

THE VICTORIAN ELECTORAL LEGISLATION AMENDMENT BILL 2018

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An undemocratic and wasteful attack on free speech

The Electoral Legislation Amendment Bill 2018 (the Bill), introduced into the Victorian Parliament by the Andrews Government earlier this year, seeks to amend the *Electoral Act 2002*. Its main aim is to introduce an extensive funding and disclosure regime in Victoria.

The Electoral Legislation Amendment Bill 2018 will, among other things:

- impose a cap of \$4,000 per electoral cycle on individual donors. The cap will not apply to a range of payments, such as 'affiliation fees';
- substantially increase the amount of taxpayer funding given to election campaigns; and
- introduce a yearly payment of over \$5 million directly to political parties for 'administration' expenses.¹

The Bill would undermine freedom of speech

Donation caps limit democratic participation

The Bill seeks to introduce an effective cap of \$4,000 per four-year election cycle, beyond which it would be unlawful for an individual to make a political donation.² This is an extremely unusual limitation, in effect placing a restriction on donors, not recipients.

A cap on individual donors would be a significant hindrance on freedom of speech and political communication. This is because freedom of speech is more than a protection on merely literally speaking about public policy issues. Thousands of Australians exercise their freedom of speech indirectly, by supporting political parties and candidates whose values and policies they support. This includes financial support.

Limiting the amount of money that free individuals can donate to political campaigns would set an unwelcome precedent. It is essentially a cap on democratic participation, akin to restricting the amount of time political party members and supporters can devote to activities like handing out how-to-vote cards and doorknocking.

The cap would affect more than just political party activity

The Bill would also limit Victorians' ability to support entities other than political parties. New section 217F would limit donations (of any amount) to so-called 'third-party campaigners'.³ These are organisations unrelated to political parties that incur a certain amount of money on 'political expenditure', defined in the Bill as money spent recommending how an elector should cast their vote.

If implemented, section 217F would limit Victorians to supporting just six such entities per election cycle. This means that Victorians will be severely limited in their ability to support advocacy groups whose area of interest includes state public-policy issues, risking a 'chilling effect' in civil society.

Exemptions are arbitrary and unjustified

The Bill also contains a number of wide and arbitrary exemptions to the donations cap. For example, the Bill's definition of 'gift' does not include things like subscription or affiliation fees.⁴ There is no good reason why individuals should be severely limited in the amount that they can 'donate' to a political party, yet free to pay as much as they like to 'subscribe' to or 'affiliate' with that party.

Rather, the exemptions appear designed to allow for 'business as usual' in certain respects. For example, while the Bill theoretically caps donations of more than \$4,000 per electoral cycle by trade unions to the Labor Party, there is nothing preventing the Labor Party from collecting substantial 'affiliation fees' from the very same unions.

Constitutional issues

Given the limits that the Bill seeks to place on political activity, there is a risk that it could successfully be challenged on the basis of the implied right of political communication in the Constitution. While the Constitution does allow for some limitations, they must be 'appropriate and adapted to serve a legitimate end'.⁵ A court may find that the provisions in the Bill are too severe to meet this constitutional requirement.

The Bill would massively increase election funding by Victorian taxpayers

An unjustified increase

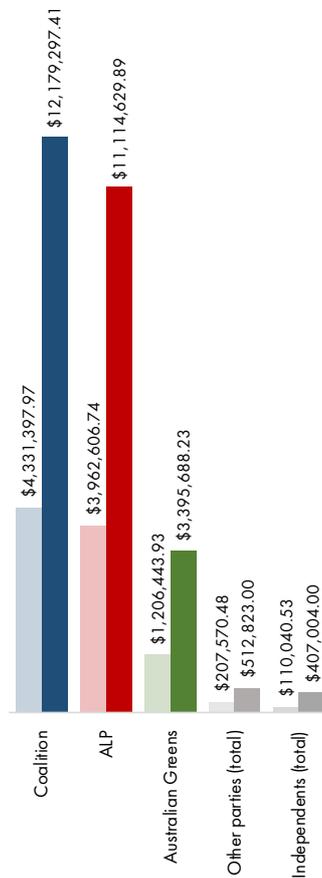
Under the new public funding provisions of the Bill, taxpayer funding of election campaigns will almost triple. At the last election, candidates who received over four per cent of the vote were awarded around \$1.63 per primary vote.⁶ Under the Bill, parties will receive six dollars per primary vote received in the Legislative Assembly, and three dollars per primary vote received in the Legislative Council.⁷ If this metric applied at the 2014 state election, the amount given to parties by Victorian taxpayers would have blown out from almost \$9.8 million to over \$27.6 million.

Entrenching the two-party system

The Bill does not, however, alter the threshold of the four per cent primary vote required to access public funding.⁸ This means that, based on 2014 results, only a handful of minor parties and independent candidates will be eligible to receive funding, as is currently the case. However, because of the significant increase in the amount of funding per vote, the Bill will substantially widen the financial advantage enjoyed by the established parties (see figure 1). It is arguably undesirable that millions of Victorian taxpayers' dollars will be used, in effect, to entrench the two-party system and potentially deprive the Parliament of minority views.

Figure 1: Election funding, per party, under proposed system based on 2014 election results (bold type, dark colours), compared with actual 2014 payments under current system (ordinary type, light colours). 'Other parties' include Liberal Democrats, Country Alliance, Family First, Democratic Labour Party, Voice for the West and Australian Christians. (Sex Party, Shooters, Fishers and Farmers, Vote 1 Local Jobs ineligible for funding under both existing and proposed systems.)

Source: IPA, Victorian Electoral Commission

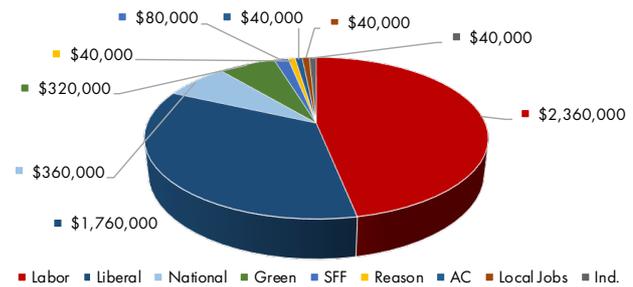


The Bill's 'administration expenses' provisions would further favour the two major parties

The 'administrative costs' payment is a dubious waste

One of the Bill's most concerning uses of public money is the new line of funding that will be given to political parties for 'administrative costs'. In effect, the Bill will require that over \$5.1 million per year in taxpayer funds be given to political parties. Because this new payment is calculated based on the number of elected representatives each party has, it will substantially favour the major parties (see figure 2).

Figure 2: 'Administrative costs' payment per year, per party, based on current parliament.



Source: IPA, Victorian Electoral Commission

While the government points to provisions in the Bill which specify that '[a]dministrative funding cannot be used for political expenditure or electoral expenditure', it is arguable that the payments will still give the major parties a significant 'edge' in terms of campaign financing.⁹ This is because the payment will relieve political parties of the 'opportunity cost' of expenses such as staff wages and rent, freeing up money to be used on campaign activity.

Empowering 'faceless men'

The government claims that the new administrative costs payment is designed to 'help elected Members of Parliament meet the administrative costs of running their offices'.¹⁰ However, under the Bill, this funding will be provided directly to the 'head office' of the relevant members' political party, not to the member themselves.

Accordingly, the Bill would put stringent limits on the amount of money that can be raised privately by parliamentarians, candidates and their local branches, while handing substantial sums of public money to each party's central office. Arguably, this may deprive elected members of control and agency over political campaigns in favour of the unelected 'professional wing' of political parties.

1 Electoral Legislation Amendment Bill 2018, pt 3, cls 45, 50, 55.

2 Ibid, cl 55.

3 Ibid.

4 Ibid, cl 40.

5 *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96, 112.

6 See Victorian Electoral Commission, 'Public funding of electoral expenditure', accessed 12

June 2018, <https://www.vec.vic.gov.au/Results/results-funding.html#i12>.

7 Above n 1, cl 50.

8 See *Electoral Act 2002* (Vic), sub-s 211(3).

9 Victoria, *Parliamentary Debates*, Legislative Assembly, 10 May 2018, 1351 (Martin Pakula, Attorney General).

10 Ibid.