

POLITICAL PARTY DEVELOPMENT IN HONG KONG

IMPROVING THE REGULATORY INFRASTRUCTURE

Richard Cullen

August 2004

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Preface

Civic Exchange embarked on a research project in 2003 to study issues related to political reform in Hong Kong. Various books, reports, surveys and pamphlets were produced, several seminars were organised and a variety of community projects were supported. We wanted to continue to explore the many issues related to constitutional development in 2004. For this year, our democracy project has five key components:

Firstly, to use the 12 September 2004 Legislative Council Election to conduct a series of public opinion surveys and focus groups in order to add to the overall knowledge about the use of such techniques as well as to generate collective insights for public consideration.

Secondly, to study the functional constituencies as this is an under-studied area.

Thirdly, to organise a series of public conferences and seminars to discuss constitutional development issues from a variety of perspectives.

Fourthly, to test using alternative media to encourage Hong Kong citizens to vote at the Legislative Council Election.

Fifthly, to conduct research on the development of political parties in Hong Kong. The paper by Professor Richard Cullen provides useful information and thinking about how Hong Kong's political parties may develop, using Australia, a leading example in this matter, as a key reference point. There is much talk in Hong Kong about the importance of having a specific law to govern political parties. We hope this paper will help the public and politicians to consider what options are in fact available and how best to strengthen our political parties.

We are most grateful to Richard Cullen for his contribution to this project, as well as Peter and Nancy Thompson for having funded this research. We also wish to thank Yip Yan-yan of Civic Exchange who managed this project for us, Alan Sargent for his skilful editing, and Word Power for translating this paper into Chinese.

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1.0 INTRODUCTION

Notwithstanding the wider political issues of limits being placed on the pace of democratisation, enhancing the development of political parties in Hong Kong remains an issue worth discussing.

This paper looks at electoral infrastructure reform in Hong Kong, with Australia providing the primary point of comparison.

2.0 POLITICAL PARTIES IN HONG KONG

Discouraged by both the British and the current PRC governments, political parties are fairly new entrants to the Hong Kong political arena. They suffer from a range of inhibiting factors, including limitations within the electoral infrastructure.

3.0 ELECTORAL AND POLITICAL PARTY REGULATION

The main HKSAR electoral regulatory body is the Electoral Affairs Commission (EAC), which enforces the provisions of the Electoral Affairs Commission Ordinance (EACO). A range of other Ordinances also are relevant directly or indirectly to electoral and political party regulation. These include the Electoral (Corrupt and Illegal Conduct) Ordinance (ECICO), the Legislative Council Ordinance (LCO), the Chief Executive Election Ordinance (CEEEO), the Societies Ordinance (SO) and the Companies Ordinance (CO).

Most political parties in the HKSAR have incorporated under the CO (which exempts them from registering under the SO). In general, political parties in Hong Kong are not formally recognised by the HKSAR electoral regulatory regime. Some unincorporated political groups have operated after registering under the SO.

Apart from their general low-status problems, political parties suffer from funding difficulties, some more than others. The HKSAR has recently moved to introduce a level of public funding for LegCo election candidates which will assist political parties. The current funding formula is rather complex, and tied to election expenditure, requiring applicants to complete detailed claims.

There are some problems with the transparency of private funding of candidates due to limitations in reporting requirements.

Hong Kong essentially prohibits election advertising via the broadcast media. Other restrictions in relation to electioneering and advertising also apply via the ECICO.

4.0 REGULATING POLITICAL PARTIES IN AUSTRALIA

Australia's system for managing elections at the federal level has been in operation for over 100 years. Commentators see scope for improvement but the system is generally well regarded by most election participants.

The Australian Electoral Commission (AEC) administers the key law, the Electoral Act (EA). Since 1984, the EA has provided a voluntary registration system for political parties. Registered parties enjoy certain benefits, including public funding based, now, simply on “voter-success” (rather than on detailed claim procedures). Registered parties also have important obligations. Parties need to complete fully auditable, detailed, annual financial returns which are all available on the Web for public inspection. Donors to political parties are now allowed tax concessions.

The EA and related provisions also regulate electioneering and election advertising. All election advertisements (very widely defined) must carry the full name and contact details of the “authoriser” and speakers on broadcast advertisements must also identify themselves. Although broadcast election advertising is allowed, there is a blackout period of three days before each election when no such advertising is allowed. An attempt to ban broadcast election advertising entirely was overturned by the High Court of Australia in 1992 because the court found it was incompatible with an implied right to political free speech in the Australian Constitution.

Most political parties in Australia are not incorporated entities. They are “voluntary unincorporated associations”. Registration with the AEC does not alter this status, although it does enable the AEC to treat political parties as quasi-legal entities. Australia has no equivalent to the SO — a crucial factor which allows political parties to operate readily as voluntary unincorporated associations. The managers of political parties appear to value this option as it has, historically, made courts reluctant to rule on, not uncommon, internal party disputes. This judicial reluctance now appears to be fading — especially since the introduction of public funding.

The major political parties date back many decades and have developed sound (though variable) private funding sources. That said, they are grateful for (and now significantly reliant upon) the additional support available from public funding.

The registration requirements — which mandate that registered parties produce detailed, publicly-available reports — have ensured greater transparency of party funding than was ever previously the case in Australia.

The public nature of these records guarantees carefully scrutiny by opposing parties — which will eagerly report any discrepancies to the AEC or other relevant authorities. Similarly, parties watch all advertising by their competitors to check that they abide by the rules. The Australian electoral regulatory regime

is, thus, self-enforcing to a degree. The upshot is operational enhancement and cost savings for the AEC. Australia has, in effect, indirectly “privatised” significant aspects of its electoral management regime.

Politicians and party officials who fail to comply with all the rules related to registration and public funding can rather swiftly find themselves in legal trouble as the example of the One Nation political party in New South Wales and Queensland demonstrates.

Australia has also had for some years a Joint Standing Committee on Electoral Matters (JSCEM). The JSCEM has multi-party membership and provides a regular oversight mechanism in relation to electoral matters. It routinely conducts an enquiry after each Federal Election. It makes recommendations, numbers of which have been implemented.

5.0 CONCLUSION

The suggestions made here draw on the research completed for this paper. A primary conclusion is that it is not necessary for the HKSAR to enact a new and separate “Political Parties Ordinance”. The basic regulatory infrastructure in Hong Kong is sound. The recommendations below all build on existing foundations, thus avoiding the need for “root and branch” reform. An important aspect of the implementation of the reforms suggested below is the establishment of a standing joint Government-LegCo Electoral Process Review Committee.

The Formal Recognition of Political Parties

Hong Kong should seriously consider creating a full political party registration system, modelled on that used in Australia. This system could be enacted under the EACO and administered by the EAC.

As in Australia, certain benefits ought to be made available to parties which register, in order to encourage registration.

Hong Kong could improve on Australian procedures by providing a model political party constitution (for registering parties) which could be simply adopted in full or modified within set limits.

It is not recommended that the political party registration system be used, also, as a basis for providing legal status to political parties.

It should not be mandatory to register. In the interests of maintaining political freedom, political parties should be able to continue operating without registering (though they will still need to register under the SO unless they are incorporated under the CO).

The Legal Status of Political Parties

The current Hong Kong practice where political parties are usually incorporated as companies limited by guarantee seems, on balance, to be acceptable and should be retained (there being no prospect of the SO being repealed or drastically revised). It would, however, be sensible to amend the CO so as to exempt incorporated political parties from having to comply with certain CO provisions, which currently hamper their normal operations. It would make more sense, still, to do this, if a political party registration system were to be introduced as that would provide an additional mode of regulation.

A key reason for maintaining a separate system for establishing the legal status of political parties is to avoid having both the registration and legal status of political parties subject to a single regulator. If a political party registration system is introduced as recommended above, the EAC would have the power to deregister political parties. It would be better that the EAC not also have the direct power to wind up the legal entity which is the political party.

Election Advertising and General Electioneering

The existing regime in the ECICO should be retained. But a legally enforceable requirement should be introduced for all (widely defined) election advertising to be *authorised* by an identified, readily-locatable individual (either party-based or otherwise). This would provide a clear primary person to sue in the event of any alleged defamation, thus discouraging reckless advertising.

On balance, the ban on broadcast-electronic election advertising should remain, as it restrains the growth of “money politics” in Hong Kong.

Fund raising

We should consider allowing registered political parties tax-exempt status. We should also consider allowing at least a partial deduction for donations to registered political parties. The implementation of such measures would need to be carefully monitored to ensure that they would not be exploited for tax avoidance purposes.

The introduction of tax concessions should proceed in tandem with a formal political party registration system as outlined above.

Public Funding of Political Parties

The new public funding provisions introduced for LegCo election candidates by the HKSAR government are a step in the right direction. The formula for calculating to whom payments are to be made (attracting at least 5% of total valid votes cast) is reasonable. The formula for calculating how much is to be paid is less so. In Australia, public funding reimbursement was tied to election

costs incurred until 1995 when the linkage was abandoned. Registered political parties no longer need to submit detailed claims. There is significantly less paperwork all round and funds are paid over more swiftly. Hong Kong should follow suit.

The public funding system should be further adapted if a political party registration system is introduced, to encourage registration.

Funding Transparency

A key aspect of the proposed voluntary political party registration system is to introduce a public reporting system for registered political parties, which provides a high level of funding transparency. This system would be self-regulating to a significant degree because every political party would have access to the public financial records of the other parties, and the EAC would be conducting regular audits of registered parties.

The current system, of setting limits on expenditure by candidates is, in principle, sound and should be retained, although it should be kept under regular review (see below).

Whether or not a political party registration system is introduced the most obvious loophole in the current candidate reporting requirements under Section 37 of the ECICO needs to be closed. Candidates should have to reveal the substantive person behind any donation rather be able simply to report a donation from Political Party A, as is currently the case.

Oversight of the Electoral Infrastructure

For some years in Australia the JSCEM has played a useful oversight role. It would be sensible to develop a comparable, on-going, oversight body (suited to Hong Kong's circumstances) to undertake a similar role in the HKSAR. A new Electoral Process Review Committee (EPRC) would be able to draw its membership from government and LegCo. The EPRC could conduct on-going reviews on matters including the implementation of a political party registration scheme, advertising and electioneering regulation, funding limits on candidates, and public funding of election expenses.

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1.0 INTRODUCTION

This paper examines:

- The current position of political parties in the Hong Kong Special Administrative Region (HKSAR) of the People's Republic of China (PRC);
- How the political party system has evolved in the HKSAR; and
- Ways that this system might be further developed by improving the infrastructure within which parties operate.

This paper adopts a comparative approach with the regime governing political parties in Australia. The primary reasons for choosing Australia are that it has developed and improved a system of electoral — and party — regulation over a significantly longer period than most other jurisdictions;² and that the comparative effectiveness of this system is well established.³

Despite that fact that the Australian system is regulating an area of human activity notorious for its contentiousness, the competing participants are largely satisfied with the operation of the scheme.⁴ In particular, there are no widespread calls for major reform.⁵ Improvements are still being suggested but the system has generally coped well with the challenges thrown up by electoral contests

¹ LLB (Hons) (Melb.) PhD (Osgoode Hall), Professor, Monash University, Melbourne, Australia.

² What is now the Australian Electoral Commission was first established as the Australian Electoral Office, as a branch of the Department of Home Affairs, in 1902 (see, *Australia's Major Electoral Developments*, at: www.aec.gov.au).

³ Those seeking other relevant comparative insights should consult two recent detailed studies published by the Research and Library Services Division of the HKSAR Legislative Council Secretariat: Chau, Pak-kwan, *The Regulatory Framework of Political Parties in Germany, the United Kingdom, New Zealand and Singapore*; and Wong, Thomas, *Operation of Electoral Regulatory Bodies in Selected Places*. See, too, Wong, Thomas, *Regulatory Arrangements for Major Election-related Activities at Parliamentary General Elections in Selected Places*, Information Note 9, 2003-04. Both reports and the Information Note are available at: www.legco.gov.hk/english/index. The regulatory systems operating in Germany, UK, New Zealand and Singapore are all of more recent origin and appear to be less comprehensively developed than the system operating in Australia in a number of ways (see, Chau, 42).

⁴ Interview with David Feeney, former State Secretary and Campaign Director, Australian Labor Party, Melbourne, Victoria, March 29, 2004.

⁵ Ibid.

over the decades. There was widespread disbelief in Australia, for example, at the fiasco surrounding vote counting in the US Presidential election in 2000.⁶ Subsequent reflection revealed that the key causes of the distress in that election had been addressed in Australia some time ago. In particular, partisan input into the management of the electoral system is essentially prohibited in Australia, plus the electoral authorities are centralised, independent, fairly well resourced, well trained and well organised.

The HKSAR is unique in the developed world in combining so much civic freedom with so much electoral restriction. Hong Kong is a highly developed society with a strong Rule of Law tradition.⁷ The head of government, known as the Chief Executive, is selected by an 800-member Election Committee. He then appoints the members of the Executive Council (cabinet). The Central People's Government in Beijing then formally appoints the Chief Executive and the members of the cabinet. The Legislative Council (LegCo) has half its members elected by universal suffrage and half by narrowly defined functional constituencies. Furthermore, LegCo's voting procedures for motions and bills restrict the political impact of legislators significantly.⁸

The **Basic Law** of the HKSAR,⁹ which came into force on July 1, 1997, provides, on paper, an impressive set of protections designed to maintain Hong Kong's way of life within the PRC. In particular, the Basic Law is meant to encapsulate the "two systems" part of Deng Xiaoping's famous "One Country, Two Systems" formula for accommodating Hong Kong's return to China.¹⁰ Confidence in the "two systems" was shaken in 2004 following the Standing Committee of the National People's Congress interpreting provisions in the Basic Law to essentially rule out universal suffrage in 2007 for the election of the Chief Executive, and in 2008 for the election of the legislature.¹¹ This is despite

⁶ This election was very closely fought by George W. Bush (Republican Party) and Al Gore (Democratic Party). The election finally turned on the outcome in the State of Florida. Key aspects of US Federal electoral regulation remain in the hands of state governments in the US and the state electoral authorities are often affected by political party influence. The combination of an antiquated, semi-automatic, mechanical voting system, the great stakes involved and constant party involvement in the counting and re-counting process delayed the election result being announced for some weeks. Ultimately, the US Supreme Court was brought into the process. The court finally sorted out the mess in a controversial decision which saw George W. Bush being declared the winner of the election.

⁷ Cullen, Richard, "The Media and Society in Hong Kong", in (Loh, Christine and Civic Exchange (Eds.)) *Building Democracy* (Hong Kong University Press, Hong Kong, 2003, 104, 110.

⁸ Sing, Ming, *Pro-Democratic Opposition in Hong Kong (1986–2002)* (2003) 38 Government and Opposition, 456.

⁹ **The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China** was adopted by the National People's Congress in Beijing on April 4, 1990 pursuant to Article 31 of **The Constitution of the People's Republic of China** (1982).

¹⁰ Ghai, Yash, *Hong Kong's New Constitutional Order* (2nd ed.) (Hong Kong University Press, Hong Kong, 1999) 494.

¹¹ These developments have been the subject of much media coverage. See, for example: Ghai, Yash, "Who will defend our autonomy?" *South China Morning Post*, April 12, 2004, A13; Loh, Christine, *Newsletter*, April 18 and April 26, 2004; Lan, David, "Clarifying the Basic Law", *South China Morning Post*, April 21, 2004, A15; Ng, Margaret, "Rule by Interpretation", *South China Morning Post*, April 21, 2004, A15; and "On hold", *The Economist*, May 1, 2004, 31.

the fact that the Basic Law does not prevent such changes from those dates.¹² While these broader democratic development issues are profoundly important for Hong Kong, they are not the primary concern of this paper. The focus, here, is on the basic regulatory infrastructure governing how political parties operate in Hong Kong.

Notwithstanding the gloomy political mood, which has overtaken the HKSAR since early 2004, the problems of political party development remain key issues within the overall challenge of constitutional reform. The political system in Hong Kong is comparatively immature, being adapted from a colonial model that had become outdated by the early 1990s. The colonial system had trained strong administrators but not politicians. As a consequence, the political elite have comparatively little experience in the business of politics. This has become painfully apparent with the C H Tung Administration even though it is supported by the, essentially intact, pre-1997 administrative apparatus. The system also suffers from a lack of experienced, well-informed politicians. Numbers of politicians have yet to sort out their ideologies and values and they also lack an understanding of the need for long-term policy development.¹³ Hong Kong currently has a set of political parties which, across the political spectrum, have been described as generally ineffective and beset by stagnation if not decline.¹⁴ Reform of the political party regulatory infrastructure will not, alone, mend such deficiencies. It makes sense, still, to look carefully at the nature of the current infrastructure and consider how it might be developed and improved for the benefit of all political parties. Hong Kong clearly stands to benefit significantly over the medium to longer term, the more effective its political parties can become.¹⁵

¹² See, **Basic Law**, Articles 45 and 68 and Annex I, Clause 7 and Annex II, Part III.

¹³ Loh, Christine and Cullen, Richard, *Politics without Democracy* (2003) 4 San Diego International Law Journal, 127, 175. See, also, Kuan, Hsin-chi and Lau, Siu-kai, "Intermediation Environments and Election in Hong Kong" in Sing, Ming (ed.) *Hong Kong Government and Politics* (Oxford University Press, Hong Kong, 2003) 310, 336-342.

¹⁴ Lau, Siu-kai and Kuan, Hsin-chi, "Partial Democratization, 'Foundation Movement' and Political Parties in Hong Kong" in Sing, Ming (ed.) *Hong Kong Government and Politics* (Oxford University Press, Hong Kong, 2003) 239, 260. See, also, Tien, James, "Why Hong Kong needs stronger political parties", *South China Morning Post*, July 24, 2003.

¹⁵ Sing, Ming has argued that the development of political parties has actually been bad for the cause of democratisation in Hong Kong. The argument, briefly, is that party development has drawn resources from civil society with the result being an overall weakening of the pro-democracy movement in the HKSAR. (See, Sing, op. cit. note 8, 477). While there is support for the view that parties do draw heavily on general resources, I do not subscribe to the "zero-sum" implications of this analysis. Political parties are very often vehicles for mobilising common views, with the aim of seeking reform. They have also demonstrated negative aspects on countless occasions. Overall, however, they have, in pluralistic societies, used their voice to inform, persuade and activate. That is, they have acted as political catalysts, such that civil society has been, over time, been more enriched rather than depleted by their presence. See, further, Ching, Frank, "Political wilderness", *South China Morning Post*, August 5, 2003, A10, where a credible case for increasing the role and status of political parties is put.

Political parties in the HKSAR are held back by a raft of factors apart from infrastructure deficiencies. These include the denial of any governmental role to parties based on electoral popularity, limited public support, the limited law-making role allowed LegCo, the negative impact of the functional constituency system, a self-chosen preference for politics based primarily on opposition rather than policy development and the watchful antagonism (especially in relation to pro-democracy parties) of Beijing.¹⁶ The regulatory infrastructure issues, although sometimes related to these broader issues, can be separately stated. These issues, which are the primary concern of this paper, include:

- The legal status of political parties;
- The formal recognition (and registration) of political parties;
- Election advertising and general electioneering;
- Fund raising;
- Public funding of political parties
- Expenditure control issues; and
- Publication of funding sources.

Part 2 of this paper reviews the history of political party development in Hong Kong. Part 3 reviews the basic elements of the current system of electoral and political party regulation in Hong Kong. Part 4 examines the operation of political party regulation in Australia. The conclusion, in Part 5, looks at options for improving the regulatory framework for political parties in the HKSAR.

¹⁶ Lau and Kuan, *op. cit.* note 14, 259. See, also, Lam, Jermain T. M., "Party Politics in Hong Kong During the Political Transition", in Sing, Ming (ed.) *Hong Kong Government and Politics* (Oxford University Press, Hong Kong, 2003) 218, 237. The functional constituency system is explained further below.

2.0 POLITICAL PARTIES IN HONG KONG

The term “political party” has been defined as follows:

A permanent organisation that aims to occupy positions of authority within the state usually but not always through electoral means. In contrast to an interest group, a party seeks to form the government and not just to influence it. Parties are a response to the emergence of the mass electorate. With the extension of the franchise, parties had to develop a modern organisation and a coherent set of policies in order to cultivate electoral support. Parties exist in almost all countries except where they are banned or suppressed. They may be based on ethnic, religious or regional identifications or on differing ideologies. Political parties, whether they operate under two-party or multiparty systems are necessary for the creation of a viable democratic government and have become an indispensable feature of politics in the modern world.¹⁷

Party-based politics did not really commence in Hong Kong until around 1989.¹⁸ The LegCo elections of 1991 proved a major turning point in the development of political parties in Hong Kong.¹⁹ In early 1990, the British Hong Kong government announced, following the Tiananmen bloodshed of June 4, 1989, that, in the 1991 LegCo elections, the number of directly elected seats would be increased from the 10 originally envisaged to 18 — with the agreement of Beijing.²⁰ Although this was still less than one-third of all LegCo seats, this change represented the single greatest move towards increased democratisation in Hong Kong until that time. For the first time ever, Hong Kong residents were being offered the chance to elect some of their legislators directly. The electoral system used was a curious, “double-seat, double-vote” one (see below).²¹

A number of factors had combined, prior to 1989-91, to discourage the development of political parties in Hong Kong. These included a colonial constitutional arrangement which provided little room for political party operation, a strategy of co-optation of potential opponents and elites into the administration, and general political disinterest as a result of a policy of de-politicisation, generating public agreement with government on the primacy of economic development.²²

¹⁷ *Oxford Paperback Encyclopedia* (Oxford University Press, New York, 1998) 1081. In Hong Kong, for reasons previously noted, political parties cannot hope to form the government — or even to participate in government based on their popular support. Notwithstanding this reality, political parties in Hong Kong generally fit within this definition.

¹⁸ Lam, *op. cit.* note 16, 220. Both the Communist Party and the Nationalist Party (Kuomintang (KMT)) were present in Hong Kong from early in the 20th century. But they never had an official existence in Hong Kong. They were not registered organisations and they each generally adopted a low profile as parties (*ibid.*, 218).

¹⁹ Louie, Kin-shuen, “Politicians, Political Parties and the Legislative Council” in Sing, Ming (ed.) *Hong Kong Government and Politics* (Oxford University Press, Hong Kong, 2003) 189.

²⁰ *Ibid.* See, also, Ma, Ngok and Choy, Chi-keung, “The Evolution of the Electoral System and Party Politics in Hong Kong” in Sing, Ming (ed.) *Hong Kong Government and Politics* (Oxford University Press, Hong Kong, 2003) 284, 285.

²¹ *Ibid.*, Ma and Choy.

²² Lam, *op.cit.* note 16, 220-221.

Various groups, such as the Hong Kong Observers, Meeting Point, the Hong Kong Forum and the Hong Kong Affairs Society were formed in the mid-1970s and early 1980s.²³ These were, however, more like political interest groups (drawing on the definition above).

The 1989 student democracy movement in the PRC — and June 4, 1989 — brought huge numbers of people into the streets of Hong Kong. The 1991 LegCo elections produced a record voter turnout of just on 40% and a landslide victory for pro-democratic candidates under the “double-seat, double-vote” electoral system then operating.²⁴

Early political parties to emerge, post-1989, included the United Democrats of Hong Kong (UDHK), Meeting Point (MP), the New Hong Kong Alliance, the Citizens Forum and the Liberal Democratic Foundation. A little later the Cooperative Resources Centre (CRC) was formed and also the principal pro-Beijing party, the Democratic Alliance for the Betterment of Hong Kong (DAB). The CRC subsequently became the Liberal Party.²⁵

In 1994, the UDHK and MP merged to form the Democratic Party (DP). A group of pro-Beijing business people also formed the Hong Kong Progressive Alliance in 1994.²⁶ A new, more radical, pro-democracy political organisation called Frontier was formed in 1996, and another smaller pro-democracy, “green” party, the Citizens Party was also founded at about the same time.

Today, three parties are dominant and other, smaller parties tend to cluster around them. The dominant parties are the DP, the DAB and the Liberal Party. The interests they represent are, broadly (and respectively), pro-democracy, pro-government and pro-government/pro-business. The Liberal Party has no directly elected members of LegCo but it has sizeable representation there through its functional constituency members.²⁷ Both the DP and the DAB have directly- and functionally-elected members of LegCo. Both, also, draw significant support from the “grass roots”. The DAB and the Liberal Party are generally considered to be pro-government. They each enjoy good relations with the Central People’s Government, whereas the various pro-democracy parties have little if any direct contact with Beijing.²⁸

²³ Ibid.

²⁴ Ibid., 224.

²⁵ Ibid., 225.

²⁶ Ma and Choy, op. cit. note 20, 289.

²⁷ www.liberal.org.hk.

²⁸ Ma and Choy, op. cit. note 20, 298.

3.0 ELECTORAL AND POLITICAL PARTY REGULATION

3.1 Voting Systems — Geographical Constituencies

When the direct election (via geographical constituencies) of around one-third of LegCo members first became possible in 1991, a “double-seat, double-vote” system was adopted. Hong Kong was divided into nine constituencies each of which returned two members. Registered voters chose two candidates on the ballot paper. The two candidates who received the most votes were then elected.

This system had been used in District Board and Municipal Council elections since 1982. The colonial administration had found the system to be effective in diluting the electoral success of grass-roots, pro-democracy candidates. Voters tended to vote for such candidates first — but would then “balance” their vote by giving a more conservative candidate their second vote. Things did not work out this way in the 1991 LegCo direct elections, however. In the aftermath of the Tiananmen Square bloodshed, Hong Kong voters overwhelmingly gave their support to pro-democracy candidates who took 17 of the 18 seats on offer.²⁹

The voting system and electoral politics generally were both greatly changed by the time of the 1995 LegCo elections. The new (and last) Governor, Christopher Patten, sent from London in 1992, introduced a raft of reforms. The franchise for functional constituencies was broadened, the voting age lowered and more democratic elections for an electoral college (which operated at that time for some LegCo members) were introduced.³⁰ At the same time, the double-seat, double-vote election system was replaced by a system using First-Past-The-Post (FPTP), single-member electorates for all the directly elected LegCo seats. This system was agreed to by a majority in LegCo (in a non-binding resolution) after significant criticism by the losers in the 1991 LegCo election. They argued that the double-seat, double-vote system was too favourable to the pro-democracy grouping because it allowed lesser candidates to ride into LegCo on the “coat tails” of high-profile democrats.³¹

By 1993, the DAB was arguing that the fairest voting system would be one relying on Proportional Representation (PR).³² Ultimately, after considerable

²⁹ Ibid., 285-287.

³⁰ See: Ghai, *op. cit.* note 10, 78; and Ma and Choy, *op. cit.* note 20, 293.

³¹ Ma and Choy, *ibid.*

³² Ibid. A List System is a PR scheme of voting that typically combines a multi-member electorate with a single (but transferable via the list) voting method. If you have, say, 10 members in the electorate, each member needs a quota of 10% + 1 of votes cast to be elected. The person at the head of the list accumulates votes up to the quota, then their votes are distributed to the next person on the list and so on. Almost certainly, there will not be a perfectly even distribution of votes, so the last successful candidate will be the candidate with the highest remainder (that is, the remainder closest to but less than 10%). A variation, used in Australian Senate Elections, for example, allows a voter to express preferences for all the candidates at will and to ignore any party list. PR clearly favours less popular parties which under a FPTP system might gain 30% of the vote, yet win no seats.

debate about whether PR or a system where multiple members for single electorates were to be elected via a system of Single Non-Transferable Votes (SNTV), PR was adopted for the 1998 (post-handover) LegCo elections.³³ PR remains the system used for LegCo elections.

3.2 Voting Systems — Functional Constituencies³⁴

The functional constituencies scheme used in Hong Kong is unique within the current, global range of electoral systems. It gives half the seats in LegCo to 28 specific interest groups who represent approximately 160,300 voters, 13,036 of whom are corporate voters.³⁵ Functional constituencies are specifically authorised by Annex II of the Basic Law.

The functional constituencies were introduced into Hong Kong by the British in 1985. At that time, it was said that they were meant to provide additional representative weight to certain economic and professional sectors claimed to be essential to future confidence and prosperity in Hong Kong.³⁶

The Patten reforms for the 1995 LegCo elections expanded the then franchise of functional constituencies from around 180,000 to over 2 million. When these reforms were overturned with effect from July 1, 1997 by the Provisional Legislative Council, the number of functional constituency voters were greatly reduced for the 1998 LegCo elections.³⁷ For a detailed analysis of the functional constituencies, see Civic Exchange's *Functional Constituency Research Project 2004*.³⁸

³³ Ibid., 302. Elections for LegCo normally are conducted every four years. Beijing claimed that the "Patten reforms" which had been introduced for the 1995 LegCo elections were in conflict with the Basic Law. (In fact these reforms kept within the letter of the Basic Law, although they did run contrary to its conservative spirit on this point. See Ghai, *op. cit.* note 10, 78.) Beijing shut down the 1995 LegCo on July 1, 1997 (see Ghai, *op. cit.* note 10, 261) and appointed, for one year, a Provisional Legislative Council (ProvLegCo). In 1998 elections (using a PR system) were then held for the first "normal" post-handover LegCo. The Basic Law provides that, although the usual term of the HKSAR LegCo is to be four years, the first term is to be two years only. This provision was designed to ensure a "through train" for LegCo across the handover date of July 1, 1997. The appointment of the ProvLegCo threw this timetable out by a year, so the first regular HKSAR LegCo ran from 1998 to 2000. The second runs from 2000 to 2004 and four-yearly thereafter.

³⁴ There is no space here to discuss the merits of functional constituencies in detail. This brief commentary simply provides an overview, as these curious electorates are subject to regular party participation and they also are subject to electoral regulation by the same electoral authority regulating direct elections.

³⁵ See www.voterregistration.gov.hk/eng/statistic3.html relating to distribution of registered electors by functional constituencies in 2003.

³⁶ *The Future Development of Representative Government in Hong Kong* (Hong Kong Government Printer, Hong Kong, 1984) 9. See, also, "Turning the clock back to 1984", Spike, February 27, 2004, 13.

³⁷ Ma and Choy, *op. cit.* note 20, 302.

³⁸ A series of papers will be published in 2004-2005. See www.civic-exchange.org under "publications".

3.3 The Electoral Regulatory Framework

The Electoral Affairs Commission (EAC) is an independent body corporate established under the **Electoral Affairs Commission Ordinance** (1997) (EACO).³⁹ It is responsible for:

- Considering or reviewing the boundaries of geographical constituencies;
- Conduct and supervision of elections;
- Conduct and supervision of the formation of the Election Committee;
- Supervision of the registration of electors and the promotional activities relating to registration;
- Reporting to the Chief Executive on any matter relating to elections and any process for the formation of the election committee; and
- Taking appropriate steps to ensure that elections are conducted openly, honestly and fairly.

The other key general Ordinance related to the regulation of elections is the **Elections (Corrupt and Illegal Conduct) Ordinance** (2000) (ECICO).⁴⁰ The aims of this Ordinance are to prohibit corrupt and illegal conduct at elections, to regulate electoral advertising, and to impose requirements on the receipt of donations and the expenditure of money in connection with elections.

These two Ordinances provide the core of the regulatory framework applying to elections at all levels in Hong Kong. The **Legislative Council Ordinance** (1997) (LCO)⁴¹ also contains, in Part VI, detailed provisions applying to LegCo elections. When considering elections (so far, really selections) for the position of Chief Executive of the HKSAR, one needs, also, to refer to the **Chief Executive Election Ordinance** (2001) (CEEEO).⁴²

The EACO establishes, in Section 2, the Electoral Affairs Commission. The EAC is headed by a Chairman who must be a Judge of the High Court (currently the Honourable Mr Justice Woo Kwok Hing, a Vice-President of the Court of Appeal in Hong Kong). The EAC has two other members. Under Section 9 of the EACO, the functions of the EAC are to be performed through a Chief Electoral Officer (CEO), who is appointed by the Chief Executive.

³⁹ Cap. 541, Laws of Hong Kong and see www.gov.hk/eac/

⁴⁰ Cap. 554, Laws of Hong Kong.

⁴¹ Cap. 542, Laws of Hong Kong.

⁴² Cap. 569, Laws of Hong Kong.

The EACO lays out a regulatory framework for matters including the establishment of geographical electoral constituencies, the conduct and supervision of all forms of public election in Hong Kong (including, of course, elections for LegCo's functional constituencies⁴³), the registration of voters (electors as they are called in the EACO), and making reports on all matters relating to elections to the Chief Executive. The ECICO closely regulates advertising and electioneering generally in relation to all elections, the collection of election-related donations and election-related expenditure.

3.4 Political Parties — Formal Recognition

Almost all these activities undertaken under the auspices of the EACO and the ECICO are of the closest interest to each political party. Notwithstanding this, these two Ordinances generally do not refer to or discuss the control of political parties. The term “political body” is defined in the EACO (although not in the ECICO) as:

- (a) *a political party or an organisation that purports to be a political party; or*
- (b) *an organisation whose principal function or main object is to promote or prepare a candidate for election.*

The definition in the EACO is repeated in Section 2 (the definitions section) of the **Societies Ordinance** (1950) (SO).⁴⁴ The CEEO also refers briefly to political parties: Section 31(1) provides that any person elected as Chief Executive of Hong Kong must, within seven days after being declared elected, make a public statutory declaration that they are not a member of any political party. Section 31(2) of the CEEO then, essentially, repeats the definition above — but uses the heading “political party” rather than “political body”. Finally, basically the same definition has recently been introduced into Section 60A of the new Part IVA (which deals with the HKSAR's new public funding regime) of the LCO.⁴⁵ The curious reality is that political parties are not yet a matter of any significant *formal* concern within Hong Kong's system for regulating electoral politics. This is not the case in Australia, as we shall see.

It follows from the above, that Hong Kong, unlike numbers of other jurisdictions, has no system for officially registering political parties, although a small step in this direction has been taken recently. Pursuant to this new measure, political

⁴³ Section 7(7), EACO.

⁴⁴ Cap. 151, Laws of Hong Kong.

⁴⁵ This new regime is discussed below. Passing references are made to political parties or political organisations (etcetera) in a range of official and semi-official publications. The overall position, however, is that the formal recognition of political parties in Hong Kong is limited to specific, practical (normally narrowly focused) issues.

parties and political groups will be allowed to have party and group names and symbols printed alongside candidates' names in coming LegCo elections.⁴⁶

Given this general approach of not providing formal recognition of political parties, it is not surprising that Hong Kong has no specific provisions allowing for a political party to be proscribed or banned. However, under current law, any society or company may have its operation terminated, in the interests of protecting national security.⁴⁷ Other jurisdictions have similar provisions, numbers of which have been strengthened since the terrorist attacks in the USA on September 11, 2001.⁴⁸

Some may perceive an advantage in the fact that successive Hong Kong governments have seen fit to pay such little formal attention to political parties. This argument normally proceeds along the lines that this leaves political parties with greater freedom. However, on balance, political parties in the HKSAR are more constrained than freed by the failure of the formal electoral regulatory system to engage with them as major participants in the electoral process. They are less developed than they might be as a result of their comparative isolation.⁴⁹ Moreover, voters are not well served by this arrangement as it facilitates reduced political funding transparency.

3.5 Political Parties — Legal Status

The Societies Ordinance, in Section 2, defines a “society” very widely to include “any ... association of persons, whatever the nature or purpose”. Section 3 of the SO requires all Hong Kong societies (unless otherwise exempted) to register (or apply for exemption) with the Societies Officer. The SO goes on to impose both heavy fines and jail sentences on persons (including office bearers of societies), which breach its provisions.

The Societies Ordinance is a species of social and political control legislation developed by the British and used throughout the former Empire. The purpose (and post-colonial durability) of such laws is well summed up in the following

⁴⁶ See, **Particulars Relating to Candidates on Ballot Papers (Legislative Council)** Regulation L.N. 263 of 2003. See, also, www.info.gov.hk/eac/en/legco/2004, Legislative Council Elections. This tendency to leave political parties to live mainly in a world outside the formal regulatory framework is most likely a legacy of British rule. Leading political parties in the UK generally remain voluntary, unincorporated associations (see, Chau, *op. cit.* note 3, 14). See, also, *Conservative and Unionist Central Office v Burrell* [1982] Weekly Law Reports, 522.

⁴⁷ Chau, *Ibid.*, 45.

⁴⁸ *Ibid.*

⁴⁹ See, Ching, Frank, “Political wilderness”, *South China Morning Post*, August 5, 2003, A10.

excerpt from the article “Repackaging Authoritarianism” on the website of the Lawyers Environmental Action Team (LEAT) based in Tanzania:⁵⁰

The Societies Ordinance ... conferred wide discretionary authority on both the colonial governor and the minister responsible for internal affairs. They were empowered to outlaw societies and prohibit their activities ... the Governor could make laws ... and was granted quasi-judicial appellate powers.... The result was a high degree of fusion between the executive, legislative and judicial powers that the colonial administration wielded over societies, powers that the Presidency subsequently inherited after independence.

The British retained the SO in Hong Kong right through until 1997 and it has continued in operation since. The SO has not been used in a politically controlling way in Hong Kong for some decades. Moreover, it provides a powerful legislative means of tackling the endemic problem of organised crime in Hong Kong — which problem was the main reason for the introduction of the predecessor to the SO, the **Triad and Unlawful Societies Ordinance** in 1897.⁵¹ It does, thus, play a legitimate role. It is one which could be played by less intrusive legislation, however. The SO continues, on paper, to place very significant powers in the hands of the Executive.

The Schedule to the SO lists “Persons to which the Ordinance does not apply”. Political parties are not specifically listed here, nor do they fit under the few general-exemption headings. Political parties in the HKSAR are, thus, *prima facie*, subject to the Societies Ordinance.

In the past, some political parties have chosen to register under the SO in accordance with Section 5.⁵² This made sense when political parties remained unincorporated associations. Today, however, this is not the usual way for political parties to deal with the SO — and the question of their legal status. One species of persons which is listed as *not subject* to the SO is any company registered under the **Companies Ordinance** (1950) (CO).⁵³ Thus, the normal approach taken by political parties in Hong Kong today is to incorporate as a company limited by guarantee (rather than share capital).⁵⁴ This takes them outside of the operation of the SO. It also provides the party with a range of significant additional benefits, including a fully recognised legal identity, separate from that of its members. The party is then able to do all the things, which a human, legal person can do,⁵⁵ including sue and be sued. Moreover, being a

⁵⁰ www.lead.or.tz/publications/authoritarianism

⁵¹ Section 18 of the SO outlaws “unlawful societies”, a term which is defined to include “triad societies” (that is, ritual-based, criminal societies). Following provisions set down an extensive regime for severely punishing membership of any such society. See also, Chau, *op. cit.* note 3, 44 and LegCo paper: *Background Information on the Societies Ordinance at* www.legco.gov.hk/yr02-03/english/bc/bc55/papers/.

⁵² In the past at least five societies registered under the SO have fielded candidates in a general election or a by-election in either LegCo or District Council elections (see Chau, *op. cit.* note 3, 44).

⁵³ Cap. 32, Laws of Hong Kong.

⁵⁴ Chau, *op. cit.* note 3, 44.

⁵⁵ Section 5A(1), CO.

company places certain limits on legal liability and confers a capacity to enjoy an indefinite life-span.

This approach means that the political party becomes subject to all the rules applying to any company incorporated under the CO. These include annual reporting and audit requirements, meeting requirements, and controls on all broad-based, public fund-raising. Also, once a political party is incorporated and sets about raising funds, it may be subject to the operation of the profits tax provisions of the **Inland Revenue Ordinance (IRO)** (1950).⁵⁶ It seems clear that a political party would not qualify as a (profits tax) exempt charitable institution or trust of a public character under Section 88 of the IRO.⁵⁷ Section 16D of the IRO does allow a company paying profits tax to deduct approved charitable donations up to 25% of assessable profits.⁵⁸ Salaries tax payers are similarly able to deduct approved charitable donations.⁵⁹ Unfortunately for political parties, they are not approved institutions under the IRO to which donations can be made.

In summary, the CO provides a way for political parties to establish a separate legal identity and leaves them free from the application of the SO but it also imposes, directly or indirectly, certain burdens — and restricts their freedom to some degree.⁶⁰

3.6 Political Parties — Other Issues

Electioneering and Election Advertising

The first point to note is that Hong Kong does not regulate the selection of candidates for election apart from laying down certain broad qualifying requirements in the Basic Law for LegCo members and appointment as the Chief Executive. In the first case, Article 67 of the Basic Law says members of LegCo normally need to be Chinese citizens who are permanent residents of the HKSAR who do not hold a right of abode in a foreign country. Article 67 goes on to say that non-Chinese permanent residents or persons who do hold a right of abode elsewhere, may become LegCo members, provided such members do not exceed 20% of the total membership of LegCo. Article 44 stipulates that the Chief Executive of the HKSAR must be a Chinese citizen, not less than 40 years of age, who is a permanent resident of the HKSAR and who does not hold a right

⁵⁶ Cap. 112, Laws of Hong Kong. Individuals may also be subject to profits tax but the burden normally is much lower as individuals in business can, by electing for “Personal Assessment”, gain access to graduated tax scales and other benefits applying to persons paying salaries tax. Under the profits tax regime, a flat rate of profits tax (currently 17.5%) applies to every dollar of assessable profits. See, further, CCH, *Hong Kong Master tax Guide 2003/04* (CCH, Singapore, 2003) para. 1-2700.

⁵⁷ CCH, *ibid.*, para. 6-8500.

⁵⁸ *Ibid.*, para. 6-5540.

⁵⁹ *Ibid.* para. 2-640.

⁶⁰ In 2001, for example, it emerged that an incorporated political party might be in breach of the law if it were to lend money to a party member to help fund a political election campaign. (See, Ching, Frank, “Political wilderness”, *South China Morning Post*, August 5, 2003, A10.)

of abode in any foreign country. The Chief Executive must also ordinarily have resided in the HKSAR for a continuous period of not less than 20 years.

The ECICO in Part 2, circumscribes, in some detail, corrupt conduct in any matter related to an election, including bribery of candidates, threatening to use force against candidates, certain deceptive behaviour, improperly providing refreshments, and impersonation of another candidate.

The ECICO, in Part 5, also stipulates that certain requirements must be met with respect to all electoral advertising. The primary requirement is that all printed advertisements must identify the printer, date of printing and number of copies printed. Section 34(2) says that this provision does not apply to advertisements appearing in a registered newspaper. Sections 26 and 27 of the ECICO also prohibit certain types of misleading or false election advertising.

The EAC has spelled out in detail what constitutes an Election Advertisement (EAdvert) for the purposes of LegCo (and other) elections in Hong Kong. An EAdvert is fairly widely defined to cover notices published and delivered by hand or via the print or electronic media or any other form of publication.⁶¹ Only EAdverts which have “the purpose of promoting or prejudicing the election of a candidate or candidates” at an election are so regulated, however. This is consistent with the general approach of the HKSAR election regulation regime, where the focus is primarily on controlling the behaviour of individual candidates. The organisations behind such candidates, typically political parties, are only controlled incidentally to the control of their candidates.⁶² Candidates are subject to fixed spending limits and they must be careful with all EAdverts to ensure that they do not end up in breach of such limits. Breaches of the rules applying to EAdverts can result in heavy fines and imprisonment for up to three years.⁶³

Although these provisions are quite tough, they do not address the issue of what might be termed, “general issue” advertising. That is, advertising which, although clearly political in its nature, cannot reasonably be said to have “the purpose of promoting or prejudicing the election of a candidate or candidates”. For example, advertising urging a “greener” Hong Kong, tougher sentences for convicted criminals, proper consumer protection laws, lower taxes, or greater — or less — democracy in Hong Kong would all appear to fall outside the boundaries.

⁶¹ *Proposed Guidelines on Election-related Activities in respect of the 2004 Legislative Council Elections* (published by the Electoral Affairs Commission of the HKSAR). See: www.info.gov.hk/eac/en/legco/lg_guide.

⁶² See, for example, *ibid.*, para. 8.63.

⁶³ *Ibid.*, Part VII.

Unlike in many other jurisdictions, no free air time on the broadcast media is provided to politicians who are campaigning for elections. (Those same politicians may, of course, be interviewed on regular programmes.) Moreover, commercial broadcasters in the HKSAR are generally not allowed to accept advertisements of a political nature.⁶⁴

This virtual ban on broadcast political advertising may be inconsistent with Article 27 of the Basic Law. In Australia, a somewhat similar ban on broadcast political advertising, which had been introduced federally in 1991, was overturned by the High Court of Australia in 1992 in *Australian Capital Television v Commonwealth*.⁶⁵ Australia has no Bill of Rights either constitutional or statutory, so the High Court had to rely on an “implied right to political free speech.”⁶⁶ Article 27 of the Basic Law guarantees, inter alia, the right of Hong Kong residents to freedom of speech, of the press, of publication and freedom of assembly and association. On the face of it, this would seem to provide a strong basis for arguing that a virtual ban on broadcast, political free speech may be in conflict with the guaranteed right.

The content of advertisements is subject to the operation of the general law including the law governing defamation and protections governing free speech in the Basic Law and the **Bill of Rights Ordinance (1991) (BORO)**.⁶⁷

Funding Sources — Private

Funding is an issue for political parties anywhere in the world. In Hong Kong, donations to parties and contributions from the incomes of elected representatives to their own parties are the main sources of funds. Membership numbers, even for the major parties, are comparatively low, so that source of funding is of limited importance.⁶⁸ The DAB is perceived to receive strong financial backing from Mainland-owned companies operating in Hong Kong. It is thus better placed financially than the other parties.⁶⁹ The Liberal Party, with its close connections to the business sector, is also well placed in terms of raising funds.

⁶⁴ See Chau, *op. cit.* note 3, 48. See, also, Sections 4 and 12 and Schedules 5-7 of the **Broadcasting Ordinance (2000) Cap. 562** and the *Radio Code of Practice on Advertising Standards* which prohibits the broadcasting of political advertisements without the prior approval of the HKSAR Broadcasting Authority.

⁶⁵ (1992) 177 Commonwealth Law Reports, 106. See, also, *Nationwide News Pty Ltd v Wills* (1992) 177 Commonwealth Law Reports, 1.

⁶⁶ A good discussion of these cases may be found on the AEC website at: www.aec.gov.au/_content/how/backgrounders/.

⁶⁷ Cap. 383, Laws of Hong Kong. See, Article 27 of the Basic Law and Articles, 16, 17 and 18 of the BORO. See, also, Ghai, *op. cit.* note 10, 430-432.

⁶⁸ Lam (*op. cit.* note 16, 237) notes how small the membership numbers were in 1994. These numbers remain indicative.

⁶⁹ *Ibid.*, 228.

Other fairly minor fund sources include street raffles and collections, dinners and so on. Political parties need a permit to raise funds in public and the Home Affairs Department, which issues the permits, restricts such activities to a limited number of days per year.

Funding Sources — Public

Unlike a number of other jurisdictions, Hong Kong, historically, has never provided any public funding to politicians seeking election.⁷⁰ Recently, however, a scheme has been introduced to provide some public funding for candidates in LegCo elections.

In March, 2004, the Secretary for Constitutional Affairs, Stephen Lam, made a statement on the priorities of the Constitutional Affairs Bureau at a special meeting of the LegCo Finance Committee. Mr Lam noted that the government had introduced, in 2003, a legislative measure to provide some financial assistance for political parties, political groups and independent candidates standing in the 2004 LegCo elections at the rate of \$10 per valid vote received.⁷¹ In fact, this is a simplification. Sections 60D and 60E of the new Part VIA of the LCO state that the financial assistance payable will be the lowest of three amounts: (a) the amount obtained by multiplying the total number of valid votes cast for a candidate (or candidates on a list) by \$10; (b) 50% of the relevant declared election expenses; or (c) where the relevant declared election expenses exceed the relevant declared election donations (in the election return required under the ECICO), the shortfall.

One outcome of this formula is that it seems it can favour more wealthy candidates (and parties). If Candidate A is not well-off in terms of donations and is prudent in election spending, but still overspends a little — say by an amount of \$1,000 — he or she will be paid \$1,000 under this scheme. If Candidate B in the same election is well financed by donations and spends more heavily (within approved limits) but just less than the relevant declared donations, he or she will be able to claim either 50% of all relevant election expenses or \$10 per valid vote cast, whichever is the lower.⁷²

New Part VIA of the LCO allows for public funding of LegCo candidates standing in both geographical and functional constituencies. Both winning and losing candidates are eligible to apply for funding, but candidates — or lists — which attract less than 5% of the total number of valid votes cast are ruled out from applying for financial assistance by Section 60C.

⁷⁰ Chau, *op. cit.* note 3, 54.

⁷¹ Lam, Stephen, *Press Release*, March 31, 2004. See, also: new Part VIA of the LCO; and **Electoral Affairs (Financial Assistance for Legislative Council Elections) (Application and Payment Procedure) Regulation** (LN 269 of 2003) in effect from July 15, 2004.

⁷² These restrictions in the funding formula were not mentioned in the statement noted above.

Funding Transparency

Again, unlike some other jurisdictions, Hong Kong has no method for regulating party campaign finances.⁷³ That is, political parties are not subject to any limit on how much they may raise, nor how much they spend. And they are under no obligation to report on party fund-raising or expenditure to the EAC or any other public authority.

There is also no regulation specifically aimed at political parties about who may donate to whom. Section 20 (1) of the SO does, however, make it an offence subject to fine and imprisonment to give money or aid to or for the purposes of (inter alia) a declared unlawful society.

The ECICO does provide a mechanism for limiting the expenditure of candidates (rather than parties) for election. Under Section 45, the Chief Executive may make regulations stipulating the maximum amount which may be incurred in a particular election by an individual candidate or a group of candidates standing under a list. The latter case deals with LegCo elections where, normally, a list of candidates is put forward under the PR system noted in Part 3.1. Section 24 of the ECICO makes it illegal for a candidate to incur election expenses exceeding the prescribed amount, while Section 18 prohibits a candidate from making improper use of any election donations. Part 6 of the ECICO makes it mandatory for each candidate to lodge a return detailing each candidate's election expenses and all donations received by or on behalf of the candidate in connection with the election. Failure to comply with these provisions is punishable by a fine and imprisonment under Section 38.

The expense controls in the ECICO are of limited utility if they are meant to provide political funding transparency and to put a cap on “money politics” in Hong Kong. First, there is no way to tell exactly who actually is supporting a candidate. If we have a candidate, A, then that candidate needs to report to the EAC, under Part 6 of the ECICO, by producing a receipt for any donation in excess of \$1,000 received. If a particular donor to Candidate A wishes to remain anonymous, they can make a large donation to, for example, Political Party B which can pass on that donation to Candidate A. Candidate A then produces a receipt made out to Political Party B when filing the required Election Return under Section 37 of the ECICO. Next, there is nothing within the ECICO (or elsewhere) to regulate the amount of “general” spending on election issues by persons other than a candidate — and, in particular, spending by political parties. Neither is there any mechanism to ensure the public knows who is providing what financial support to which political parties.

⁷³ Lee, Klaudia, “Parties coy about where funds come from; Critics of the status quo say rules are needed to increase transparency and avoid conflict of interest”, *South China Morning Post*, August 25, 2003, A2.

Virtually all representative democracies encounter difficulties with maintaining a free and open electoral system when certain individuals, groups or corporations are in a position to spend massively to advance their point of view. This problem is perhaps at its greatest in the United States. Limitations on candidate election spending are easily avoided by general issue spending and certain collection limitations are circumvented through the use of Political Action Committees (PACs). Around 4,000 PACs are active at the federal level in the US and they dispense millions of dollars at every election. They provide around half the cash for every winning candidate in elections for the House of Representatives. Both general issue spending and PACs are significantly protected from serious regulation by the First Amendment of the **Constitution of the United States 1788** — and lack of political will to remedy such problems within the two main political parties.⁷⁴

⁷⁴ See, further, discussion of “Political Action Committee” in Bullock, Alan and Trombley, Stephen, *New Fontana Dictionary of Modern Thought* (HarperCollins, London, 2000) 659.

4.0 REGULATING POLITICAL PARTIES IN AUSTRALIA

4.1 Introduction

Australia has a federal parliamentary system of government. The central (or federal) government is based in Canberra while six state governments and two territory governments make up the balance of the governmental structure established in 1901 (and since) under the **Australian Constitution Act 1900** (UK) (Constitution).⁷⁵

This Part concerns itself primarily with the regulation of political parties by what is now the Australian Electoral Commission (AEC). That is, coverage is generally not provided of the separate but mostly similar regulatory systems applying in the six states and two territories.

4.2 The Australian Electoral System

Australia has a bicameral parliamentary system. It uses two voting systems in federal elections; one for the House of Representatives (the Lower House) and one for the Senate (the Upper House). In the House of Representatives, what is called “Preferential Voting” (PV) is used. PV is a system designed to retain single-member electorates but reduce the “winner take all” outcomes common with First-Past-The-Post (FPTP) voting systems. If you have three candidates standing in a House of Representatives electorate, A, B and C, each voter will have to express, by numbers 1, 2 and 3, the order in which they prefer A, B and C. After all votes are cast, first preferences are then counted. Suppose this results in 40% of votes for A, 35% of votes for B and 25% of votes for C. Under a FPTP system, A is immediately the winner. Under a PV system, all the second preferences of those voters who put C first are now counted. This is because no one has 50% + 1 of all valid first preference votes. Under a PV system, this means that you next need to count the second preference votes from the least popular first preference candidate (C) (and so on) until one candidate achieves a total of 50% + 1 of all valid votes cast. Suppose all the second preference votes for C show B as “2” and A as “3”. Under PV, B now has 60% of the vote, is elected and thus beats A. One key outcome of PV is the universal use of “How to Vote” (HTV) cards — which list what each particular party suggests as the best ordering of candidates. HTV cards are discussed, further, below.

⁷⁵ See, www.aph.gov.au/senate/general/constitution. The states are Queensland, New South Wales, Victoria, Tasmania, South Australia and Western Australia. The territories are the Northern Territory and the Australian Capital Territory.

In the Senate, Australia uses a PR system of voting, where each state is a single electorate today returning a total of 12 senators (over two federal elections) and each territory returns two senators.⁷⁶

It should be noted, finally, that Australia has no equivalent to the functional constituencies found in the HKSAR.

4.3 The Australian Electoral Commission

What is now the AEC was first established as the Australian Electoral Office (AEO) as a branch of the Department of Home Affairs in 1902.⁷⁷ In 1984, the AEC was established as a statutory authority under the **Electoral Act** 1918 (Cth) (EA). As a statutory authority the AEC exercises its powers and functions with resources directly allocated by parliament. It does not require any sort of day-to-day, ministerial approval for its decisions.⁷⁸

Under the EA, the AEC is responsible for conducting and supervising all federal elections.⁷⁹ It also plays a role in the conduct and supervision of a range of other elections including elections at the state and local government,⁸⁰ and trade union and employer organisation elections.⁸¹

The AEC itself has a part-time chair, who is appointed by the head of state, the governor-general, on the advice of the federal government. The chair is chosen from a panel of three judges nominated by the Chief Justice of the Federal Court of Australia. The two other members of the AEC are the Electoral Commissioner and a non-judicial, part-time member (usually the Australian Statistician). The Electoral Commissioner is also the Chief Executive Officer of the AEC.⁸² In order to carry out its functions, the AEC has an establishment (secretariat) of over 800 persons. All permanent staff members of the AEC are civil servants.⁸³ The AEC can seek legal advice, independent of government.

For some years there has been, within federal parliament, a Joint Standing Committee on Electoral Matters (JSCEM). This committee routinely conducts an enquiry into the conduct of each federal election to which submissions are made

⁷⁶ For discussion of how a PR system generally works and also for comments on the PR system used in Australian Senate elections, see note 32. Australian senators are elected for a term of six years (double the term for members of the House of Representatives). Normally only six Senate seats in each state come up (in rotation) for election at each Federal Election. See, further, www.aph.gov.au/Senate/pubs/briefs/briefone.

⁷⁷ See, *Overview* at: www.aec.gov.au/_content/what/about/overview.

⁷⁸ Wong, *op. cit.* note 3, 27.

⁷⁹ www.aec.gov.au/_content/what/about/functions

⁸⁰ In Australia local government is the third level of government — after federal (first level) and state (second level). Local government is the government operating at the level of cities, towns and rural shires.

⁸¹ Wong, *op. cit.* note 3, 28.

⁸² See, www.aec.gov.au/_content/what/about/overview.

⁸³ Wong, *op. cit.* note 3, 30.

by the AEC and other parties. It also has made recommendations which have resulted in reforms to electoral procedures and the EA. Parliament thus plays a crucial, institutionalised role in supervising the electoral regulatory system — and the AEC — in Australia.⁸⁴

4.4 Political Parties — Formal Recognition

Since 1984, any political party may apply for registration as a political party with the AEC under the EA provided they satisfy certain basic criteria. These tests, which are set down in the *Handbook for Federal Registration of Political Parties*,⁸⁵ are fairly easy to satisfy. They are, basically, that a party must be established on the basis of a written constitution, and must have either at least 500 members who are entitled to be on the federal electoral roll or at least one member who is member of the federal parliament. No party can rely on a member who has been used by another party for the purposes of registration. Registration brings an entitlement to possible benefits (public funding) and certain obligations, both of which are discussed further below.⁸⁶

There is an application fee of \$A500 (but no annual fee is payable). A registered party is required to submit an annual statement to the AEC showing the total party receipts and payments and certain other related information.⁸⁷

The written constitution requirement is easily satisfied — it must simply include a statement that the party wishes to endorse candidates to contest federal elections and state the terms and conditions for accepting a person as a member and for terminating such membership.⁸⁸

This easy process has operated satisfactorily over a long period of time with no serious complaints. The straightforward mechanism enhances the democratic process. By keeping the requirements for registering a political party simple and comparatively inexpensive, the political participation door is left wide open to anyone who wishes to raise any issues which concern them at a federal election.

It is not mandatory to register. That is, a political party may choose not to register and still run candidates in a federal election. But when a party is unregistered, it loses access to public funding and, also, the listing of the party name on the ballot paper.

⁸⁴ Ibid., 31

⁸⁵ To view or obtain a copy of the Handbook see, www.aec.gov.au/_content/who/party_reg/handbook/.

⁸⁶ Handbook, Part 3.

⁸⁷ See, *Legal Information Access Centre (LIAC) — Hot Topics at www.austlii.edu.au/au/other/liac/hot_topic/*.

⁸⁸ Handbook, op. cit. note 85, Part 3.

In 1977, the Constitution was amended to deal with the problem of filling a casual vacancy in the senate (which might arise through death or retirement of a senator, mid-term, for example). The aim of the amendment was to ensure that the replacement senator would come from the same party as that of the senator being replaced. The amendment specifically used the term “political parties” providing the first ever, formal constitutional recognition of political parties.

4.5 Political Parties — Legal Status

Most Australian political parties are unincorporated at both federal and state levels.⁸⁹ They are what are known as *voluntary not for profit, unincorporated associations*.⁹⁰ Political parties have apparently come to the view that the advantages of not being incorporated usually out-weigh any disadvantages.⁹¹ One reason for Hong Kong political parties to incorporate is to take themselves outside of the SO regulatory framework. Australia, however, does not have any equivalent to the SO. That is, there is no requirement, once you form any sort of club, association or group, to register that “society”.

By remaining unincorporated, political parties avoid the significant reporting requirements and regulatory controls which apply to companies. Corporations law also allows the members of a corporation to take a variety of legal actions against office holders and the company. Avoidance of this sort of member interference in party management has been argued to be a significant reason why parties have generally shied away from incorporation.⁹²

⁸⁹ The exception to this rule are a few political parties (usually branches thereof) which are based in Western Australia (WA) and to a lesser extent, South Australia (SA), Queensland (Qld) and New South Wales (NSW). In WA, SA, Qld and NSW, some parties and branches of certain parties have incorporated under state association incorporation legislation. One can see this pattern in the list of (federally) AEC registered parties. That list shows only a very small number of incorporated parties or branches. See, www.aec.gov.au/_content/who/party_reg/reg_parties.

⁹⁰ The general law and statute law in Australia take notice of a range of different groups or associations which include: companies or corporations (for-profit associations which have a full legal identity separate from the members); incorporated associations (normally not-for-profits associations which have a full legal identity separate from the members); partnerships (for-profit associations which have *no legal identity* separate from the members; and unincorporated associations (not-for-profit associations which have no legal identity separate from the members). See, further, Latimer, Paul, *Australian Business Law* (22nd ed.) (CCH, Sydney, 2002) para. 9-630.

⁹¹ For a good discussion of this view and of matters related to the legal status of parties in Australia generally (and a range of other matters) see, Johns, Gary, “Political Parties: From Private to Public” (1999) 37, *Commonwealth and Comparative Politics*, 89.

⁹² See Johns, *ibid*. The author notes that particular circumstances seem to have driven the decisions to incorporate in some cases. For example, he says that the WA branch of one major party incorporated so as better to manage its finances. As in Hong Kong, this tendency to leave political parties to live mainly in a world outside the formal regulatory framework, is most likely a legacy of the British heritage. Leading political parties in the UK still generally remain voluntary, unincorporated associations (see, Chau, *op. cit.* note 3, 14). See, also, *Conservative and Unionist Central Office v Burrell* [1982] Weekly Law Reports, 522.

On the face of it, political parties do miss out on limiting their liability to that of a company limited by guarantee. It turns out, however, that this is not such a serious problem. The little case law and opinion on the subject suggests that unincorporated political parties are somewhat difficult to sue.⁹³ They are not regarded by the law, it seems, in the same way that, say, an unincorporated cricket club or football club might be.⁹⁴ This appears to follow from the nature of the operation of a political party, the way in which it typically interacts with other persons (including the AEC) and the availability of alternatives to dealing, legally, with the (political) behaviour of members of a political party.

Over 70 years ago, the High Court of Australia had cause to comment on the general nature of political parties — and the legal implications arising there-from. In 1932, Mr Hogan, the Premier of the State of Victoria was expelled from the Australian Labor Party. He went to court to seek a remedy.⁹⁵ In 1934, the case came before the High Court in *Cameron v Hogan*.⁹⁶ A majority of the court found that:

*[A political party] is a political machine designed to secure social and political changes. It furnishes its members with no civil right or proprietary interest suitable for protection by injunction. Further, such a case is not one for declaration of a right. The basis of an ascertainable and enforceable legal right is lacking. The policy of the law is against interference in the affairs of voluntary associations which do not confer upon the members civil rights susceptible of private enjoyment.*⁹⁷

In one area where a political party is rather likely to find itself subject to legal action from time to time, defamation, the EA sorts out whom to sue. Section 328 of the EA requires all electoral advertisements (widely defined) to be identified by the name and address of the authoriser and the name and place of business of the printer (where relevant). With broadcast advertisements, the speaker or speakers need to identify themselves also. If someone feels they have been defamed in any electoral advertising, they should, thus, readily be able to locate the authoriser and/or speaker in order to sue them.

For a political party the most frequent external interaction, as a party (outside of electioneering) will be with the AEC. And, although for general purposes, a party will usually have no legal identity, the AEC treats political parties — and

⁹³ Presumably they normally do not need to sue in their own right often either. In such cases, suits can proceed in the name of a senior officer bearer (for example the Secretary). As we will see, when dealing with the AEC, political parties are treated as quasi-legal entities for the purposes of their interaction with the AEC in relation to the EA.

⁹⁴ In these latter cases, if a person — say a spectator at a club match — suffers injury which is the result of club negligence, then the Club Committee often can be sued, in the names of the individual committee members.

⁹⁵ Johns, *op. cit.* note 91.

⁹⁶ (1934) 51 Commonwealth Law Reports, 358.

⁹⁷ *Ibid.*, 378 (per Rich, Dixon, Evatt and McTiernan JJ.)

especially registered political parties — as if they enjoy a separate status. Examples of this are the mechanisms which have been developed to allow the AEC to register political parties and to forward public funds to political parties (discussed further below).

More recent case law in South Australia, has indicated greater judicial willingness to rule on the *internal* operations of political parties. In a series of cases involving a dispute between a party member and the South Australian Branch of the Australian Labor Party, the Supreme Court of South Australia found that, in certain circumstances (and notwithstanding the authority in *Cameron v Hogan*) it was appropriate for the court to interpret the Constitution and Rules of the SA Branch and to grant a declaration that certain changes proposed by the SA Branch were unconstitutional due to their retrospective effect.⁹⁸ Still, the concern here arose from an *internal* dispute, rather than some *external* interaction of the party. The court did not, thus, need to decide exactly what the “quasi-legal” status of a political party registered under the AEC might be, in general.

In summary, political parties in Australia do not have a clear, separate legal personality, unless they happen to be amongst the minority of parties (or branches of parties) which have incorporated as associations (rather than as companies) under state legislation. They are members of a species known as “voluntary unincorporated associations”. Despite this, political parties can be sued. Where there is an internal dispute the courts may now allow an action in certain cases against the unincorporated party and relevant office bearers (in their own right). Where a political party is alleged to have defamed a person in any, widely defined, electoral related advertising, the clear rules laid down by the EA, identify one of more party officials who are “available” to serve as primary defendants in any such suit. Next, the AEC, in its interactions with political parties, treats them as separate entities when administering various provisions of the AEC, including the registration and funding provisions. However, it is clear that registration of a political party with the AEC does not, of itself, create any sort of complete legal identity for a political party.

⁹⁸ See, *Clarke v ALP (SA Branch), Hurley & Ors & Brown* [1999] South Australian Supreme Court, 365, paras 88 and 100. See, also: *Clarke v ALP (SA Branch), Hurley & Ors & Brown* [1999] South Australian Supreme Court, 415; and *Clarke v ALP (SA Branch), Hurley & Ors & Brown* [1999] South Australian Supreme Court, 433. The dispute was over “pre-selection”, that is, the selection by the SA Branch of who should stand in which electorate as party-endorsed candidates. Internal party pre-selection battles are frequent in all major political parties in Australia. It has been argued that a key reason for the courts being more willing to intervene in the application of party rules has been the introduction of public funding — and AEC party registration (to obtain public funding) — since 1984. See, further; LIAC, op cit. note 87; and *Baldwin v Everingham* [1993] Queensland Reports, 10.

4.6 Political Parties — Other Issues

Electioneering and Election Advertising ⁹⁹

Section 328 of the EA requires all electoral advertisements to be identified by the name and address of the authoriser and the name and place of business of the printer (where relevant). Section 331 of the EA, which, like Section 328 is in effect at all times, requires that all electoral advertisements in printed form carry a heading with the word “advertisement” clearly shown.¹⁰⁰ Such advertisements must be authorised at all times — not just during specified election periods. The term “electoral advertisement” is defined in Section 328(5) of the EA to include any advertisement that contains electoral matter. Section 4(1) of the EA defines “electoral matter” very widely. The result is that most electioneering which involves any advertising in any recorded form (including on the Internet¹⁰¹) must, at all times, comply with these authorisation provisions. In other words, mere speech-giving on a street corner or in a town hall will not be caught — but most other forms of electioneering, including all pamphlets and the like, will be caught. With broadcast advertisements, the speaker or speakers need to identify themselves also. Section 328 of the EA makes it an offence for anyone (including, for example, a newspaper) to fail to comply with these and related requirements. Section 350 of the EA also makes it an offence for any person to publish a defamatory statement about a candidate.

Under the PV system of voting used in the House of Representatives, virtually all parties produce “How to Vote” (HTV) cards. The idea of HTV cards is to “direct” the second (etcetera) preferences of voters. Parties say to their regular voters: “If you can’t have your first preference, choose the least bad second preference.” HTV cards can be quite important in deciding the outcome of tightly contested seats — and sometimes even elections.¹⁰² There has been much disputation over HTV cards — especially when one party has apparently tried to pass off its own HTV card as that of another party, for example by imitating a colour scheme or layout. Where such “imitator” cards are similar enough to an official party HTV card, the courts have found that they breach Section 329 of the EA which prohibits anyone from printing or publishing anything likely to mislead or deceive an elector in relation to casting a vote.¹⁰³ It

⁹⁹ A good overview of the rules in relation to election advertising may be found in the AEC publication, *Election Advertising — Backgrounder 12* at www.aec.gov.au/_content/how/backgrounders/12/.

¹⁰⁰ Previously all “Letters to the Editor” needed to show the name and address of authors but this requirement has now been dropped, *ibid.* para. 16.

¹⁰¹ This has not been tested in court but it is the view of the AEC that Section 328 applies to the Internet (see, *Backgrounder 12, ibid.*, para. 13).

¹⁰² The 1963 Federal Election was one of the closest ever. The conservative Liberal–Country Party government retained office by one seat. The winning margin in that seat was small. And the final manual counting and recounting of votes in the election took some weeks because of the closeness. In the seat won by the conservatives which gave them government, a Communist Party (CP) candidate stood and gained a handful of votes. The CP HTV card put the opposition Australian Labor Party (ALP) candidate below the Liberal Party candidate. Ideologically, the CP was closer to the ALP than to the Liberal Party. But the CP, it seems, for this reason, regarded the ALP as more “heretical”. The CP preferences ultimately were crucial in the re-election of a conservative government.

¹⁰³ See, for example, *Bray v Walsh* (1976) 15 South Australian State Reports, 293.

is been held, however, that only materials which actually are likely to mislead or deceive a voter in relation to the *actual casting of his vote* are outlawed by Section 329. Misleading or deceitful political advertising which is just meant to exert some level of *general influence* on a voter is not prohibited.¹⁰⁴ In this latter case, the remedy lies in the political process (that is, by debate amongst the parties),¹⁰⁵ or by resort to the law of defamation.

There has been much debate in Australia about the need for legislation mandating what is known as “truth in political advertising”. For a short time, in the early 1980s, the EA banned “untrue” electoral advertising in Section 329(2). This provision was repealed in 1984 and, despite more discussion, no similar provision has been re-introduced. The conclusion of these debates has been that truth-in-political-advertising provisions are always going to be difficult to interpret and enforce and they also may be open to constitutional challenge.¹⁰⁶

Under Schedule 2 of the **Broadcasting Services Act 1922** (Cth) (BSA) there is an election advertising (but not commentary) ban which applies to the electronic media from midnight on the Wednesday before a polling day until the end of the polling day on Saturday.¹⁰⁷ In 1991, the Political Disclosures Act 1991 (Cth) came into force. It amended the EA (see further below) and also the BSA by banning all broadcast political advertising in elections for parliament (at federal, state and territory levels). This reform was meant to reduce the burden on political parties in contesting elections and also to reduce the impact of “money politics”. In 1992, these provisions were struck down by the High Court of Australia in *Australian Capital Television v Commonwealth*.¹⁰⁸ The court concluded that there was an implied guarantee of political free speech in the Australian Constitution and the relevant legislation, the court said, was in conflict with this implied right.¹⁰⁹

The regulatory framework governing electioneering, in general, works rather efficiently. To a significant extent, “self-regulation” applies. The reality is that all the parties — but most particularly, the larger ones — watch one another’s advertising and electioneering exceptionally closely. Whenever they spot what may be an infraction of any of the rules, they waste no time in contacting the relevant entities (AEC, television station, newspaper and so on) and, where warranted, a party campaign secretary may take the matter to court directly, for example to seek an injunction to stop the broadcasting of an allegedly illegal advertisement.¹¹⁰ They would also usually notify the media about any such infraction, as such publicity will normally reflect poorly on an opponent.

¹⁰⁴ See, *Evans v Crichton-Browne* (1981) 147 Commonwealth Law Reports, 169.

¹⁰⁵ *Backgrounder 12*, op. cit. note 99, para. 26.

¹⁰⁶ *Ibid.*, paras 42–49.

¹⁰⁷ Polling is always done on a Saturday in Australia.

¹⁰⁸ (1992) 177 Commonwealth Law Reports, 106. See, also, *Nationwide News Pty Ltd v Wills* (1992) 177 Commonwealth Law Reports, 1.

¹⁰⁹ See, also, *Backgrounder 12*, op. cit. note 99, paras 56–72.

¹¹⁰ Interview with David Feeney, former State Secretary and Campaign Director, Australian Labor Party, Melbourne, Victoria, March 29, 2004.

Funding Sources

The leading parties in Australia currently are the Australian Labor Party (ALP) the Liberal Party (LP) and the National Party (NP). The ALP was formed out of the trade union movement in the 19th century to represent working-class interests in parliament. In the last several decades, the ALP, like many worker-based parties in the Western world, has moved from the left (or a socialist bias) towards the political centre.¹¹¹ All three parties are long-established. The NP is mainly a rural-based party and, federally, the LP and NP normally govern in coalition and form a joint opposition group when out of government. The LP and the NP have formed the government in Australia since 1996. They are separately and jointly, what are normally termed non-Labor (in contrast to the ALP) or conservative parties. Their roots trace back to the (Deakin) Liberal Party of 1909.¹¹²

There are also many minor parties, some of which have held seats in parliament and have had a significant influence on political policy development, for example, the Australian Democrats and the Greens.¹¹³

Traditionally, funding for the ALP came mainly from the trade union movement while that for the LP came principally from business and the NP's came from rural business and farming interests. Since the move of the ALP towards the centre of politics, it has been able to source more funding from business, especially once it proved itself able to win successive terms of office, federally, commencing in the early 1980s.¹¹⁴ Overall, funding has remained a larger problem for the ALP than for the conservative parties.

Shortly after the ALP came to power under Prime Minister Bob Hawke in 1983, the new government moved to introduce a range of electoral reforms. These included the establishment of the AEC as an independent statutory authority, the registration of political parties by the AEC (to permit the printing of party names on ballot papers), the disclosure of donations to registered parties, the disclosure of their electoral expenditures, and public funding for election campaigns.¹¹⁵

¹¹¹ See, www.ozpolitics.info/parties/alp. This is the website of a privately run Australian political commentary service, *Palmer's Oz Politics*. For those seeking further information on Australian politics in general it provides a range of useful resources.

¹¹² See, <http://www.ozpolitics.info/intro/intro1>. and www.ozpolitics.info/parties/system.

¹¹³ See, <http://www.ozpolitics.info/parties/system>.

¹¹⁴ See, www.ozpolitics.info/parties/alp.

¹¹⁵ See, www.aec.gov.au/_content/when/history/history.

To qualify for public funding a political party needs :¹¹⁶

- To have a minimal written constitution (see earlier discussion);
- To have at least 500 members who are enrolled to vote or at least one member who is a member of the federal parliament;
- To register as a political party with the AEC;
- To obtain (in the case of each endorsed candidate) a minimum of 4% of the valid formal first-preference votes in the election contested;
- To lodge annual financial disclosure returns;
- To appoint an agent who is personally responsible for receipt of funding and meeting all disclosure obligations; and
- To subject itself to compliance audits by the AEC.

The current public funding rate is just under \$A2.00 per eligible vote. The rate is indexed, which means it rises every six months in line with inflation.¹¹⁷ Registered political parties also are able to have the party name printed on ballot papers next to the name of their endorsed candidate. All the major parties favour this arrangement as it reduces the chances of invalid votes being cast or the possibility of mistakes being made when, on occasions, candidates have similar names. In the 1998 federal election, the total amount of public funding paid was just over \$A31 million. The three major parties received just under 90% of this amount.¹¹⁸

One other benefit offered to political parties in 1991 was to allow donors to claim a tax deduction for any donations to registered political parties.¹¹⁹

Funding Transparency

Every registered political party (or registered state or territory party branch) must lodge an annual return with the AEC which discloses the total of all amounts received, plus details of all expenditure incurred and all debts outstanding. Registered parties, branches and any associated entities are subject to routine compliance audits by the AEC. The disclosure requirements are detailed and comprehensive. They impose obligations on parties, candidates, donors (above a certain threshold) and broadcasters and publishers.¹²⁰

These returns are placed on the public record where they may be inspected by all interested parties.¹²¹ As in the case of advertising and electioneering, the political parties themselves are important scrutineers of this public information.

¹¹⁶ Handbook, op. cit. note 85, Part 1.

¹¹⁷ www.aec.gov.au/_content/how/funding_payments/rate.

¹¹⁸ See, www.aec.gov.au/_content/what/media_releases/1998/nov/supplementary.

¹¹⁹ Section 78 (1) (aaa), **Income Tax Assessment Act** 1936 (Cth).

¹²⁰ See, www.aec.gov.au/_content/Who/party_reg/1998_report/.

¹²¹ See, www.aec.gov.au/_content/how/political_disclosures/index.

They can normally be relied upon to draw any apparent anomalies to the attention of the AEC or other relevant authorities. Awareness of this level of “privatised” scrutiny, in turn, tends to make each political party pay attention to their own housekeeping.

Anonymous donations (above a basic threshold) to political parties are illegal. Anonymous donations to associated entities (for example to a party promotion company) are allowed, however. The AEC can now audit associated entities of political parties, which assists in improving transparency but this loophole remains. The AEC has recommended that it be closed by making anonymous donations to associated entities illegal.¹²²

4.7 A Case Study — The One Nation Party¹²³

Pauline Hanson was a controversial, conservative politician from the state of Queensland who rose to prominence after she won the Queensland seat of Oxley in the House of Representatives in the federal parliamentary elections of 1996.¹²⁴ She argued strongly against free trade and large-scale immigration and took a controversial stand on a range of other policies. She and her party, the One Nation Political Party (ONPP) enjoyed some popularity, particularly in Queensland, amongst people who felt socially and economically disenfranchised as the Australian economy began to change dramatically, especially from the mid-1980s. Within a few years after her initial success, Pauline Hanson and her equally controversial party were in decline.¹²⁵

Hanson and the ONPP first became embroiled in litigation in relation to electoral matters in the state of New South Wales and then in Queensland. What is of interest here is that in Queensland, ultimately criminal charges were brought against Pauline Hanson and another ONPP office bearer, David Ettridge, in relation to the registration of the ONPP and public funding of the ONPP as a political party under the **Electoral Act** 1992 (Qld) (EAQ). These criminal prosecutions followed on from a civil action in *Sharples v O’Shea and Another*¹²⁶ in 1999. In that case, the court found that fraud or misrepresentation had been used to induce the Queensland State Electoral Commissioner (QSEO) to register the ONPP as a political party under the EAQ.¹²⁷ Following on from this civil action, Ms Hanson and Mr Ettridge were charged under Section 408C(1)(f) of the **Criminal Code** 1995 (Qld) with dishonestly inducing the QSEO to register the ONPP and also of dishonestly obtaining property (that is, public funding) from the QSEO. The provisions in the EAQ on registrations (500 members required) and public funding are similar to those found in the EA.

¹²² Ibid., Part 4, para. 4.11.

¹²³ This case study is closely based on research work completed by Jane O’Callaghan, February, 2004. See, also, Johns, op. cit. note 91.

¹²⁴ See, www.vicnet.net.au/

¹²⁵ See, www.wsns.org/articles/1999/mar1999/hans-m09.

¹²⁶ [1999] Queensland Supreme Court, 190.

¹²⁷ Ibid., para. 142.

Ms Hanson and her co-accused were initially found guilty in the District Court in Queensland, as charged.¹²⁸ They each received jail sentences. Although One Nation — as a total entity — had more than 500 paid-up supporters in Queensland, the problem was that they were, as a matter of law, members of an incorporated support group of the ONPP (unbeknownst to many of the paid-up members at that time). It seems this approach was taken so that the ONPP itself would remain strictly under the control of Ms Hanson and a few very close associates.

Ms Hanson and Mr Ettridge appealed against their convictions and ultimately were successful. The Queensland Court of Appeal found that the members of the support group believed that they were members of the ONPP itself. The ONPP had communicated to the applicants (somewhat ambiguously) that they had been successful in their applications to the ONPP. It was arguable, the court found, that the applicants had thus become members of the party. The court concluded that, in these circumstances, it was improper for the convictions and the jail sentences to stand.¹²⁹

Although Ms Hanson and Mr Ettridge had their convictions quashed, the case does demonstrate how careful political parties and their agents must be in seeking registration and access to public funding in Australia. Had the legislation been more specifically drafted, or had the handling of the applications been less ambiguous, the convictions may have stood.

It is also worth noting that the way that the Australian political party regulatory regime permits political parties to operate from a sort of legal “never-never” land facilitated the steps taken by the One Nation movement to separate the ONPP from the rest of the entity that was One Nation.

The ONPP is now largely a spent force in Australia.¹³⁰ The imbroglio in which it found itself as a result of this litigation in relation to public funding clearly contributed to the fading of the party’s popularity.

¹²⁸ *R v Ettridge and Hanson*, District Court of Queensland, Wolfe CJ, August 20, 2003.

¹²⁹ *R v Hanson; R v Ettridge* [2003] Queensland Court of Appeal, 488.

¹³⁰ *One Nation loses its last WA MPs*, ABC News Online, Friday May, 28, 2004 (copy on file with author).

5.0 CONCLUSION

In the course of discussions about political party development in Hong Kong, the possibility of enacting a Political Party Ordinance has been advocated quite regularly in the belief that it would provide greater efficiency and transparency in the operation of parties. Such a law may not be a particularly desirable reform.¹³¹ Though the current electoral and political party regulatory regime in the HKSAR suffers from inadequacies which inhibit the development of political parties, the fundamental regulatory structures and practices are reasonably sound. Therefore, there is not a great need for root and branch reform. The best way forward may be to look at how the current infrastructure can be developed and improved. The key reform issues to be addressed include:

- The formal recognition (and registration) of political parties;
- The legal status of political parties;
- Election advertising and general electioneering;
- Fund raising and public funding of political parties; and
- Funding transparency.

The Formal Recognition of Political Parties

It seems clear that the current position where political parties have almost no formal engagement with the electoral regulatory system is not sensible. Political parties exist and play a very important role in the political life of the HKSAR. They have done so now for over a decade. The regulatory system should formally recognise political parties — especially now that a public funding system for electioneering (discussed further below) has been introduced.

Hong Kong should seriously consider creating a proper political party registration system, modelled on that used in Australia. This system could be enacted under the Electoral Affairs Commission Ordinance and administered by the Electoral Affairs Commission. The essential elements of such a system would include the following.

All political parties seeking registration would need:

- To submit a written party constitution — containing certain mandatory provisions (see further below);
- To have a minimum number of members (appropriate to the HKSAR);
- To submit an annual return with respect to the party and also with respect to all defined, associated entities which would detail in full, all income, expenditure and debts plus any other matters deemed necessary for the reporting period;

¹³¹ A series of important questions arise whenever a jurisdiction contemplates any new comprehensive law. These include: to what extent is that area already regulated, is the existing regulatory regime fundamentally inadequate, how long will it take to “bed down” any such new law, are the unforeseen — but almost always inevitable — adverse consequences arising from any such new comprehensive law worth enduring, and what clear additional benefits can be shown which would make this approach superior to targeted reform of the existing regime.

- To submit to regular registration-related, performance audits by the EAC;
- To agree to all the annually reported information being placed on the public record (preferably on the Web) so that it can be scrutinised by, amongst others, rival political parties; and
- To nominate certain officers of the political party as the responsible contact points for EAC regulatory purposes.

Hong Kong could learn from the Australian experience by providing a model political party constitution, which could be either generally adopted in full or modified (within set limits). Such a model constitution would aim to be clear and fairly simple but would likely contain provisions setting down membership and management rights and obligations in some detail together with rules for choosing and endorsing election candidates. This would avoid the situation in Australia where parties can register using very thin constitutions which may not be fair to members and others. Parties seeking registration in the HKSAR would thus need to have constitutions which conformed to certain minimum standards designed to protect the interests of members and others (such as applicants for membership or ex-members) interacting with the party.

Upon the introduction of any new registration system, the EAC should be given a power to de-register a political party but only when it can be shown that a given political party is in serious breach of clearly and carefully spelled-out requirements. The exercise of any de-registering power would need to be made subject to full judicial review on the motion of any affected political party.

For reasons explained below, it is not recommended that the political party registration system be used, also, as a basis for providing legal status to political parties. It is best to leave the matter of political party legal status as a separate issue — one which normally would be addressed, as it is now, by incorporation under the CO. It may be necessary to enact certain cross-over provisions with the CO to ensure compatibility between the new EACO political registration regime with reporting and meeting requirements under the CO.

As in Australia, certain benefits ought be made available to parties which register, in order to encourage registration. Incentives could include:

- Allowing registered political parties to access enhanced public funding in their own right;
- Providing detailed electoral roll and related data to registered parties without charge; and
- Allowing certain tax benefits to registered political parties (see below).

It should not be mandatory to register — parties could continue to operate without registering. But in that case, the benefits above would not apply. Public funding (discussed further below) could remain available to individual candidates (and thus, indirectly to unregistered political parties) but at a lower rate than in the case of political parties.

In Australia, a further incentive to register is provided by the arrangement to allow registered political parties to have the name of each party shown beside the candidate's name on each ballot paper. This sensible idea has just been introduced in Hong Kong so that all LegCo candidates may now apply to the EAC to have certain particulars shown beside their names on each LegCo ballot paper in order to help voters identify the candidates' affiliations.¹³² This facility is thus not now available as a "registration incentive" in the HKSAR.

The Legal Status of Political Parties

The current practice common in the HKSAR, where parties are usually incorporated as companies limited by guarantee, is somewhat awkward and places a certain burden on political parties. On balance, however, it seems acceptable. First, there is no prospect of the SO being repealed or drastically revised. So, unlike in Australia, there is no option available for political parties to be non-legal entities which are, by various devices, recognised for certain legal purposes and interactions. Moreover, this aspect of the Australian political party regulatory system has its drawbacks. Indeed, it appears to have played a part in allowing the problems with respect to the operation of the One Nation political group to arise. That experience suggests that it is preferable for political parties to be required to have some sort of clear, identifiable legal structure.

In the HKSAR now, a party can decide against incorporation, although then they will need to register under the SO. One improvement which should be considered is to allow non-incorporated political parties to register as such with the EAC under a new, EAC-administered, political party registration scheme (discussed above). The Schedule to the SO could then be amended so that unincorporated political parties registered with the EAC are specifically exempt from registration under the SO.

Another improvement which should be considered is to exempt registered, incorporated political parties from the operation of certain provisions in the CO which are not appropriately applied to a political party.

A key reason for retaining the current practice is that it is prudent to avoid having both the registration and legal status of political parties subject to a single government regulator. If a political party registration system is introduced as recommended above, the EAC would have the ultimate power to deregister political parties (subject to judicial review). It would be better that the EAC not also have the power to wind up the legal entity which is the political party. Political parties and the government are always in a rather special relationship with each other, one where tensions are common. In these circumstances, it is best to divide the controlling powers of government rather than have them concentrated in a single regulator.

¹³² See, **Particulars Relating to Candidates on Ballot Papers** (Legislative Council) Regulation L.N. 263 of 2003. See, also, www.info.gov.hk/eac/en/legco/2004, Legislative Council Elections.

Election Advertising and General Electioneering

The existing regime based on the Elections (Corrupt and Illegal Conduct) Ordinance should be retained — subject to certain modifications being made after a full review of this regime. The provisions which make it problematic to offer food and entertainment at any political function clearly need revising, for example.¹³³

Based on the Australian experience, it would also be sensible to introduce a requirement for all widely defined election advertising to be authorised by a clearly identified, readily locatable individual (either party-based or otherwise). It is probably best not to try and create any sort of “truth in political advertising” regulation. It has been shown in Australia that such provisions are genuinely difficult to implement and enforce.

On balance, the ban on broadcast-electronic election advertising should remain (although, as noted, it could be argued that this ban is contrary to the Basic Law). The retention of this ban provides a means to put a hold on the growth of money politics in Hong Kong.

Fund raising

It may be worthwhile to consider allowing registered political parties tax-exempt status. Such a provision would relieve registered parties of a compliance burden. Any such change would need to be carefully implemented, however, to prevent its use for tax avoidance purposes.¹³⁴ Properly implemented, such a measure should have a negligible effect on revenue.

It is also worth considering allowing at least a partial deduction for donations to registered political parties. Once again, the implementation of any such measure would need to be carefully considered to ensure it would not be exploited for tax avoidance purposes.

The implementation of these possible tax concessions should, in my view, only proceed in tandem with a formal political party registration system as outlined above. The detailed reporting and audit requirements under the registration system help to ensure that these tax concessions would not be subject to abuse.

It would be best not to allow deductions to candidates for campaign expenses. Policing any such deduction regime would be difficult. It would also raise issues about taxing any public funding received (see below).

¹³³ The EAC has interpreted the ban on using “entertainment” to induce desired voting behaviour quite narrowly in the past. See, “Rally hangover after drink and song ban”, *The Standard*, November 13, 2003.

¹³⁴ This would include ensuring that tax evasion, also, cannot occur. Tax “avoidance” is the term normally used for tax planning which, whilst not strictly illegal, exploits any and every “loophole” in tax law. Tax evasion is the term normally used to describe outright tax fraud, for example where income is omitted or false deductions are claimed on a tax return.

Public Funding of Political Parties

The new public funding provisions introduced for LegCo election candidates by the HKSAR government are a step in the right direction. The formula for calculating to whom payments are to be made (attracting at least 5% of total valid votes cast) is reasonable. The formula for calculating how much is to be paid is less so. It is rather complex and it looks set to favour some candidates who already are financially well off. In Australia, public funding reimbursement was tied to election costs incurred until 1995. In that year this linkage was abandoned. Registered political parties no longer need to submit detailed claims. There is significantly less paperwork all round and funds are paid over more swiftly.¹³⁵

Let us assume that a political party registration system is introduced as outlined above. In that case, the public funding provisions should be amended so that the fixed sum (currently \$10 per valid vote cast above the threshold) is simply paid — but with the total sum being paid directly to the registered political party. Individual candidates, whether or not they are member of an unregistered party could apply for support under a more limited funding formula (but one less complex than the current three-tier funding formula).

This reform would provide a boost to registered political parties both in terms funding assistance and also in terms of encouraging persons seeking election to join registered political parties.¹³⁶

In Australia, there have been instances where publicly funded, registered political parties have refused to pass on public funds to cover costs incurred privately by endorsed party candidates.¹³⁷ To avoid this outcome, the (model) registered party constitution referred to above would need to contain mandatory provisions requiring parties to be financially answerable to their endorsed candidates.

In the event the political party registration is not introduced, the three-tier funding formula for candidates should be repealed and replaced with a simple payment of \$10 per valid vote cast, above the relevant threshold.¹³⁸

Funds paid out under any public funding scheme could be earmarked as not being subject to any tax, but if this rule applied, campaign expenses should not be treated as deductible.

¹³⁵ See Chau, Pak Kwan and Lam, Kitty, *Public Subsidies for Parliamentary Election Expenses in Canada, Germany and Australia*: LegCo Information Note 09/02-03, para. 4.5 at www.legco.gov.hk/english/index

¹³⁶ This assumes that the development of political parties is, on the whole, good for the HKSAR. This is the view taken in this paper, see note 15.

¹³⁷ See, *Sharples v O'Shea and Another* [1999] Queensland Supreme Court, 190.

¹³⁸ For a useful discussion of public funding schemes operating in Canada, Germany and Australia, see Chau, and Lam, *op. cit.* note 135.

Funding Transparency

A key aspect of the proposed political party registration system is to introduce a public-record reporting system for registered political parties. This system would be self-regulating to a significant degree because each political party would have access to the public financial records of the other parties, while the EAC would be also be conducting regular audits of registered political parties.

This is an intrusive regime, it is true. But, participation would remain voluntary. Almost all parties would volunteer, however, because of the benefits which would flow from registration including enhanced, direct public funding of political parties, improved electoral information access, and possible taxation-related benefits.

Also, this revelation of information is in the general public interest. The more clear we are about who pays what to whom, politically, the better informed the average voter will be.

The Australian experience tells us that no anonymous donations (beyond a low, and policed, threshold) should be allowed either to parties or to any associated entities.

Whether or not a political party registration system is introduced, the most obvious loophole in the current candidate reporting requirements under Section 37 of the ECICO needs to be closed. Candidates should have to reveal the substantive person behind any donation rather be able simply to report a donation from Political Party A, as is currently the case.

The statutory limits on candidate expenditure under the ECICO are, in principle, sensible. It might make sense to consider limits, in due course, on “general issue” campaign spending by political parties, as such spending can be used to circumvent individual spending rules. Whilst the HKSAR maintains its ban on broadcast electoral advertising, however, the general issue spending problem should remain contained. It is through use of the electronic media that money politics creates its greatest impact — and greatest distortions.¹³⁹

¹³⁹ Hong Kong, unlike Australia, does impose expenditure limits on candidates. See, further, Chau and Lam, *op. cit.* note 135.

Oversight of the Electoral Infrastructure

For some years in Australia the JSCEM, a joint party standing committee, has had a useful oversight role with respect to all matters pertaining to federal elections. Thus, the JSCEM routinely conducts an enquiry into the conduct of each federal election. The AEC and other parties make submissions and the JSCEM makes recommendations for infrastructure improvement, many of which have been implemented.

It is sensible to consider the establishment of an appropriate, on-going, oversight body to undertake a similar role in Hong Kong. A core component in any such body should come from LegCo but, as the HKSAR government is not formed in LegCo, this committee likely would need to draw on government membership from outside of LegCo. This body could, like the JSCEM, build up expertise in the area of electoral management which would be very valuable in maintaining constructive oversight of the electoral system. Also, it would be an excellent forum for building consensus on what can often be contentious issues. Such a body might conduct useful, ongoing reviews on a range of matters including the implementation of a political party registration scheme, advertising and electioneering regulation, funding limits on candidates, and public funding of election expenses.

The suggestions made here require further development before any final implementation. They are, however, considered recommendations which draw on the practical experience of a mature political party regulatory system in a country with a similar legal heritage to the HKSAR.

GLOSSARY OF ABBREVIATIONS

AEC	Australian Electoral Commission
AEO	Australian Electoral Office
ALP	Australian Labor Party
Basic Law	Basic Law of the HKSAR
BORO	Bill of Rights Ordinance
BSA	Broadcasting Services Act
CEEO	Chief Executive Election Ordinance
CO	Companies Ordinance
Constitution	Australian Constitution Act
CRC	Cooperative Resources Centre
DAB	Democratic Alliance for the Betterment of Hong Kong
DP	Democratic Party (of the HKSAR)
EA	Electoral Act
EAC	Electoral Affairs Commission
EACO	Electoral Affairs Commission Ordinance
EAdvert	Election Advertisement
EAQ	Electoral Act (Queensland)
ECICO	Elections (Corrupt and Illegal Conduct) Ordinance
EPRC	Electoral Process Review Committee (HKSAR)
FPTP	First-Past-The-Post (Voting System)
HKSAR	Hong Kong Special Administrative Region
HTV	How To Vote (Cards)
IRO	Inland Revenue Ordinance
JSCEM	Joint Standing Committee on Electoral Matters
LCO	Legislative Council Ordinance
LEAT	Lawyers Environmental Action Team
LegCo	Legislative Council of the HKSAR)
Lower House	House of Representatives (Australia)
LP	Liberal Party (Australia)
MP	Meeting Point
NP	National Party (Australia)
ONPP	One Nation Political Party (Australia)
PR	Proportional Representation
PRC	People's Republic of China
PV	Preferential Voting
QSEO	Queensland State Electoral Commissioner
SA Branch	South Australian Branch of the ALP
SNTV	Single Non-Transferable Vote
SO	Societies Ordinance
UDHK	United Democrats of Hong Kong
UK	United Kingdom
Upper House	Senate (Australia)
US	United States

Note re www citations

The www references used in this paper were all individually checked as operational at the time of writing. Web addresses sometimes have a short “shelf-life”, however. In the event that any reader cannot locate any web citation, please contact the author who has retained a full hard copy file of relevant materials.