



# The funding of New Zealand's elections: Current problems and prospects for change

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New Zealand's 2005 general election campaign was notable for a range of questionable behaviour by various electoral participants.

- The Labour Party exceeded the statutory maximum on its election expenses by over \$400 000, primarily due to the costs associated with distributing a pledge card to voters shortly before polling day. Furthermore, the use of parliamentary funding to produce and distribute this campaign material prompted a post-election review by the Auditor-General, which concluded that a range of parties and individual MPs had misused this source of funds for campaign purposes.<sup>1</sup>
- The National Party's failure to account for GST when booking its election broadcast time led to it screening some \$112 000 more in campaign advertising than the law allowed.
- Both National and Labour, and to a lesser degree some smaller parties, used anonymous donations and trusts to shield the identity of their major donors, allowing hundreds of thousands of dollars to flow into their campaign coffers from hidden sources.
- An extensive leaflet campaign funded by members of the Exclusive Brethren Church and devoted to attacking the Labour and Green Parties was carried out with a (still disputed) degree of knowledge on the part of the National Party. On at least some occasions these leaflets breached the legal requirement that they identify the 'true identity' of the person publishing them.<sup>2</sup>
- Other examples of third party advertising by various unions and the racing industry also appeared to contravene the rules requiring the authorisation of such messages and the identification of their source.

Taken alone, any of these matters would be cause for concern. In combination, they reveal an urgent need for an extensive overhaul of the rules governing the funding of New Zealand's electoral campaigns. The Ministry of Justice has completed a review of the present law and the Labour-led Government has committed itself to enacting legislation dealing with the issue by the end of 2007. The National Party has also indicated it is prepared to provide bi-partisan support for at least some reform measures. However, the exact nature of any proposals for change is not clear at the time of writing.

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<sup>1</sup> Auditor-General, *Advertising Expenditure Incurred by the Parliamentary Service in the Three Months Before the 2005 General Election*, Wellington: Office of the Controller and Auditor General, 2006.

<sup>2</sup> Nicky Hager, *The Hollow Men: A Study in the Politics of Deception*, Nelson: Craig Potton Publishing, 2006, pp. 238–40.

This paper is therefore intended to provide a background for whatever reforms may emerge by recounting the difficulties that the 2005 campaign caused for New Zealand's present regulatory scheme, as well as making some suggestions for how these may be combatted. It then concludes with a call for greater attention to be paid to how the rules on election campaign funding are enforced.

## **The need for election funding reform in New Zealand.**

The events of the 2005 election demonstrate flaws in every aspect of the regulatory regime governing the funding of election campaigns in New Zealand.<sup>3</sup>

### **1. Supply side problems**

Perhaps the most serious shortcoming in New Zealand's current regulatory regime is the general lack of transparency around the supply of money to electoral participants. The *Electoral Act* 1993 does require that political parties report annually the identity and address of donors giving \$10 000 or more.<sup>4</sup> However, if a donor's identity is not 'known' to the party, their contribution is listed as coming from an anonymous source. In 2005, the Labour Party received \$275 000 by way of such anonymous donations. Where a contribution is received via a conduit organisation, such as a trust entity, the party's report need only list that conduit organisation as the donor.<sup>5</sup> In 2005, the National Party received \$1 741 793 from such sources. The law also permits a single donation to be split amongst several 'straw donors', thereby causing each purported donor's share to fall beneath the threshold at which disclosure is required. Furthermore, it is entirely legal for a donor and a political party (or individual candidate) to actively plan how one of these

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<sup>3</sup> for a more complete description of the present rules, see Andrew Geddis, 'The regulation of election campaign financing in Canada and New Zealand', Paper delivered to the Audit's Political Finance Workshop held at the ANU on 25 February 2006 (<<http://democratic.audit.anu.edu.au>>; Andrew Geddis, *Electoral Law in New Zealand: Practice and Policy*, Wellington: LexisNexis New Zealand Ltd, 2007, Ch 8.

<sup>4</sup> Donations of \$1,000 or more to an individual candidate must be disclosed to the Chief Electoral Officer following the election.

<sup>5</sup> A position recently reinforced by the Electoral Commission, see <http://www.elections.govt.nz/news/ec-media-complaints-020207.html>.

stratagems will be used to pass along a contribution 'facelessly' — that is, make a donation in a manner that evades public disclosure of the donor's identity.

These loopholes mean the current public disclosure regime for political donations is all but voluntary in application. This state of affairs is indefensible. The rationale for requiring the public naming of a political party's large donors is to combat any potential *quid pro quo* arrangement by empowering the voters to judge the extent of the donor's influence on the actions of the party's representatives. Allowing large donors to easily (and lawfully) remain faceless negates its very purpose—it is hardly likely that a donor expecting some payoff for his or her contribution will choose to identify themselves to the public. Further, the present system of disclosure shows the public that the political parties are receiving hundreds of thousands of dollars from private sources (thus raising concerns about what may be expected in exchange for this largesse), but prevents them from checking what effect those donations may have on policy. This is hardly a recipe for increasing the public's overall confidence in the political process.

New Zealand instead should require political parties (as well as individual candidates) to ascertain and publicly reveal the true identity of every donor who gives more than a nominal amount (say, \$300). This approach was recommended by the Royal Commission on the Electoral System, which also called for preventing the use of conduit organisations to avoid the disclosure requirements.<sup>6</sup> The splitting of donations amongst “straw” donors also should be prohibited (although lowering the required level of disclosure would itself undermine this tactic). Furthermore, regular public disclosure reports should be required prior to the election, so that voters are able to ascertain before casting their ballots who is financially backing the parties and individual candidates.

Aside from reforming the disclosure requirements for donations, limits should be placed on who may fund electoral participants, and how much they may donate. Current law allows any person or organisation to give as much money as he, she or it wishes to any

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<sup>6</sup> Royal Commission on the Electoral System, *Towards a Better Democracy*, Wellington: Government Printer, 1986, pp. 189–90.

political party or candidate. Contributors need not be citizens, nor even residents, of New Zealand. The legitimacy of persons who are not eligible to vote in this country's elections funding those who are contesting it is debateable, to say the least. Similar considerations apply to contributions to electoral contestants from organisations such as companies or unions. Finally, even individual supporters ought to be prevented from making unlimited donations to parties or candidates. The concern is that reliance on large financial backers can have a distorting effect on the internal policy development and direction of a party, as well as creating an ongoing sense of obligation toward the donor. A donation limit of \$10 000 would seem eminently reasonable, not least as this is approximately the equivalent of the average wage for three months work (i.e., it is the monetary equivalent of an individual donating three months voluntary labour to a political party during the electoral campaign).

## **2. Demand side problems**

New Zealand traditionally has applied demand side controls as its primary form of election funding regulation. Political parties and individual candidates are limited in the total 'election expenses' they may incur in the three months leading up to the election.<sup>7</sup> Similarly, the amount that may be spent on using the broadcast media to screen 'election programmes' (i.e. campaign advertisements) is strictly controlled through the pre-election broadcast allocation process carried out by the Electoral Commission. Restrictions also apply to election spending by 'third parties': individuals or organisations not directly contesting the election, but with an interest in influencing its outcome. Any advertising paid for by third parties that 'is used or appears to be used to promote or procure the election of a constituency candidate', or 'encourages or persuades or appears to encourage or persuade voters to vote for a party', must be authorised in writing by the party or candidate concerned.<sup>8</sup> The efficacy of each of these forms of demand side control may be questioned following the 2005 election.

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<sup>7</sup> For individual candidates, the cap is \$20 000. For political parties, it is \$1 million + \$20 000 for each electorate contested by the party (i.e. a party contesting all 69 electorates may spend up to \$2.38 million on its 'election expenses').

<sup>8</sup> Where such authorisation is given, the party or candidate must then count that spending as a part of its own election expenses. In addition, the advertising must carry the 'true name' and address of the person authorising it.

Most obviously, the fact that the Labour Party was able to exceed the cap on its election expenses by some \$400 000 without facing any legal consequences puts the limit's effectiveness in doubt. The overall issue of enforcing the rules on election campaign funding is discussed at the end of this paper. However, beyond problems with policing the present spending limits, there also is reason to be concerned about their reach. The restriction applies to election expenses, which includes only advertising activities designed to promote a political party or candidate's chances of being elected. Because activities such as opinion polling, travel, consultant fees, etc do not count as election expenses, unlimited sums may be spent on them. In practice, then, the electoral contestants can (and do) spend vastly more on their campaigns than the apparently low limits provide. The definition of election expenses thus needs to be broadened to prevent the development of an unhealthy arms race in election spending.

The present cap on spending on election broadcasting also is problematic. It is not clear why a separate limit is even required, given the overall limits on election expenses. In addition, because parties may only spend as much on election broadcasting as they are allocated by the Electoral Commission before the election, there is a large discrepancy between the ability of smaller and larger parties to access this medium. In 2005, for instance, Labour was entitled to spend \$1.1 million on broadcasting its campaign advertisements, while the ACT, Green, New Zealand First and United Future Parties could spend only \$200 000 each. It is simply not legitimate for one party to be allowed five times more direct exposure than its competitors.<sup>9</sup>

Finally, New Zealand's controls on third party election spending present a real difficulty. The current authorisation requirement for messages that appear to promote or encourage support for a political party or candidate only covers 'express advocacy' messages that *explicitly* urge voters to vote for some identified contestant. Consequently, third parties can spend as much as they wish on negative advocacy (messages that attack or criticise a

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<sup>9</sup> Andrew Geddis, 'Reforming New Zealand's Election Broadcasting Regime', 14 *Public Law Review*, 164, 2003.

candidate or party) or issue advocacy (messages that purport to discuss issues, even if intended to help a party or candidate).<sup>10</sup> For one thing, this regulatory framework actively encourages third parties to engage in the kind of negative, attack politics so disliked by the general public. Furthermore, the loophole created by allowing issue advocacy intended to promote one party or candidate over others fatally undermines the restrictions on express advocacy, as was graphically illustrated during the 2005 campaign.<sup>11</sup> Closing such loopholes involves a difficult balancing between the values of free electoral participation and ensuring a measure of participant equality.<sup>12</sup> Nevertheless, there is a need to reign in the ability of third parties to inject themselves into the electoral process, both in order to maintain a level financial playing field and to protect the overall integrity of the regulatory regime.

### **3. The problem of public assistance**

The Auditor-General's post-election finding of widespread misuse of parliamentary funding has produced calls to reduce the temptation that political actors will exploit this resource, by expanding the amount of direct public funding available for electoral campaign purposes. At present, direct public funding of the election participants' activities is restricted to the \$3.212 million broadcasting allocation. There are several arguments for why this limited form (and level) of funding may be inadequate. The Royal Commission on the Electoral System, for example, recommended that registered political parties should receive a bulk sum based on the number of votes gained by a party at the previous election.<sup>13</sup> It claimed this measure would alleviate financial inequality between the parties and reduce the risk that large donors might exert unwarranted influence over a party's policy positions. Increased campaign costs in the following two decades, allied to the overall decline in party membership, only serve to strengthen these concerns. In addition, it has been argued that a fall in private funding following any introduction of tighter supply side controls, such as more stringent public disclosure of the identity of

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<sup>10</sup> However, the *Electoral Act 1993* does require that such messages identify the 'true identity' and address of the person responsible for them.

<sup>11</sup> Hager, n. 2 above, at ch. 13

<sup>12</sup> See generally Andrew Geddis, 'Democratic Visions and Third-Party Independent Expenditures: A Comparative View', 9 *Tulane Journal of International and Comparative Law* 5, 2001.

<sup>13</sup> Royal Commission, n. 6 above, pp 226–229.

individual donors and limits on how much may be donated, might require compensatory public funding. Simply put, if the New Zealand public wants to avoid its political parties being dependant upon a few large-scale donors to fund their activities, or even skirting the legal rules in order to obtain the money they need to operate, then they will need to provide the necessary funding through general tax revenue.

However, there are also potential problems involved in establishing any public-funding scheme.<sup>14</sup> Its design will require careful attention, least it entrench already established political parties against displacement by emerging political movements. Crucial to this issue is the support threshold at which public funding is made available to electoral contestants; a higher threshold privileges established parties, while adopting a lower threshold will increase overall financial costs. On a more principled level, we must ask whether the taxpaying public should be forced into contributing financially to political parties that cannot convince individuals to support them voluntarily. Furthermore, there is a risk that providing a stream of guaranteed funding might contribute to the further 'cartelisation' of the political parties.<sup>15</sup> If parties are substantially able to fund their activities through direct grants from the State, then their leadership may become even more insulated from the influence of its grass-roots membership. Such an outcome would be of real concern in an era of already declining levels of party membership.

### **The final problem of rule enforcement**

Following the 2005 election, the election administrators reported 17 potential offences under the *Electoral Act* 1993 to the police. However, the police subsequently declined to prosecute any of these matters, even after accepting there was strong prima facie evidence that an offence had been committed in at least some instances. This failure to bring a prosecution in a situation where the law clearly appeared to have been breached raises the general problem of enforcing the rules around election campaign funding. Simply put, there is little point in having a well designed and comprehensive set of rules

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<sup>14</sup> Andrew Geddis, 'Towards a System of Taxpayer Funding for New Zealand Elections?', 10(2) *Otago Law Review* 181 (2002).

<sup>15</sup> Raymond Miller, 'New Zealand's Multi-Party System: Consolidation of the Cartel Model under Proportional Representation' in Ian Marsh (ed), *Political Parties in Transition*, Annandale: Federation Press, 2006.



to govern how money may be raised and spent in the electoral context if those who break the rules are not held to account for their actions.

One response to this enforcement problem would be to transfer responsibility for investigating and responding to potential breaches of (at least some) matters of electoral law from the police to the the electoral administrators.<sup>16</sup> The role played by the Commissioner of Canada Elections provides a useful template in this regard. The Commissioner of Canada Elections is a non-partisan official appointed by Canada's Chief Electoral Officer (who is in turn appointed by, and reports directly to, the Canadian Parliament), with the statutory duty to ensure compliance with Canada's electoral law.<sup>17</sup> In carrying out this responsibility, the Commissioner of Canada Elections can investigate any alleged breach of the electoral law and decide on an appropriate course of action to remedy any infraction. Therefore, he or she has exclusive responsibility for initiating a prosecution under Canada's electoral law. In addition, the Commissioner of Canada Elections may negotiate binding compliance agreements with electoral participants to remedy a breach of the electoral law, or seek injunctions from the courts to prevent an ongoing breach of the law.

Alternatively, if enforcement is going to be left in the hands of the police, steps need to be taken to ensure that they take this role more seriously than at present. One means of achieving this would be to raise the potential penalties for a breach of electoral law. At present, 'illegal practices' only attract a fine of up to \$3000, while more serious (but far less commonly alleged) 'corrupt practices' attract a possible sentence of up to one year in prison, a fine of up to \$4000, or both. Consequently, the likely penalty following even a successful prosecution makes it appear that it is not worth the time and effort involved. A further change should be for the police to incorporate a 'harm to the election process' component when they are deciding whether a prosecution is warranted. That is to say, they should not regard a breach of the rules governing the funding of elections as being a

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<sup>16</sup> There may still be some serious criminal matters—such as allegations of bribery or undue influence—that the police should retain responsibility for investigating and prosecuting.

<sup>17</sup> Diane Davidson, 'Enforcing Campaign Finance Laws: What Others Can Learn from Canada', 3 *Election Law Journal*, 537, 2004.

kind of victimless crime. Insofar as such breaches undermine the overall integrity of the election process, they threaten the legitimacy of our entire system of government. The enforcement agents' attitude towards pursuing and prosecuting those who have broken the law governing election campaign funding should reflect this fact.