each of the remaining 75 seats (80% of all seats): the average for a top 20% electorate was 14 times as much as the average for a bottom 80% electorate for Labor, 6 times as much for the Coalition and 6 times as much for the Greens.³⁴

Figure 8: Meta ad spend per NSW electorate by the top 20%/bottom 80% of electorates



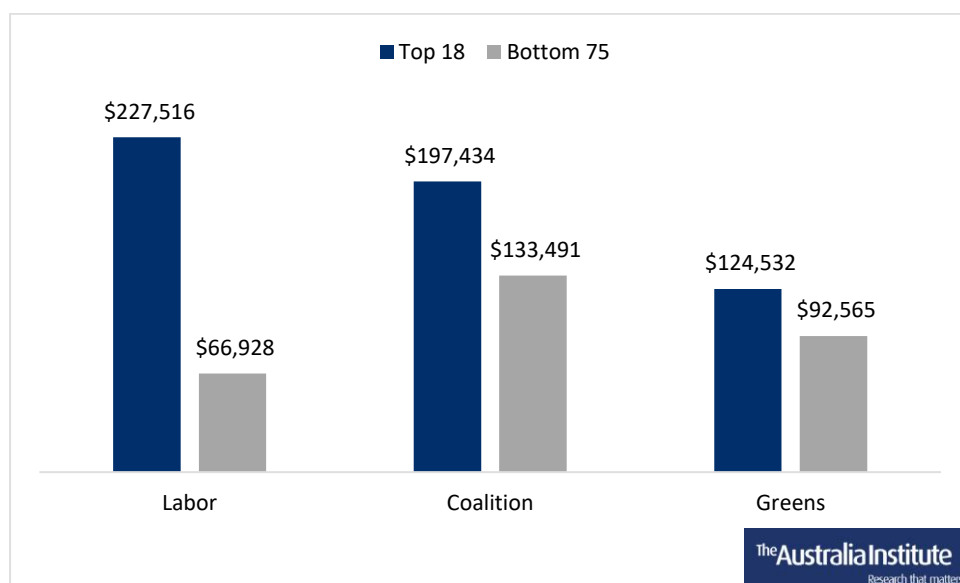
Source: Authors' calculations from Populares (2023) *NSW Election AdTracker*, <https://populares.co/nswadtracker>

Note: The top 18 electorates are the top electorates for each party; a top electorate for one party was not necessarily a top electorate for another.

Another way of looking at this is that for each party, more than half of Meta spending went to just 18 seats: 57% for the Greens, 60% for the Coalition and 77% for Labor. Figure 9 shows this pattern for each party, including the absolute spending figures.

³⁴ Authors' calculations from Populares (2023) *NSW Election AdTracker*, <https://populares.co/nswadtracker>

Figure 9: Most NSW election spending on Meta ads went to the top 20% of electorates



Source: Authors' calculations from Populares (2023) *NSW Election AdTracker*

Note: The top 18 electorates are the top electorates for each party; a top electorate for one party was not necessarily a top electorate for another.

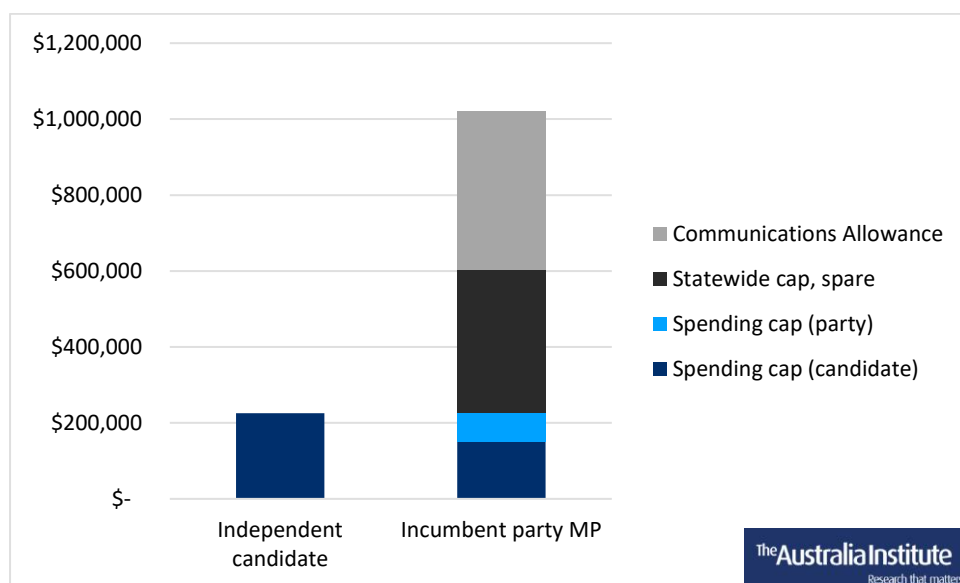
Social media spending is only a fraction of overall spending, and more data is needed to see whether Meta ad spend is representative of that overall spending. However, it is strong evidence for the theory that parties target spending on a handful of “key seats” or “seats to watch”—about 10 to 30 for the 2023 NSW election.³⁵

Assuming that parties concentrate 60% of their \$14.0 million capped spending (\$8.4 million) on 20% of the seats (18 seats), parties could spend \$452,000 per target seat on top of the \$150,700 spent by their endorsed candidate—outspending an independent candidate almost three to one (\$602,800 vs \$225,800).

Figure 10 below shows the spending position of an independent new entrant compared to a sitting, party-affiliated MP in a key seat. The figure likely over-estimates the value of the MP's Communications Allowance, but it does not include the other substantial financial and non-financial advantages of incumbency discussed above. It also does not account for the fixed costs of running an election campaign, which are lower per-candidate for parties running many candidates than they are for each independent candidate.

³⁵ Between 12 and 30 “key seats” or “seats to watch” were identified, based on the media outlet: Green (2023) *Key seats - NSW election 2023*, <https://abc.net.au/news/elections/nsw/2023/guide/key-seats>; McGowan & Rose (2023) *Seats to watch: the NSW election is likely to come down to these key electorates*, <https://www.theguardian.com/australia-news/2023/mar/24/seats-to-watch-the-nsw-election-is-likely-to-come-down-to-these-key-electoralates>; Smith, Cormack, & Rabe (2023) *The seats that will decide the outcome of this election*, <https://www.smh.com.au/politics/nsw/the-seats-that-will-decide-the-outcome-of-this-election-20230220-p5clvt.html>

Figure 10: Potential spending caps, independent vs party-affiliated candidate in a key seat



Taken together, this suggests that a fair spending cap for an independent new entrant might need to be over \$1,000,000 if the cap for political party candidates remains \$151,000 per district.

This apparent unequal treatment of independent candidates compared to party-affiliated candidates would probably be politically unpalatable, but it follows logically from enumerating just one of the advantages of incumbency and way political parties can target state-wide spending caps.

INDEPENDENTS UNDER CAPS

NSW electoral laws that entrench incumbency were identified as an impediment to independent candidates in the 2023 state election.³⁶

The NSW Legislative Assembly has a historically large crossbench of 12, including nine independents. However, a review of the backgrounds of the independents shows that most were not new entrants: they were sitting or former mayors, ran for a party and later defected or, in one case, were the nominated successor of an established independent MP. The exception, Joe McGirr, won in his third tilt at the seat in a by-election created by the departure of a “disgraced” major party MP.

³⁶ For example, see Saville (2023) *Why NSW electoral rules don't help teals in 'Kmart election,'* <https://www.smh.com.au/politics/nsw/why-nsw-electoral-rules-don-t-help-teals-in-kmart-election-20230130-p5cgdc.html>

Table 2: Current independent crossbenchers in the NSW Legislative Assembly

Independent	Background
Alex Greenwich	First elected in 2015 as the nominated successor of Clover Moore.
Greg Piper	First elected in 2007 while a sitting mayor.
Judy Hannan	First elected in 2023 while a sitting councillor, after an unsuccessful run in 2019. Hannan is a former mayor.
Michael Regan	First elected in 2023 while a sitting mayor.
Joe McGirr	First elected in 2018, after unsuccessful runs in 2015 and 2011. Elected at a by-election created by the departure of a “disgraced” major party MP. ³⁷
Roy Butler	First elected in 2019 as a Shooters, Fishers and Farmers Party MP.
Helen Dalton	First elected in 2019 as a Shooters, Fishers and Farmers Party MP.
Philip Donato	First elected in 2016 as a Shooters, Fishers and Farmers Party MP.
Gareth Ward	First elected in 2011 as a Liberal MP.

Sources: 9News (2012) *O’Farrell accused of bullying Sydney mayor*, <https://www.9news.com.au/national/o-farrell-accused-of-bullying-sydney-mayor/b2545ac0-94f1-486d-92a8-77fa2fc2e145>; Parkes-Hupton (2023) *The crossbencher could play a crucial role in the next NSW parliament — here’s who they are*, <https://www.abc.net.au/news/2023-03-29/nsw-election-who-is-sitting-on-the-crossbench/102154828>; Patty (2015) *Clover Moore delighted with Alex Greenwich’s success in seat of Sydney*, <https://www.smh.com.au/national/nsw/clover-moore-delighted-with--alex-greenwichs-success-in-seat-of-sydney-20150329-1ma9jz.html>; Sas & Khalik (2018) *Wagga Wagga by-election: Antony Green calls it for Dr Joe McGirr*, <https://www.abc.net.au/news/2018-09-09/antony-green-calls-by-election-for-joe-mcgirr/10219584>

At the 2022 Victorian state election, the first to be held under strict donation caps, the two incumbent independent MPs in the Legislative Assembly contesting the election lost their seats and no new independents were elected. Community independent candidate Kate Lardner identified Victoria’s “unfair” donation laws as contributing to an uneven playing field.³⁸

Queensland capped donations and spending ahead of the 2020 election, at which no new independents were elected. The Parliament’s one independent MP was originally elected in 2017.

³⁷ For completeness, Joe McGirr is the grandson of a deputy premier and great-nephew of a premier, although he did not know them personally: McGirr (2018) *Inaugural speech*, <https://www.parliament.nsw.gov.au/members/Pages/member-details.aspx?pk=2237>

³⁸ Ore (2022) *‘Teal wave’ turns out to be barely a ripple as number of Victorian independents goes backwards*, <https://www.theguardian.com/australia-news/2022/nov/28/teal-wave-turns-out-to-be-barely-a-ripple-as-number-of-victorian-independents-goes-backwards>

RECOMMENDATIONS

- Reform donation and spending caps to be compatible with the nine principles for fair political finance reform, for example by limiting them to entities that accept public funding only, or abolish them if they remain unfair.
- If donation caps are retained, they should be intuitive and fair, applying to all contributions to a party and its candidates and members.
- If spending caps are retained, they should account for the benefits of incumbency and the ability of state-wide organisations to concentrate spending on target seats.
- Assess all campaign finance reforms against the nine principles for fair political finance reform.
- Introduce constructive reforms to stop cash-for-access, as described in *Securing transparency and diversity in political finance* (and the appendix to this submission).

Political finance transparency

Political finance reforms should strive for fairness and increased transparency, and focus on those who most clearly threaten democracy and accountability. When it comes to political finance disclosures, this should include disclosing any contributions that risk compromising decision-makers, as well as giving enough information that the fairness or otherwise of the political finance system as a whole can be assessed.

While NSW's disclosure regime is strict in theory, in practice the required disclosures from political parties and candidates in NSW do little to illuminate how political parties and candidates are funded.

For the 2022–23 financial year, the NSW Electoral Commission identifies 374 disclosures associated with the NSW branch of the Labor Party and 281 disclosures identified with the NSW branch of the Liberal Party. These disclosures cannot be downloaded in a single file; the only way to access the information is to use the search function, which provides a list of individual disclosures. Each of these must be viewed separately.

In addition to this fundamental design flaw, frustrations and obstacles abound. Hitting the browser's "Back" button from a disclosure page, for instance, does not the reader to the search page; instead, it leaves the site entirely. Disclosure pages cannot be opened in new tabs. There are no direct links to individual disclosure pages, meaning they cannot be shared or bookmarked for later access.

Each disclosure lists information over eight different tabs, most of which will be empty for most disclosures. And if one adds up the donations under the "Reportable political donations received" tab, the result bears no apparent relationship to the "Reportable political donations" amount given under the "Summary" tab.

To collect all the information disclosed by the NSW Electoral Commission about how just the two largest parties in one state were funded in 2023–23, a researcher would have to open and manually collect the data from 5,240 individual disclosure pages—all in the same browser tab.

The extremely weak³⁹ Commonwealth disclosure laws give a picture of party finances that is in some ways clearer than the NSW system. For example, the Australian Electoral Commission disclosure for NSW Labor provides the branch's total receipts (\$26.5 million),

³⁹ See for example Knaus (2021) *Australia's weak donation laws allowed \$1bn in dark money to go to political parties over two decades*, <https://www.theguardian.com/australia-news/2021/jan/31/australias-weak-donation-laws-allowed-1bn-in-dark-money-to-go-to-political-parties-over-two-decades>

payments (\$21.9 million) and debts (\$220,000); and gives details for 88% of the party's debts (\$193,000) and 76% of its receipts (\$20.0 million).⁴⁰

Even so, because donor returns include information not found in party returns, a thorough researcher trying to understand how the NSW branches of the Liberal and Labor parties are funded should also go through the AEC's 222 annual donor returns and 23 associated entity returns associated with the branches for the 2022–23 financial year.

It is worth acknowledging that one area where NSW disclosures are helpful is the membership and subscription figures, which allow for accurate calculation of party memberships.⁴¹ NSW is the only jurisdiction the author could find which does this. The author is also grateful to the NSW Electoral Commission for readily answering his questions about the disclosures and disclosure laws.

NSW's real-time disclosure of political donations is at least hypothetically useful in exposing the use of political contributions to purchase access to politicians or sway decision-making. However, the extremely patchy nature of disclosures and the NSW Electoral Commission's poor online functionality mean that in practice how parties and candidates are funded is being obscured almost as effectively as if the information were not available in the first place.

⁴⁰ AEC (2023) *2022-23 ALP (NSW) return*,

<https://transparency.azure.aec.gov.au/AnnualPoliticalParty/ReturnDetail?returnId=66160>

⁴¹ See for example Hardaker (2021) *National party membership tumbles in NSW, Greens now have more*

RECOMMENDATIONS

- Introduce political finance transparency reforms so that:
 - Parties and candidates disclose their revenue, expenditure, loans and assets at least annually.
 - Political contributions of all sorts are disclosed at least quarterly, and more frequently ahead of an election.
 - Political contributions are disambiguated so there is no risk of double-counting between state and federal disclosures.
 - All forms of political contribution above the threshold are disclosed, not just “donations” or “gifts”.
 - All political contributions by corporations and all cash-for-access payments are disclosed, even if they are below the disclosure threshold.
 - “Other receipts” like asset sales and dividends above the threshold are disclosed, including their source and circumstances.
 - The nature of a payment (for example, a membership fee or affiliation fee) is published as well as the size of the payment.
 - All disclosures are searchable, filterable, exportable and queryable, so simple questions like “Which political contributions did a party and its candidates receive in the four years leading up to the 2023 election” can be answered with a single search.
 - The NSW Electoral Commission to publish annually a summary of political finances, including the total funding for each party and its sources and an explanation of how this relates to federal disclosures by NSW-based parties, candidates and entities.
 - The NSW Electoral Commission to publish quarterly a summary of political contributions, including the top contributors to each political party and its candidates.

Full preferential voting

NSW uses optional preferential voting, a system enshrined in its state constitution.⁴²

Australian electoral systems are generally good at reducing the incentive for parties and candidates to suppress voter choice. Compulsory voting obviates the need for “get out the vote” campaigns and makes voter suppression very difficult, if not impossible. Preferential voting means “tactical voting” is rarely needed, forming a contrast even to other Westminster systems; in the United Kingdom, for instance, a multi-party system and first-past-the-post electoral system means voters must balance their true preference against voting for the “second-best”.

The clear exception to this picture is optional preferential voting, which encourages cynical “Just Vote 1” and “Put X Last” campaigns—often conducted under the guise of being official communications instead of being presented as party-political material. Both major parties have done this in NSW when they believed doing so favoured them.⁴³ The effect, as academic John Wanna describes, is:

In democratic terms, the use of optional preferential voting in Queensland appears to empower the voter, allowing individuals to decide whether or not to allocate preferences to some or all candidates. But in the hands of parties anxious to maximize their electoral advantage, optional preferential voting risks becoming a de facto first-past-the-post system—in which candidates can be elected with around 35 per cent of the formal vote. Optional preferential voting has the potential, then, to inflate majorities while penalising the most divided side of politics.

If voters deliberately choose to ‘just vote one’ (plumping) and intend their vote to exhaust if their candidate comes 3rd or worse, then this does not undermine democracy. However, if voters simply follow party instructions to vote for one candidate and out of ignorance or unfamiliarity do not allocate preferences, then if their votes exhaust this could be a denial of a true democratic outcome.⁴⁴

⁴² Scully (2019) *Compulsory preferential voting*, <https://www.parliament.nsw.gov.au/la/papers/Pages/qanda-tracking-details.aspx?pk=54494>

⁴³ Stevens (2015) *Are Queenslanders in danger of ‘wasting’ their votes?* <http://theconversation.com/are-queenslanders-in-danger-of-wasting-their-votes-35919>

⁴⁴ Wanna (n.d.) *Democratic and electoral shifts in Queensland: Back to first past the post voting*, https://www.academia.edu/57040585/Democratic_and_Electoral_Shifts_in_Queensland_Back_to_First_Past_the_Post_Voting in Joint Standing Committee on Electoral Matters (2009) *Advisory Report on the Commonwealth Electoral (Above-the-Line Voting) Amendment Bill 2008*, pp. 16–17, https://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=em/elect07/report3/index.htm

At the time Wanna was writing, Queensland used optional preferential voting. It has since returned to full preferential voting, in line with other Australian jurisdictions.

While optional preferential voting does allow for more votes to be counted, which makes a good argument for stronger savings provisions to be in place under a mandatory preferential voting system (as is the case for votes cast for the Senate), on the whole optional preferential voting introduces several potential problems. The most prominent and best documented is the risk of returning to de facto first-past-the-post voting, but there are several others; these are described below.

Discouraging coalition partners from running against one another

Optional preferential voting makes it much more difficult for parties in coalition, like the Liberal and National parties, to run against one another—depriving voters of a choice between sometimes very different candidates and policy platforms. Optional preferential voting apparently contributed to the decision in Queensland for the Liberal and National parties to merge,⁴⁵ and the decline in the number of three-cornered contests in NSW and Queensland.⁴⁶

Leading to voter confusion and wasted votes

The inconsistency between federal elections using full preferential voting (in the lower house) and the state using optional preferential voting also likely leads to voter confusion, with reports of high informal voting in multicultural seats in Sydney in the 2022 federal election.⁴⁷ A similar observation was made by Connor Wherrett, writing for the McKell Institute,⁴⁸ and as early as 2005 by the federal Joint Standing Committee on Electoral Matters.⁴⁹ Federal Labor parliamentarians on the Joint Standing Committee on Electoral Matters wrote in 2020:

⁴⁵ Green (2008) *The Liberal-National Party - a new model party?* <https://www.abc.net.au/news/2008-07-30/the-liberal-national-party---a-new-model-party/457812>

⁴⁶ Green (2020) *The decline of three-cornered contests at federal elections*, <https://antonygreen.com.au/the-decline-of-three-cornered-contests-at-federal-elections/>

⁴⁷ Davies (2022) *High number of invalid votes in culturally diverse seats prompts concerns after federal election*, <https://www.theguardian.com/australia-news/2022/may/24/high-number-of-invalid-votes-in-culturally-diverse-seats-prompts-concerns-after-federal-election>

⁴⁸ Wherrett (n.d.) *The case for mandatory preferential voting in NSW*, <https://mckellinstitute.org.au/research/articles/the-case-for-mandatory-preferential-voting-in-nsw/>

⁴⁹ JSCEM (2005) *Inquiry into the conduct of the 2004 federal election and matters related thereto*, pp. 220–221, https://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=em/elect04/report.htm

Optional preferential voting, where only one box on a ballot paper needs to be numbered, results in a significant number of votes being wasted if a voter's single preference isn't elected. Instead of the full preferential voting system where the voter's second and subsequent preferences are allocated, their vote is simply discarded after their first preference is exhausted. It has been shown that, where given the option, only the most engaged voters distribute all their preferences which results in the disenfranchisement of a significant number of voters and undermines our compulsory system of voting. In his foreword, the Chair states that this will maximise voter choice—in actual fact it does the opposite.

Labor members of the Committee note that the close proximity of the New South Wales state election (which allowed optional preferential voting) to the federal election may have resulted in some confusion amongst voters. However, New South Wales is one of only two Australian jurisdictions which does not have full preferential voting. If there was confusion, it is New South Wales which should be changing its system of voting to bring it into line with the rest of the country.⁵⁰

Reducing voter choice in practice

There is a theoretical argument that optional preferential voting increases voter choice because a voter who genuinely cannot choose between candidates can cease numbering.⁵¹ In practice, it seems most voters stop numbering well before their true preferences have been exhausted.

In 2023, 57% of NSW voters only marked a single preference.⁵² A year earlier, electing the House of Representatives, the vast majority of these same voters filled out complete preferences that—as seen in the aggregated figures—follow a logical order and are not chosen randomly as would be expected if most voters truly had no preference beyond their first choice.

⁵⁰ JSCEM (2020) *Report on the conduct of the 2019 federal election and matters related thereto*, p. 197, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Electoral_Matters/2019Federalelection/Report

⁵¹ For a wide-ranging discussion of compulsory voting, which covers this issue among others, see Orr (1997) *The choice not to chose: Commonwealth electoral law and the withholding of preferences*, <http://classic.austlii.edu.au/au/journals/MonashULawRw/1997/19.html>

⁵² Raue (2023) *NSW 2023 – final two-party-preferred preference flows*, <https://www.tallyroom.com.au/51507>

Driving short-term political expediency

While full preferential voting favours the Labor Party and independents at this time,⁵³ it is not guaranteed to do so—and in Queensland, the Labor Government’s adoption of full preferential voting was probably to its detriment.⁵⁴ Optional preferential voting has at times been thought to favour independents and minor parties.⁵⁵ Traditionally, it was the Liberal and National parties that benefited from full preferential voting because they could both run in the same seat without sabotaging one another.

Ultimately, it is better to make these decisions on principled grounds than to attempt to second-guess which side the changes will briefly favour. Short-term political expediency is a poor compass.

RECOMMENDATIONS

- Consider a referendum to adopt full preferential voting for NSW elections (or to remove the requirement of optional preferential voting from the state constitution).

⁵³ Green (2015) *Second preferences at the 2015 NSW election*, <https://www.abc.net.au/news/2015-08-26/second-preferences-at-the-2015-nsw-election/9388644>; Reilly (2021) *Here’s why the Coalition favours optional preferential voting: it would devastate Labor*, <http://theconversation.com/heres-why-the-coalition-favours-optional-preferential-voting-it-would-devastate-labor-155640>

⁵⁴ Hunt (2017) *With One Nation on the march, a change to compulsory voting might backfire on Labor*, <http://theconversation.com/with-one-nation-on-the-march-a-change-to-compulsory-voting-might-backfire-on-labor-86923>; Wherrett (n.d.) *The case for mandatory preferential voting in NSW*

⁵⁵ Stevens (2015) *Are Queenslanders in danger of ‘wasting’ their votes?*

Truth in political advertising

The Australia Institute has made the case for robust truth in political advertising laws for many years. Such laws are currently in place in South Australia (since 1985) and the Australian Capital Territory (since 2021).

A similar law for NSW was the subject of a private member's bill from deputy Nationals leader Don Page in 2007. That bill—the *Parliamentary Electorates and Elections Amendment (Truth in Advertising) Bill 2007*—is drafted very similarly to the existing South Australian laws. It lapsed after the 2007 state election.⁵⁶

Both the Victorian Electoral Matters Committee and the federal Joint Standing Committee on Electoral Matters recommended truth in political advertising laws be legislated in their respective jurisdictions, and both recommended following the South Australian model. These reforms have the support of the Victorian and Commonwealth governments but are yet to be legislated.

MISLEADING ADVERTISING IN NSW

For the 2023 election, the NSW Electoral Commission tracked disinformation relating to elections—following a successful model adopted by the Australian Electoral Commission and Victorian Electoral Commission. The commission identified and corrected 10 claims.⁵⁷ There were claims by the NSW Liberals and independent candidates that each other's corflutes (rigid plastic signs) could mislead voters, which is prohibited under existing laws.⁵⁸

The commission is (currently) limited to investigating claims about elections and how to cast a vote, rather than misleading claims about policy, rival candidates and the party and the like. Such claims are undoubtedly circulating as well. Media fact checking identified political claims that “misrepresented” other parties' policies or were “exaggerated”,⁵⁹ although at

⁵⁶ *Parliamentary Electorates and Elections Amendment (Truth in Advertising) Bill 2007* (NSW), <https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=2528>

⁵⁷ NSW Electoral Commission (2023) *Disinformation register*, <https://elections.nsw.gov.au/integrity/disinformation-register>

⁵⁸ NSW Electoral Commission (n.d.) *Electoral material regulations*, <https://elections.nsw.gov.au/integrity/electoral-material-regulation>

⁵⁹ See for example RMIT ABC Fact Check (2023) *Has the social housing waitlist really been “slashed” under the NSW Coalition? Here's what we found*, <https://www.abc.net.au/news/2023-03-09/fact-check-nsw-coalition-slashed-social-housing-waitlist/102064552>; (2023) *We examined NSW education minister's claim that phone-jamming tech could track schoolchildren*, <https://www.abc.net.au/news/2023-03-17/checkmate-nsw-labor-phone-jamming-technology-tracking/102104920>

this election NSW seems to have been spared the widespread allegedly misleading advertising campaigns seen in other jurisdictions.⁶⁰

THE SOUTH AUSTRALIAN MODEL

South Australia and the ACT are unique in Australia in having laws that govern what can be said in election material. Section 113 of SA's *Electoral Act 1985* makes it an offence to authorise or cause to be published electoral advertisements that are materially inaccurate and misleading. The SA Electoral Commissioner can request such advertisements be withdrawn from further publication and a retraction published; they can also apply to the Supreme Court to enforce withdrawal and/or retraction.⁶¹ The ACT's laws are very similar to those in South Australia.

The Court of Disputed Returns in South Australia may declare the results of an election (for an individual lower house seat or the entire half-Legislative Council) void on the grounds of misleading advertising, if the result of the election was affected by that advertising.⁶²

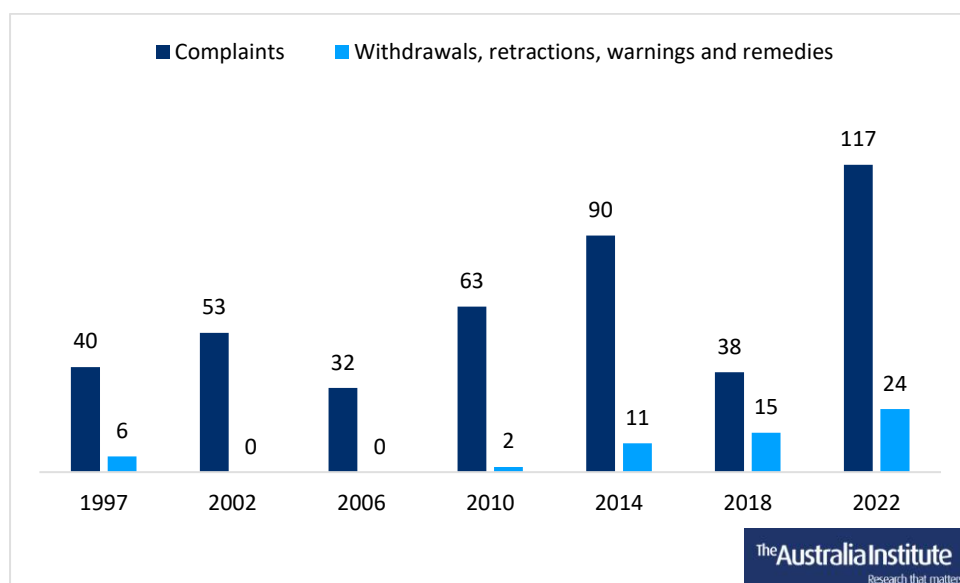
The maximum penalty for materially inaccurate and misleading advertising is \$5,000 for individuals or \$25,000 for a body corporate. However, the offence is rarely prosecuted. Instead, the law is mainly realised through the Electoral Commissioner's requests for withdrawal and/or retraction, which appear to be largely honoured. Candidates have sometimes litigated to have an election declared void on the grounds of misleading advertising, but the Court of Disputed Returns has not done so to date.

⁶⁰ For examples from Queensland and at the federal level, see Browne (2020) *Impact of social media on elections and electoral administration: Submission*, p. 16, <https://australiainstitute.org.au/report/impact-of-social-media-on-elections-and-electoral-administration-submission/>; Browne and Shields (2022) *Fortifying Australian democracy: submission to the inquiry into the 2022 election*, pp. 20–21

⁶¹ *Electoral Act 1985* (SA), s 113, http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/sa/consol_act/ea1985103/s113.html

⁶² *Electoral Act 1985* (SA), s 107(5)

Figure 11: Complaints to SA electoral commission and remedies, by election



Sources: Renwick & Palese (2019) *Doing democracy better*, p 23; ECSA (2018) *2018 state election report*, pp 78–79; ECSA (2022) *2022 state election report*, p 80

Note: Results for 1997 through to 2014 are for withdrawal and retraction requests only, while 2018 and 2022 results include remedies and warnings. From 2018 onwards, ECSA changed its method of calculating the number of complaints.

OVERSIGHT BODY

Both the South Australian and ACT truth in political advertising laws assign the responsibility for deciding if an electoral advertisement is inaccurate or misleading to their electoral commissioner, who can request, but not compel, a withdrawal or retraction. The Electoral Commission of South Australia (ECSA) receives legal advice from the Crown Solicitor’s Office to assist in making its determination.⁶³

Electoral commissions are trusted, non-partisan, familiar with electoral processes and used to ramping up during election periods. ECSA has successfully handled misleading advertising complaints for 27 years.⁶⁴ In 2016 Elections ACT expressed reservations about truth in political advertising laws⁶⁵ but in 2020 the ACT Legislative Assembly still chose it to regulate

⁶³ Electoral Commission SA (2018) *2018 state election report*, p. 80, <https://ecsa.sa.gov.au/about-ecsa/publications/publications-state-election-and-by-election-reports>

⁶⁴ South Australia has had a criminal offence relating to truth in political advertising since 1985, but the power of the Electoral Commissioner to require a withdrawal or retraction was introduced in 1997.

⁶⁵ ACT Electoral Commission (No 2) (2017) *Submission 14: Select Committee on the 2016 ACT Election and Electoral Act*, https://www.parliament.act.gov.au/__data/assets/pdf_file/0003/1086231/Sub-14-ACT-Electoral-Commission-Sub-2.pdf

these laws. In other jurisdictions, electoral commissions would also be a good choice of agency to oversee truth in political advertising laws.

While the EMC's report into social media supported truth in political advertising laws, there was disagreement over whether the Victorian Electoral Commission (VEC) should be the regulator responsible. Some committee members unsuccessfully proposed a change to specify the VEC as the regulator responsible. The majority rejected this change,⁶⁶ potentially in response to the VEC's concern that it "does not consider its role to be the arbiter of 'truth'".⁶⁷

The Australia Institute has addressed the VEC's reservations,⁶⁸ and notes that parliaments in SA and the ACT have chosen their respective electoral commissions to regulate their truth in political advertising laws.

That said, there are alternatives to making electoral commissioners responsible for misleading advertising complaints, including creating a separate branch within the electoral commission, using consumer affairs regulators or establishing a separate organisation.

In a submission to the Victorian Electoral Matters Committee inquiry into the impact of social media on elections, Monash University Associate Professor Luke Beck has suggested a consumer affairs-style provision; the Australian Greens suggested that the Australian Competition and Consumer Commission (ACCC) could oversee laws.⁶⁹

When federal truth in political advertising laws were considered in the 1990s, the Australian Electoral Commission proposed that a new, separate agency called the Election Complaints Authority be established with "strong coercive powers of investigation".⁷⁰ Giving the agency investigative powers helps resolve one of the weaknesses of current laws, which is that they can be slow to resolve.

One argument for placing the responsibility for overseeing truth in political advertising laws with a body other than the electoral commission is that it insulates the electoral

⁶⁶ Electoral Matters Committee (2021) *Inquiry into the impacts of social media on elections and electoral administration*, pp. 275–277, <https://www.parliament.vic.gov.au/emc/article/4482>

⁶⁷ Victorian Electoral Commission (2020) *Inquiry into the impact of social media on elections and electoral administration submission* p.14, https://www.parliament.vic.gov.au/images/stories/committees/emc/Social_Media_Subs_2020/77._Victorian_Electoral_Commission_Submission_Redacted.pdf

⁶⁸ Browne (2020) *Impact of social media on elections and electoral administration: Submission*, pp. 6–7

⁶⁹ The Greens submission also floats the idea of an independent body being established. Australian Greens (2019) *Submission 112*, p. 7, <https://www.aph.gov.au/DocumentStore.ashx?id=f454d75f-63d0-45de-950b-dca567aad1b5&subId=670810>; Beck (2020) *Submission to the Electoral Matters Committee Inquiry into the impact of social media on elections and electoral administration*, <https://www.parliament.vic.gov.au/emc/inquiries/article/4561>

⁷⁰ AEC (1996) *Supplementary submission to the Joint Standing Committee on Electoral Matters*, https://www.aec.gov.au/Elections/australian_electoral_system/files/jssem/1996_election/sub109.pdf

commission, and therefore confidence in the electoral system, from potential partisan attack. This has become a live concern since the integrity of the Australian Electoral Commission was unfairly and inaccurately undermined during the Voice referendum.⁷¹

FEDERAL DEVELOPMENTS

Zali Steggall's private member's bill

Independent MP Zali Steggall has made truth in political advertising a priority. She introduced the Stop the Lies private member's bill in 2021, which would introduce truth in political advertising laws along the lines of those operating in South Australia. In 2022, she revised the bill to address the risk of misleading and deceptive advertising in referendums, not just elections. Unfortunately, the bill was not debated or passed.

In 2023, Zali Steggall has introduced a revised and updated bill.⁷² It serves as a comprehensive model of how South Australia's successful laws could be implemented at the federal level, while drawing on existing and well-understood laws against misleading and deceptive conduct in trade and commerce.

Parliamentary committee endorses truth in political advertising laws

The parliamentary committee on electoral matters considered truth in political advertising laws in detail as part of their election review. Led by Labor MP Kate Thwaites, the committee majority (including Labor and Greens MPs and senators and independents Kate Chaney MP and Senator David Pocock) recommending the introduction of truth in political advertising laws in their interim report.

The Committee recommends that the Australian Government develop legislation, or seek to amend the Commonwealth Electoral Act 1918, to provide for the introduction of measures to govern truth in political advertising, giving consideration to provisions in the *Electoral Act 1985 (SA)*.

⁷¹ Williams (2023) *Coalition's claims on 'rigged' voice vote must be called out*, <https://www.theaustralian.com.au/commentary/coalitions-claims-on-rigged-voice-vote-must-be-called-out/news-story/fe0eecbc0c3cdb7dcd31d5c12c192517>; Wilson (2023) *No camp said the referendum is "rigged". Then came viral electoral fraud claims*, <https://www.crikey.com.au/2023/08/29/voice-to-parliament-referendum-rigged-conspiracy/>

⁷² *Commonwealth Electoral Amendment (Voter Protections in Political Advertising) Bill 2023 (Cth)*, https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r7101

The Committee recommends that the Australian Government consider the establishment of a division within the Australian Electoral Commission, based on the principles currently in place in South Australia, to administer truth in political advertising legislation, with regard to ensuring proper resourcing and the need to preserve the Commission’s independence as the electoral administrator.⁷³

Albanese Government’s election promise

The Albanese Government is committed to implementing truth in political advertising laws. Prime Minister Anthony Albanese and Special Minister of State Don Farrell have identified South Australia’s successful, long-lasting laws as a viable model.⁷⁴

THE MISINFORMATION BILL⁷⁵

The Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 (the “Misinformation Bill”) will amend the *Broadcasting Services Act 1992* to increase the powers of the Australian Communications and Media Authority (ACMA) over digital platforms when dealing with content that is “false, misleading or deceptive”.⁷⁶

The expanded powers of the new legislation would seek to do the following:

- Enable the ACMA to gather information from, or require digital platform providers to keep certain records about matters regarding misinformation and disinformation;
- Enable the ACMA to request industry develop a code of practice covering measures to combat misinformation and disinformation on digital platforms, which the ACMA could register and enforce; and

⁷³ JSCEM (2023) *Conduct of the 2022 federal election and other matters: Final report*, p. xviii, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Electoral_Matters/~/link.aspx?_id=B0EB44BCE6544D4488F8F90E44E0AA37&_z=z

⁷⁴ AAP (2023) *Truth in political advertising laws on Govt agenda*, <https://www.indaily.com.au/news/2023/10/24/truth-in-political-advertising-laws-on-govt-agenda>; Finance and Public Administration Legislation Committee (2023) *Estimates 24/10/2023*, p. 14, https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=committees/estimate/27438/&sid=0002; Hansard (2023) *House of Representatives on 17/10/2023*, p. 25, https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansardr/27171/&sid=0000

⁷⁵ Thank you to Benjamin Walters for preparing the briefing note that is the basis for this section.

⁷⁶ Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 (Cth) *Exposure Draft*, s 7(1) & (2), <https://www.infrastructure.gov.au/sites/default/files/documents/communications-legislation-amendment-combatting-misinformation-and-disinformation-bill2023-june2023.pdf>

- Allow the ACMA to create and enforce an industry standard (a stronger form of regulation), should a code of practice be deemed ineffective in combatting misinformation and disinformation on digital platforms.⁷⁷

Truth in political advertising laws (both state and federal) could operate alongside or in the absence of the Combatting Misinformation and Disinformation Bill:

- While there is some overlap in materials covered, truth in political advertising laws encompass advertising both online and offline while the Misinformation Bill would include all types of content, but only when it is provided on a digital service;
- The Misinformation Bill would not give ACMA the power to request the removal of specific content or posts directly.⁷⁸ This is distinct from truth in political advertising laws, where the administrator can request the removal of specific advertisements, and the courts can require it;
- The Misinformation Bill would limit misinformation and disinformation to content that is false, misleading or deceptive *and* may cause “harm”, including harm to the integrity of democratic processes and of government institutions.⁷⁹ Truth in political advertising laws instead limit political advertising to that which is misleading and inaccurate (or other, similar forms of words) *to* a material extent;
- The Misinformation Bill would leave for the digital platforms to resolve the practice of combatting misinformation and disinformation. Truth in political advertising laws create a mechanism, including legal remedies, for identifying and correcting misleading political advertising.

So, while the Misinformation Bill may prevent misleading political advertising or lead to digital platforms removing it, it does not guarantee it—even for digital advertising. Truth in political advertising laws complement other misinformation regulation by creating a specific, direct remedy for a particularly dangerous class of misinformation – that of misleading political advertisements.

⁷⁷ Department of Infrastructure, Transport, Regional Development, Communications and the Arts (2023) *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023—Fact sheet*, p. 1, <https://www.infrastructure.gov.au/sites/default/files/documents/communications-legislation-amendment-combatting-misinformation-and-disinformation-bill-2023-factsheet-june2023.pdf>

⁷⁸ Department of Infrastructure, Transport, Regional Development, Communications and the Arts (2023) *Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023—Fact sheet*, p. 1

⁷⁹ Communications Legislation Amendment (Combatting Misinformation and Disinformation) Bill 2023 (Cth) *Exposure Draft*, s 2

POLLING RESEARCH

The Australia Institute conducted national polling on truth in political advertising laws in an exit poll conducted after the Voice referendum, which asked respondents whether they agreed or disagreed that truth in political advertising laws should be in place in time for the next federal election campaign. 85% of NSW residents agreed, including 46% who strongly agreed. Only 5% disagreed, including 1% who strongly disagreed.⁸⁰

RECOMMENDATIONS

- Legislate truth in political advertising laws along the South Australian model, in time for the next state election.

⁸⁰ The Australia Institute (2023) *Misinformation and the referendum*, <https://australiainstitute.org.au/report/misinformation-and-the-referendum/>

Conclusion

The NSW electoral system serves to privilege incumbents and entrench the position of established major parties. Much of this system is funded with public money: the NSW Government provides about two-thirds of the disclosed funding for the NSW Labor and Coalition parties, both of which already enjoy significant financial advantages over smaller parties and independent candidates. Despite this, governmental largesse goes overwhelmingly to incumbents and established parties—at the expense of new parties and candidates.

The weight of public funding has transformed the major parties from mass member movements into self-sustaining quasi-NGOs. The people of NSW—over 99% of whom are not party members—have not been consulted about what they want or can expect from the parties in exchange for majority funding. The law requires little from registered parties by way of governance or transparency.

Donation and spending caps work together to further entrench incumbents and block new entrants from raising and spending money, while doing little to inhibit established, state-wide parties from doing the same.

Attempts to improve political transparency have been frustrated by a fragmented, byzantine disclosure regimen that omits much information that is important, and scatters what is disclosed over thousands of tabs across hundreds of disclosures. NSW voters must still go to the polls without truth in political advertising laws, despite working models in South Australia and the ACT.

Ironically, this situation arises at a time when fewer NSW residents are joining, participating in and voting for the major parties. The contrast between the public shift away from the two major parties and the systemic entrenchment of those parties' positions risks an alienated electorate and, ultimately, threatens the quality of democracy in the state.

Appendix: Recommendations for addressing cash-for-access

These recommendations first appeared in *Securing transparency and diversity in political finance*.⁸¹ That paper was targeted at the federal level, and recommendations that are not applicable to NSW or that have already appeared in this submission are not repeated.

Reveal the extent of cash-for-access and expose it to public scrutiny by:

- Disclosing documents made as part of representations to ministers and senior public servants; and
- Digitising the register of members' interests.

Stop any one voice from dominating the election debate by doing one or both of the following:

- Introducing a mega-donor cap that prevents any one entity from contributing election-distorting amounts of money; and
- Introducing a diversity guarantee that prevents any one entity from contributing more than 15% of a candidate's or party's total funding for an election.

Address the advantages of incumbency and other barriers to new entrants by:

- Establishing a public library of materials funded by the communications allowance paid to parliamentarians, so they can be scrutinised.

Reduce the influence of corporate money where it is at most risk of distorting the political process by:

- Reviewing whether a ban on political donations and other contributions from big government contractors, including consulting firms, would be appropriate and, if so, how it might be implemented;
- Reviewing whether a ban on political donations and other contributions from vested interests, including tobacco, liquor, gambling and fossil fuel companies, would be appropriate and, if so, how it might be implemented;
- Legislating to require publicly-listed corporations to seek member consent for political contributions and memberships of trade associations; and
- Requiring trade associations to disclose their members and the amount of money contributed by each member.

⁸¹ Browne & Walters (2023) *Securing transparency and diversity in political finance*