

To Give and to Receive: The Australian Government's Proposed Electoral Finance Reforms

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Abstract

In December 2008, the federal government released its *Electoral Reform Green Paper: Donations, Funding and Expenditure* ('Green Paper') proposing a variety of reforms to Australia's current federal election funding and financial disclosure systems. This article canvasses some of the arguments which have been raised in favour of and against two areas of electoral reform proposed in the Green Paper. The first is with respect to restrictions on private donations to political parties or candidates. The second deals with restrictions on spending in electoral campaigns. In so doing, the article considers the question of restrictions on donations to political parties or candidates. It secondly analyses whether corporate donations should be treated differently from individual donations. The paper thirdly considers whether foreign donations should be accepted at all. Fourthly the issue of whether imposing caps on electoral campaign spending would help to control campaign costs and inequalities between candidates and parties or, alternatively, restrict a candidate's right to freedom of political expression and supporters' rights to hear such expression, is discussed. Fifthly, the problems of 'incumbency advantage' and whether a distinction should be drawn between limits on donations and limits on campaign expenditure are discussed. The paper concludes by considering other issues which arise in relation to the federal government's proposed restrictions on private donations and campaign spending under Australian electoral law.

Introduction

The question of the appropriateness of current electoral laws is a matter of strong debate. In July 2009, the head of a former corruption inquiry, Tony Fitzgerald publicly criticised the current and former Queensland

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governments for having taken advantage of incumbency to relax ethical standards and tacitly encourage corrupt practices in Parliament and some sectors of the public service. Similarly, major controversy arose earlier in the year regarding the relationship between the Prime Minister and a car dealer and the question of perceived favouritism in relation to the implementation of government policy (although the Prime Minister was completely cleared of any suggestion of wrongdoing). The Queensland government which enacted legislation in 2008 amending Queensland's electoral laws has also recently announced further plans for reforms to improve government integrity and accountability in the areas of political donations, fundraising and campaigning.¹

Electoral reforms are also on the federal government's agenda. In December 2008, the government released its *Electoral Reform Green Paper: Donations, Funding and Expenditure* ('Green Paper'). The Green Paper signals the first part of further electoral changes proposed by the government and canvasses a variety of issues relating to federal election funding and the effectiveness of the current financial disclosure schemes. Many of the issues are prompted by concerns that the inappropriate exercise of power, wealth or influence may impede or prevent full democratic and equitable participation in electoral contests or hinder the proper operation of our political processes.

Those concerns are the basis of this article, although the scope of the article is restricted to two areas of federal electoral reform proposed in the Green Paper. These areas are the restrictions on private donations to political parties or candidates and the restrictions on spending in electoral campaigns. We will consider some of the arguments in favour of and against reform, considering aspects such as transparency, accountability, corruption, equality and freedom.

A background to electoral laws

When they commenced in 1984, Australia's federal election funding system and financial disclosure schemes were designed to:²

- assist political parties and candidates in contesting elections;
- reduce their reliance on private funding;

¹ *Integrity and Accountability in Queensland* (2009) (Qld) 13-5.

² *Electoral Reform Green Paper: Donations, Funding and Expenditure* ('Green Paper') (2008) (Cth), 9. Department of Prime Minister and Cabinet <http://www.dPMC.gov.au/consultation/elect_reform/docs/electoral_reform_green_paper.pdf> at 19 February 2009.

- require the disclosure of campaign-related transactions (particularly donations and electoral expenditure) in the interest of transparency; and
- reduce the risk of corruption.

Although our electoral laws have undergone significant amendment,³ further electoral funding and disclosure reforms are proposed. These proposed changes were first enshrined in the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008 which was introduced in the Senate on 15 May 2008. On 18 June 2008, the Senate referred the Bill to the Joint Standing Committee on Electoral Matters ('JSCEM') for inquiry and report.

The JSCEM tabled its report on the Bill on 23 October 2008. In the report, a majority of the JSCEM recommended that the Senate support the proposed reforms relating to electoral funding, the donations disclosure threshold, reporting periods and the biannual framework, donation splitting, foreign and anonymous donations, and penalties, offences and compliance. A majority also recommended two changes to the Bill:

- a broadening of the current definition of 'electoral expenditure' to 'include reasonable costs incurred for the rental of dedicated campaign premises, the hiring and payment of dedicated campaign staff, and office administration'; and
- an amendment of the proposals in the Bill relating to anonymous donations so as to allow for anonymous donations of under \$50 to be received 'without a disclosure obligation being incurred by the donor, and without the recipient being required to forfeit the donation or donations to the Commonwealth'.⁴

In December 2008, the federal government introduced amendments to the Bill, partly in response to the JSCEM's recommended changes. The revised Bill, which is now the Commonwealth Electoral Amendment

³ See Deborah Z. Cass and Sonia Burrows, 'Commonwealth Regulation of Campaign Finance – Public Funding, Disclosure and Expenditure Limits' (2000) 22 *Sydney Law Review*, 477 for useful background information on federal electoral funding, disclosure and expenditure regulation.

⁴ Joint Standing Committee on Electoral Matters, Commonwealth Parliament, *Advisory report on the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008* (2008) (Cth), xiii–xvii. Australian Parliament House <<http://www.aph.gov.au/house/committee/em/taxlawbill%202/report/fullreport.pdf>> at 18 August 2009.

(Political Donations and Other Measures) Bill 2009, is intended to amend the *Commonwealth Electoral Act 1918* (Cth) to:

- reduce the donations disclosure threshold from \$10 900 (the current CPI-indexed amount) to \$1000 and remove CPI indexation;
- prohibit foreign donations to registered political parties, candidates and members of Senate groups and also prevent the use of foreign donations for political expenditure;
- prohibit anonymous donations above \$50 to registered political parties, candidates and members of Senate groups and also prevent the use of anonymous donations above \$50 for political expenditure;
- permit anonymous donations of \$50 or less in certain circumstances;
- limit the potential for 'donation splitting';
- introduce a claims system for electoral funding and tie funding to electoral expenditure;
- extend the range of electoral expenditure that can be claimed and prevent existing members of Parliament from claiming electoral expenditure that has been met from their parliamentary entitlements, allowances and benefits;
- introduce a biannual disclosure framework in place of annual returns and reduce timeframes for election returns; and
- introduce new offences and increase penalties for a range of existing offences.

Some arguments for reform - Restrictions on donations

At present, there are virtually no restrictions placed on the amount that an individual or organisation can donate to the electoral campaigns of political parties and candidates in Australia.⁵ Funding and disclosure laws regulate the private funding of electoral contests by imposing disclosure obligations on electoral participants, including candidates, political parties and the donors themselves, once the donations exceed a disclosure threshold amount.⁶ Before 2006, the disclosure threshold amount was set at \$1500. In 2006, the federal government increased the disclosure

⁵ S 216 of the *Electoral Act 2002* (Vic) provides that it is unlawful for any holder of a gaming or casino licence to donate more than \$50 000 to a registered political party in each financial year.

⁶ Sally Young and Joo-Cheong Tham, *Political finance in Australia: A skewed and secret system* (2006), 9. Democratic Audit of Australia <http://democratic.audit.anu.edu.au/papers/focussed_audits/20061121_youngthamfin.pdf> at 3 April 2009.

threshold for political donations from \$1500 to \$10 000, with this amount set to increase each year through indexation.⁷

The Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2009 seeks to lower the disclosure threshold to \$1000 (non-indexed). It also seeks to ensure that related political parties would be treated as one entity with regards to the disclosure threshold and the disclosure of donations.

However, the Bill has not been passed and the current indexed threshold remains at \$10 900.⁸ Under the current financial disclosure scheme, individual but related entities, such as a husband and wife, or State branches of the same party, are regarded as separate for the purposes of political donation disclosures. This means that spouses or directors of a company can separately donate the maximum amount to each State and federal branch of a political party without having to disclose the donations. In effect, this allows each individual donor to make multiple donations of up to \$10 900 to national, State and Territory branches of the same political party without triggering the disclosure requirements.⁹ Closing this loophole would allow financial disclosure requirements to operate in the way in which they were intended.

Donations from private sources are not capped in Australia on the basis that they are a legitimate exercise of the right to freedom of political expression and association. However, this approach has been criticised because private funding carries the risk of making its recipients potentially dependent on a small number of large donors and vulnerable to possible undue influence or corruption.¹⁰ The Green Paper indicates that approximately 20% of the major political parties' total funding comes from private donations and that these are primarily large donations, with 45% consisting of amounts of \$100 000 or more.¹¹ This is in contrast to countries such as Canada, whose approach is based on encouraging small donations from a large number of donors.¹²

⁷ *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act* (2006) (Cth), Schedule 2.

⁸ Financial disclosure funding threshold information, Australian Electoral Commission <http://www.aec.gov.au/Parties_and_Representatives/public_funding/threshold.htm> at 6 April 2009.

⁹ Senator Andrew Murray, 'Accountability – Election 07' (2007), 1-2. <http://www.andrewmurray.org.au/documents/527/2007_Election_Accountability_Launch.pdf> at 2 April 2009.

¹⁰ Green Paper, above n 2, 41, 57.

¹¹ *Ibid*, 41-2.

¹² *Ibid*, 28.

Some arguments for reform - Individual donations

Private funding to political parties and candidates consists of donations made by corporations or other organisations, as well as those made by individuals. However, there is an argument that individual donations should be treated differently from donations by corporations and other groups. This is premised on the basis that individuals can claim that their donations to candidates or parties are a manifestation of their right to freedom of political expression.

In the United States, the issue of an individual's right to donate to political candidates as an exercise of freedom of political expression was considered by the Supreme Court in the case of *Buckley v Valeo*. After deliberating, the Supreme Court ultimately decided that restricting the amount that any one person or group could contribute to a candidate or political committee entailed only a marginal restriction on the contributor's freedom of political expression.

A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.¹³

In Australia, these freedoms are implied in the *Constitution* as well as being expressly provided in international law, with article 19 of the *International Covenant on Civil and Political Rights* ('ICCPR') setting out the right to freedom of political opinion and expression.¹⁴ However, article 19(3) of the ICCPR notes that the exercise of the right may be restricted by law in certain circumstances. However the United Nations Human Rights Committee, which monitors the implementation of the ICCPR, has stated that 'when a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself'.¹⁵

Far from prohibiting the making of donations, a cap simply restricts the amount which may be given for reasons of public interest, such as to

¹³ *Buckley v Valeo*, 424 US 1 (1976), 21-2.

¹⁴ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 19 (entered into force 23 March 1976).

¹⁵ United Nations Human Rights Committee, 'General Comment No. 10: Freedom of expression (Art. 19): 29/06/83', [4]. United Nations Office of the High Commissioner for Human Rights. <[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/2bb2f14bf558182ac12563ed0048df17?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/2bb2f14bf558182ac12563ed0048df17?Opendocument)> at 1 April 2009.

prevent corruption and to preserve a level political playing field. Having regard to these principles, the imposition of a cap on a donor's private donations to candidates or parties is a permissible and indeed appropriate restriction on the donor's right of freedom of political expression which does not jeopardise the right itself.

Accordingly, while individuals have the right to donate to a political candidate or party of their choice, limiting the amount of their donations is a legitimate 'public interest' restriction permitted in accordance with their right to freedom of expression. As the Green Paper acknowledges, countries such as the United States, Canada and the United Kingdom seek to balance the individual's right to freedom of political expression and association against the public interest in minimising the risk of undue influence or corruption in their electoral systems by restricting the amounts that individuals and organisations can donate to parties or candidates.¹⁶ These countries have clearly decided that the right to freedom of political expression and association is legitimately limited in the political context by imposing a cap on donations to parties and candidates.

Some arguments for reform - Corporate and other group donations

Similarly, caps should also be placed on corporate donations to political parties or candidates. In Australia, despite corporate or group donations comprising the bulk of private funding for the major political parties,¹⁷ the *Commonwealth Electoral Act 1918* (Cth) does not distinguish between corporate and individual donations.

This is in contrast with a number of other liberal democracies. Professor Marian Sawer noted in 2004 that some 23 countries ban corporate donations outright.¹⁸ These countries include Canada, which bans donations from corporations, unions, associations and other groups, and the United States, which bans donations from corporations, banks and unions.¹⁹ The United Kingdom also has specific corporate donations provisions which require public companies to seek shareholder approval of donations and to list donations in full in their annual reports. Trade

¹⁶ Green Paper, above n 2, 57.

¹⁷ Ibid 42.

¹⁸ Marian Sawer, 'Election 2004: How democratic are Australia's elections?' (2004) *Australian Review of Public Affairs* <<http://www.australianreview.net/digest/2004/09/sawer.html>> at 1 April 2009.

¹⁹ Green Paper, above n 2, 29, 31, 45, 57.

unions must seek their members' approval of donations to political candidates or parties.²⁰

Professor Sawyer has described Australia's approach as being 'at the laissez-faire end of this regulatory spectrum, with no bans or limitations on private money except for that given anonymously'. According to her, this 'laissez-faire attitude allows corporations to purchase political influence in clear contravention of principles of political equality and popular control of government'.²¹ Certainly, this was one of the concerns underlying some of the Green Paper's proposed electoral reforms.

Ultimately, the argument for capping political donations is based on transparency. This was, after all, the aim of introducing the financial disclosure scheme.²² The exercise of undue influence by wealthy individuals, who may seek to use their donations to influence the election or parliamentary work of candidates or parties, subverts the democratic principles under which public representatives are elected and jeopardises the democratic process itself. Such risks are correspondingly greater where larger amounts of money are able to be donated without being disclosed.

Although the public disclosure of donations neither eliminates the risks of corruption and undue influence nor redresses inequalities in the amounts donated to different candidates and parties, it does allow public scrutiny and monitoring of both donors and recipients. In 1983, when the Hon Kim Beazley MP gave the Second Reading Speech for the amendment Bill introducing the present election funding and financial disclosure scheme, he commented that 'it is simply naive to believe that no big donor is ever likely to want his cut some time. [...] The whole process of political funding needs to be out in the open so that there can be no doubt in the public mind. Australians deserve to know who is giving money to political parties and how much'.²³

Even where undue influence is not actually exercised, it is nonetheless important to minimise or eliminate the perception of a conflict of interest.

²⁰ Ibid 30, 45.

²¹ Sawyer, above n 18. See also Graeme Orr, 'The Currency of Democracy: Campaign Finance Law in Australia' (2003) 26 *University of New South Wales Law Journal* 1, 5-6.

²² Green Paper, above n 2, 19-20, 43.

²³ Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 1983, 2213 (Kim Beazley, Minister for Aviation, Special Minister of State and Minister Assisting the Minister for Defence).

The United Kingdom Ministry of Justice acknowledged in a recent White Paper on party finance and expenditure that 'the objective of donation caps would be to remove any possible perception that donating to a political party could secure influence of some sort and to reassure the public of the motives of those who give to political parties'.²⁴ This is all the more important in relation to corporate donors, whose financial contributions and potential commensurate potential influence are likely to be greater than those of individual donors. As Tony Fitzgerald recently reminded the community, for a government, perceptions may sometimes be as important as the reality where potential corruption is concerned.

Unfortunately, cynical, short-sighted political attitudes adopted for the benefit of particular politicians and their parties commonly have adverse consequences for the general community. [...] Political leaders who gloss over corruption risk being perceived by their colleagues and the electorate as regarding it of little importance. Even if incorrect, that is a disastrous perception.²⁵

This argument is also in accordance with one of the fundamental objectives of the current funding and disclosure scheme as indicated by the parliamentary JSCEM in 2006. The objective is that 'high degrees of transparency in donations to political parties and candidates should reduce the potential for undue influence and corruption in the political system'.²⁶

Some arguments for reform - Overseas donations

Should donations from overseas sources be treated differently from other private donations? The United States, Canada and the United Kingdom are examples of countries which have banned donations to electoral campaigns from foreign nationals and other overseas sources. In contrast, New Zealand permits overseas donations of up to NZ\$1000.²⁷

In Australia, there are currently no restrictions on foreign donations to political candidates and parties. However, the federal government's

²⁴ United Kingdom Ministry of Justice, *Party finance and expenditure in the United Kingdom: The Government's proposals* (2008) 53.

²⁵ Tony Fitzgerald, 'Introduction to the Hon Justice Arthur Chaskalson', 28 July 2009, 3. Griffith University. <http://www.griffith.edu.au/__data/assets/pdf_file/0020/156125/Tony-Fitzgerald---Arthurs-introduction---Griffith-lecture-web.pdf> at 20 August 2009.

²⁶ Joint Standing Committee on Electoral Matters, Commonwealth Parliament, *Funding and Disclosure: Inquiry into disclosure of donations to political parties and candidates* (2006) iii. Australian Parliament House <<http://www.aph.gov.au/house/committee/em/donations/report/fullreport.pdf>> at 5 April 2009.

²⁷ Green Paper, above n 2, 29.

proposed electoral amendments include measures to prohibit the receipt of gifts of foreign property by registered political parties, candidates and members of Senate groups. The Bill also includes measures to prevent people and associated entities from using gifts of foreign property to incur political expenditure. The Bill defines 'foreign property' as 'money standing to the credit of an account kept outside Australia', 'other money (for example, cash) that is located outside Australia' or 'property, other than money that is located outside Australia'.²⁸ In the second reading speech for the 2008 Bill, Senator John Faulkner stated that,

There has been concern that large overseas companies may be able to exert influence through the making of significant and often unreported gifts and donations [...]. The policy intent is to ensure that the source of all funds that are used for political purposes are clearly identified, to enable the AEC to have jurisdiction over those donations, and to enable the Australian public to scrutinise any possible impact that such donations may have on political decision-making.²⁹

In its 1996 election report, the Australian Electoral Commission ('AEC') noted that Australia's federal disclosure laws were 'not adequate to ensure full disclosure of the true source of donations received from overseas' and that 'the potential exists for political parties to channel donations, originating in Australia, through overseas bodies and thus avoid disclosure requirements'.³⁰ In 2001, it recommended that donations received from outside Australia either be prohibited, or at least forfeited to the Commonwealth where the true original source of the donation is not disclosed in a disclosure return lodged by the foreign source.³¹

In 2004, the AEC advised the JSCEM that 'Australian law generally has limited jurisdiction outside our shores and hence the trail of disclosure can be broken once it heads overseas'. This provides 'an obvious and easily exploitable vehicle for hiding the identity of donors through

²⁸ Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2009, Schedule 1.

²⁹ Commonwealth, *Parliamentary Debates*, Senate, 15 May 2008 (Senator John Faulkner).

³⁰ Australian Electoral Commission, *Funding and Disclosure Report Following the Federal Election held on 2 March 1996* (1997) 13-14. Australian Electoral Commission <http://www.aec.gov.au/About_AEC/Publications/Reports_On_Federal_Electoral_Events/1996/elec96.pdf> at 5 April 2009.

³¹ Australian Electoral Commission, *Submission to the Joint Standing Committee on Electoral Matters Inquiry into Electoral Funding and Disclosure* (2001), Recommendation 11. Australian Parliament House <http://www.aph.gov.au/house/committee/em/f_d/subfifteen.pdf> at 5 April 2009.

arrangements that narrowly observe the letter of the Australian law with a view to avoiding the intention of full public disclosure'. In other words, if an overseas individual or corporate donor were not the original source of the funds, 'there would be no legally enforceable trail of disclosure back to the true donor, nor would any penalty provisions be able to be enforced against persons or organisations domiciled overseas'. The 'easiest solution' to address this loophole would be to place a 'blanket prohibition' on funds donated from or passed through an overseas entity.³²

The problems inherent in accepting donations of foreign property have also been noted by the International Institute for Democracy and Electoral Assistance, which warned in 2003 that,

The most obvious danger [to the successful operation of a democracy] comes from foreign funding. If a governing party depends heavily on financial resources provided by foreign governments or especially multinational corporations, their influence may undermine national sovereignty and the democratic principle of self-determination.³³

Donations from foreign nationals and offshore corporations raise different issues to those associated with domestic individual or group donations, and accordingly should be banned outright. As the AEC has explained, one reason for this is the practical difficulty associated with tracing and accounting for donations from overseas sources. The more compelling reason is that financial resources provided by foreign individuals or companies may result in the donor seeking to influence the recipient's policies or decision-making. The potential for such improper influence to occur, or the mere perception that it may occur, runs the risk of undermining our national sovereignty. This risk can be eliminated by banning all donations of foreign property to registered political parties and candidates.

³² Australian Electoral Commission, *Inquiry into Disclosure of Donations to Political Parties and Candidates: Submission from the Australian Electoral Commission (2004)* 25, 27. <<http://www.aph.gov.au/House/committee/em/donations/subs/sub11.pdf>> at 5 April 2009.

³³ International Institute for Democracy and Electoral Assistance ('IDEA'), *Funding of Political Parties and Election Campaigns* (2003) 15. IDEA <http://www.idea.int/publications/funding_parties/upload/full.pdf> at 8 April 2009, quoted in Senator Andrew Murray, 'Political Parties: Donations' (2004). Political Donations WA <http://www.political-donations.org.au/Speeches/?speech_id=1357> at 3 April 2009.

Some arguments for reform - Restrictions on electoral spending

At present, there is no limit on the amount that can be spent during a federal election campaign in Australia. Although candidates' electoral expenditure was capped at the time of federation in recognition of the need to contain campaign costs, this cap was abolished in 1980 on the basis that such limits imposed a constraint on candidates' campaigns and were difficult to enforce.

A campaign spending cap imposed on the amounts that may be spent by all candidates during an election campaign would serve a number of purposes, such as helping to break the nexus between money and politics,³⁴ go some way towards reducing the 'incumbency advantage' which is enjoyed by sitting parliamentarians and ensure that all candidates' campaigns draw on funding and resources to the extent of the cap, placing all candidates in a similar position to the extent possible.

Some arguments for reform - Reducing costs of campaigning

Political scientists Sally Young and Joo-Cheong Tham contend that there are strong arguments for placing restrictions on campaign expenditure. According to them, spending caps would help to control inequalities between candidates and between parties, prevent excessive and prohibitive increases in the costs of elections and limit the scope for undue influence and corruption.³⁵ The Green Paper also notes that capping political campaign expenditure could reduce the reliance of political parties and candidates on donations and other private sources of funding, by reducing the need for campaign funding. It could also even out the campaign budgets of participants.³⁶

Is there an argument that electoral spending should be considered a manifestation of a candidate's right to freedom of political expression? Even if this were so, this right may legitimately be limited, as has previously been noted. It may also be argued that it is in the public's interest to restrain excessive electoral spending and any associated exercise of undue power or influence. The public interest in creating a level playing field for all political candidates should prevail over, and limit, the candidate's individual right to spend as much money as he or she might wish during an election campaign on the basis of the right to freedom of political expression.

³⁴ Sally Young and Joo-Cheong Tham, above n 6, 96.

³⁵ Ibid 94.

³⁶ Green Paper, above n 2, 63.

Costly campaigns for public office in the United States provide salutary examples of the alternative of unbridled electoral spending. As one federal parliamentarian noted during parliamentary debates on 16 March 2009, '[w]e need only look at the experience of the United States to get a glimpse of the future in terms of the extraordinary costs of campaigning.' Moreover, he continued,

I fear that the prospect of corruption, bribery and undue influence will only increase if the campaign arms race escalates in an uncontrolled manner in the future. [I]n a world of uncapped campaign spending, political parties will look to the bottom line and we face the prospect of wealthy candidates effectively buying a seat in parliament in the future.³⁷

Associate Professor Graeme Orr makes the point that strongly audited electoral expenditure limits imposed on parties and candidates would 'help to breed a more modest campaign culture, something which anecdotal evidence suggests that voters would prefer'.³⁸

Some arguments for reform - Reducing the 'Incumbency advantage'

Another strong argument for the reintroduction of a cap on campaign expenditure is to diminish the significant 'incumbency advantage' enjoyed by sitting politicians. The incumbency advantage is the natural or 'inbuilt' advantage enjoyed by any sitting member of Parliament, who is likely to benefit from a higher profile, greater media exposure and a 'recognition factor', particularly if he or she holds a ministerial office. A sitting member also has staff, office resources and electoral allowances which, even if not used directly for campaign purposes, may be used to communicate the ideas and platform of the incumbent member (or the member's political party) to the electorate. This has the result of raising his or her profile with constituents. This natural advantage is further boosted if the parliamentarian is permitted to use staffing, travel, printing, postal and communications entitlements, which are funded by public moneys, during an election campaign.³⁹

During the term of the previous federal government, the incumbency advantage was significantly augmented over a number of years. For

³⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 16 March 2009 (Darren Chester).

³⁸ Graeme Orr, above n 21, 23.

³⁹ Senator Andrew Murray, above n 9, 5.

example, in 2001, the Prime Minister introduced a cap on printing entitlements of \$125 000 per annum. An Audit Office report produced that same year showed that 113 out of 147 lower house parliamentarians spent less than \$50 000 on printing, meaning that the new cap effectively encouraged parliamentarians to spend up to five times more than most of them had normally been spending.⁴⁰

Moreover in 2001, the federal government increased the communications allowance provided to parliamentarians for the delivery of letters, newsletters and internet materials. The new reforms allowed parliamentarians to call forward up to 25% of their next year's entitlement, effectively providing them with an additional amount to fund postage and other communications during an election year.

In 2005, the government once again changed the entitlements so that the communications allowance would no longer be based on the size of the electorate for lower house members of Parliament. Instead, it would be based on the number of electors in each electorate multiplied by 50 cents per elector. Young and Tham note that although it may sound reasonable to allow each parliamentarian 50 cents for each voter in his or her electorate, the allocation nonetheless represents a major increase. Indeed, former Western Australian State parliamentarian Norm Kelly has estimated that the communications allowance rose from approximately \$27 500 to around \$45 000.

In 2006, having won control of the Senate, the government increased printing allowances from \$125 000 to \$150 000 per annum for lower house members of Parliament, and from 10 reams of paper per month (estimated at a cost of less than \$1000 a year) to \$20 000 a year for senators.⁴¹ Almost half of these entitlements could be carried over to the next year, effectively providing parliamentarians with a printing allowance of up to \$217 500 to spend on their election campaigns. In addition, marking a significant policy shift, government ministers confirmed that members of Parliament could use their printing and postage entitlements to fund campaign-related printing such as postal vote applications and 'how to vote' cards.⁴²

⁴⁰ Sally Young and Joo-Cheong Tham, above n 6, 55.

⁴¹ Norm Kelly, 'MPs' incumbency benefits keep growing', Discussion Paper 27/06 (2006) 2. Democratic Audit of Australia <http://democratic.audit.anu.edu.au/papers/20060830_kellympperks.pdf> at 3 April 2009.

⁴² Sally Young and Joo-Cheong Tham, above n 6, 55-7.

In 2006, Young and Tham compiled a detailed list setting out the value of key parliamentary entitlements received by members of federal Parliament. According to their calculations, the total quantifiable value of the entitlements ranges from \$887 024 to \$899 324 per annum for the average member of federal Parliament.⁴³ By any measure, this amounts to a significant 'incumbency advantage' for each parliamentarian. Orr has referred to the 'excessive parliamentary allowances' and 'unrestrained political donations' enjoyed by incumbent politicians as 'problematic',⁴⁴ while Kelly has more derisively called these entitlements 'slush money' which was 'tilting election contests unfairly in favour of incumbent MPs, at the expense of democratic equality'.⁴⁵

Young and Tham have also concluded that government resources in particular advantage incumbent governments 'in ways which lead to a very uneven electoral playing field because all other challengers and non-government parties are severely disadvantaged in their ability to communicate with voters and participate in the public debate through media access'.⁴⁶

Certainly, the use of parliamentary entitlements to fund election campaigns constitutes a significant 'incumbency advantage', providing public moneys which may be used to promote his or her profile and platform. At the same time, it requires potential entrants to obtain similar funds and resources in order to communicate effectively or competitively.

These entitlements render the electoral campaign more difficult or expensive for some candidates than for others. In doing so, they constitute an advantage which is both anti-competitive and undemocratic. They also constitute an unethical use of taxpayer money. Indeed, the allocation of public moneys to boost political support during electoral campaigns may be regarded as a form of corruption, if you accept the definition by Rogrow and Laswell that corruption exists if there are 'violations of common interest for special advantage'.⁴⁷

⁴³ Ibid 58-9.

⁴⁴ Graeme Orr, 'Government Advertising, Parliament and Political Equality' (Speech delivered at the Senate Occasional Lecture Series, Canberra, 11 November 2005), 3.

⁴⁵ Norm Kelly, above n 41, 2.

⁴⁶ Sally Young and Joo-Cheong Tham, above n 6, 88-9.

⁴⁷ Arnold Rogrow and Harold Laswell, *Power, Corruption, and Rectitude* (1963) 132-133, quoted in Scott Prasser and Geoff Cockfield, 'Rolling out the regional pork barrel: A threat to democracy?', Discussion Paper 22/07 (2007) 9-10. Democratic Audit of Australia <<http://democratic.audit.anu.edu.au/papers/20071220prassercockfieldporkbarrell.pdf>> at 6 April 2009.

In this regard, Young and Tham have considered whether in Australia, the major parties have created a political finance 'cartel' by colluding either implicitly or explicitly 'in creating and maintaining a political finance system that operates in their mutual interest'. They note that 'fair opportunity to hold public office requires that there be "fair rivalry". Specifically it requires an "equality of arms" amongst the competing parties'⁴⁸ and their candidates. These principles are all the more important when minor party or independent candidates are contesting an election, since such candidates are already likely to be disadvantaged by limited campaign budgets and other available resources. Furthermore, principles of 'fair rivalry' and 'equality of arms' are in accordance with another fundamental objective of the current electoral funding and disclosure scheme; that 'a level playing field should operate between political parties and independent candidates'.⁴⁹

On that basis, caps should apply to all campaign expenditures to restrict federal parliamentarians from using their publicly-funded resources or parliamentary allowances to contribute to their own or other party members' election campaigns. Kelly also suggests the independent scrutiny of government advertising before it can be released,⁵⁰ while Orr proposes that government spending on campaign advertising be capped, perhaps to an annual amount, in order to avoid significant spending 'spikes' during or leading up to election years.⁵¹

Some arguments against reform - Implied freedom of political speech

The implied freedom of political speech was established in Australia in a number of cases in the 1990s.⁵² The High Court declared that implicit in our system of representative and responsible government was a freedom of political speech. The doctrine was first established in 1992, when the federal government passed laws which had the effect of prohibiting a body, whether government or non-government, from advertising during election periods. Broadcasters were required to make free air time available to political parties; the amount of time allocated was determined by the number of representatives that party had in the previous Parliament. The relevant minister claimed the laws were necessary to

⁴⁸ Sally Young and Joo-Cheong Tham, above n 6, 5.

⁴⁹ Joint Standing Committee on Electoral Matters, above n 26, iii.

⁵⁰ Norm Kelly, above n 41, 5.

⁵¹ Graeme Orr, above n 44, 14.

⁵² *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Levy v Victoria* (1997) 189 CLR 579.

prevent corruption and undue influence caused by the purchase of advertising during election periods. A majority of the Court invalidated the legislation on the basis that it impermissibly interfered with the freedom of an individual to communicate on political matters.

In *Australian Capital Television Pty Ltd v Commonwealth* ('ACTV'), Mason CJ said the Court should,

scrutinize very carefully any claim that freedom of communication must be restricted in order to protect the integrity of the political process. Experience has demonstrated on so many occasions in the past that, although freedom of communication may have some detrimental consequences for society, the manifest benefits it brings to an open society generally outweigh the detriments. All too often attempts to restrict the freedom in the name of some imagined necessity have tended to stifle public discussion and criticism of government. The Court should be astute not to accept at face value claims by the legislature and the Executive that freedom of communication will, unless curtailed, bring about corruption and distortion of the political processes.⁵³

It has been clarified in later cases that the freedom is a negative one. Therefore, while an individual cannot seek compensation by arguing that their freedom has been breached, she or he may challenge laws that unacceptably infringe the freedom. When considering such challenges, the court asks two questions;

- a) Whether the law effectively burdens freedom of communication about government or political matters in terms, operation or effect; and
- b) Whether the law is reasonably appropriate and adapted to serve a legitimate end, the fulfilment of which is compatible with the constitutionally prescribed system of representative and responsible government.⁵⁴

If the answer to the first question is positive and the answer to the second question is negative, the law is invalid. The High Court has clarified that communication can include the non-verbal as well as the verbal⁵⁵ and that

⁵³ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 145.

⁵⁴ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, with a minor change in wording evident in *Coleman v Power* (2004) 220 CLR 1.

⁵⁵ *Levy v Victoria* (1997) 189 CLR 579.

freedom of communication is not simply a right to speak, but a right to hear a range of political views.⁵⁶

Given these findings, it is submitted that the freedom of political communication is relevant to the question of the constitutionality of laws limiting donations or campaign expenditure. It is contended that a limit on the extent to which an individual can make a donation to a political party does burden that individual's freedom of communication. This is on the basis that his or her activity in seeking to financially support a particular political party (that presumably espouses the kinds of policies which the donor supports) is a form of communication.⁵⁷ Another way in which the freedom would be relevant in this context would be in terms of limits on the ability of third parties to expend money on campaigns. Such a restriction would directly restrict an individual's ability to convey political ideas through media.⁵⁸

A further relevant question, referred to above, is whether any distinction should be made between donors who are individuals and donors that are organisations. An argument that no distinction should be made between the two types of donor may be premised on the basis of the nature of the freedom of communication. The argument is that in order for individuals to properly participate in their democracy, they must be able to hear a range of views, and that some of these views might be expressed by organisations. Mason CJ has expressed these sentiments by stating that, 'individual judgment [...] on so many issues turns upon free public discussion in the media of the views of all interested persons, groups and bodies and on public participation in, and access to, that discussion'.⁵⁹

⁵⁶ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

⁵⁷ Anne Twomey in her recent paper for the Department of Premier and Cabinet of New South Wales acknowledges that campaign finance reforms must be considered in light of the constitutionally implied freedom of political communication. Anne Twomey, 'The Reform of Political Donations, Expenditure and Funding' (Department of Premier and Cabinet of New South Wales, 2008) 1.

⁵⁸ Graeme Orr, above n 21, 24: 'How much more likely will political elites be to invent ways of circumventing campaign expenditure limits, for example by setting up ostensibly independent bodies to engage in electoral advertising? [...] In Issacharoff and Karlan's famous metaphor, regulators face the problem of the "hydraulics" of campaign finance – money is fluid and tends to find its own level'; Samuel Issacharoff and Pamela Karlan, 'The Hydraulics of Campaign Finance Reform' (1999) 77 *Texas Law Review* 1705; Daniel Lowenstein, 'On Campaign Finance Reform: The Root of all Evil is Deeply Rooted' (1989) 18 *Hofstra Law Review* 301.

⁵⁹ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 139. McHugh J agreed at 232 that voters had a right to convey and receive opinions. Deane and Toohey JJ in *Nationwide News Pty Ltd v Wills* said that freedom of political discussion necessarily involved the freedom to maintain and consider claims and opinions about political matters: (1992) 177 CLR 1, 75. And the Court unanimously

Another way of considering limits on the amount that a political party can spend on election campaigns is to see it as a burden on that party's right to communicate about political matters, given that most of the cost in running a campaign involves communication with the people (for example, television, radio and internet advertising, as well as mail-outs and newspaper coverage). It is argued that such laws would burden the freedom of communication, in terms of the first 'Lange' question framed above.

The remaining question would then be whether the law is appropriate and adapted to serve a legitimate end compatible with representative and responsible government. What legitimate ends might justify this kind of regulation?

Some arguments against reform - Corruption justification

One argument is that limits on donations are justified by the need to avoid corruption of the political process. Both the High Court of Australia and the United States Supreme Court have recognised this as a legitimate government interest in the context of regulating political funding.⁶⁰ However, as with any claimed justification for legislation, these must be closely scrutinised and not taken at face value.

Many studies which have studied links between political donations and voting behaviour of politicians, have found little evidence that donations in fact influence a politician's voting patterns in any material way. The position is summarised by Hall and Wayman neatly as follows.

Despite the claims of the institutional critics and the growing public concern over [lobby groups] during the last decade, the scientific evidence that political money matters in legislative decision making is surprisingly weak. Considerable research on members' voting decisions offers little support for the popular view that [lobby groups'] money permits interests to buy or rent votes on matters that affect them.⁶¹

declared in *Lange* that 'common convenience and welfare of Australian society are advanced by discussion – the giving and receiving of information – about government and political matters': *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 571. The United States Supreme Court in *First National Bank v Bellotti* (1978) 435 US 765 dismissed arguments that the worth of speech depended on whether an individual or corporation was doing the talking.

⁶⁰ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Buckley v Valeo* 424 US 1 (1976).

⁶¹ Richard Hall and Frank Wayman, 'Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees' (1990) 84(3) *American Political*

Many other researchers, including Chappell,⁶² Grenzke,⁶³ Welch,⁶⁴ Wright,⁶⁵ Lott,⁶⁶ Sorauf,⁶⁷ Moussalli⁶⁸ and Smith,⁶⁹ have similarly not found the evidence to support the premise that political donations lead to specific policy outcomes favourable to the donors.

The United Kingdom Ministry of Justice in its recent White Paper is similarly unconvinced of the corruption argument:

There is no evidence to suggest that the overwhelming majority of people who give to political parties do so with the intention of securing improper influence.⁷⁰

In this context, this argument for electoral law reform lacks supporting evidence.

Some arguments against reform - Inequality

Others who argue for reform claim that it is needed to improve 'equality'. In other words, in order to create a level playing field, we should limit donations or total campaign expenditure. The argument is put by Blum that,

Science Review 797, 798; Kathleen Sullivan, 'Political Money and Freedom of Speech' (1997) 30 *University of California Davis Law Review* 663, 679; cf Richard Briffault, 'The Political Parties and Campaign Finance Reform' (2000) 100 *Columbia Law Review* 620.

⁶² Henry Chappell, 'Campaign Contributions and Congressional Voting: A Simultaneous Probit-Tobit Model' (1982) 62 *Review of Economics and Statistics* 77.

⁶³ Janet Grenzke, 'Shopping in the Congressional Supermarket: The Currency is Complex' (1989) 33 *American Journal of Political Science* 1.

⁶⁴ William Welch, 'Campaign Contributions and Legislative Voting: Milk Money and Dairy Price Supports' (1982) 35 *Western Political Quarterly* 478.

⁶⁵ John Wright, 'PACs, Contributions and Roll Calls: An Organisational Perspective' (1985) 79 *American Political Science Review* 400.

⁶⁶ John Lott, 'Empirical Evidence in the Debate on Campaign Finance Reform' (2001) 24 *Harvard Journal of Law and Public Policy* 9.

⁶⁷ Frank Sorauf, *Money in American Elections* (1983) 285; Frank Sorauf, 'Politics, Experience and the First Amendment: The Case of American Campaign Finance' (1994) 94 *Columbia Law Review* 1348.

⁶⁸ Stephanie D. Moussalli, *Campaign Finance Reform: The Case for Deregulation* (1990).

⁶⁹ Bradley Smith, 'Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform' (1996) 105 *Yale Law Journal* 1049; Bradley Smith, 'Money Talks: Speech, Corruption, Equality and Campaign Finance' (1998) 86 *Georgetown Law Journal* 45.

⁷⁰ United Kingdom Ministry of Justice, above n 24, 53.

The libertarian conception of free speech is best seen as integral to the libertarian strategy of seeking a 'minimal state' in which paternalistic and regulatory functions are severely limited [...]. By promoting speech entitlements that are coextensive with the private ownership of wealth and property, the libertarian approach facilitates an upward redistribution of political power and initiative that tends to strengthen the political base for reducing the regulatory and welfare programs despised by libertarian theorists. By contrast, the equal liberty and collective right conception is integral to a strategy designed to achieve ends that are in many respects the opposite of those that libertarians favour. By using absolutist protection to guarantee sufficient social space for movements to form and enter the established political system, the Supreme Court has enhanced the political initiative, and thus the political power, of groups that lack control over significant wealth and property. This limited redistribution of political power has helped to create a political base for the paternalistic, regulatory welfare state.⁷¹

This argument might be supported by the principle of voting equality inherent in our democratic system. Voting equality might be equated with participation equality. It is said that the libertarian conception of free speech ignores existing inequalities in wealth, power and knowledge which help shape participation in the political process.

However, as with the argument about corruption above, evidence is required to support the assertion that electoral finance reform would, in fact, achieve equality or greater equality than is presently the case. Even if it is accepted that 'greater equality' is a laudable objective, we must first ask whether there is in fact existing inequality in campaign finance. Moreover, if we proceed on the assumption that this is a problem, we must further consider whether regulation of electoral finances will actually help to solve the perceived problem.

The evidence does not support the argument of significant inequality, at least between the major political parties in Australia. According to the Australian Electoral Commission, between 2002-2003 and 2004-2005, the Australian Labor Party received \$122 million in private donations, compared to the \$105 million received by the Liberal Party. Between

⁷¹ Jeffrey Blum, 'The Divisible First Amendment: A Critical Functionalist Approach to Freedom of Speech and Electoral Campaign Spending' (1983) 58 *New York University Law Review* 1273, 1349. See also Orr, above n 21: 'genuine democracy requires parties to be able, in rough equality, to afford to commit resources to *policy generation*, and not simply campaigning' at 23.

1999-2000 and 2001-2002, the ALP received \$99 million in private donations, compared with \$83 million for the Liberals.⁷²

According to recent available figures, between 1984 and 1996 the ALP spent \$40 million on campaigns, while the Liberals spent \$35 million. The estimate of total campaign expenditure on the 2004 election was \$19 million for the ALP and \$22 million for the Liberals.⁷³ These figures do not support an assertion of gross inequality, at least as between Australia's major political parties and the others realistically in a position to form government. Therefore they do not justify regulation of campaign finances by the federal government.

Another argument is that a candidate may be able to raise large amounts of cash simply by virtue of the popularity of such a candidate and their views. An example is the impressive fund raising ability of President Barack Obama from 2006 to 2008. It is difficult to argue that limiting the amount that could be donated to his (or any other candidate's) campaign would have made the result more 'democratic'. The very fact that he drew donations from such a broad cross-section of society could actually be suggestive of democracy at work, of people expressing their strong support for a candidacy by providing that candidate with resources.

Other scholars have concluded that, far from creating equality, campaign finance restrictions actually promote inequality by making it tougher for new entrants to raise the necessary funding. It is argued that restrictions favour 'repeat players' in the political system, those who know the rules and how to make them work, at the expense of new candidates.⁷⁴ Regulation thus could lead to conservative outcomes where the status quo is privileged at the expense of new candidates or fresh political movements.

Another argument against reform is that less drastic means than bans and caps are available to secure the legitimate objectives of such regulation. The Lange test calls for such consideration, with its second question focussing on whether the law is appropriate and adapted to fulfilling a

⁷² Green Paper, above n 2, 12.

⁷³ See also Joo-Cheong Tham and David Grove, 'Public Funding and Expenditure Regulation of Australian Political Parties: Some Reflections' (2004) 32 *Federal Law Review* 397, 401-5.

⁷⁴ Bradley Smith, 'Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform', above n 69, 1072-84; Bradley Smith, 'Money Talks: Speech, Corruption, Equality and Campaign Finance', above n 69, 88; Joel Gora, 'Campaign Finance Reform: Still Searching Today for a Better Way' (1998) 6 *Journal of Law and Policy* 137, 145-6.

legitimate end. An example of such reasoning appears in the unanimous decision of *Lange v Australian Broadcasting Corporation*.

In *ACTV*, for example, a majority of this Court held that a law seriously impeding discussion during the course of a federal election was invalid because there were other less drastic means by which the objectives of the law could be achieved.⁷⁵

In the current context of campaign finance regulation, less drastic means include many of the existing features of finance regulation such as registers of political donations, requirements for full disclosure of donations made and the existence and enforcement of criminal penalties for bribery and corruption. In other words, we may not need further regulation in order to meet the clearly legitimate objective of having fair and corruption-free electoral processes.

The assumption that, merely because a candidate or a political party has more money, he or she is guaranteed electoral success is also open to question.⁷⁶ In one recent Australian example, very significant resources were devoted to the 'selling' of the previous federal government's Work Choices policy, evidently with little success.

Some arguments against reform - Freedom of association

A related argument is that campaign finance regulation may effectively infringe on the right to freedom of association. The first question is whether such a right exists in Australia. Article 22 of the *International Covenant on Civil and Political Rights* provides expressly for the right to freedom of association with others. The article provides that the right is not absolute but that any limits must be prescribed by law and must be necessary in a democratic society in the interests of national security or public safety, the protection of public health or morals, or the protection of the rights and freedoms of others. A proportionality test is envisaged.⁷⁷

⁷⁵ (1997) 189 CLR 520, 568.

⁷⁶ Bradley Smith, 'Money Talks: Speech, Corruption, Equality and Campaign Finance', above n 69; Bradley Smith, 'Late Money in Key House Races' (1995) *Political Financing and Lobbying Report* 3, 5-6.

⁷⁷ Joseph suggests, in the context of terrorism laws but in terms equally applicable here, that the exclusion of judicial involvement in the prescription process might mean that the law lacks the proportionality required by article 22: Sarah Joseph, 'Australian Counter-Terrorism Legislation and the International Human Rights Framework' (2004) 27(2) *University of New South Wales Law Journal* 428, 437. See also Jenny Hocking, 'Counter-Terrorism and the Criminalisation of Politics: Australia's New Security Powers of Detention, Proscription and Control' (2003) 49 *Australian Journal of Politics and History* 355 and 'Protecting Democracy by Preserving Justice: Even for the Feared and the Hated' (2004) 27 *University of New South Wales Law Journal* 319.

While this covenant has not been enacted by the Australian Parliament, international law is relevant in interpreting the requirements of the *Australian Constitution*.⁷⁸

In *Australian Capital Television Pty Ltd v Commonwealth*,⁷⁹ Gaudron J claimed that representative democracy may include freedom of association. McHugh J also discussed a right to associate and accepted that the freedom of political communication included the right of individuals to communicate their own arguments and opinions to other members of the community concerning those issues.⁸⁰ Mason CJ accepted that the freedom included freedom of communication between all persons, groups and bodies in the community.⁸¹ Although these were comments made in obiter dicta, it is submitted that they support an argument that the freedom of political communication includes the freedom of association. Individuals cannot communicate political ideas without being able to associate with others for that purpose.

The broader context in which the freedom could operate was in evidence in the facts in *Kruger v The Commonwealth*.⁸² In this case the issues did not concern communication or association that might be described as overtly political, unlike other cases involving the implied freedom.⁸³ In *Kruger*, Toohey J found the freedom of association was an essential ingredient of political communication.⁸⁴ Gaudron J agreed, to the extent

⁷⁸ *Roach v Electoral Commissioner* (2007) 233 CLR 162.

⁷⁹ (1992) 177 CLR 106, 212.

⁸⁰ *Ibid* 231-2.

⁸¹ *Ibid* 139. Similarly, in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, Deane and Toohey JJ concluded at 72 that '[t]he people of the Commonwealth would be unable responsibly to discharge and exercise the powers of governmental control which the Constitution reserves to them if each person was an island, unable to communicate with any other person.'

⁸² (1997) 190 CLR 1.

⁸³ In other words, it did not involve banning of political advertising (*Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106); laws regarding defamation of a politician (*Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 and *Roberts v Bass* (2002) 212 CLR 1); laws criminalising speech regarding a member of the Industrial Relations Commission (*Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1) or laws defining a 'political party' for the purposes of benefits and name recognition on a ballot paper (*Mulholland v Australian Electoral Commission* (2004) 220 CLR 181). It was in this respect more like *Coleman v Power* (2004) 220 CLR 1, involving a law concerning vagrancy, and *Levy v Victoria* (1997) 189 CLR 579, involving a law about presence on particular territory. *Kruger* confirms that the freedom, while sourced in ss 7 and 24 of the *Constitution*, is not confined to conduct during elections or cases involving politicians; it is of more general application.

⁸⁴ *Kruger v The Commonwealth* (1997) 190 CLR 1, 91.

necessary for the maintenance of the system of government for which the *Constitution* provides, as did McHugh J.⁸⁵ Gaudron J noted that,

just as communication would be impossible if 'each person was an island', so too it is substantially impeded if citizens are held in enclaves, no matter how large the enclave or congenial its composition. Freedom of political communication depends on human contact and entails at least a significant measure of freedom to associate with others. And freedom of association necessarily entails freedom of movement.⁸⁶

In *Mulholland v Australian Electoral Commission*,⁸⁷ several members of the Court considered the argument in favour of a freedom of political association. McHugh J reiterated his belief in such a freedom.⁸⁸ Kirby J accepted there was implied in sections 7 and 24 of the *Constitution*, a freedom of association and freedom to participate in community debate⁸⁹ about political parties' policies and programmes and the substantially uncontrolled right of association enjoyed by electors to associate with political parties and communicate about such matters with other electors.⁹⁰ Gummow and Hayne JJ, with whom Heydon J agreed, did not dismiss the freedom of association and saw it as part of the recognised freedom of political communication.⁹¹ Various commentators have suggested that freedom of association is essential to representative democracy.⁹²

⁸⁵ Ibid 116, 142.

⁸⁶ Ibid 115.

⁸⁷ (2004) 220 CLR 181.

⁸⁸ Ibid 225; McHugh J stated that these rights, in his view, extended only insofar as they were identifiable in ss 7 and 24 of the *Constitution*. He accepted freedom of association 'at least for the purposes of the constitutionally prescribed system of government and the referendum procedure'. It is not clear whether McHugh J would have agreed with the definition of 'political speech' given in the next footnote.

⁸⁹ Political speech was defined broadly by Mason CJ, Toohey and Gaudron JJ in *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 124 as including 'all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about'; see also Gleeson CJ in *Coleman v Power* (2004) 220 CLR 1, 30 who was prepared to concede that material about a police officer on a flyer was 'political', although it was not party political, was not about laws and was not about government policy.

⁹⁰ *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 277.

⁹¹ Ibid 234, 306; Callinan J claimed that an implication of freedom of association was 'not necessary' (at 297) and Gleeson CJ found it unnecessary to decide (at 201) but seemed to assimilate freedom of association with freedom of political communication.

⁹² For example, Jeremy Kirk, 'Constitutional Implications from Representative Democracy' (1995) 23 *Federal Law Review* 37, 55; Reginald Bassett, *The Essentials of Parliamentary Democracy* (1935) 116-117; David Held, *Models of Democracy* (1987), 67. Similarly the United States Supreme Court found in *Sweezy v New Hampshire* 354 US 234 (1957) that free association was part of the political freedom

The authors accept the existence of such a freedom remains contentious. However, if and when the High Court eventually accepts that such a freedom exists, it could be relevant to a consideration of the constitutional validity of proposed reforms to electoral financing. Specifically, the argument would be that by restricting an individual's ability to donate to a particular political party, the limit is likely to have the effect of implicitly limiting the likelihood of an individual associating with others in terms of political parties.

Should a distinction be made between donations and campaign expenditure?

The Green Paper considers the question of limits on donations separately from questions of limits on actual campaign expenditure.⁹³ The American cases, including the leading case of *Buckley v Valeo*,⁹⁴ draw a distinction between the two types of regulation, allowing limits to be imposed on one but not the other.⁹⁵ One argument against such differential treatment is that the candidate is effectively the medium through which the political views of the donor are communicated. The donor can speak directly to the people, or indirectly through a candidate. In *Buckley*, the Supreme Court recognised a distinction between, on the one hand, limits on donations and on the other, caps on spending, in these terms:

By contrast with a limitation upon expenditure for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. [A] limitation on the amount of money a person may give to a candidate or campaign organisation thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While

upon which democracy was based. It has been noted that advocacy is improved by group association: *National Association for the Advancement of Coloured People v Alabama* 357 US 449 (1958), 460.

⁹³ Chapter 7 is about bans or caps on private funding. Chapter 8 concerns caps on expenditure.

⁹⁴ 424 U.S. 1 (1976).

⁹⁵ This distinction continues to be made: see, for example, *Randall v Sorrell* 126 S Ct 2479 (2006); *Federal Election Commission v Wisconsin Right to Life Inc* 127 S Ct 2652 (2007).

contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.⁹⁶

By contrast, it might be argued that both are forms of political speech, and should be entitled to equal protection. In the broader view of things, surely the consequences of allowing limits on donations will, all other matters being equal, effectively limit total spending.⁹⁷ As Burger CJ in dissent observed in the *Buckley* case, donations made are intended to be expended, and are expended, by the candidate in communicating a political view. This view is one with which the authors agree. It is difficult to justify making the distinction between the two as sharply as the Court expressed it in *Buckley*, since surely the effect of limiting donations will, sooner or later, end up curbing the total expenditure, exactly the type of measure the Supreme Court would not accept in *Buckley*. Arguably, a sharp distinction should not be made between the two.

Conclusion

At this stage, the scope of the government's proposed federal electoral reforms is unknown. The first Green Paper was an initial step towards donation, funding and expenditure reforms, while a second Green Paper proposing ideas and options to strengthen federal electoral processes was released on 23 September 2009. The federal government called for public submissions in response to the first Green Paper and much may depend on the nature of that response and the content of the submissions.

Furthermore, the passage of the revised Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2009 may be a long time coming. The Bill was introduced to the House of Representatives on 12 March 2009, where it was passed on 16 March 2009. It was introduced to the Senate on 17 March 2009, but its second reading was adjourned on the same day and the Bill has not progressed since then.⁹⁸

⁹⁶ *Buckley v Valeo* 424 U.S. 1 (1976).

⁹⁷ It may increase third party expenditure, unless that is also proscribed or is included within the limit.

⁹⁸ See the background to the Bill in Nicholas Horne, Parliamentary Library, 'Bills Digest No 115 2008-09 in relation to the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2009', 18 March 2009, 3-4. Australian Parliament House <<http://www.aph.gov.au/library/pubs/bd/2008-09/09bd115.htm>> at 8 April 2009.

Even if it is passed, the question of whether it will address the problems with federal electoral funding and campaign finance schemes which have been considered in this article is difficult to answer. As Deborah Cass and Sonia Burrows have noted, campaign finance regulation in Australia over the past 100 years has been a case of 'catch-up politics', with new loopholes opening as soon as others are closed.⁹⁹ Indeed, according to the AEC, a comprehensive review of federal electoral legislation and the principles underpinning the legislation may be required.¹⁰⁰

Clearly, it is still 'early days' for the federal government's proposed electoral reforms. Nonetheless, the proposed reforms raise issues which are important and relevant to all jurisdictions. These issues, together with any questions they raise, deserve to be carefully and thoroughly addressed. It is for this reason that this article has considered a number of the issues and arguments that are likely to be raised in the public debate over electoral reforms and has reached some conclusions. It is our view that the government should be prepared to consider some restrictions in the areas of private donations and electoral spending. However, in a liberal democracy such as Australia, where an individual's right to freedom of expression is valued and safeguarded, any restrictions which are eventually imposed must be the result of careful consideration and capable of full justification.

⁹⁹ Deborah Z Cass and Sonia Burrows, above n 3, 523.

¹⁰⁰ Australian Electoral Commission, above n 32, [1.4].

