

SUBMISSION TO JSCEM'S INQUIRY INTO 2010 FEDERAL ELECTION

DR. JOO-CHEONG THAM*

* Associate Professor, Melbourne Law School. This submission draws heavily upon various chapters of Joo-Cheong Tham, *Money and Politics: The Democracy We Can't Afford* (UNSW Press, 2010). Thank you to Clara Jordan-Baird for excellent research assistance.

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LIST OF RECOMMENDATIONS

- Recommendation 1:* The federal political funding scheme be based on the following principles:
1. Protecting the integrity of representative government;
 2. Promoting fairness in politics;
 3. Supporting parties to perform their functions;
 4. Respect for political freedoms.
- Recommendation 2:* COAG and the electoral matters committees should liaise to ensure that federal, State and Territory laws governing political funding are properly integrated.
- Recommendation 3:* The Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010 (Cth) should be enacted subject to the following changes:
- ‘due diligence’ defences be available in relation to offences; and
 - the definition of ‘political expenditure’ (which applies to third parties) be tightened up.
- Recommendation 4:* Registered political parties and associated entities be required to provide:
- expenditure disclosure returns; and
 - donation reports (modelled upon the British system).
- Recommendation 5:* Weekly donations reports be required during the election period.
- Recommendation 6:* Federal election spending limits should apply 2 years and 5 months after the previous election.
- Recommendation 7:* Federal spending limits should apply to ‘electoral expenditure’ under the *Commonwealth Electoral Act* with an exclusion for expenditure incurred substantially in respect of an election to members of Parliament other than the Commonwealth Parliament.
- Recommendation 8:* Federal spending limits should apply to parties, candidates and third parties.
- Recommendation 9:* There should be federal spending limits applying at the

national, State and electorate levels.

Recommendation 10: Federal contribution limits should be introduced based on limits that apply under *EFED Act* with the following modifications:

- the limits should be set at a lower level (e.g. \$1,000 per annum); and
- the limits applying to the party subscriptions exclusion should be lower (e.g. \$500 per member).

Recommendation 11: There should be a compulsory third party registration scheme at the federal level requiring third parties that spend more than \$2,000 in ‘electoral expenditure’ during the period which election spending limits apply to register.

Recommendation 12: This scheme should make public the following information regarding registered third parties:

- their constitutions and decision-making structures (including membership policies);
- the relationships third parties have with other third parties as well as political parties should also be made public.

Recommendation 13: Third parties should be required to seek specific authorisation from their members (or shareholders) before making political contributions or engaging in political spending on a periodic basis.

Recommendation 14: There should be a Party and Candidate Support Fund comprising three components:

- election funding payments (calculated according to a tapered scale based on the number of first preference votes with 20% of electoral expenditure floor);
- annual allowances (calculated according to number of first preference votes and membership);
- policy development grants (calculated according to number of first preference votes and membership).

- Recommendation 15:*
- The rules governing federal parliamentary entitlements should:
 - be made accessible and transparent; and
 - clearly limit the use of such entitlements to the discharge of parliamentary duties and prevent their use for electioneering.
 - The amount of federal parliamentary entitlements should not be such so as to confer an unfair electoral advantage on federal parliamentarians.
- Recommendation 16:* The report of the Parliamentary Entitlements Review Committee should be released as soon as possible.
- Recommendation 17:* Recommendations 10 and 12 of the Senate Finance and Public Administration Committee in relation to the disclosure of information concerning government advertising should be fully adopted.
- Recommendation 18:* Federal government advertising guidelines and rules should be in a legislative form.
- Recommendation 19:* There should be a general ban on government advertising during the period that election spending limits apply.
- Recommendation 20:* Paragraph 5 of the *Guidelines on Campaign Advertising by Australian Government Departments and Agencies* which allows for exemption by Cabinet Secretary should be deleted.

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I INTRODUCTION

The federal funding and disclosure scheme was enacted in 1983.¹ Since then – more than two and half decades ago – there has not been fundamental change to the scheme. Indeed, no attempt has been made at such fundamental change since 1991 when the *Political Broadcasts and Political Disclosures Act 1991* (Cth) which sought to ban political advertising and institute a regime of ‘free-time’ was struck down as constitutionally invalid by the High Court in *Australian Capital Television Pty Ltd v Commonwealth* (ACTV).²

This stasis has resulted in federal regulation of political funding being ‘by international standards ... decidedly laissez faire’.³ Unlike Canada, New Zealand and the United Kingdom, there are no limits on election spending. Moreover, the ACTV decision meant that Australia does not have a ban on federal political advertising⁴ like that which applies in New Zealand and the United Kingdom. Whereas Canada and the United States have extensive limits on the amounts that can be contributed by individuals and organisations, unfettered freedom to contribute largely prevails at the federal level. Even the degree of transparency achieved by Australia’s federal disclosure regime compares unfavourably. For instance, the schemes in Canada, the United Kingdom and the United States mandate far more frequent disclosure than the annual disclosures that are required in Australia and New Zealand.

The characterisation of federal regulation as laissez faire (or relatively so) is *not* a compelling case for increased regulation. The absence of regulation in itself is not sufficient cause for concern. We should resist what Graeme Orr has perceptively described as the ‘regulatory instinct’⁵ that automatically deems such absence as a lack that needs to be remedied by more legislation – not least because intensity of regulation does not necessarily produce better outcomes. Indeed, if the parties and

¹ *Commonwealth Electoral Legislation Amendment Act 1983* (Cth) cl 113, inserting *Commonwealth Electoral Act 1918* (Cth) pt XVI.

² (1992) 177 CLR 106.

³ Graeme Orr, ‘Political Finance Law in Australia’ in K D Ewing and Samuel Issacharoff (eds), *Party Funding and Campaign Financing in International Perspective* (Hart, 2006) 99, 100.

⁴ ACTV (1992) 177 CLR 106.

⁵ See Graeme Orr, ‘The Law Comes to the Party: the Continuing Juridification of Australian Political Parties’ (2000) 3 *Constitutional Law and Policy Review* 41.

candidates were able to self-regulate to ensure fairness and integrity, this would be cause for celebration and testimony to a deep and robust democratic culture.

The facts, however, speak to the failure of self-regulation in the area of political finance. As the rest of this submission will document, this failure traverses the whole spectrum of political funding encompassing private funding and public funding, political contributions and political spending. It is this gross failure in the context of a laissez-faire system that provides the case for reform.

The case for reform is all the more compelling given that the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) (*EFED Act*) now provides for a comprehensive scheme of disclosure obligations, contribution and expenditure limits and a reconfigured public funding scheme. The Queensland Government has also signalled that it will follow New South Wales' (NSW) lead.⁶ These measures are significant not only because they provide possible models but also because they suggest that one set of obstacles perceived to stand against political funding reform can be overcome - constitutional considerations, in particular those relating to the implied freedom of political communication. The measures suggest that these considerations, whilst they should be taken seriously especially in the design of the measures, should not be treated as being fatal to fundamental change.⁷

There are four substantive parts to this submission:

- Part II sets out the aims of a democratic political funding regime;
- Part III explains the funding and spending patterns of federal political funding;
- Part IV identifies key problems with federal political funding and its regulation; and
- Part V details a blueprint for reform.

⁶ Queensland Government, *Reforming Queensland's Electoral System* (2010) <<http://www.premiers.qld.gov.au/community-issues/open-transparent-gov/assets/electoral-reform-whitepaper.pdf>>.

⁷ This submission examines these issues in greater depth at text accompanying n 334-360, 429-440.

II AIMS OF A DEMOCRATIC POLITICAL FUNDING REGIME

One of the most important recommendations made by the NSW Joint Standing Committee on Electoral Matters in its 2010 report on the public funding of election campaigns was the enactment of a new Act on political funding based on four governing principles:

1. Protecting the integrity of representative government;
2. Promoting fairness in politics;
3. Supporting parties to perform their functions;
4. Respect for political freedoms.⁸

These principles should also be adopted in relation to the federal political funding scheme.

Recommendation 1: The federal political funding scheme be based on the following principles:

1. Protecting the integrity of representative government;
2. Promoting fairness in politics;
3. Supporting parties to perform their functions;
4. Respect for political freedoms.

The following discussion elaborates upon these principles.

A *Protecting the Integrity of Representative Government*

As the Royal Commission on WA Inc rightly observed, the ‘architectural principle’ of the Australian governmental system is that elected officials are accountable to Australian citizens and expected to act in the public interest.⁹ The first element of this principle, *accountability*, most importantly requires that elected officials be in ‘a

⁸ Joint Standing Committee on Electoral Matters, Parliament of New South Wales, *Inquiry into the Public Funding of Election Campaigns* (2010) 3, recommendation 3. These four principles were proposed by the New South Wales Electoral Commissioner (see Joint Standing Committee on Electoral Matters, *Inquiry into the Public Funding of Election Campaigns* 3 recommendation 3) and detailed in Joo-Cheong Tham, *Towards a More Democratic Political Funding Regime in New South Wales* (2010) 9-25

<http://www.efa.nsw.gov.au/__data/assets/pdf_file/0009/66465/Towards_a_More_Democratic_Political_Finance_Regime_in_NSW_Report_for_NSW_EC.pdf>

⁹ Western Australia, WA Inc Royal Commission, *Report on WA Inc: Part II*, (1992) 1–10.

constant condition of responsiveness' to the citizens.¹⁰ There is no such responsiveness without regular elections.¹¹ Not only should there be responsiveness during elections but also between elections, as was recognised by High Court Chief Justice Mason in *Australian Capital Television Pty Ltd v Cth*:

the representatives who are members of Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as representatives of the people. And in the exercise of these powers the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act.¹²

Public accountability is also fundamentally concerned with public confidence - accountability to the public implies their trust or confidence. Hence, elected officials 'should act so as to create and maintain public confidence in their actions and in the legislative process'.¹³

The second element of this principle, *acting in the public interest*, can, of course, take on various meanings and is (and should be) hotly contested in the political arena.¹⁴ However, what is perhaps central and uncontroversial is the merit principle: elected officials 'should act on reasons relevant to the merits of public policies or reasons relevant to advancing a process that encourages acting on such reasons'.¹⁵

Political funding can undermine the principles of accountability and acting in the public interest by leaving in its wake particular kinds of corruption.¹⁶ Secrecy of such

¹⁰ Hanna Fenichel Pitkin, *The Concept of Representation* (University of California Press, 1967), 233 (emphasis original).

¹¹ *Ibid* 234.

¹² *ACTV* (1992) 177 CLR 106, 138 (emphasis added).

¹³ Dennis Thompson, *Ethics in Congress: From Individual to Institutional Corruption* (Brookings Institution, 1995) 70–71.

¹⁴ Some of these disagreements stem from the complex character of political representation, see Pitkin, above n 10, Ch 10. Speaking of the American context, for instance, Thompson has spoken of '[the] classic tension in representative government ... [t]he dual nature of Congress – as an assembly of local representatives and as a lawmaking institution': Thompson, above n 13, 69.

¹⁵ Thompson, above n 13, 20.

¹⁶ As the following discussion indicates, there are various shades and meanings of corruption: see, for example, Arnold J Heidenheimer, Michael Johnston and Victor T LeVine (eds) 'Introduction' in Arnold J Heidenheimer, Michael Johnston and Victor T LeVine (eds), *Political Corruption: A*

funding can lead to *corruption of electoral processes*. Effective accountability through elections requires informed voting – citizens will not be able to cast informed votes if they are in the dark as to the finances of the parties and candidates. A democratic political finance regime should be an antidote to this type of corruption ‘by providing details of the funding sources of political parties’.¹⁷ As Kim Beazley, when proposing the federal funding and disclosure regime as Special Minister for State, emphasised:

The whole process of political funding needs to be out in the open ... Australians deserve to know who is giving money to political parties and how much.¹⁸

The other way political funding threatens the integrity of representative government is through *corruption of public office* or, put differently, the ‘improper use of public office for private purposes’.¹⁹ There are three main forms of such corruption. First, there is *corruption through graft* when the receipt of private funds directly leads to political power being improperly exercised in favour of contributors. Bribery of public officials is a prime instance of such corruption. Such corruption was at issue in WA Inc and the Fitzgerald Inquiry into the Joh Bjelke-Petersen Queensland Government. Similarly, it was of such corruption that former Queensland Minister, Gordon Nuttall, was found guilty.²⁰

Second, there is *corruption through undue influence*. Such corruption is much more insidious and constitutes a species of conflict of interest. Substantial political

Handbook (Transaction Publishers, 1989) 3, 7–13; Syed Hussein Alatas, *Corruption: Its Nature, Causes and Functions*, (Avebury, 1990) 1–5; Oskar Kurer, ‘Corruption: An Alternative Approach to its Definition and Assessment’ (2005) 53 *Political Studies* 222.

¹⁷ Joint Standing Committee on Electoral Matters, Parliament of Australia, *Interim Report on the Inquiry into the Conduct of the 1993 Election and Matters Related Thereto: Financial Reporting by Political Parties* (1994) [7].

¹⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 1983, 2215 (Kim Beazley). For similar sentiments, see Electoral and Administrative Review Commission, *Report on Public Registration of Political Donations, Public Funding of Election Campaigns and Related Issues* (1992) [2.5].

¹⁹ Thompson, above n 13, 7.

²⁰ Michael McKenna and Sarah Elks, ‘Corrupt ex-minister Gordon Nuttall in jail facing extra charges’, *The Australian* (Australia), 16 July 2009.

contributions tend to create a conflict between private interests and public duty²¹ and, therefore, create the possibility that holders of public office will give undue weight to the interests of their financiers rather than deciding matters on their merits and in the public interest.²² In contrast with corruption through graft, corruption through undue influence does not require explicit bargains or that a *specific act* results from the receipt of funds. Rather, it arises when the structure of incentives facing public officials results in *implicit bargains* of favourable treatment or a *culture* of delivering preferential treatment to moneyed interests. As the Bowen Committee on Public Duty and Private Interest explained:

Conflict of interest generally differs from bribery because it does not require a transaction between two parties. It needs only one person, the officeholder possessing the interest in point. The distinction between bribery and this category ... is that, whilst a benefit conferred as a bribe is directed to a particular transaction or series of transactions, gifts, hospitality or travel may be provided to create *a general climate of goodwill* on the part of the beneficiary. The 'debt' might not be called in for years or ever.²³

Corruption through undue influence manifests itself in various ways. More blatant forms involve the sale of political access and influence (examined in Part IV). Here, formal and informal ways for money to influence politics come together in an unsavoury mix: some businesses secure favourable hearings by buying access and influence and also through the lingering effect of their contributions (a phone call from a big donor, for example, being more likely to be returned than one from a constituent). With perceptions of the merits of any issue invariably coloured by the arguments at hand, preferential hearings mean that when judging what is in the 'public interest', the minds of politicians will be skewed towards the interests of their financiers.²⁴

²¹ Daniel Lowenstein, 'On Campaign Finance Reform: The Root of All Evil is Deeply Rooted' (1989) 18 *Hofstra Law Review* 301, 323–29.

²² Charles Beitz, 'Political Finance in the United States: A Survey of Research' (1984) 95(1) *Ethics* 129, 137; Thomas F Burke, 'The Concept of Corruption in Campaign Finance Law' (1997) 14 *Constitutional Commentary* 127; Thompson, above n13, 55.

²³ Committee of Inquiry Concerning Public Duty and Private Interest, *Public Duty and Private Interest* (1978) 14 (emphasis added).

²⁴ See Yasmin Dawood, 'Democracy, Power, and the Supreme Court: Campaign Finance Reform in Comparative Context' (2006) 4(2) *International Journal of Constitutional Law* 269, 280–81.

The third form of corruption of public office is *corruption through the misuse of public resources*. This occurs when public resources are used for illegitimate purposes. Such purposes might be grounded in personal or party interests. For instance, the party in government might use public monies to pay for advertising principally aimed at boosting electoral fortunes (see Part IV). More subtly, a governing party might use information secured through public office not for official purposes but, in an effort to fundraise for the parties, for instance, through ‘off the record’ briefings given by Ministers to fee-paying businesses.

The last example illustrates how these various forms of corruption of public office are not mutually exclusive and, indeed, may overlap – secret briefings by Ministers to their business patrons involves not only corruption through the misuse of public resources but also corruption through undue influence. Similarly, this example highlights how corruption stemming from private funding can intertwine with corruption related to public resources; this is not surprising considering that the motivation for corruption due to private funding tends to arise when the party or politician enjoys some degree of public power (and therefore, access to public resources).

A political finance regime should aim to prevent all of these forms of corruption of public office. This was a point well recognised by Kim Beazley. In his Second Reading Speech for the Political Broadcasts and Political Disclosures Bill 1991 (Cth) – the Bill that introduced a ban on political advertising and compelled (?) annual disclosure returns – Beazley noted that:

There is no greater duty upon the representatives of the people in a democratic society than the duty to ensure that they serve all members of that society equally. This duty requires government which is *free of corruption and undue influence*.²⁵

Not only should governments be free of graft and undue influence but:

²⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1991, 3477 (Kim Beazley, Minister for Transport and Communications).

The public is entitled to be assured that *parties and candidates* which make up the government or *opposition of the day* are free of undue influence or improper outside influence.²⁶

These various forms of corruption of public office can be more fully understood through the distinction between individual corruption and institutional corruption. We can understand *individual corruption* as occurring when public officials render undeserved services in exchange for personal gain.²⁷ In these cases, the necessary link between the services and the gain is provided by corrupt motives.²⁸ Corruption through graft (for example, bribery of public officials), typically involves cases of individual corruption. With *institutional corruption*, on the other hand, ‘the gain a [public official] receives is political rather than personal, the service the member provides is procedurally improper, and the connection between the gain and the service has a tendency to damage the legislature or the democratic process’.²⁹

Whilst corruption through graft tends to take the form of individual corruption, the other forms of corruption – whether it be corruption of electoral processes, corruption through undue influence or corruption through the misuse of public resources – can take either the form of individual or institutional corruption. For example, the misuse of public resources like parliamentary entitlements and government advertising often take the form of institutional corruption (see Part IV).

Accordingly, a democratic political finance regime should aim to tackle both individual and institutional corruption. A focus or preoccupation with individual corruption (like corruption through graft) can lead to the dangerous neglect of institutional corruption through undue influence and misuse of public resources. While ‘more ambiguous’, the latter is ‘often [a] more corrosive kind of corruption that

²⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1991, 3482 (Kim Beazley, Minister for Transport and Communications) (emphasis added). For similar sentiments, see Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 1983, 2213-15 (Kim Beazley).

²⁷ See Thompson, above n 13, 28.

²⁸ Thompson, above n 13, 103–8.

²⁹ *Ibid* 7.

takes place within the heart of the institution’³⁰ because it can be ‘so closely related to conduct that is a perfectly acceptable part of political life’³¹ or ‘the way things are done’.

In addressing institutional corruption, a political finance regime should be based on the ‘appearance’ standard. As the Bowen Committee stated:

there is a test ... in judging what is proper in particular circumstances: the test of appearance. Does that interest look to the reasonable person the sort of interest that may influence?³²

The appearance standard rests on two related grounds. First, it protects an essential element of accountability, public confidence in governmental processes. One of its premises is that ‘under certain institutional conditions the connection between contributions and services *tends* to be improper’,³³ and that this tendency erodes public confidence in representative institutions. In this context, as the then Queensland Integrity Commissioner Gary Crooke put it, ‘[p]erception is reality’.³⁴ The second ground is evidential and is based on the premise that ‘when confronted with a connection that exhibits these tendencies, citizens cannot be reasonably expected to obtain the evidence they need to judge whether the connection is actually corrupt’.³⁵ These grounds explain why breach of the appearance standard is ‘a distinct wrong, independent of and no less serious than the wrong of which it is an appearance’.³⁶ They also highlight the importance of transparency or, more accurately, reveal how the secrecy of political funding breaches the appearance standard: political contributions given in secret not only tend to involve improper conduct but also defeat reasonable attempts by citizens to properly assess whether there was corrupt conduct.

³⁰ Ibid 25.

³¹ Ibid 7.

³² Committee of Inquiry Concerning Public Duty and Private Interest, above 23, 11. See also Thompson, above n 13, 32.

³³ Thompson, above n 13, 124.

³⁴ Queensland Integrity Commissioner, *Annual Report 2007–08* (2008) 8.

³⁵ Thompson, above n 13, 124.

³⁶ Ibid.

B *Promoting Fairness in Politics*

The principle of political equality lies at the heart of democracy. By insisting that each citizen has equal political status, this principle not only implies that political freedoms be formally available to all citizens but also as political philosopher, John Rawls has argued, that such freedoms have ‘fair value’.³⁷ As Rawls has put it, ‘[t]he fair value of the political liberties ensures that citizens similarly gifted and motivated have roughly an equal chance of influencing the government’s policy and of attaining positions of authority *irrespective of their economic and social class*’.³⁸ The aim here is to ensure that citizens have ‘a genuine chance to make a difference’³⁹ – they should have leverage over the political process.

This aim is perhaps the most difficult challenge facing political finance regimes in capitalist economies like Australia. The value of political freedoms will depend upon background inequalities. Specifically, significant social and economic inequalities will undermine the value of such freedoms for those who are marginalised – the poor, the disadvantaged, the powerless. In such contexts (as in the case of Australia), there is a serious likelihood that such freedoms, while formally available, cannot be meaningfully exercised by many.⁴⁰ Indeed, Rawls has observed that laissez faire capitalism ‘rejects ... the fair value of equal political liberties’.⁴¹

Ensuring the fair value of political freedoms will involve a radical redesign of Australia’s social, economic and political institutions, a task that clearly cannot be borne alone by a political finance regime. At the same time, proper design of a political finance regime is crucial to ensuring fair value of political liberties⁴² and an over-riding aim of such a regime should be to ensure fairness in politics.

³⁷ John Rawls, *A Theory of Justice* (Oxford University Press, revised ed, 1999) 225; John Rawls, *Justice as Fairness: A Restatement* (Belknap Press of Harvard University Press, 2001) 149. Carmen Lawrence has noted that ‘[d]espite the otherwise general equality in voting power, many are suspicious that not all citizens are equally able to influence their representatives’: Carmen Lawrence, ‘Renewing Democracy: Can Women Make a Difference?’ (2000) 12 (4) *The Sydney Papers* 54, 58.

³⁸ Rawls, *Justice as Fairness: A Restatement*, above n 37, 46 (emphasis added).

³⁹ Ronald Dworkin, ‘Equality, Democracy, and Constitution: We the People in Court’ (1990) 28(2) *Alberta Law Review* 324, 338.

⁴⁰ Norman Daniels, ‘Equal Liberty and Unequal Worth of Liberty’ in Norman Daniels (ed), *Reading Rawls: Critical Studies on Rawls’ A Theory of Justice* (Basil Blackwell, 1975) 253, 253–81.

⁴¹ Rawls, *Justice as Fairness: A Restatement*, above n 37, 137.

⁴² See *ibid* 149.

This aim has several key elements. First, a political finance regime should facilitate fair access to the public arena, that is, the forums in which public opinion and policy is articulated, influenced and shaped. Citizens and their political organisations will only obtain leverage when there is such access. Such access moreover provides the principal guarantee that the public agenda is responsive to the opinions of the citizenry.⁴³ In other words, fair access to the public arena secures public accountability.

The ‘public arena’ is, of course, a multifarious and complex notion with public opinion and policy expressed and shaped in numerous ways including door-to-door campaigning, party newsletters, lobbying and, increasingly, advertisements through the mass media. It is also a ‘limited space’⁴⁴ where the loudness of one voice can drown out others. In particular, those with far superior means of communication can exclude less resourced citizens or groups. In elections, for example, parties with the money to take out expensive advertising able to reach out to mass audiences will tend to receive a better hearing amongst the public than their less well-off competitors which rely upon letter-boxing and door-knocking. Preventing such unfairness is one of the central aims of a democratic political finance regime.

The importance of access to the public arena stems from the deliberative nature of democracy. Democracy is not simply a matter of the majority getting what it wants. Such crude majoritarianism fails to recognise that political competition involves – at its core – a battle of rival ideas, policies and ideologies: politics is conducted through debate and discussion. Such deliberation is the basis upon which citizens engage in the *making of laws* by arguing their various positions and seeking to influence others. Deliberation also plays another role. Many citizens will be bound by laws with which they disagree. Deliberation is a process of *justifying* laws and policies to the public. It is through such justification that respect is accorded to citizens as *subjects of laws* who may or may not agree with those laws.⁴⁵ In this sense, citizens are ‘the “makers” and the “matter” of politics’.⁴⁶

⁴³ See Charles Beitz, *Political Equality: An Essay in Democratic Theory* (Princeton University Press, 1989).

⁴⁴ Rawls, *Justice as Fairness: A Restatement*, above n 37, 150.

⁴⁵ See Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton University Press, 2004) 4–5. For a fuller discussion of the purposes of democratic deliberation, see Gutmann and

The centrality of democratic deliberation explains why the principle of political equality – the notion that each citizen has equal political *status* – does not imply equal political power, that is, each citizen having the same amount of political *power*. In rare situations, equal political power is mandated by the principle of political equality. Voting rights provide a relatively uncontroversial example. With these rights, we can see how political equality finds expression in the key objective advanced by the original *Commonwealth Electoral Act 1918*, that of ‘equality of representation throughout the Commonwealth’.⁴⁷ In the realm of franchise, we can see the force of Harrison Moore’s observation that the ‘great underlying principle’ of the Constitution is that citizens have ‘each a share, and an equal share, in political power’.⁴⁸

In other realms of political activity (including that of political funding), however, equal political power is generally not a requirement of political equality. Democratic deliberation means that not all ideas or voices are given equal weight. Ideally, superior ideas gain greater support while their lesser competitors fall by the wayside. In the context of political deliberation, what political equality generally requires is conditions of fair deliberation,⁴⁹ conditions that only exist with fair access to the public arena (discussed above).

Most importantly perhaps, a political finance regime should promote fairness in electoral contests. As the Royal Commission on WA Inc emphasised:

The first institution of representative government, the Parliament, must be constituted in a way which fairly represents the interests and aspirations of the community itself. *The electoral processes must be fair.*⁵⁰

Thompson, *Why Deliberative Democracy?* (Princeton University Press, 2004) 10–13 and Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Belknap Press, 1996) 41–44.

⁴⁶ Beitz, above n 43, 98.

⁴⁷ Commonwealth, *Parliamentary Debates*, Senate, 30 January 1902, 9529 (Richard O’Connor).

⁴⁸ Harrison Moore, *The Constitution of the Commonwealth of Australia*, (John Murray, 1st ed, 1902) 329. This statement was cited with approval in *ACTV* (1992) 177 CLR 106, 139–40 (Mason CJ).

⁴⁹ See discussion in Beitz, above n 43, 12–14, 15–16.

⁵⁰ WA Inc Royal Commission, above n 9, [1]–[10] (emphasis added). See also Corruption and Crime Commission of Western Australia, *Report on the Investigation of Alleged Public Sector Misconduct Linked to the Smiths Beach Development at Yallingup* (2007) 90.

Fairness in this context implies fair competition amongst candidates and parties.⁵¹ This, firstly, means that a political finance regime should ensure open access to electoral contests. It should prevent the costs of meaningful access to the public arena escalating to prohibitive levels. It should be vigilant to the danger that meaningful access will be placed beyond the reach of most citizens through the ‘competitive extravagance’⁵² of parties that seek to outbid each other by spending excessive amounts in campaigning. This may warrant election spending limits, especially in light of escalating levels of campaign spending (see Part III). More than a century ago, Senator O’Connor, when introducing the original *Commonwealth Electoral Act*, justified the candidate expenditure limits enacted by the Act in this way:

If we wish to secure a true reflex of the opinions of the electors, we must have ... a system which will not allow the choice of the electors to be handicapped for no other reason than the inability of a candidate to find the enormous amount of money required to enable him (sic) to compete with other candidates.⁵³

Ensuring meaningful access to the public arena may also require ‘compensating steps’,⁵⁴ for example, public funding so that the electoral contest is open to ‘worthy parties and candidates [that] might not [otherwise] be able to afford the considerable sums necessary to make their policies known’.⁵⁵ New candidates and parties may need to be financially assisted so as to ensure that elections are open and not merely restricted to the established parties.

A political finance regime will also promote fair electoral competition by advancing ‘fair rivalry’⁵⁶ between the main parties. Fair rivalry implies an absence of ‘[a]

⁵¹ The notion being emphasised here is of fair competition and not competition per se. A competitive system, even a highly competitive one, is not necessarily fair: Beitz, above n 43, 200–1.

⁵² T H Marshall, ‘Citizenship and Social Class’ in T H Marshall, *Class, Citizenship and Social Development* (Doubleday, 1964) 65, 90.

⁵³ Commonwealth, *Parliamentary Debates*, Senate, 30 January 1902, 9542 (Richard O’Connor).

⁵⁴ Rawls, *A Theory of Justice*, above n 37, 198.

⁵⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 1983, 2215 (Kim Beazley). This specific aim is long-standing.

⁵⁶ Keith Ewing, *The Funding of Political Parties in Britain* (Cambridge University Press, 1987) 182.

serious imbalance in campaign funding'⁵⁷ between the major and minor political parties. As Ewing has argued, 'no candidate or party should be permitted to spend more than its rivals by a disproportionate amount'.⁵⁸ Fair rivalry amongst the major parties, that is, the parties contending for government, may demand more than the absence of a gross disparity in resources. The most important choice citizens make in an election is to choose the party or coalition that will form government. For this choice to be meaningful in Australia's predominantly two-party system, the two alternatives may need to be equally represented. If so, then fair rivalry amongst the major parties would imply a situation approximating 'equality of arms'.

Also, there should be fairness between the electoral contestants, or the political parties and candidates, and other political participants such as lobby groups, trade unions, businesses and other non-government organisations. The latter, often referred to as third parties in electoral law jargon, should, firstly, have adequate access to the public arena as they play an essential role in elections. Their role should, however, be understood against the central function of elections as a process of determining who is to govern. This function suggests that the electoral contestants have a privileged (but not dominant) place during election time. At the very least, the role of electoral contestants should not be swamped by third parties. For example, third parties should not be able to outspend political parties and candidates. Neither should political parties and candidates be subject to unfair speech by third parties, for example, political attacks made by groups whose identities are not publicly known.

The principle of fairness also extends beyond electoral contests to governmental processes in between elections. The role played by elections is crucial but nevertheless limited. Elections are usually contested on broad issues. Moreover, the electoral policies of parties are sometimes vague and allow them significant room to manoeuvre once in office. This means that *electoral politics* does not always govern what parties do in parliament (*parliamentary politics*), or what a party in office does

⁵⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 1983, 2213 (Kim Beazley).

⁵⁸ Keith Ewing, *Money, Politics and Law: A Study of Electoral Finance Reform in Canada* (Clarendon Press, 1992) 18.

in relation to executive action (*policy politics*).⁵⁹ All three types of politics, however, should be subject to the principle of fairness. This underscores the importance of fair access to the public arena including avenues to influence the exercise of political power such as lobbying.

In this context, we can see a close connection between unfairness in politics and the various forms of corruption. It was explained earlier that individual corruption occurs when public officials render undeserved services in exchange for personal gain. Institutional corruption is involved when a public official receives a political gain while rendering a procedurally improper service. In the case of individual corruption, service will be undeserved when there is departure from the merit principle. Proper adherence to this principle, however, requires observance of fair processes; only in this way can there be any assurance that a robust notion of merit is articulated and applied. Similarly in the case of institutional corruption, fair processes are an imperative of procedural propriety.

C *Supporting Parties in Performing their Functions*

In his major study of Australian political parties, Dean Jaensch observed:

There can be no argument about the ubiquity, pervasiveness and centrality of party in Australia. The forms, processes and content of politics – executive, parliament, pressure groups, bureaucracy, issues and policy making – are imbued with the influence of party, party rhetoric, party policy and party doctrine. Government is party government. Elections are essentially party contests, and the mechanics of electoral systems are determined by party policies and party advantages. Legislatures are party chambers. Legislators are overwhelmingly party members. The majority of electors follow party identification. Politics in Australia, almost entirely, is party politics.⁶⁰

⁵⁹ For this distinction, see Ian Marsh, *Beyond the Two Party System: Political Representation, Economic Competitiveness and Australian Politics* (Cambridge University Press, 1995) 35–43.

⁶⁰ Dean Jaensch, *Power Politics: Australia's Party System* (Allen & Unwin, 1994) 1–2.

Parties are central to Australia's democracy and, indeed, 'modern democracy is unthinkable save in terms of parties'.⁶¹ There is little doubt then that Australia's political finance regime should be rooted in the centrality of political parties. This means that such a regime should ensure that parties are adequately funded. Adequacy, though, does not mean what the parties want (or think they need for campaigning purposes) and must be strictly judged against the functions that parties ought to perform.

It may be said, however, that the only functions that parties perform are as vehicles to gain political power. This is true but only in part. What it obscures are the various democratic functions that parties perform. Foremost, political parties have *representative functions*, that is, functions aimed at reflecting public opinion. They perform an *electoral function* whereby political parties, in their efforts to secure voter support, respond to the wishes of the citizenry. They also have a *participatory function* as they offer a vehicle for political participation through membership, meetings and engagement in the development of party policy. The relationship between political parties and the citizenry is not, however, one way. As Giovanni Sartori has noted, '[p]arties do not only *express*; they also *channel*'.⁶² Alongside their representative functions, political parties also perform an *agenda-setting function* in shaping the terms and content of political debates. For example, the platform of a major party influences, and is influenced by, public opinion. Political parties further perform a *governance function*. This function largely relates to parties that succeed in having elected representatives. These parties determine the pool of people who govern through their recruitment and preselection processes. They also participate in the act of governing. This is clearly the case with the party elected to government and also equally true of other parliamentary parties as they are involved in the lawmaking process and scrutinise the actions of the executive government.

There are, of course, many other intermediary organisations, many of which perform one or more of these functions that have been ascribed to political parties. The media,

⁶¹ Elmer E Schattschneider, *Party Government* (Holt, Rinehart and Winston, 1942) 1. On the connection between different types of parties and democracy, see Gerald Pomper, 'Concept of Political Parties' (1992) 4(2) *Journal of Theoretical Politics* 143.

⁶² Giovanni Sartori, *Parties and Party Systems: A Framework for Analysis: Volume 1* (Cambridge University Press, 1976) 28 (emphasis original).

for example, clearly performs an agenda-setting function and, to a lesser and controversial extent, a responsive function. Non-government organisations, like interest groups, also perform responsive and agenda-setting functions while the public service obviously has a governance function. But no other institution or group *combines* these various functions. That is why Sartori is correct to argue that ‘[p]arties are *the* central intermediate and intermediary structure between society and government’.⁶³

D *Respecting Political Freedoms*

The aim of promoting fairness in politics implies respect for political freedoms. As noted earlier, this aim is directed at ensuring the fair value of political freedoms. However, given how deeply implicated such freedoms are in this area, in particular freedom of political expression and freedom of political association (as discussed below), respect for political freedoms deserves separate standing as a distinct end of a political finance regime.

1 *Respecting Freedom of Political Expression*

Freedom of political expression is essential for citizens to participate in democratic decision-making.⁶⁴ The reason is fairly obvious: democratic decision-making depends upon citizens being able to argue for their own views, to listen to the opinions of others, to debate and to dissent. At a most fundamental level, democratic deliberation depends on political expression.

Political funding can involve political expression in two fundamental ways. The giving of money itself by donors tends to be an act of political expression with the political contribution signalling support for a party or candidate (although not necessarily in a public manner). Moreover, money is an enabling resource for engaging in political expression: most of the essential tools of campaign communications (for example, pamphlets, posters and advertisements) have to be paid

⁶³ Ibid ix.

⁶⁴ In terms of freedom of *political* expression, the rationale based on democratic participation is the most pertinent and compelling, see Eric Barendt, *Freedom of Speech* (Oxford University Press, 2nd ed, 2005) vi, 18–19. See also Tom Campbell, ‘Rationales for Freedom of Communication’ in Tom Campbell and Wojciech Sadurski (eds), *Freedom of Communication* (Dartmouth, 1994) 17, 37–41.

for. It clearly follows that regulation of political funding throws up challenges for freedom of political expression. In Australia, these challenges also have constitutional significance as the High Court has implied a freedom of political communication into the *Commonwealth Constitution*.⁶⁵

In understanding these challenges, it is useful to distinguish between two aspects of freedom of political expression. There is, firstly, ‘freedom from’ which emphasises the absence of state regulation of political expression or, put differently, freedom from state interference in political discussion (the aspect with which the constitutional freedom is centrally concerned). The other aspect, ‘freedom to’, turns on the ability of citizens to actually engage in political expression. While ‘freedom to’ of course depends on ‘freedom from’, it requires more than just the absence of state regulation and extends to a range of factors, notably, the adequacy of resources to engage in political expression. Both aspects of freedom of political expression need to be taken into account – citizens should be significantly free from legal constraints on political activity *as well as* having a meaningful capacity to engage in such activity. In Rawls’ phraseology, freedom of political expression should not only be formally available to all citizens but should also have a fair value.

What follows is that respect for freedom of political expression does not dictate any particular formula or combination of ‘freedom from’ (state regulation) and ‘freedom to’. The desirable balance between them is often a complex matter depending not only on normative principles, but also the specifics of the factual context. Because proper respect for freedom of political expression is contingent on such specifics, such freedom does not create an in-principle bar against state regulation of political expression.⁶⁶

This point is sometimes obscured by excessive emphasis on the metaphor of the ‘marketplace of ideas’. This metaphor likens the political forum to a market for goods and services and suggests a ‘free’ market of political debate on the basis that the absence of state regulation will result in a rich diversity of ideas. With this metaphor, freedom of political expression is typically equated to ‘freedom from’. The essential

⁶⁵ See text accompanying nn 334-360, 429-440.

⁶⁶ See Beitz, above n 43, 209–13.

flaw of this metaphor (or at least uses of it) is that while it correctly takes into account state regulation, it ignores the structures of private power. It neglects the way that financial inequalities between citizens (in the context of expensive means of communications, for instance, radio and television) create blockages in accessing the public realm. These blockages mean that, rather than fostering a flourishing diversity of ideas, ‘freedom from’ (that is, an absence of state regulation of political expression) instead produces a political agenda biased in favour of powerful interests.⁶⁷ The result, for most citizens, is that whilst freedom of political expression is formally available, it has little or negligible value.

More useful metaphors for the public realm are those of a ‘town hall’ meeting⁶⁸ or ‘public square’ meeting. These metaphors suggest that the public realm is a limited space (only a limited number of persons can speak at a public meeting) that is not only governed by *state regulation* but also structures of *private power*. Further, it implies that state regulation has a role in setting out the rules and procedures for fair deliberation (like the rules of a public meeting).⁶⁹ Importantly, such regulation might be required to counteract the silencing effects of ‘private aggregations of power’.⁷⁰ As Owen Fiss eloquently put it:

It [the state] may have to allocate public resources – hand out megaphones – to those whose voices would not otherwise be heard in the public square. It may even have to silence the voices of some in order to hear the voices of the others.⁷¹

In terms of specific measures regulating political funding, protecting freedom of political expression may very well require state funding of parties and candidates and limits on political spending.

⁶⁷ See Stanley Ingber, ‘The Marketplace of Ideas: A Legitimizing Myth’ (1984) 1984 *Duke Law Journal* 1.

⁶⁸ This metaphor is famously used by Alexander Meiklejohn: Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (Harper & Brothers, 1948).

⁶⁹ The connection between political finance and democratic deliberation is powerfully made by Gutmann and Thompson: Gutmann and Thompson, *Democracy and Disagreement*, above n 45, 134; Gutmann and Thompson, *Why Deliberative Democracy*, above n 45, 48–49. See also Ian Shapiro, ‘Enough of Deliberation: Politics is about Interests and Power’ in Stephen Macedo (ed), *Deliberative Politics: Essays on Democracy and Disagreement* (Oxford University Press, 1999) 28, 34–36.

⁷⁰ Owen Fiss, *The Irony of Free Speech* (Harvard University Press, 1996) 2.

⁷¹ *Ibid* 4.

The preceding discussion underlines how misleading the characterisation of the debate between those who favour state regulation of political expression on the one hand, and those who oppose such regulation on the other is as a conflict between political equality and liberty. This characterisation operates upon an unduly narrow conception of liberty that reduces freedom of political expression to ‘freedom from’. A more expansive and plausible understanding of freedom of political expression that combines ‘freedom from’ and ‘freedom to’ reveals that ‘what at first seemed to be a conflict between liberty and equality [is] a conflict between liberty and liberty’.⁷²

Even when there is a genuine conflict between freedom of political expression on one hand, and equality (or, more accurately, political fairness) on the other, resolution of this conflict does not imply the absence of state regulation. Like all political freedoms, freedom of political expression is not absolute and can be legitimately limited on the grounds of competing public interests, whether they be political fairness or protecting the integrity of government. Whether such limitation is justifiable will depend on a complex series of factors, including the weight of the countervailing public interest, the extent to which the limitation is properly tailored to advancing this interest and the severity of the limitation (including the risk that the limitation will lead to an abuse of state power).

2 *Respecting Freedom of Political Association*

Various types of political associations are active in Australian politics. There are, of course, the political parties that put up candidates in a bid to gain public office. There are also groups which are not seeking public office but aim to influence the outcomes of elections or public debate more generally. These political associations are fundamental to the proper workings of Australian democracy. In a mass democracy, leverage is usually secured through acting collectively. It is very rare for a citizen of ordinary means to have political leverage on her or his own accord. It is only through mobilising in groups like parties, interest groups and community groups that a citizen is capable of securing meaningful political power; it is through collective actions – acting through associations – that citizens secure a modicum of influence over the

⁷² Ibid 15. See also Beitz, above n 43, 209–13.

political process. In particular, associations are necessary in order to engage in meaningful political expression. As political philosopher Amy Gutmann put it:

organized association is increasingly essential for the effective use of free speech ... Without access to an association that is willing and able to speak up for our views and values, we have a very limited ability to be heard by many other people or to influence the political process, unless we happen to be rich or famous.⁷³

The importance of political associations to citizens securing meaningful political power underscores how such associations, and the freedom to form and act through them, is crucial to fairness in politics and protecting the integrity of representative government, in particular, to ensure accountability in the exercise of public power.⁷⁴

Underlying the importance of the freedom of political association is the principle of pluralist politics. This principle stipulates that citizens should have diverse avenues to combine in order to influence the political process and to express their views. This principle is also implicit in the functions to be performed by political parties: party politics should provide citizens with different ways to engage in political activity and to be represented; party policies and programmes should provide clear and meaningful choices.

The principle of pluralist politics provides further justification for freedom of political association.⁷⁵ Political associations require a meaningful degree of freedom from state regulation in order to develop their distinctive identities, messages and activities. This applies in particular to political parties: pluralism in party politics cannot be sustained without parties having meaningful autonomy in organising their affairs. Put

⁷³ Amy Gutmann, 'Freedom of Association: An Introductory Essay' in Amy Gutmann (ed) *Freedom of Association* (Princeton University Press, 1998) 3.

⁷⁴ For a general argument that freedom of association is based on the idea of popular sovereignty, see Jason Mazzone, 'Freedom's Associations' (2002) 77 *Washington Law Review* 639.

⁷⁵ See generally Howard Davis, *Political Freedom: Associations, Political Purpose and the Law* (Continuum, 2000) 47.

differently, freedom of party association from state regulation is necessary so that parties can perform their functions in a democratic society.⁷⁶

As with freedom of political expression, freedom of political association does not imply an absence of state regulation. State regulation might be necessary in order to promote ‘freedom to’ associate, for instance, through state funding assisting disadvantaged sectors of society in forming organisations. Freedom of political association is also not absolute and can be properly limited in certain circumstances. The functions of the parties themselves may, for example, furnish reasons for limiting such freedom. For instance, parties cannot properly discharge their participatory functions if their membership rolls have been corrupted, a problem that may require state intervention. Moreover, state regulation might be necessary in order to secure pluralism and fairness in politics. It might also be needed as an antidote to the ‘[t]he monopolistic position of parties’⁷⁷ or the ‘oligopoly’ status of major parties.⁷⁸ Whether these rationales justify limitation of freedom of political association will depend (as with freedom of political expression) on various circumstances,⁷⁹ including the weight of such rationales, the extent to which the limitation is adapted to advancing this rationale and the severity of the limitation (including the risk that the limitation will lead to an abuse of state power).⁸⁰

⁷⁶ For a rejection of a rights-based approach to freedom of party association and a preference for a functional analysis, see Samuel Issacharoff, ‘Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition’ (2001) 101(2) *Columbia Law Review* 274.

⁷⁷ Davis, above n 75, 45.

⁷⁸ Beitz, above n 43, 191.

⁷⁹ For fuller examination of this point, see Jeremy Moss and Joo-Cheong Tham, ‘Freedom of Association, Political Parties and Party Funding’ in Joo-Cheong Tham, Brian Costar and Graeme Orr (eds), *Electoral Regulation and Prospects for Australian Democracy* (Melbourne University Press, 2011 forthcoming). See generally Peter de Marneffe, ‘Rights, Reasons, and Freedom of Association’ in Amy Gutmann (ed), *Freedom of Association* (Princeton University Press, 1998) ch 6.

⁸⁰ The last point threads through Nathaniel Persily’s argument for non-interference in the primary elections of American political parties, see Nathaniel Persily, ‘Toward a Functional Defense of Political Party Autonomy’ (2001) 76 *New York University Law Review* 750, 751.

III FUNDING AND SPENDING PATTERNS OF FEDERAL POLITICAL FUNDING

This section will examine the following:

- private funding of federal political parties and candidates;
- public funding of federal political parties; and
- election spending of federal political parties and third parties.

A *Private Funding of Federal Political Parties and Candidates*

An analysis of the budgets of political parties for the financial years 1999–2000 to 2001–02 shows how heavily dependent the major parties (the ALP and the Coalition) are on private money with more than 80 per cent of their funding coming from this source. The minor parties were slightly less dependent with half to three quarters of their budgets privately financed.⁸¹ AEC analysis of returns made for the 2004 federal election cycle results in a similar conclusion. For the financial years 2002–03 to 2004–05, private funding of the ALP and the Liberal Party respectively stood at 81 per cent and 79 per cent of their total budgets.⁸²

There is nothing fundamentally wrong with parties being dependent upon private money. Indeed, a funding base comprising many small donations would reflect a vibrant party with strong grass-roots support. Big money in small sums would testify to a robust democracy where many citizens engage with the political process by donating money to their preferred candidates and parties. Such a development could be a crucial antidote to the hollowing-out of the party system that has witnessed falling party membership and affiliation.

It is clear that parties are awash with big money: the budgets of major parties are in the order of millions. But for the most part, they are neither in small sums nor from individual citizens; big money comes from large donations. While donations of less than \$1500 formed 42% of the *number of donations* made in 2004-05, a federal election year, to the federal political parties, they amounted to only four per cent of the *amount donated*. A reverse situation applied to donations of \$25 000 or more: they

⁸¹ Joo-Cheong Tham and David Grove, 'Public Funding and Expenditure Regulation of Australian Political Parties' (2004) 32(3) *Federal Law Review* 397, 401.

⁸² Australian Government, *Electoral Reform Green Paper: Donations, Funding and Expenditure* (2008) 12.

formed only four per cent of the number of donations but amounted to 48% the amount donated.⁸³ Donations of this magnitude are far out of the reach of ordinary Australians. In 2009, the average annual earnings of an Australian employee was \$48604.40.⁸⁴ A donation of \$25 000 would be more than half of this amount.

Not surprisingly, individual donations form only a fraction of party finances. It is institutional contributions, that is, money from corporations and trade unions, that constitute the lion's share of party finances. *All of the major parties* depend on corporate funding. The figures are stark: in the financial years 1999–2000 to 2001–02, the dollar amount of corporate donations received by the Liberal Party was more than 18 times the amount of individual donations received. The ratio for the National Party stood at slightly over 11. Even with the ALP, corporate donations are more important than either individual or trade union donations. In the 2001–02 financial year, for example, corporate donations received by the ALP were nearly 2.5 times the amount of trade union donations.⁸⁵ Of the main parties, it is only the Greens that can plausibly claim to have a strong funding base grounded in individual donations.⁸⁶

The ALP and Liberal Party also receive a significant amount of money from their own investment activities, much of which appears to be conducted by their commercial arms (many of which seem to operate as property trusts).⁸⁷ With no readily available information, it is difficult to precisely ascertain the amount of income generated by these investment vehicles. An indication of the importance of these vehicles, all of which are considered 'associated entities' under the *Commonwealth Electoral Act*, can be gleaned from Table 1 below. The table reveals the aggregate revenue of associated entities as a proportion of the revenue received by the parties. While this proportion fluctuates according to the electoral cycle, the figures demonstrate the extensive use of 'associated entities' by the ALP and the

⁸³ Australian Electoral Commission, *Election Funding and Disclosure Report: Federal Election 2007* (2010) 15.

⁸⁴ Australian Bureau of Statistics, *Average Weekly Earnings, Australia: Catalogue 6302.0* (August 2009) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/6302.0>>.

⁸⁵ Dean Jaensch, Peter Brent and Brett Bowden, Democratic Audit of Australia, *Australian Political Parties in the Spotlight: Democratic Audit of Australia Report No 4* (2004) 29.

⁸⁶ Tham and Grove, above n 81, 402.

⁸⁷ See Senate Standing Committee on Economics, Parliament of Australia, *Disclosure Regimes for Charities and Not-for-Profit Organisations* (2008) [7.5]

Liberal Party. The lowest proportion, occurring in the financial year 2001–02, shows a figure that is still close to half of the parties' respective revenues.

Table 1: Party-Revenue compared with Revenue Received by Associated Entities

	Federal election year, 2001–02 (\$m)	Federal non-election year, 2002–03 (\$m)	Federal non-election year, 2003–04 (\$m)
Revenue received by political parties (RPP)	\$147.24	\$91.14	\$91.93
Revenue received by associated entities (RAE)	\$63.59	\$80.12	\$72.60
RAE as a proportion of RPP (RAE/RPP x 100)	43.19%	87.91%	78.97%

Source: Australian Electoral Commission, *Funding and Disclosure Report: Election 2004* (2005) 19 (Table 6).

Further indication of the importance of these vehicles can be gathered from Table 2. It lists the prominent investment vehicles of the ALP and the Liberal Party, their total receipts for 2005–06 to 2007–08, and the amounts they gave and loaned to their associated political parties.

Table 2: Selected Investment Vehicles of the ALP and Liberal Party, 2005–06 to 2007–08

Associated entity	Political party associated to	Total receipts	Amount provided to political party associated to (all branches)	Loans provided to political parties associated to (all branches)
John Curtin House Ltd	ALP	\$58 516 841	\$12 447 810.52	\$4 509 838.77
Labor Holdings Pty Ltd	ALP	\$51 199 627	\$4 499 999	NIL
Labor Resources	ALP	\$3 005 933	\$3 000 000	NIL
Progressive Business Association Inc	ALP	\$2 482 008	\$1 441 558.66	NIL

Bunori Pty Ltd	LP	\$6 459 194.62	NIL	\$5 579 423.50
Cormack Foundation	LP	\$8,900,751.51	NIL	\$100 000.00
The Free Enterprise Foundation	LP	\$1 020 238	\$963 000	NIL
Greenfields Foundation	LP	\$151 375	NIL	\$11 550 000.00
The 500 Club (Vic)	LP	\$1 532 239.95	\$314 280	NIL
Vapold Pty Ltd	LP	\$1 767 554	\$569 308	\$679 585

Source: AEC Annual Returns 2005–06 to 2007–08, available from Australian Electoral Commission, *Annual Returns Locator Service*, (28 January 2011) <<http://periodicdisclosures.aec.gov.au/>>.

Private funding is predominantly channelled to political parties. Funding provided directly to candidates comprises a very small component of the total funding made to political parties and candidates. Table 3 illustrates this point by comparing donations received by candidates standing in the 2007 federal election and donations received by the federal branches of the parties in 2007–08.

Table 3: Donations Received by Candidates in 2007 Federal Election

	ALP (Federal)	Liberal Party (Federal)	National Party (Federal)	Greens (Federal)
Donations received by candidates	\$428 465.85	\$55 100.00	\$50 733.00	\$100 515.37
Party receipts	\$61 764 260.22	\$34 662 036.00	\$1 809 362.00	\$1 965 185.00
Donations received by candidates as a proportion of party receipts	0.69%	0.16%	2.80%	5.11%

Source: AEC 2007–08 party returns and 2007 federal election candidate returns, available from Australian Electoral Commission, *Annual Returns Locator Service*, (28 January 2011) <<http://periodicdisclosures.aec.gov.au/>>.

There are, of course, exceptions to the rule of funding being party-centred. The most notable is probably Malcolm Turnbull, former leader of the Opposition. So much is illustrated by the activities of Mr Turnbull's fund-raising organisation, Wentworth Forum. Reporting on the Forum, *The Age* has revealed how it offers different types of membership packages, ranging from \$5 500 to become a 'member' to \$55 000 to become a 'governor'. Those taking up membership include some of the richest individuals in Australia with Seven Network chairman Kerry Stokes, Westfield founder Frank Lowy and Aussie Home Loans executive chairman, John Symond.⁸⁸

1 *Corporate Political Contributions*

While empirical study of corporate political contributions in Australia is at an incipient stage,⁸⁹ existing research reveals several features of such giving. Surprisingly perhaps, only a minority of large businesses make regular political contributions. A study by Iain McMenemy of 450 large businesses has revealed that 47 per cent of these businesses did not make *any* payments to political parties during the seven-year period between 1998–99 and 2004–05, while only 15 per cent of the sample made a payment to political parties *every year* during this time.⁹⁰ At the same time, the study also found that the larger the business, the more likely it is to contribute. Moreover, business contributions are also more likely to be made as elections approach. The study, however, concluded that while the likelihood to contribute varies between each industry sector, it is difficult to state with any certainty which sectors are more likely to contribute.⁹¹

How then do businesses distribute their political money once they have decided to contribute? An analysis by Ian Ramsay and others of corporate contributions made in the three year period 1995–96 to 1997–98 found that 99 per cent of these contributions went to the Coalition parties and the ALP,⁹² in a context where '[t]he Liberal Party consistently outperformed the other parties in terms of attracting

⁸⁸ Richard Baker, 'Rich mates fill Turnbull poll coffers', *The Age* (Melbourne), 15 July 2009, 1.

⁸⁹ In fact, empirical study of Australian political contributions is *generally* at an incipient stage.

⁹⁰ Iain McMenemy, 'Business, Politics and Money in Australia: Testing Economic, Political and Ideological Explanations' (2008) 43(3) *Australian Journal of Political Science* 377, 381.

⁹¹ *Ibid* 382.

⁹² Ian Ramsay, Geoff Stapledon and Joel Vernon, 'Political Donations by Australian Companies' (2001) 29(2) *Federal Law Review* 201.

corporate donations'.⁹³ The study by McMenamin similarly concluded that businesses principally channelled their money to the ALP and the Coalition parties. It also added that:

Australian businesses have a strong underlying ideological predilection towards the conservative coalition of Liberals and Nationals. Nonetheless, they react strongly to changing political conditions. If the ALP has the political advantage, in terms of either control of government or a lead in the polls, businesses tend to be even handed. By contrast, if the Coalition has the political advantage businesses target the vast majority of their money on the Coalition.⁹⁴

These comments indicate that for businesses which make political contributions, whilst ideology clearly matters, its significance is tempered – perhaps even rivalled – by a pragmatism whereby *corporate money follows power*. An important reflection of this logic is the practice of businesses hedging their bets by giving to both the ALP and the Coalition. For instance, nine of the top ten corporate donors in the financial years 1995–96 to 1997–98 gave to both the ALP and the Liberal Party with seven of them donating to both of these parties as well as to the National Party.⁹⁵ More recently, in the 2005–06 financial year, Inghams Enterprises, ANZ and Westpac ranked amongst the top ten donors to *both* the ALP and Liberal Party federal branches.⁹⁶

Work by Harrigan has cast some light on the characteristics of companies that split their contributions between these parties. According to Nicholas Harrigan, these bipartisan contributors are more likely to be corporations located in highly regulated industries or potential defence contractors. Donors that only give to the Coalition parties, on the other hand, tend not to have these characteristics and are more likely to have rich individuals on their boards and ties with other Coalition-donors or conservative think-tanks. What seems to be at play here are ideological motivations

⁹³ Ibid 204.

⁹⁴ McMenamin, above n 90, 391.

⁹⁵ Ramsay, Stapledon & Vernon, above n 92, 201–2.

⁹⁶ AEC Annual Returns for 2005–06, available from Australian Electoral Commission, *Annual Returns Locator Service*, (28 January 2011) <<http://periodicdisclosures.aec.gov.au/>>.

with contributions aimed at securing support for a business-friendly political agenda.⁹⁷

2 *Trade Union Political Contributions*

Trade union contributions to political parties falls into two categories: party affiliation fees and non-membership subscriptions. Party affiliation fees are fees paid by a union to a political party as a condition of taking out organisational membership of the party. Non-membership contributions are essentially political donations made by unions to support the cause or policies of a political party.

Of the main political parties, the ALP is clearly the principal recipient of trade union contributions (though, as will be seen later, the Greens are beginning to receive modest amounts of trade union money). The ALP receives trade union money both in the form of affiliation fees and non-membership contributions while the Greens only receive non-membership contributions.

For the ALP, trade union money is clearly of importance. Table 4 provides two measures of the ALP's dependence on trade union money: itemised union receipts as a percentage of the sums itemised by all branches of the ALP and itemised union receipts as a percentage of total receipts declared by these branches. It can be seen from this table that the importance of trade union money to the ALP, while significant, should not be overstated. Even at its highest proportion for the financial years 2006–07 and 2007–08, trade union money constituted less than one-sixth of the ALP's total income.

⁹⁷ Nicholas Harrigan, '*Political Partisanship and Corporate Political Donations in Australia*' (2007), viewed 11 April 2008, <<http://www.mysmu.edu/faculty/nharrigan/2007,%20Partisanship.doc>>.

Table 4: Itemised Trade Union Contributions as Proportion of ALP Income, 2006–07 to 2007–08

	2006–07	2007–08
Itemised trade union receipts as percentage of all itemised receipts by the ALP	13.09%	10.8%
Itemised trade union receipts as percentage of total receipts by the ALP	7.52%	8.18%

Source: AEC Annual Returns (ALP), 2006–07 to 2007–08, available from Australian Electoral Commission, *Annual Returns Locator Service*, (28 January 2011) <<http://periodicdisclosures.aec.gov.au/>>.

Table 5 seeks to divide the amounts received by all branches of the ALP for the financial year 2006–07 (a non-federal election year) and 2007–08 (a year in which a federal election was held) into affiliation fees and non-membership contributions. Sums declared by trade unions as ‘Other Receipts’ and ‘Subscriptions’ are treated as affiliation fees while sums identified as ‘Donations’ are treated as non-membership contributions. This breakdown provides only a rough-and-ready analysis for two reasons. First, the description of sums as ‘Other Receipts’, ‘Subscriptions’ or ‘Donations’ is based on a system of self-classification. Second, the table only works on sums that are required to be itemised by the ALP and not on the total amounts received by the ALP.⁹⁸

Bearing these limitations in mind, Table 5 suggests that the balance between affiliation fees and non-membership contributions shifts according to whether it is a federal election year or not. In both 2006–07 and 2007–08, the amount received in affiliation fees was somewhat steady at slightly over \$4 million dollars. In comparison, the amount received in non-membership contributions nearly tripled from \$1.3 million in 2006–07 to \$4.8 million in 2007–08. The effect was that non-membership subscriptions amounted to more than half of trade union money to the ALP in 2007–08.

⁹⁸ The disparity between the total of itemised amounts and total receipts is quite significant. The amounts itemised for the 2006–07 and 2007–08 financial years were respectively 57.49 per cent and 75.78 per cent of the total funding (calculated from Annual Returns to the AEC 2006–07 to 2007–08, available from Australian Electoral Commission, *Annual Returns Locator Service*, (28 January 2011) <<http://periodicdisclosures.aec.gov.au/>>.). At the same time, this disparity might not mean significant understatement of trade union political contributions to the ALP as these contributions are likely to have exceeded the threshold for itemisation.

Table 5: Breakdown of ALP Receipts: Trade Union Affiliation Fees and Non-Membership Contributions, 2006–07 to 2007–08

	2006–07	2007–08
Affiliation fees	\$4 066 930.51	\$4 206 835.74
Affiliation fees as a % of itemised trade union funding	75.44%	46.57%
Non-membership contributions	\$1 323 800.00	\$4 826 176.84
Non-membership contributions as a % of itemised trade union funding	24.56%	53.43%
Total itemised trade union funding	\$5 390 730.51	\$9 033 012.58

Source: AEC Annual Returns, 2006–07 to 2007–08 available from Australian Electoral Commission, *Annual Returns Locator Service*, (28 January 2011) <<http://periodicdisclosures.aec.gov.au/>>.

We can now turn to the question of which unions provide affiliation fees and non-membership contributions to the ALP. With affiliation fees, it is important to appreciate that trade union affiliation occurs through the state branches of the ALP. The decision to affiliate is, therefore, made by the state branches of the various unions. As a result, for a particular union some branches might be affiliated to the ALP while others are not.

What is striking is that an overwhelming majority of trade unions are affiliated to the ALP. Of the unions registered with various federal, state or territory industrial registrars, more than 80 per cent are affiliated to the ALP in each of these jurisdictions with the number reaching 100 per cent in Queensland, Australian Capital Territory and the Northern Territory. In some cases, all branches of a particular union are affiliated to the ALP. The list of such unions includes the Shop, Distributive and Allied Employees Association (SDA); Liquor Hospitality and Miscellaneous Union (LHMU); Communications, Electrical and Plumbing Union (CEPU); Australian Services Union (ASU); Australian Manufacturing Workers Union (AMWU); and the Transport Workers Union (TWU). With some other unions, all but one of their branches are affiliated to the ALP. These include the Construction, Forestry, Mining

and Energy Union (CFMEU); Rail, Tram and Bus Industry Union (RTBU); National Union of Workers (NUW); Maritime Union of Australia (MUA); Australian Workers' Union (AWU); and the Australian Meat Industry Employees' Union (AMIEU). There are, however, major unions that are not affiliated to the ALP. No branches of the National Tertiary Education Union (NTEU) or the Association of Professional Engineers, Scientists and Managers Association (APESMA) are affiliated to the ALP and only one branch of the Australian Nursing Federation (ANF) is affiliated to the ALP.⁹⁹

Interestingly, non-membership contributions by trade unions to the ALP seem to be made either by state labour councils or affiliated trade unions. In the 2006–07 and 2007–08 financial years, not a single non-affiliated trade union made a non-membership contribution to the ALP.¹⁰⁰ Table 6 identifies the top five unions in terms of non-membership contributions given to the ALP by all branches of the various unions (as noted earlier, trade union contributions identified as 'donations' are treated as non-membership contributions).

Table 6: Top Five Trade Union Contributors to the ALP in Terms of Non-Membership Contributions, 2006–07 to 2007–08

2006–07		2007–08	
CEPU (including ETU)	\$631 800.00	CEPU (including ETU)	\$1 318 122.80
CFMEU	\$192 000.00	LHMU	\$274 000.00
LHMU	\$180 000.00	CFMEU	\$230 650.00
ETU	\$120 000.00	AWU	\$227 000.00
ASU	\$100 000.00	HSU	\$176 000.00

Source: AEC Annual Returns, 2006–07 to 2007–08 available from Australian Electoral Commission, *Annual Returns Locator Service*, (28 January 2011) <<http://periodicdisclosures.aec.gov.au/>>.

Table 7 goes beyond the amounts declared as 'donations' and lists the top five union contributors to the ALP for the financial years 2006–07 and 2007–08 based on the total amount of itemised contributions given to the ALP by all branches of the various

⁹⁹ The information contained in this paragraph was collected from two types of sources: information published on the websites of the various ALP state branches and correspondence with these branches and some unions (copies of correspondence on file with author).

¹⁰⁰ Annual Returns to the AEC, 2006–07 to 2007–08 above n 98.

unions. In other words, the figures in Table 7 include items declared as ‘donations’, ‘subscriptions’ and ‘other receipts’, and so now also include membership fees.

Table 7: Top Five Trade Union Contributors (all Contributions) to the ALP 2006–07 to 2007–08

2006–07		2007–08	
CEPU (including ETU)	\$1 333 397.70	CEPU (including ETU)	\$1 728 621.41
LHMU	\$661 022.17	SDA	\$1 488 591.18
SDA	\$628 245.12	CFMEU	\$1 339 385.76
CFMEU	\$609 799.84	LHMU	\$764 906.19
AMWU	\$385 277.18	AMWU	\$650 934.07

Source: AEC Annual Returns, 2006–07 to 2007–08 available from Australian Electoral Commission, *Annual Returns Locator Service*, (28 January 2011) <<http://periodicdisclosures.aec.gov.au/>>.

It remains to discuss trade union funding to the Greens. In the financial years 2006–07 and 2007–08, three unions gave money to the Greens: AMWU, CFMEU and ETU. The biggest giver was the ETU which contributed \$219 506 during this period. The CFMEU and the AMWU donated much smaller amounts respectively giving \$60 000 and \$30 000. Trade union funding does not form a significant part of the Greens’ budget. Of the disclosed amounts that have been itemised, trade union funding of the Greens was respectively 6.4 per cent and 3.3 per cent for the 2006–07 and 2007–08 financial years.¹⁰¹

B *Public Funding of Federal Political Parties: Election Funding and Tax Subsidies*

Public funding of federal political parties occurs in various ways:

- election funding;
- tax subsidies;
- parliamentary entitlements; and
- government advertising.

¹⁰¹ Annual Returns to the AEC, 2006–07 to 2007–08, above n 98.

The following examines the first two forms of public funding while parliamentary entitlements and government advertising are discussed in later sections.

1 Election Funding

Political parties and candidates are eligible to receive election funding under the federal scheme if they reach the threshold of 4% of the first preference votes in the constituencies they have contested.¹⁰² The rate for such funding is indexed and was 231.191 cents per eligible (first preference) vote for the 2010 federal election.¹⁰³

Table 8 details the amount of federal election funding provided in relation to federal elections that were held from 1984 to 2007.

Table 8: Federal Election Funding, 1984–2007

Federal election	Amount of election funding
1984	\$7 806 778.00
1987	\$10 298 657.00
1990	\$12 878 920.00
1993	\$14 898 807.00
1996	\$32 154 800.55
1998	\$33 920 787.43
2001	\$38 559 409.33
2004	\$41 926 158.91
2007	\$49 002 638.51

Source: Joint Standing Committee on Electoral Matters, Parliament of Australia, *Advisory Report on the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008* (2008) 13.

Election funding provides an important, albeit limited, source of income to political parties. Based on figures from the annual returns lodged between 1999–2000 and 2001–02 (for both federal and state branches of the parties), Table 9 highlights that despite the provision of election funding, private funding remains the key source of income. For this period, election funding constituted less than one–sixth of the

¹⁰² *Commonwealth Electoral Act 1918* (Cth) ss 294, 297, 321.

¹⁰³ Australian Electoral Commission, *Current Funding Rate* (5 January 2011)

<http://www.aec.gov.au/Parties_and_Representatives/public_funding/Current_Funding_Rate.htm>

budgets of each of the ALP and Coalition parties. On the other hand, we see a far greater reliance on election funding by the minor parties.

Table 9: Reliance of Political Parties on Election Funding, 1999–2000 to 2001–02

Party	Total receipts	Private funding (% of total receipts)	Public funding (% of total receipts)	Election funding (% of total receipts)
ALP	\$117 273 999	81.85	18.15	13.57
Liberal Party	\$95 542 648	83.61	16.39	14.57
National Party	\$21 725 957	84.89	15.11	11.43
Australian Democrats	\$6 667 728	56.90	43.10	38.80
Greens	\$6 495 651	74.56	25.44	23.94

Source: Joo-Cheong Tham and David Grove, 'Public Funding and Expenditure Regulation of Australian Political Parties' (2004) 32 *Federal Law Review* 397, 401 (Table 1).

2 Tax Subsidies

Under Division 30–DA of the *Income Tax Assessment Act 1997* (Cth) ('*ITAA 1997*'), individuals and companies are entitled to a tax deduction in respect to contributions or gifts made to political parties. Prior to 22 June 2006, these deductions were limited to donations of up to \$100 per annum and deductions were only available to parties registered under the *Commonwealth Electoral Act 1918* (Cth), thereby excluding independent candidates and parties registered under state and territory legislative regimes. In 2006, amendments to the *ITAA 1997* increased the maximum deduction to donations of up to \$1500 per annum and extended deductions to parties registered under relevant state and territory legislation and independent candidates.¹⁰⁴

The take-up rate of these deductions appears to be relatively low. The Explanatory Memorandum to Schedule 1 of the Tax Laws Amendment (2008 Measures No.1) Bill 2008, a Bill that sought to remove the availability of these deductions, indicates the Bill would result in savings of \$31.4 million over three years.¹⁰⁵ It can, therefore, be inferred that around \$10 million per annum is claimed through these tax deductions.

¹⁰⁴ *ITAA 1997* ss 30–243 as amended by the *Electoral and Referendum Amendment (Electoral Integrity and other Measures) Act 2006* (Cth).

¹⁰⁵ Explanatory Memorandum, Tax Laws Amendment (2008 Measures No.1) Bill 2008 (Cth) 3.

C *Election Spending of Federal Political Parties and Third Parties: Intensifying Arms Races*

In analysing patterns of election campaign spending, a threshold difficulty concerns the availability of data. This is not a difficulty that significantly applies to spending by candidates and third parties – under the *Commonwealth Electoral Act*, both groups are respectively required to disclose their electoral and political expenditure. Rather, the difficulty lies with the election campaign spending of federally registered political parties. When the federal funding and disclosure scheme was introduced in 1984, these parties were required to lodge returns specifying the amount of electoral expenditure. This requirement was, however, abolished after the 1996 federal election and has not been reinstated since. As a result, the federal election spending of such parties has to be inferred from the total amount of spending made by these organisations.

These limitations in mind, we can still identify various features of federal election campaign spending. There appears, firstly, to be a parallel in the funding and spending of political parties and candidates in that both occur primarily through their party organisations rather than directly through candidates. Table 10 illustrates this by drawing out the relative importance of candidate election spending in the 2007 federal election. Two measures indicate how candidate election spending pales in comparison with party election spending. The first relates to the number of candidates who have lodged returns disclosing independent electoral expenditure. Those who have not lodged returns are essentially declaring that they have not engaged in independent electoral expenditure exceeding \$10 500 for that election.¹⁰⁶ It can be seen from Table 10 that most candidates of the major parties did not lodge these returns.

The second indicator is a comparison of candidate election spending with party election spending. As noted above, there is no specific data for party election campaign spending so the total expenditure of the various parties for the financial year 2007–08 has been used as a proxy. These figures strongly suggests that the ALP and the Liberal Party conduct highly centralised election campaigns with less than

¹⁰⁶ See Australian Electoral Commission, *Funding and Disclosure Handbook for Candidates* (2007 ed) <http://www.aec.gov.au/pdf/political_disclosures/handbooks/2007/candidates/candidates_handbook_2007.pdf>.

one per cent of such spending occurring through independent candidate spending. A greater proportion of spending occurs through candidates for the National Party and the Greens but the share of such spending is still quite low.

Table 10: Candidate vs. Party Election Spending for 2007 Federal Election

	ALP	Liberal Party	National Party	Greens
Total number of candidates	172	157	38	141
Number of Candidate Returns lodged	13	13	5	20
Candidate election spending	\$326 680	\$157 577	\$256 661	\$102 976
Party expenditure for 2007–08 financial year	\$60 850 361	\$35 590 845	\$2 168 372	\$1 996 044
Candidate election spending as a percentage of total party spending	0.54%	0.44%	11.84%	5.16%

Source: AEC Annual Returns 2007–08 and Candidate Election Returns for the 2007 federal election, available from Australian Electoral Commission, *Annual Returns Locator Service*, (28 January 2011) <<http://periodicdisclosures.aec.gov.au/>>.

Another feature of election campaign spending of the major parties is that it has been steadily increasing in relation to federal elections for more than two decades (i.e. since disclosure returns were introduced at the federal level). As noted above, for elections held between 1984 and 1996, political parties were required to disclose their electoral expenditure. According to Australian Electoral Commission (AEC) analysis of this data, the amounts disclosed by all branches of the ALP and the Liberal Party increased in real terms by approximately 60 per cent and 45 per cent respectively in this period.¹⁰⁷ The AEC's calculations reveal even more dramatic increases for the national branches of these parties with the election spending of the federal branches of the ALP and the Liberal Party increasing by approximately 116 per cent and 136 per cent between the 1984 and 2004 federal elections.¹⁰⁸

¹⁰⁷ Australian Government, *Electoral Reform Green Paper*, above n 82, 11.

¹⁰⁸ Ibid.

Another conclusion that can be drawn from the available data relating to election campaign spending is that there has been a recent increase in expenditure by third parties in federal elections. In the 2004 federal election, spending by political parties predominated: for instance, the parties spent \$37.4 million on election advertising while the amount of third party election spending on advertising was slightly over a tenth of this amount at \$4.4 million.¹⁰⁹

Table 11 attempts to gauge the position in relation to the 2007 federal election. It should be noted, first, that the data in the various columns is not strictly comparable. The figures in the second column relating to federal major party expenditure are derived from the total spending made by federal branches of the ALP, Coalition parties and the Greens (which is not restricted to election spending), while the third party figures in the third column are restricted to political expenditure made in 2007–08. This lack of comparability is, however, not a great issue, since it can be reasonably assumed that the lion's share of the federal major party expenditure in a financial year leading up to a federal election comprises election spending.

Table 11 indicates that third party spending for the 2007 federal election was more than half of federal major party expenditure and, standing at slightly more than \$50 million, was nearly 12 times the amount third parties spent on election advertising for the 2004 federal election. It is not possible yet to fully assess the position in relation to the 2010 federal election as third parties have only lodged political expenditure returns for 2009/2010 financial year. These returns do not cover nearly two months leading up to the 21 August 2010 federal election.

¹⁰⁹ Australian Electoral Commission, *Funding and Disclosure Report – Federal Election 2004* (2005) 28.

Table 11: Major Party vs. Third Party Expenditure in 2007 Federal Election

	Federal major party expenditure (2007–08)	Third party political expenditure	Combined expenditure
Amount	\$100 605 622.15	\$50 592 204.89	\$151 197 827.04
Group expenditure as a proportion of total expenditure	66.5%	33.5%	100%

Source: AEC Annual Returns 2007–08 and Third Party Returns for 2007–08, available from Australian Electoral Commission, *Annual Returns Locator Service*, (28 January 2011) <<http://periodicdisclosures.aec.gov.au/>>.

At times, these *increases* in election campaign spending are described as giving rise to an ‘arms race’.¹¹⁰ This is not entirely correct. Each electoral cycle gives rise to an arms race with parties needing to build up their resources for the next election campaign. With these resources largely depleted after the election campaign, another arms race begins as parties start preparing for the next electoral contest. These rolling series of arms races are inherent in regular elections and drive much of party activity, especially fundraising practices. Hence, even when the level of election campaign spending does not increase, there is still an arms race amongst the political parties.¹¹¹ What spending increases point to is an *intensifying* arms race, as the stakes get higher with parties having to amass increasingly large war-chests for their election campaigns.

While there are various factors explaining the increases in election spending ranging from decreased reliance upon the volunteer labour of (shrinking) party membership to more capital-intensive campaign techniques,¹¹² a clear contributor is spending on political advertising. Figure 1 illustrates the growth in spending on political advertising by using disclosure returns for elections for the years 1974–1996, and, from 1996 onwards, data obtained from media monitoring companies which estimate how much the parties are spending during each election. Although the latter are only estimates, they are one of the only contemporary sources available to determine

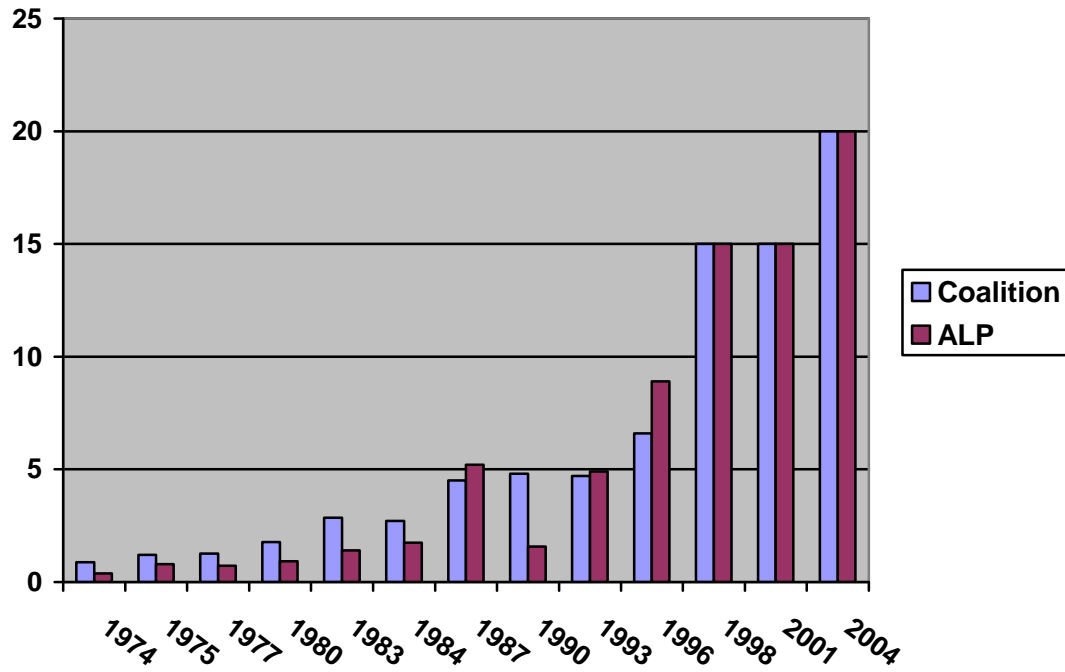
¹¹⁰ Australian Government, *Electoral Reform Green Paper*, above n 82, 1.

¹¹¹ I owe this insight to Keith Ewing.

¹¹² See discussion in Ian Ward, ‘Cartel Parties and Election Campaigning in Australia’ in Ian Marsh (ed), *Political Parties in Transition?* (Federation Press, 2006) 70, 75–79.

election advertising spending since the obligation on media companies to lodge returns was abolished in 1998.

Figure 1: Political (Election) Advertising in \$ Millions, 1974–2004



Source: Sally Young, 'Party Expenditure' in Sally Young and Joo-Cheong Tham (eds), *Political Finance in Australia: A Skewed and Secret System* (Democratic Audit of Australia, 2006) Figure 5.1.

IV KEY PROBLEMS WITH FEDERAL POLITICAL FUNDING AND ITS REGULATION

The part of the submission catalogues the key problems concerning federal political funding and its regulation, namely:

- A porous disclosure scheme;
- Corruption through the sale of access and influence;
- The undermining of the health of political parties;
- Ineffectual and unfair public funding through election funding and tax subsidies;
- Abuse of parliamentary entitlements for electioneering;
- Party-political government advertising; and
- An unfair playing field.

A *Porous Disclosure Scheme*

At the federal level, the main way in which private political funding is regulated is through a disclosure scheme. The key principle underlying this scheme is transparency of political funding. Such transparency is required to protect the integrity of representative government in three ways. It aids informed voting, thereby buttressing the integrity of electoral processes. Moreover, it is a crucial tool for preventing corruption – graft and undue influence in the case of private political funding and misuse of public resources in the case of public funding. Further, such transparency is in itself necessary to protect public confidence in representative government. (Besides these broader rationales, transparency of political funding is also necessary to ensure the effectiveness of specific regulatory measures. For instance, contribution and election spending limits can only work effectively if accompanied by adequate disclosure of political contributions and spending.)

The federal disclosure scheme, however, seriously fails to give effect to these principles. Timeliness of disclosure is necessary if this scheme is to prevent graft and undue influence, as well as to ensure that citizens are equipped with the relevant information prior to casting their votes. The AEC has, however, observed in relation to federal annual returns that '[t]his form of ... reporting and release can result in

delays that can discount the relevance of making the information public'.¹¹³ Specifically, the dated nature of the returns means that voters do not have access to the relevant information when determining their voting choices. For example, in late September 2004, British Lord Michael Ashcroft donated \$1 million to the federal Liberal Party,¹¹⁴ barely a fortnight before the October 2004 federal election. Citizens casting their votes in that election were completely unaware of this contribution and only found out more than 15 months later, on 1 February 2005, when the AEC released the disclosure returns.

The detail of the information disclosed is also inadequate. Registered parties and associated entities are not legally required to accurately categorise a receipt as a 'donation' or otherwise. The voluntary system of self-declaration that results is a recipe for errors and under-reporting. Moreover, a breakdown of donations received from particular types of donors, for instance companies and trade unions, can only be extricated with a great deal of effort. This fact has been learnt the hard way by academics, political researchers and activists seeking to distil such information.¹¹⁵

What is perhaps the most serious loophole of the federal disclosure scheme is the astonishing level of non-disclosure permitted by its high disclosure thresholds. This is a direct consequence of the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth) which greatly relaxed the disclosure obligations of federally registered parties and their associated entities. These entities are now required only to itemise sums exceeding an indexed threshold instead of disclosing details of receipts of \$1500 or more (as was the case under the previous law). The threshold, which was \$10 000 when these changes took effect, now stands at \$11 500.¹¹⁶

¹¹³ Australian Electoral Commission, Submission No 26 to the Joint Standing Committee on Electoral Matters, *Inquiry into Electoral Funding and Disclosure*, 17 October 2000, [2.10].

¹¹⁴ Donor return lodged by Lord Michael Ashcroft, viewed at Australian Electoral Commission, *Annual Returns Locator Service* (28 January 2011) <<http://fadar.aec.gov.au/>>.

¹¹⁵ Similar criticisms have been made by Ramsay et al, 'Political Donations by Australian Companies' (Melbourne University Research Report, University of Melbourne, 2001); Ramsay et al, 'Political Donations by Australian Companies' (2001) 29 *Federal Law Review* 177.

¹¹⁶ See Australian Electoral Commission, *Disclosure Threshold* (23 December 2010) <http://www.aec.gov.au/Parties_and_Representatives/public_funding/threshold.htm>. See generally Colin Hughes and Brian Costar, *Limiting Democracy: The Erosion of Electoral Rights in Australia* (University of New South Wales, 2006) ch 3.

According to Commonwealth Parliamentary Library research, the previous disclosure threshold of \$1500 or more resulted in nearly three-quarters, that is, 74.7 per cent, of declared total receipts being itemised over the period spanning from the 1998–99 financial year to the 2004–05 financial year. If the threshold of more than \$10 000 were applied to the same data, this figure would drop to 64.1 per cent.¹¹⁷ Updating the research of the Commonwealth Parliamentary Library, the Joint Standing Committee on Electoral Matters found that under the \$10 300 threshold (which applied in 2006–07), only 52.6 per cent of the income of the ALP and Coalition parties was itemised for that year.¹¹⁸ On these calculations, we have a remarkable situation where the source of *nearly half* of the income of the major parties is unknown.

While these figures give some indication of the level of non-disclosure under the federal scheme, it may underestimate the proportion of funds that remain undisclosed. As non-disclosure is increasingly legitimised, it is likely that parties will take greater advantage of the regulatory gaps that are opened up by the changes. One gap stems from disclosure thresholds applying *separately* to each registered political party. In a context where the national, state and territory branches of the major political parties are *each* treated as a registered political party, this means that a major party constituted by nine branches has the cumulative benefit of nine thresholds. For example, a company can presently donate \$11 500 to each state and territory branch of the Labor Party as well as to its national branch – a total of \$103 500 – without the Labor Party having to reveal the identity of the donor. There is little doubt on this point – having such a high threshold can only mean more secret donations.

The *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth) also increased the threshold at which the prohibition against anonymous donations and loans applies from amounts greater than \$1000 to sums exceeding \$10 000 (indexed). It is this increase that will perhaps most seriously compromise transparency. This change is less about public disclosure of donations and loans and more about records kept by parties: it will mean that parties can legally

¹¹⁷ Sarah Miskin and Greg Baker, 'Political Finance Disclosure under Current and Proposed Thresholds' (Research Paper No 27, Parliamentary Library, Parliament of Australia, 2006).

¹¹⁸ Joint Standing Committee on Electoral Matters, Parliament of Australia, *Advisory Report on the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008* (2008) 33.

accept larger sums without recording details of the donor. This potentially renders the whole notion of disclosure thresholds meaningless.

Take, for instance, a situation where the Liberal Party, through its various branches, accepts anonymous donations from a single company in the amount of \$103 500. The company then gives an additional \$10 000 that is publicly disclosed. Under the current law, details of the entire \$113 500 should be disclosed. The ability to legally accept \$103 500 in anonymous circumstances, however, potentially destroys the paper trail required to enforce such an obligation. At best, this change is an invitation to poor record keeping; at worst, it is a recipe for wholesale circumvention of the disclosure scheme.

The secrecy resulting from the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth) is hardly an unintended consequence. Senator Eric Abetz, the Minister sponsoring the Act, perhaps spoke for many others in his party when he said that he hoped for ‘a return to the good old days when people used to donate to the Liberal Party via lawyers’ trust accounts’.¹¹⁹ The Act has also produced greater secrecy in some states and territories, since the federal scheme acts as a default scheme for jurisdictions that do not provide for separate funding disclosure schemes (that is South Australia, Tasmania, Victoria). Moreover, Western Australia and the Northern Territory allow state parties and associated entities to comply with the much less demanding disclosure obligations under the federal scheme in lieu of adhering to the requirements under their respective statutes.¹²⁰

These shortcomings of current disclosure schemes vividly illustrate how Australia has a ‘lackadaisical law’ regulating political money.¹²¹ Lackadaisical laws are moreover accompanied by lackadaisical attitudes. There is good evidence that the parties are not treating their disclosure obligations under the federal scheme seriously. The AEC has observed:

¹¹⁹ Richard Baker, ‘Are our politicians for sale?’, *The Age* (Melbourne), 24 May 2006, 15.

¹²⁰ See Joo-Cheong Tham, *Money and Politics: The Democracy We Can’t Afford* (University of New South Wales Press, 2010) 30-32.

¹²¹ Graeme Orr, ‘Political Disclosure Regulation in Australia: Lackadaisical Law’ (2007) 6(1) *Election Law Journal* 5.

The legislation's history to date can be characterised as one of only partial success. Provisions have been, and remain, such that full disclosure can be legally avoided. In short, the legislation has failed to meet its objective of full disclosure to the Australian public of the material financial transactions of political parties, candidates and others.¹²²

Much of the AEC's cause for complaint is based on its view that a culture of evasion exists in some quarters. It has previously stated that 'there has been an unwillingness by some to comply with disclosure; some have sought to circumvent its intent by applying the narrowest possible interpretation of the legislation'.¹²³

Arguably, evasion of disclosure obligations is facilitated in two other ways. First, there is the receipt of foreign-sourced contributions. As Table 12 indicates, the main parties did not receive many of such contributions in the period 1998–99 to 2002–03. Nevertheless, these contributions still pose the challenge of ensuring the accuracy of information provided given the constrained ability of electoral commissions to verify such information.

Table 12: Foreign Contributions to Parties, 1998–2003

Party	Amount from overseas addresses
ALP	\$82 529.76
Liberal Party	\$41 609.05
National Party	Nil
Australian Democrats	\$2200
Greens	\$31 573.57

Source: Calculated from Australian Electoral Commission, Submission No 11 to the Joint Standing Committee on Electoral Matters, Parliament of Australia, *Inquiry into Disclosure of Donations to Political Parties and Candidates*, 26 April 2004, 26.

Second, there is the enormous amount of money being channeled through the associated entities of the major parties (see Table 2). Such use of associated entities is not necessarily motivated by an attempt to evade disclosure. For instance, parties might be using an associated entity as a vehicle for investment purposes. The benefits

¹²² Australian Electoral Commission, Submission No 26 to the Joint Standing Committee on Electoral Matters, *Inquiry into Electoral Funding and Disclosure*, 17 October 2000, [2.9].

¹²³ Australian Electoral Commission, *Funding and Disclosure Report Following the Federal Election Held on 3 October 1998* (2000) [2].

of investing through an associated entity might include the limited liability of such an entity, if incorporated, and the opportunity to have directors who have stronger investment expertise. Also, there may be a perception that donors are more willing to contribute to an organisation that appears to be at arms-length from the party.

On the other hand, the use of an ‘associated entity’ might be aimed at compromising transparency. Party officials may wish to avoid the formal decision-making processes of the party. While most disclosure schemes subject associated entities to obligations identical to those that apply to registered parties, money received by such entities might not be as well scrutinised by the media or other organisations when compared with those funds directly received by the parties.

Party officials might also suspect that the electoral commissions themselves face greater difficulties in enforcing the law against associated entities. The case of the Greenfields Foundation is instructive. In 1996, the foundation was assigned a loan of \$4.45 million from the Liberal Party after then Liberal Party National Treasurer and prominent businessman Mr Ron Walker discharged the guarantee of an existing debt of the party. In 1998, the AEC required the trustees of the foundation to lodge an ‘associated entity’ return, which it refused. The *Commonwealth Electoral Act* was then amended to confer upon the AEC the power to inspect records of an organisation for the purpose of determining whether it was an associated entity. After exercising this power, the AEC formed the view that the foundation was an associated entity and required it again to lodge ‘associated entity’ return. Under protest, the foundation eventually lodged such returns in September 1999.¹²⁴ What the Greenfields Foundation episode demonstrates is that when an organisation resists its obligations as an associated entity, electoral commissions may have to redouble their efforts and, in some situations, secure legislative amendment, before successfully enforcing the law against such an organisation.

B *Corruption through the Sale of Access and Influence*

¹²⁴ See *ibid* 15.

The New South Wales Liberal Party runs a body called the Millennium Forum. A testimonial from former Prime Minister John Howard describes it as ‘one of Australia’s premier political corporate forums’ that ‘provides a wealth of opportunities for the business community and political leaders at federal and state levels to meet and discuss key issues within an informal setting’.¹²⁵ ‘Wealth’, it seems, is the operative word. For sponsorship fees ranging from \$10 000 upwards, company representatives are not only entitled to ‘[a]n ENGAGING programme of professional corporate events and "Off the Record" briefings’¹²⁶ but also a chance to play golf with John Howard on Sydney’s Bonnie Doon golf course.¹²⁷ Corporate Australia has not been reluctant to seize these opportunities. The roll-call of the Forum’s sponsors include British American Tobacco Australia, Publishing and Broadcasting Ltd, Tenix Group, major construction companies like Leighton Holdings and Multiplex Constructions and key accountancy firms such as Deloitte and Ernst & Young.¹²⁸

The New South Wales ALP has also not been shy in selling access and influence to business. For \$102 000, a company can become a ‘foundation partner’ of the New South Wales ALP’s ‘Business Dialogue’ and secure five places to events, such as boardroom lunches and dinners with the Premier and State Government Ministers.¹²⁹ In late 2006, a few months prior to the state selection, the New South Wales ALP held a fundraising event at the Convention Centre, Darling Harbour, which was attended by nearly 1000 people. General admission cost \$500 per head; attending an exclusive cocktail party with Ministers cost \$15 000 for nine guests; and dining with (former) Premier Morris Iemma was priced at a hefty \$45 000.¹³⁰

¹²⁵ Millennium Forum, <http://www.millenniumforum.com.au/first.htm>, viewed 7 June 2007. Note that this page is no longer available online. However, the more recent link to the Millennium Forum website contains a similar quotation:

<http://www.millenniumforum.com.au/index.php?option=com_content&view=article&id=37:the-hon-john-howard-ac&catid=9:testimonials&Itemid=11>

¹²⁶ Millennium Forum, <<http://www.millenniumforum.com.au/first.htm>> (emphasis original). As above, note that this page is no longer available online.

¹²⁷ E Mychasuk and P Clark, ‘Howard and his team rented by the hour’, *Sydney Morning Herald* (Sydney), 13 June 2001, 1.

¹²⁸ A list of Millennium Forum’s sponsors used to be available online: Millenium Forum, http://www.millenniumforum.com.au/index.php?option=com_content&view=article&id=9&Itemid=10, viewed 25 January 2010. The current website for the forum requires a username and password.

¹²⁹ Andrew Clennell, ‘Coalition wins vote for donations inquiry’, *Sydney Morning Herald* (Sydney), 28 June 2007, 4.

¹³⁰ Anne Davies and Jonathan Pearlman, ‘Top Libs split on corporate donations’, *Sydney Morning Herald* (Sydney), 3 November 2006, 1.

In Victoria, the ALP's Progressive Business has been described as 'one of the most efficient money-making operations in the country'.¹³¹ According to its website, its 'express purpose [is] building dialogue and understanding between the business community and government'. It currently offers two types of membership, corporate and small business, priced at \$1550 and \$990 per annum respectively, entitling the company to a set number of breakfast and twilight ministerial briefings.¹³² The 2009 annual Progressive Business dinner, for example, witnessed Latrobe Fertilisers, a company vigorously advocating the use of Gippsland coal mines for the production of fertiliser, paying \$10 000 to the ALP so that its chairman, Allan Blood, could sit at the side of Victorian Premier John Brumby and, in Blood's words, 'ben[d] his ear'.¹³³

These activities merely illustrate a wider set of unsavoury practices. There are other vehicles for peddling influence. For example, membership of the Liberal Party's 500 Club will provide 'a tailored series of informal, more personally styled, early evening events' thus 'adding a new level of value for ... Club members'.¹³⁴ Party meetings are also a favoured venue for selling influence. In the lead up to the 2004 federal election, Mark Latham, then federal Labor Party leader, hosted an 'It's Time' dinner at Sydney's Westin Hotel with \$10 000 charged per table. During the same period, the Liberal Party charged \$11 000 for seats at John Howard's table as part of a fundraiser at Sydney's Wentworth Hotel that included 10-minute briefings with Ministers.¹³⁵ At the 2007 federal ALP conference, major companies including NAB, Westpac and Telstra engaged a high-price escort service. At \$7000 per person, their representatives were accompanied by federal ALP frontbenchers for the span of the conference.

¹³¹ Michael Bachelard, 'Taking their toll', *The Age* (Melbourne), 14 May 2007, 9.

¹³² Information about Progressive Business is available from its website: Progressive Business, *Home* <<http://www.pb.org.au/>>. Details about membership fees are also available online: Progressive Business, *Membership* <<http://www.pb.org.au/page/membership.html>>.

¹³³ Royce Millar and Paul Austin, '\$10 000 to sit next to Brumby', *The Age* (Melbourne), 3 November 2009, 1.

¹³⁴ Details about Millennium Forum's events used to be available through its website http://www.millenniumforum.org.au/index.php?option=com_content&view=category&layout=blog&id=6&Itemid=7, viewed 25 January 2010.

¹³⁵ Jason Koutsoukis and Misha Schubert, 'Political donors put money where a mouth is', *The Sunday Age* (Melbourne), 1 August 2004, 8.

Tables at the conference dinner were also sold for up to \$15 000 for the privilege of sitting next to Shadow Ministers.¹³⁶

Indeed, the former Prime Minister John Howard was not shy in using his official residence for fundraising.¹³⁷ In June 2007, business observers paid more than \$8000 each to attend a Liberal Party meeting held at Kirribilli House.¹³⁸ The prize for the most successful fundraiser perhaps goes to Malcolm Turnbull who charged \$55 000 per head for a fundraising dinner to support his bid for re-election.¹³⁹ Not much seems to have changed since the election of the Rudd Government with the *Sydney Morning Herald* reporting in 2008 that a deal had been struck between the then federal ALP national secretary, Tim Gartrell, and his counter-part, the federal Liberal Party director, Brian Loughnane, to use the Great Hall and the Mural Hall of Parliament House for party fundraising purposes.¹⁴⁰

With the sale of access and influence, we witness the logic of the market being ruthlessly applied to political power. Demand on the part of business for political influence is being met by supply on the part of the major parties and their leaders. As a senior ALP figure put it, '[w]e use our political leadership to raise funds because they are (sic) the best product we have to sell'.¹⁴¹ Like other markets, the greater the value of the product, the higher the price. Referring to ministerial lunches organised by Progressive Business, an experienced Victorian lobbyist has said:

The cost depends on how senior the Minister is. If you want a key Minister, companies pay \$10 000.¹⁴²

The clearest instances of access and influence being sold occur when payment is expressly exchanged for privileged access, say \$10 000 for a Minister. It would be a

¹³⁶ Michelle Grattan & Katharine Murphy, 'Hope in the hearts of Labor faithful', *The Age* (Melbourne), 27 April 2007, 1.

¹³⁷ For details, see Michelle Grattan, 'Labor legal advice: PM function was a gift', *The Age* (Melbourne), 16 June 2007, 2.

¹³⁸ Brendan Nicholson, 'Rudd open to Melbourne PM pad', *The Age* (Melbourne), 11 June 2007, 5.

¹³⁹ Clare Masters, 'How \$55, 000 will buy you a slice of Malcolm', *Daily Telegraph* (Sydney), 1 August 2007, 23.

¹⁴⁰ Alan Ramsey, 'Junee farmer tables dinner time complaint', *Sydney Morning Herald* (Sydney), 5 April 2008.

¹⁴¹ Baker, above n 119, 15.

¹⁴² Bachelard, above n 131, 9.

mistake to think that they are the only ways in which access and influence are being sold. In some cases, large ‘donations’, though not directly tied to access and influence, are given to achieve the same result. Referring to a \$50 000 sum given to the Victorian ALP in 2000 by Walker Corporation, a property developer, John Hughes, the company’s managing director, said:

It does not get you access on the spot, but what it does, it allows us to support the government of that particular day, if it was (former Victorian Premier) Bracks you said. If we wished to be able to put a case at some point in the future, then one could hope that it would favourably get you that access faster than others, but it does not achieve anything. At the end of the day being able to have an appointment with somebody, to be able to put your case, does not guarantee a result.¹⁴³

In a similar vein, Mark Fitzgibbon, former head of the Clubs NSW, the peak industry body for clubs registered in New South Wales, has said of the thousands of dollars Clubs NSW donated to the New South Wales ALP: ‘I have no doubt it had some influence . . . supporting (the ALP’s) fundraising helped our ability to influence people’.¹⁴⁴

This process of granting and securing influence seems to be driven by the parties as much as their corporate sponsors. In fact, there is evidence of some public officials seeking to extract rent from their positions. An example from the WA Inc debacle involves the conduct of former WA Premier Brian Burke and his brother Terry Burke, who was then Cabinet Secretary. Referring to their conduct, the Royal Commission on WA Inc concluded that

[the Burkes] were actively engaged in soliciting campaign donations from prospective corporate donors. In his approaches, the Premier was direct to the point at times of being forceful. He nominated the amounts he expected. They

¹⁴³ As quoted in Select Committee on Public Land Development, Parliament of Victoria, *Final Report*, (2008) [383].

¹⁴⁴ As quoted in Anthony Klan, ‘Political donors play to win, as the pokies saga during Bob Carr’s tenure illustrates’, *The Weekend Australian* (Australia), 13-14 February 2010, 5.

were far in excess of amounts previously donated in the course of campaign fundraising in this State.¹⁴⁵

Those defending such practices sometimes deny that influence is being sold. According to them, all that is sold is access to political leaders with leaders free to make up their minds on particular issues. This is highly questionable: influence is inseparable from access.¹⁴⁶ Businesses that pay for ‘off the record’ briefings with Ministers not only get to meet the Ministers but, in the words of the Millennium Forum’s website, secure an opportunity to ‘promote issues of concern and importance’ to them.¹⁴⁷ The website of Progressive Business used to be very up-front about what was being traded when it stated that ‘[j]oining this influential group allows you to participate in the decision making progress (sic)’.¹⁴⁸

The way in which the corporate patrons of the ALP and Liberal Party obtain influence over party leaders can be quite subtle. Reporting on the fundraisers of Progressive Business, *The Age* journalist Michael Bachelard said:

It’s an unwritten rule that there will be no overt lobbying: businesses are there to be seen, to put a face to the name, to establish a profile in the minister’s mind.¹⁴⁹

While nothing specific is promised or discussed in such events, there is still value for businesses. As an executive from a property development company observed, ‘[i]t just smoothes the path to get something heard’.¹⁵⁰

¹⁴⁵ WA Inc Royal Commission, above n 9, 1–3.

¹⁴⁶ As David Truman correctly observed, ‘power of any kind cannot be reached by a political interest group, or its leaders, without access to one or more key points of decision in the government. Access, therefore, becomes the facilitating intermediate objective of political interest groups’: David Truman, *The Governmental Process: Political Interests and Public Opinion*, (Knopf, 2nd ed, 1971) 264.

¹⁴⁷ Details used to be available from Millennium Forum, <<http://www.millenniumforum.com.au/>>.

¹⁴⁸ ALP website, *Progressive Business* <<http://www.alp.org.au/action/progressive>>. Note that this page on the ALP website is no longer active. The current website to view information about Progressive Business, viewed 5 February 2010, is located at: Progressive Business, *Home* <<http://www.pb.org.au/>>.

¹⁴⁹ Bachelard, above n 131, 9.

¹⁵⁰ *Ibid.*

Much less commented on but perhaps even more important is the impact of such influence on the broader political agenda. Those who are able to pay for access are in a privileged position to highlight matters of significance to them. Inevitably, Ministers who they can directly access will tend to pay more attention to these matters compared with others issues of public interest, unless these other issues are also taken up by powerful and articulate advocates.

What is also clear is that businesses buying such access and influence tend not to be pursuing an electoral strategy – they are not channelling funds to parties as an open endorsement of their policies in an effort to secure their electoral success. Rather, what is being largely pursued is an access strategy: money is being given to parties to secure access and influence after the parties have been elected to public office with general indifference as to the respective merits of the party policies. By paying hefty fees, companies are able to exercise influence in clandestine circumstances such as ‘off the record’ briefings.¹⁵¹

This is an emphatic instance of what Walzer characterises as a ‘blocked exchange’, where money is used to buy political power.¹⁵² The result is corruption through undue influence: the purchase of access and influence creates a conflict between public duty and the financial interests of the party or candidate,¹⁵³ resulting in some public officials giving an undue weight to the interests of their financiers rather than deciding matters in the public interest.¹⁵⁴

That the bargains struck in the sale of access and influence are not overt or explicit makes little difference to the question of corruption through undue influence: the structure of incentives facing parties and their leaders once a contribution is received remains the same with their judgment improperly skewed towards the interests of their financiers.¹⁵⁵ With these incentives, there is a double injury to the democratic process: wealthy donors are unfairly privileged while the interests of ordinary citizens become sidelined. Such injury highlights how the sale of access and influence is not

¹⁵¹ The website of the organization promises sponsors “‘Off the Record” briefings that will keep you up to date with important political and economic developments that impact on your business’: Ibid 9.

¹⁵² Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books, 1983) 100.

¹⁵³ Lowenstein, above n 21, 323–29.

¹⁵⁴ Beitz, above n 43, 137.

¹⁵⁵ See *ibid.*

only corrupt because it undermines merit-based decision-making but is also unfair: contributors are illegitimately *empowered* in the political process while others are illegitimately *disempowered*.

Further, corruption through undue influence tends to take the form of institutional corruption. When access and influence is sold, the gain is principally political (and not personal) as money is usually channelled to the campaign coffers of the party rather than to the purse of the individual candidate. It is also procedurally improper as opportunities to influence the political process, often in circumstances of secrecy, are being given solely because money is being paid. Such practices clearly damage the democratic process not only through the secrecy and unfairness accompanying them but by also undermining the merit principle.

What's worse is how such corruption pervades Australian politics and how, in some quarters, it is perfectly normal. At the 2007 Liberal Party federal council, federal Ministers auctioned off their time to the tune of thousands of dollars: a harbour cruise with Tony Abbott, then Health Minister, fetched \$10 000 while a night at the opera with Helen Coonan, then Minister for Communications, Information Technology and the Arts, picked up a princely sum of \$12 000, all this under the council theme of 'Doing what's right for Australia'.¹⁵⁶

With some companies, complicity with such practices has, in fact, become a mark of a 'real' business. As one leading Victorian business figure has observed, '[m]ost of the serious players in business are paying to both sides for access'.¹⁵⁷ Or as another business figure observed: '[y]ou've got to be seen to be there. We do it because everyone else does it ... we know it gets us access'.¹⁵⁸ Perhaps nobody can put it more plainly than Ashley Mason, the external affairs executive for Leighton Holding, when he said of buying access and influence through Progressive Business:

It's part of the system ... It's seen as part of the process.

¹⁵⁶ Misha Schubert, 'Party hopes party won't end so soon', *The Age* (Melbourne), 4 June 2007, 6.

¹⁵⁷ Baker, above n 119, 15.

¹⁵⁸ *Ibid.*

In his defence of Progressive Business and its sale of access and influence, Victorian Premier John Brumby referred to his support for the ‘democratic right’ of people and businesses to donate.¹⁵⁹ There is some plausibility to Brumby’s position – after all, political contributions can animate the democratic process. This perspective is, however, self-servingly selective. Not only does it gloss over questions of corruption (discussed in the previous section), it seems to invoke a partial notion of ‘right’ or ‘freedom’ that rests principally on being free from legal restrictions. It is insufficiently cognisant of the value of such freedom or, put differently, the ‘freedom to’ make donations.¹⁶⁰ Importantly, it fails to fully recognise how the economic inequalities of Australian society renders a formal freedom to donate largely meaningless for most of its members - the amounts involved in political contributions, including those made by corporate financiers of Progressive Business, are out of the reach of most Australian citizens (see discussion above).

These blind spots pave the way for what is the most damaging aspect of the peddling of influence, its governing principle that political power can and should be bought and sold like any other product on the market. The commodity principle is, however, deeply anathema to democracy. As noted earlier,¹⁶¹ at the heart of democratic principles is a commitment that each citizen has an equal status in the political process, a commitment that underlies the principle of political fairness. This implies that each citizen, *regardless* of class and wealth, shall be treated with equal respect and concern. This is why property votes are alien to democratic traditions and were abolished in the process of instituting the democratic franchise.

Contrast this with the logic of the market where power is purchasing power. This is a place where money not only talks but it is the only currency that matters. The true measure of one’s worth in the market is determined by the size of one’s bank balance. This shows why the commodification of political power is such a vicious assault upon Australia’s democracy. While we no longer have property votes,¹⁶² moneyed interests have discovered other ways of translating their wealth into political power – influence

¹⁵⁹ Millar and Austin, above n 133.

¹⁶⁰ See text above accompanying nn 65-72.

¹⁶¹ See text above accompanying nn 37-39.

¹⁶² At least for state and federal elections. The position is different with some local government elections.

is sought through more covert means like ‘off the record’ ministerial briefings. With the peddling of influence, we see the force of the following comments made by Jeff Kennett, former Liberal premier of Victoria:

The professionalism of selling time has risen to such a level that it has corrupted the democratic process; it corrupts the principle all people are equal before the law.¹⁶³

When applied to political power, the commodity principle also undermines the notion of the public interest. In a democracy, the calculus for the public interest gives equal weight to the concerns of each citizen. In doing so, it draws a crucial distinction between the private interest of the holders of public office and the broader interest of the community. Government property, for example, is not treated like the property of the party in power. Rather it is held in trust on behalf of citizens and can only be used in the public interest. Queensland Integrity Commissioner, Gary Crooke provided an insightful analysis of this set of issues, parts of which merit full reproduction. ‘[C]alling in aid a concept of capital in relation to government property’, Crooke observed that:

All the components of government property (whether physical, intellectual or reputational) are really no more, and no less, than the property of the community, the capital of which is held in trust by elected or appointed representatives or officials.

The term ‘capital’ is an amorphous one and includes all the entitlement to respect and inside knowledge that goes with holding a high position in public administration.

The trust bestowed importantly includes an obligation to deal with government property or capital only in the interests of the community. As such, it is singularly inappropriate for any person to use it for personal gain.¹⁶⁴

¹⁶³ Royce Millar, ‘Brumby in rethink on fund-raising’, *The Age* (Melbourne), 8 December 2009, 1.

Speaking of party fundraising, Crooke further noted that:

It seems to be a common strategy to hold a dinner or like function where entry is often by invitation, and usually at a price well beyond the cost of the provision of any food or services at the function. Often, it is openly advertised that such payment will ensure access to a Minister or other high-ranking politician.

Having regard to my reference to ‘capital’ and trusteeship of the same, it seems to me that questions such as the following need to be asked:

- What is being sold and who (or what entity) receives or controls the proceeds?
- Whose is it to sell, or can it appropriately be sold?
- Is what is on offer, being offered on equal terms to all members of the community?
- What is the likely understanding or expectation, of the payer on the one hand, and of the reasonable member of the community on the other, of what the buyer is paying for?
- If there is a Government decision to be made, is a perception likely to arise that those interested, and not attending the function, whether competitors for a tender, or opponents to a proposal, are at a disadvantage?

Unless questions such as the above can be unequivocally answered in a way which is consistent with the integrity issues raised in the previous discussion of capital and trusteeship, it would not be appropriate to engage in, or continue this practice.¹⁶⁵

This analysis reveals that the selling of access and influence not only involves corruption through undue influence and political unfairness but also suggests corruption through the misuse of public resources, in particular, the privileges or ‘capital’ of public office.

¹⁶⁴ Queensland Integrity Commissioner, *Annual Report 2007–08* (2008) 7.

¹⁶⁵ *Ibid* 7–8.

It also reveals why the use of Kirribilli House, the Lodge and Parliament House for party fundraising should be vigorously condemned. If political power is to be bought and sold like any other commodity then its exercise is no longer oriented to the public interest and is, in fact, treated just like any other piece of property. It is just a small step from this to treating the national estate like the private property of the party in government with ‘those in power ... acting as if they own the trappings of office’.¹⁶⁶ Worryingly, this is already occurring. Federal Opposition Leader, Tony Abbott, has argued that holding Liberal Party fundraisers at Kirribilli House was entirely proper and simply a case of ‘someone inviting people to a private home’.¹⁶⁷

C *Undermining the Health of the Political Parties*

The health of the Australian party system suffers from the undue influence that is spawned by the sale of access and influence. As corporate financiers of the major parties increasingly call the shots, the interests and rights of citizens that should be represented become sidelined. The ideal of governing in the public interest is placed in jeopardy when, as former High Court Chief Justice Gerard Brennan observed:

The financial dependence of a political party on those whose interests can be served by the favours of government ... cynically turn[s] public debate into a cloak for bartering away the public interest.¹⁶⁸

The agenda-setting function of the party system is also impaired, as the policies of the major parties are disproportionately influenced by a small band of businesses.

There are other serious effects on the major parties. Their ability to effectively govern is undermined by the time consumed by subsequent rounds of fundraising.¹⁶⁹ Former federal Human Services Minister Joe Hockey, for instance, is reported to have complained in the Liberal Party room about the constant pressure to attend

¹⁶⁶ Quoted in Editorial, ‘Political hubris laid bare in a tale of two lodges’, *The Age: Insight* (Melbourne), 16 June 2007, 8.

¹⁶⁷ Quoted in *ibid.*

¹⁶⁸ *ACTV* (1992) 177 CLR 106, 159.

¹⁶⁹ For a similar argument in the US context, see Vincent Blasi, ‘Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All’ (1994) 94 *Columbia Law Review* 1281, 1283.

fundraisers.¹⁷⁰ A submission of the New South Wales ALP has similarly observed that:

Under the current system, it is an unfortunate reality that Party Officials and MPs must dedicate a considerable amount of their time to fundraising efforts. This is time which could be better spent promoting progressive policies and advocating on behalf of constituents.¹⁷¹

The quality of the candidates that parties recruit may also suffer from this pre-occupation with fundraising. The importance of fundraising ability in Liberal Party pre-selections, for instance, has been frankly acknowledged by former Treasurer Peter Costello:

In my time in politics, the amount of time and effort put into fund-raising has exploded. Fund-raising is considered such an integral part of an MP's job that candidates for pre-selection are assessed for their fund-raising potential. A candidate who can bring in campaign funds is as highly prized as one that will bring in votes.¹⁷²

The significance of fundraising ability can also be seen in the following instances. In the aftermath of the recent federal election, one of the factors said to have enhanced Malcolm Turnbull's chances of winning leadership of the federal Liberal Party was his ability to raise money to restore the party's depleted funds.¹⁷³ The same was also said of Alan Stockdale's (successful) candidature for presidency of the federal Liberal Party.¹⁷⁴ This is not to deny that Turnbull or Stockdale are worthy candidates. Rather, the point is that the calculus of merit appears to have been weighted too heavily in favour of their ability to fundraise and, arguably, has detracted attention from more

¹⁷⁰ Michelle Grattan, 'Our Political Guns for Hire', *The Age* (Melbourne), 25 May 2005, 21.

¹⁷¹ Australian Labor Party (NSW Branch), Supplementary submission No 107a to Select Committee on Electoral and Political Party Funding, *Inquiry into Electoral and Political Party Funding*, 25 March 2008, 2.

¹⁷² Peter Costello, 'Beware cashed-up influence peddlers', *Sydney Morning Herald* (Sydney), 12 August 2009.

¹⁷³ See, for example, Tony Wright, 'Bold offer might help Lib reset', *The Age* (Melbourne), 26 November 2007.

¹⁷⁴ See, for example, Michelle Grattan, 'Lib Senate leader urges conservatives to unite', *The Age* (Melbourne), 26 January 2008.

important leadership attributes, such as their policies and ability to effectively challenge the ALP.

Fundraising practices may also lessen the ability of the major parties to act as vehicles for popular participation. Their appeal to ordinary citizens will lessen as these practices tend to hollow out the meaning of party membership. As parties sell influence to moneyed interests, they also send out a signal to their rank-and-file members that the voices that will be listened to are those with large purses, rather than those who faithfully subscribe to party principles.

The role of party members is also sidelined in other ways. ‘Capitalist financing’ increasingly outstrips ‘democratic financing’ through membership subscriptions in terms of financial importance.¹⁷⁵ This occurs through corporate fundraising, but also through the growing reliance of the major parties on investment (discussed earlier). The federal Government’s *Electoral Reform Green Paper: Donations, Funding and Expenditure*, for instance, estimates that three-quarters of the major parties’ private funding derives from fundraising activities, investments and debts.¹⁷⁶

This ‘business’ model of the party tends to centralise power within the party. It vests increasing control over fundraising in the party leadership, control that is made more effective when the investment arrangements are opaque with lines of accountability blurred or hidden from view. More subtly, it contributes to ‘the increasing professionalization of party organizations’.¹⁷⁷ According to some commentators, the major parties are increasingly becoming electoral-professional parties¹⁷⁸ where ‘a much more important role is played by professionals (the so-called experts, technicians with special knowledge)’¹⁷⁹ in the context of a weak membership base.¹⁸⁰ The ‘business’ model of the party will shape what is seen as ‘professional’ and,

¹⁷⁵ Maurice Duverger, *Political Parties: Their Organization and Activity in the Modern State* (Barbara and Robert North trans, Meuthen, 2nd ed, 1959) 63 [trans of: *Les Partis Politiques* (first published 1954)].

¹⁷⁶ Australian Government, *Electoral Reform Green Paper*, above n 82, 41.

¹⁷⁷ Angelo Panebianco, *Political Parties: Organization and Power* (Marc Silver trans, Cambridge University Press, 1988) 264 [trans of: *Modelli di partito: Organizzazione e potere nei partiti politici* (first published 1982)] (emphasis original).

¹⁷⁸ See Ian Ward, ‘The Changing Organisational Nature of Australia’s Political Parties’ (1991) 29(2) *The Journal of Commonwealth and Comparative Politics* 153.

¹⁷⁹ Panebianco, above n 177, 264.

¹⁸⁰ *Ibid* 264.

consequently, the distribution of power within the party: as the ability to fundraise and manage investments is seen as key to the success of the party, party officials having these skills will gain more power within the party.¹⁸¹ With growing centralisation, responsiveness to rank-and-file members correspondingly decreases. ALP Senator John Faulkner has, for example, argued that, for the Labor Party, ‘[g]rass-roots members are an afterthought and for many in the machine, an inconvenience’.¹⁸² Developments such as this directly undermine the participatory function of the major parties. In addition, the bypassing of rank-and-file members saps the ability of these parties to generate new ideas and policies and weakens their claims to be representative of citizens.

D *Ineffectual and Unfair Public Funding through Election Funding and Tax Subsidies*

1 *Election Funding*

There are two central purposes of the federal election funding scheme. The first is to promote fairness in politics, specifically, electoral fairness. When introduced in 1983, federal election funding was directed at ensuring that ‘different parties offering themselves for election have an equal opportunity to present their policies to the electorate’.¹⁸³ Such equal or fair opportunity is advanced by opening up the electoral contest to ‘worthy parties and candidates [that] might not [otherwise] be able to afford the considerable sums necessary to make their policies known’.¹⁸⁴ In promoting electoral fairness in this way, election funding clearly enhances ‘freedom to’ engage in political expression. Electoral fairness is also furthered by attempting to reduce candidates’ and parties’ reliance on private funding for campaigns, thereby preventing ‘[a] serious imbalance in campaign funding’¹⁸⁵ of the political parties.¹⁸⁶ The second purpose of election funding schemes is aimed at protecting the integrity of

¹⁸¹ Ibid 35–36.

¹⁸² Senator John Faulkner, ‘Apathy and Anger: Our Modern Australian Democracy’ (Speech delivered at the 3rd Henry Parkes Oration, Henry Parkes Memorial School of Arts, 22 October 2005).

¹⁸³ Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 1983, 2215 (Kim Beazley).

¹⁸⁴ Ibid.

¹⁸⁵ Ibid 2213.

¹⁸⁶ Ewing has also noted that equality of electoral opportunity requires that ‘no candidate or party should be permitted to spend more than its rivals by a disproportionate amount’: Ewing, above n 56, 18.

representative government: in seeking to lessen reliance on private funding, election funding schemes not only seek to promote electoral fairness but also to lessen the risk of corruption accompanying private funding. The federal election funding schemes, however, fares poorly against its fairness and anti-corruption rationales. Worse still, it has in fact contributed to electoral unfairness and possibly increased the risk of corruption.

With the fairness rationale, we can begin by considering the effect of election funding schemes on levelling out the financial inequalities amongst the main parties. Table 13 provides an indication of this effect. It attempts to gauge how the amount of each party's funding compares with their electoral support by dividing the amount of total funding, private funding and election funding received by a party for the period 1999–2000 to 2001–02 by the number of first preference votes the party received in the 2001 federal election. This measure is used to indicate how the funding received by each party corresponds to its electoral support (as indicated by first preference votes).

These figures reveal a dramatic funding inequality between the ALP, Liberal Party and National Party, on one hand, and the Democrats and the Greens, on the other. The former received more than \$20 per 2001 election vote. The Democrats and Greens, however, received around \$10 per 2001 election vote. Table 13 indicates that this inequality is due largely to the different amounts of private money received by the parties with the pattern of private money received per vote corresponding with the pattern of total funding received per vote.

In terms of the levelling effect of election funding, one measure is to assess the extent to which such funding narrows the disparity in private funding per vote. Using this measure, we see that overall election funding has a limited levelling effect on the funding inequality between the parties. However, this effect varies significantly according to the party. For example, the effect is quite substantial in relation to the Democrats. As an illustration, the ratio of private funding per vote for the ALP and the Democrats stands at 1:3.62. The corresponding ratio of total funding (which includes electoral funding) per vote is, however, 1:2.51. In contrast, the levelling effect is very modest in relation to the Greens. For example, the ratio of private funding per vote for the Liberal Party and the Greens is 1:2.19 whereas the

corresponding ratio of total funding per vote was marginally less at 1:1.95. Such difference will largely be due to the inferior electoral funding that the Greens received because of the 4 per cent threshold which applies to election funding.¹⁸⁷

Table 13: Funding per Vote, 1999–2000 to 2001–02

Party	First preference votes in 2001 election	Total funding per vote	Private funding per vote	Election funding per vote
ALP	4 341 419	\$27.01	\$22.14	\$3.67
Liberal Party	4 291 033	\$22.27	\$18.62	\$3.25
National Party	643 924	\$33.74	\$28.64	\$3.86
Democrats	620 248	\$10.75	\$6.12	\$4.17
Greens	569 075	\$11.41	\$8.51	\$2.73

Source: Joo-Cheong Tham and David Grove, 'Public Funding and Expenditure Regulation of Australian Political Parties' (2004) 32 *Federal Law Review* 397, 404 (Table 3).¹⁸⁸

Together with having a limited levelling effect, there are also features of election funding schemes that result in greater electoral unfairness. Funding under these schemes is calculated based on past electoral support, a method that inevitably means that established parties enjoy a financial advantage over newer parties. Instead of promoting open electoral contests, the 4 per cent threshold that applies to these schemes clearly discriminates against minor parties and newcomers.¹⁸⁹ Indeed, it has been argued that the current system of election funding 'reinforces the duopoly that the major parties have over political office'.¹⁹⁰

¹⁸⁷ See also discussion in Graeme Orr, 'The Currency of Democracy: Campaign Finance Law in Australia' (2003) 26 *University of New South Wales Law Journal* 1, 27.

¹⁸⁸ The following definitions have been used in relation to this table:

-*Electoral funding*: Funding received from federal and state electoral commissions.

-*Public funding*: Funding from all government bodies. This would include *Electoral funding* as well as payments from governmental bodies like the Australian Taxation Office

-*Private Funding*: Total funding minus public funding.

-*Total funding*: The total receipts indicated on the returns minus *Internal Transfers*.

¹⁸⁹ For similar sentiments, see Orr, above n 187, 21.

¹⁹⁰ David Tucker & Sally Young, 'Public Financing of Election Campaigns – A Solution or a Problem?' in Glenn Patmore (ed), *Labor Essays 2002: The Big Makeover: A New Australian Constitution*, (Pluto Press in association with the Australian Fabian Society, 2001) 60, 69.

Worse, election funding might, in fact, exacerbate electoral unfairness by functioning as ‘an add-on that allows the competing political parties to spend more on advertising and other electoral purposes than they would otherwise choose to do’.¹⁹¹ The issue here is whether election funding fuels increases in campaign expenditure. While a definitive answer awaits a systematic analysis, there is good reason to suspect this to be the case. There is, firstly, no natural limit to campaign expenditure or, more generally, to the parties’ expenditure. The only real limit is the size of the parties’ budgets. Thus, if the parties’ budgets expand because of election funding, we should expect increases in campaign expenditure in the absence of other constraints like election spending limits.¹⁹² Furthermore, there is anecdotal evidence that broadcasters charge the parties an additional premium for political advertising.¹⁹³ If this is true, by boosting advertising rates election funding would necessarily increase campaign expenditure. If election funding does, in fact, fuel campaign expenditure, such funding indirectly sets up a barrier against newcomers. Such newcomers will invariably be discouraged by the prohibitive costs of political campaigns.

These features of the federal election funding schemes realise, to some extent, a fear voiced by opponents of increased public funding of political parties. This is the fear that public funding will ossify the existing party system by generously supporting existing parties while creating a “vicious circle” for smaller parties which would be unable to receive funding because they had no representation and would be unable to field candidates because they lacked the necessary funding’.¹⁹⁴

What then of the anti-corruption rationale of election funding schemes? The fact that federal election funding is not tied to any conditions or obligations relating to the receipt of private funding makes a mockery of this rationale. It is fanciful, for

¹⁹¹ Ibid 67.

¹⁹² Even with robust regulation of campaign expenditure, public funding is still likely to fuel the parties’ expenditure in other areas, for example, through the employment of increased numbers of party staff members and more expensive party events like conferences.

¹⁹³ Stephen Mills, *The New Machine Men: Polls and Persuasion in Australian Politics* (Penguin, 1986) 189–90.

¹⁹⁴ United Kingdom Electoral Commission, *The Funding of Political Parties: Background Paper* (2003) 22. See also Committee on Standards in Public Life, *Fifth Report: The Funding of Political Parties in the United Kingdom*, Cm 4057–I (1998) 91–92 (often referred to as the Neill Committee Report after its Chair, Lord Neill). For similar sentiments, see Sally Young, ‘Killing Competition: Restricting Access to Political Communication Channels in Australia’ (2003) 75(3) *AQ: Journal of Contemporary Analysis* 9, 9–11.

example, to suggest that election funding acts as an antidote to the unsavoury fundraising practices of political parties. Indeed, the vice of election funding might, in fact, go beyond ineffectiveness. If it were true that federal electoral funding inflates campaign expenditure, such funding would then perversely increase reliance on private funding as parties seek more donations to meet their perceived expenditure needs. So, far from ‘purifying’ the political process by reducing the reliance of political parties on large donations and insulating them from the risk of corruption,¹⁹⁵ election funding might perversely be a corrupting element.

There are two other criticisms of election funding schemes to consider. First, such schemes are said to sap the vitality of political parties by reducing their need to have members or engage with them and the broader citizenry in order to raise funds.¹⁹⁶ The risk here is that election funding detracts from the participatory function of political parties. It is not easy to evaluate this claim not least because a proper inquiry into the connection between election funding (or public funding more generally) and the vitality of Australian political parties has yet to be undertaken. This much, however, can be said – current election funding schemes do little to enhance the participatory function of political parties, a matter that will be revisited shortly.

Second, election funding schemes are said to pose a danger of corruption through the misuse of public resources. This has come to the fore with claims of ‘profiteering’ from such schemes. The most prominent instance has been with candidates associated with Pauline Hanson, former leader of the One Nation party. These candidates received almost \$200 000 in election funding in relation to the 2007 federal election but only spent \$35 427 on campaigning costs - the implication being that the difference between the amount of election funding received and the campaign spending was ‘pocketed’ by Hanson.¹⁹⁷

¹⁹⁵ Arguments based on ‘purification’ have been made by UK proponents of increased state funding, see Committee on Standards in Public Life, above n 194, 90–91.

¹⁹⁶ See Dean Jaensch, ‘Party Structures and Processes’ in Ian Marsh (ed), *Political Parties in Transition* (Federation Press, 2006) 24, 30. Blondel has also raised the prospect that public funding of parties might diminish their ‘fighting spirit’: Jean Blondel, *Political Parties: A Genuine Case for Discontent?* (Wildwood House, 1978) 91.

¹⁹⁷ Joint Standing Committee on Electoral Matters, *Advisory Report: Commonwealth Electoral Amendment Bill 2008*, above n 118, 14.

In response to this issue of ‘profiteering’, the Commonwealth Electoral Amendment (Political Donations and other Measures) Bill 2008 seeks to bring the federal election funding arrangements in line with other schemes by limiting the amount of such funding to ‘electoral expenditure’ incurred by the eligible party or candidate. In its report on the Bill, the Joint Standing Committee on Electoral Matters supported the central thrust of this amendment but agreed with the suggestion of the Democratic Audit of Australia that the definition of ‘electoral expenditure’ should be broadened to include rental of campaign premises, employment of campaign staff and office administration.

This is a sensible position but does not go far enough. Whilst corruption through the misuse of public resources occurs when election funding is used for the private purposes of a candidate, there is little ground for concluding the same when such funding is used for party activities other than campaigning (e.g. party administration costs). True, the original rationale of the federal election funding scheme was aimed at promoting the electoral function of political parties (by promoting electoral fairness) but it is time for fuller recognition of the fact that parties have other functions, all of which should also be adequately resourced through state funding. As will be argued below, such recognition will come about by moving from election funding schemes to Party and Candidate Support Funds.

2 *Tax Subsidies*

Three distinct aims may justify such subsidies. Tax deductions may be said to:

- encourage small contributions so as to diversify the funding base of parties and, therefore, reduce the influence of ‘big money’;
- promote political participation through increased party membership; and
- help ensure that parties are adequately funded.

All three aims are integral to the democratic functions of political parties – the first two links more specifically to the participatory function of political parties, while the last seeks to generally promote democratic functions of parties.

Measured against these three aims, however, tax subsidies are both *inefficient* and *inequitable*. They are inefficient because neither small contributions - say contributions of a hundred dollars or less - nor party membership is a condition for tax deductibility. Specifically, eligibility for tax deduction is cast too wide with large contributions coming within the scope of the current provisions. Another cause of inefficiency is that the money provided from the public purse goes to tax payers rather than to the parties¹⁹⁸ - if these provisions are meant to assist in ensuring that parties are adequately funded, they do so in a rather indirect and limited fashion. There may also be another reason why tax deductions are an inefficient way to achieve the above aims. Such a system places the incentive to make contributions and take out membership on the taxpayer more so than on the parties themselves to solicit contributions and membership. A system of public subsidy that relies more directly on strengthening incentives for parties may be more effective.

Tax subsidies of the kind that currently exist are also inequitable on several counts. They discriminate against those who do not have to pay tax: job seekers,¹⁹⁹ retirees without income, full-time parents and students not engaged in paid work who make small contributions or take out party membership are denied the benefit of the current system. This leads to a broader point: a system of tax relief tends to disproportionately benefit wealthy sections of society.²⁰⁰ Whilst there is no data to indicate which taxpayers have relied upon the tax subsidies under the *ITAA 1997*, the Canadian experience of using tax relief to encourage political contributions is instructive. Canadian federal law provides for a Political Contribution Tax Credit (PCTC). Under this scheme, individuals and corporations can deduct a portion of their political contributions from their tax liability. The deductible amounts are based on a sliding scale as depicted in the table below.

¹⁹⁸ For similar sentiments, see Lowenstein (1989), above n 21, 364–65.

¹⁹⁹ See Ewing, *The Funding of Political Parties in Britain*, above n 56, 139.

²⁰⁰ See KD Ewing, *The Cost of Democracy: Party Funding in Modern British Politics* (Hart, 2007) 194.

Table 14: Canadian Political Contribution Tax Credit

Amount of contribution	Tax credit
C\$0 to C\$100	75% of contribution <i>For example C\$75 credit for C\$100 contribution</i>
C\$101 to C\$550	C\$75 + 50% of amount of contribution exceeding C\$100 <i>For example C\$275 credit for C\$500 contribution</i>
Over C\$550	The lesser of \$500 or C\$300 + 33 1/3% of amount of contribution exceeding C\$550 <i>For example C\$450 credit for C\$1000 contribution</i>

Source: *Income Tax Act*, RSC 1985, c 1, s 42(2) (Canada)

In her analysis of the impact of the PCTC, Young, while acknowledging that the scheme may encourage small contributions, observed its unfair operation. Drawing upon a breakdown of tax data for 2000 (which were based on a scheme providing slightly different amounts of tax credits from the current one), she said:

The almost half of all Canadian tax filers whose income fall into the lowest bracket comprise only 10 per cent of all PCTC claimants, while the 3 percent of tax filers in the highest bracket make 18 percent of all claims. The pattern is even more skewed when one compares the value of the tax credit for low and high income earners, as the latter are prone to make large contributions. Despite its other merits, then, the PCTC reinforces an inequitable pattern of giving to parties and candidates.²⁰¹

In fact, Young's observations may have greater force now. In 2000, the PCTC allowed tax credits of 75 per cent for contributions up to C\$200 whereas that limit has since been increased to C\$400.²⁰²

A similar system of tax relief operates in the Canadian province of Quebec although at less generous rates.²⁰³ Nevertheless, the inequity of such a system is apparent. Data from 1997 indicates that while taxpayers earning C\$20 000 or less per annum

²⁰¹ Lisa Young, 'Regulating Campaign Finance in Canada: Strengths and Weaknesses' (2004) 3(3) *Election Law Journal* 444, 452.

²⁰² *Ibid* 447, 459.

²⁰³ See Louis Massicotte, 'Financing Parties at the Grass-Roots Level: The Quebec Experience' in K D Ewing & Samuel Issacharoff (eds), *Party Funding and Campaign Financing in International Perspective* (Hart, 2006) 151, 159–60.

constituted 54 per cent of all taxpayers, they only constituted 15 per cent of those who claimed a credit under the Quebec system. Those earning C\$50 000 or more, on the other hand, represented 43 per cent of those who claimed the credit, while only constituting 10 per cent of all taxpayers.²⁰⁴

This brief review of the Canadian evidence indicates that a system of *tax relief* aimed at encouraging political contributions disproportionately benefits the wealthy for two reasons. First, the rich are more likely to make financial contributions to parties than the less well off. In Massicote's words, such contribution is 'a rather elitist activity'.²⁰⁵ Second, because the rich are more likely to make larger contributions, the amount of tax relief they can claim is correspondingly increased.²⁰⁶

Such inequity may exacerbate the unfairness of political competition. Given the lack of information regarding the use and impact of current tax deductions, it would be unwise to be too emphatic about this point. That said, it is likely to be the case that under a system of tax relief, inequity amongst citizens will translate to inequity amongst the parties. Parties with rich members and supporters will probably reap significant rewards from this system while the benefit to parties with poorer members and supporters may very well be marginal.

Worse, several features of the current scheme exacerbate the risk of such unfairness. Allowing deductions for donations up to \$1500 per annum provides tax relief for political donations that are out of reach of ordinary Australians. Moreover, the current provisions allow corporations to claim tax deductions for their political contributions. This runs contrary to the aim of reducing the influence of 'big money'. Because corporate money tends to go overwhelmingly to the major parties, subsidising corporate contributions threatens to exacerbate the financial divide between the major and minor parties. Of fundamental concern is why public subsidy should facilitate contributions by entities that are clearly not citizens nor organised in a democratic

²⁰⁴ Ibid 173.

²⁰⁵ Ibid 172.

²⁰⁶ Similar points are made by Ewing: K D Ewing, *Trade Unions, the Labour Party and Political Funding: The Next Step: Reform with Restraint* (Catalyst, 2002) 39–40.

fashion but instead are plutocratic organizations whose general principle is ‘one share, one vote’.²⁰⁷

There is, therefore, a compelling case for abolishing these tax deductions (and for the enactment of Schedule 1 of the Tax Laws Amendment (2008 Measures No. 1) Bill 2008 (Cth))²⁰⁸. Whilst the various aims that may justify tax subsidies are sound, these aims should be pursued through other regulatory measures. The general aim of promoting the functions of parties should be advanced by the establishment of Party and Candidate Support Funds (as discussed earlier in this chapter). Annual allowances which are calculated in part according to the number of party members should encourage party membership. In terms of encouraging small contributions, a system of matching funds could be put in place. For example, for each contribution of \$50 or less received per annum by candidates and registered parties, public funds could be provided to match 10 per cent of the value of these contributions. It is important to stress that, in addition to limiting this system to small contributions, the scheme should only involve a modest public subsidy in total. Both of these factors are necessary in order to alleviate the risk of such a system being biased towards wealthy citizens and parties.

E *Abuse of Parliamentary Entitlements for Electioneering*

We now shift our focus from the public funding available to political parties and candidates to that specifically provided to parliamentarians. Some questions immediately arise: Why should public funding be provided specifically to parliamentarians? If public funding is to be provided at all, why is it not provided to all parties and candidates?

The answers to these questions lie with the distinctive duties of parliamentarians. Parliamentarians are not merely successful candidates, but are also holders of *public* office. As holders of public office, parliamentarians have two key duties. The first is to represent the constituents of their electorate (and not just their supporters, the

²⁰⁷ RP Austin & IM Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 2007) 298.

²⁰⁸ See generally Joint Standing Committee on Electoral Matters, *Advisory Report: Commonwealth Electoral Amendment Bill 2008*, above n 118.

members of their party or their party organisation). It is this duty that informs the description of parliamentarians as the ‘Member *for* [name of electorate]’. Secondly, parliamentarians have a duty to participate in the governance of their country, state or territory, notably, through participation in parliament. Such participation will embrace involvement in law making, scrutiny of executive action and deliberation of important public issues.

Performance of these duties encompasses a range of activities, most of which require money and personnel. Proper performance of these duties firstly requires a full-time commitment from parliamentarians. To avoid elected office becoming the privilege of the wealthy, adequate remuneration should be provided to the parliamentarians themselves so that they can deliver on this commitment. Basic infrastructure (like an office with adequate facilities and staff) is also necessary for the performance of these duties. Communicating with constituents is essential and some methods of doing so will require funding.

It is in recognition of the public duties of parliamentarians (and the resources that are necessary for the performance of such duties) that all jurisdictions (including the Commonwealth) have established parliamentary entitlements. Common entitlements include, for example, parliamentary salaries, office accommodation and facilities, travel and accommodation entitlements and the use of government vehicles.²⁰⁹ Commonwealth, state and territory parliamentarians are also provided with a (differing) range of allowances. All parliamentarians are, for example, provided with an electorate allowance that, as the name suggests, is to be used to service the needs of their electorates.²¹⁰

²⁰⁹ See Department of the Legislative Council, Parliament of New South Wales, *Legislative Council Members’ Guide* (2007); Department of the Legislative Council, Parliament of New South Wales, *Members’ Handbook: A Guide to the Support Available to Members of the New South Wales Legislative Assembly* (2008); Parliamentary Service of Queensland, *Members’ Entitlements Handbook: Benefits Afforded Members and Former Members of the Queensland Legislative Assembly* (2009); Legislative Council, Parliament of South Australia, *Handbook for Members of the Legislative Council of South Australia* (2009); *Parliamentary Allowances Regulations 2003* (Vic); Legislative Assembly for the Australian Capital Territory, *Members’ Guide: Guide to Services, Facilities and Entitlements for Non-Executive Members and Their Staff* (2008); Northern Territory of Australia Remuneration Tribunal, *Report on the Entitlements of Assembly Members and Determination No 1 of 2009* (2000).

²¹⁰ Queensland Parliamentarians are not entitled to an electorate allowance but are provided similar allowances, namely, the General and Miscellaneous allowances: Parliamentary Service of Queensland, *Members’ Entitlements Handbook*, above n 209, 5, 7. Similarly, there is no specific electorate allowance for members of the ACT Legislative Assembly. These members are, however, entitled to a

What seems to be the most complicated framework governing parliamentary entitlements is that of the Commonwealth. This framework is comprised of five separate pieces of legislation. The salary and electorate allowance of Commonwealth parliamentarians are provided under the *Remuneration and Allowances Act 1990* (Cth).²¹¹ Various other entitlements are provided under the *Parliamentary Entitlements Act 1990* (Cth) including office accommodation, postage allowance and travel entitlements.²¹² The regulations for this statute authorise other entitlements,²¹³ notably, a printing and communications entitlement.²¹⁴ Finally, there are various allowances determined by the Commonwealth Remuneration Tribunal under the *Parliamentary Allowances Act 1952* (Cth) and the *Remuneration Tribunal Act 1973* (Cth).²¹⁵ There are no specific principles prescribed to guide the Tribunal's determinations.

Whilst the provision of parliamentary entitlements has, at its base, a compelling justification, it also carries two related risks: corruption through the misuse of public resources; and unfairness in politics, specifically electoral unfairness. With parliamentary entitlements, corruption through the misuse of public resources occurs when entitlements are used for a purpose other than the performance of parliamentary duties, for example, for the personal benefit of parliamentarians or to advance the electoral position of parliamentarians or their parties. In the latter situation, corruption through the misuse of public resources comes hand in hand with electoral unfairness.²¹⁶ The danger of such unfairness is inherent in the provision of parliamentary entitlements. These entitlements are provided to parliamentarians but not to their unelected competitors. Furthermore, parliamentary activities are inseparable from campaign activities in many cases.²¹⁷ The result is that various parliamentary entitlements (for example, the provision of office, staff and electorate

similar allowance, an annual Discretionary Office allocation. For members other than the Speaker or the Leader of the Opposition, the amount of the allocation is \$4,600 per annum: Legislative Assembly for the Australian Capital Territory, *Members' Guide*, above n 209, 120.

²¹¹ *Remuneration and Allowances Act 1990* (Cth) ss 6–7, schs 3–4.

²¹² *Parliamentary Entitlements Act 1990* (Cth) s 4, sch 1.

²¹³ *Ibid* s 5(1)(b).

²¹⁴ *Parliamentary Entitlements Regulations 1997* (Cth) reg 3AA.

²¹⁵ *Parliamentary Allowances Act 1952* (Cth) s 4; *Remuneration Tribunal Act 1973* (Cth) ss 7(1), 7(4).

²¹⁶ For similar sentiments, see Thompson, above n 13, 74.

²¹⁷ *Ibid* 73.

allowances) can easily be used to resource the campaigns of parliamentarians to the detriment of their unelected rivals.

This is hardly an insignificant risk. There are various examples of parliamentary entitlements having been used for campaign purposes. At the Commonwealth level, printing and communication allowances have been flagrantly abused to resource the election campaigns of federal parliamentarians (discussed below), a development that has coincided with the trend of increased use of parliamentarians' office accommodation and facilities during election periods.²¹⁸

Corruption through the misuse of public resources can take the form of individual corruption. Take, for example, the situation where a parliamentarian uses his travel entitlements to fund a holiday. In this situation, the gain to the parliamentarian is personal and the gain is undeserved as the travel entitlements are being illegitimately used. When there is corruption through the misuse of public resources involving electoral unfairness, however, such corruption tends to take the form of institutional corruption. The gain that is secured in such cases is political not personal as it is aimed at boosting the electoral position of the parliamentarian (or his or her party), the use of public resources is procedurally improper because of its illegitimate purpose and this purpose clearly damages the democratic process by promoting electoral unfairness.

In addressing the cognate dangers of corruption through the misuse of public resources and electoral unfairness, three principles should be followed:

- Principle One: The rules governing parliamentary entitlements should be accessible and transparent;
- Principle Two: The rules should clearly limit the use of parliamentary entitlements to the discharge of parliamentary duties and prevent their use for electioneering; and
- Principle Three: The amount of parliamentary entitlements should not confer an unfair electoral advantage upon parliamentarians.

²¹⁸ Australian National Audit Office, *Administration of Parliamentarians' Entitlements by the Department of Finance and Deregulation: Auditor-General Report No 3 / 2009–2010* (2009) 141.

The rationale for Principle One is clear: use of public funds should be transparent and publicly accountable. Principle Two seeks to prevent the illegitimate use of parliamentary entitlements. Principle Three recognises that, in the context of parliamentary activities being sometimes inseparable from campaign activities, Principle Two is insufficient to prevent electoral unfairness, hence the need to ensure that the value of parliamentary entitlements does not unfairly advantage parliamentarians.

When evaluated against these principles, the arrangements governing federal parliamentary entitlements fall seriously short.

Principle One: The Rules Governing Parliamentary Entitlements Should be Accessible and Transparent

The rules governing federal parliamentary entitlements are contained in the relevant legislation and determinations of the Commonwealth Remuneration Tribunal. They are also included in the handbook issued to parliamentarians regarding these entitlements. The relevant legislation and determinations are clearly accessible and transparent and the handbook was publicly released in 2010.²¹⁹

This principle has, however, been breached through the development of opaque conventions, arguably in breach of formal legal rules. In 2009, the Auditor-General handed down a comprehensive report on parliamentary entitlements that found that their use was influenced by two documents developed by the then federal government, '31 Statements' and '42 Questions and Answers', which purported to capture accepted practices.²²⁰ These documents, as the Auditor-General curtly observed, were 'not made public'.²²¹ Moreover, legal advice received by the Auditor-General indicated that these documents were not consistent with the statutory

²¹⁹ Commonwealth of Australia, *Senators and Members' Entitlements* (2010)

<http://www.finance.gov.au/parliamentary-services/docs/senators_and_members_entitlements.pdf>

²²⁰ See Australian National Audit Office, *Administration of Parliamentarians' Entitlements: Auditor-General Report No 3/2009-2010*, above n 218, 54–67.

²²¹ *Ibid* 19–20.

provisions governing the Printing Entitlement, resulting in the entitlement being frequently used in breach of its conditions.²²²

Principle Two: The Rules Should Clearly Limit the Use of Parliamentary Entitlements to the Discharge of Parliamentary Duties and Prevent their Use for Electioneering

This principle suggests four elements:

- a general policy that parliamentary entitlements only be used for parliamentary duties;
- a clear elaboration or definition of such duties;
- a general prohibition of the use of entitlements for electioneering; and
- specific rules elaborating upon this prohibition.

All four elements are *not* met in relation to federal parliamentary entitlements. There is no general policy that these entitlements only be used for parliamentary duties, nor is there a general prohibition against their use for electioneering. For a handful of entitlements (for instance, the postage allowance), there is a requirement that they be used for ‘parliamentary or electorate business (other than party business)’.²²³ Despite this restriction, the entitlements remain quite malleable and can fund electioneering activities. This malleability is due to the fact that the legislative instruments do not define either ‘parliamentary or electorate business’ or ‘party business’. As a result, there is no statutory delineation between legitimate and illegitimate uses, despite calls from bodies like the Australian National Audit Office for clearer definitions and guidance.²²⁴ As a consequence of this ambiguity, a liberal view of ‘parliamentary or electorate business’ has been adopted resulting in various forms of electioneering being included within the definition. One stark example is a general acceptance that the use of electorate staff to aid the re-election of incumbent parliamentarians constitutes a permissible use of such entitlements.²²⁵

²²² Ibid 21.

²²³ *Parliamentary Entitlements Act 1990* (Cth) sch 1 pt 1 item 3.

²²⁴ Australian National Audit Office, *Parliamentarian Entitlements: 1999–2000* (2001) [2.61]–[2.68]; Australian National Audit Office, *Administration of Parliamentarians’ Entitlements: Auditor-General Report No 3/2009-2010*, above n 218, 15.

²²⁵ Australian National Audit Office, *Administration of Staff Employed Under the Members of Parliament (Staff) Act 1984: Auditor-General Audit Report No 15 / 2003–2004* (2003) 16.

Not only do the arrangements governing Commonwealth parliamentary entitlements fail to prohibit their use for electioneering and campaigning purposes, they have gone further by officially sanctioning such use. One of the most egregious examples is provided by the printing entitlement.²²⁶ Prior to October 2009, the *Parliamentary Entitlement Regulations 1997* (Cth) allowed the Special Minister of State to approve further categories of printed material that could be distributed to constituents through the use of this entitlement.²²⁷ In 2004, approval was given by the then Minister to use this entitlement to print ‘postal vote applications and other voting information’.²²⁸ In his 2009 report on federal parliamentary entitlements, the Auditor-General found that such use of the printing entitlement often resulted in postal vote applications being accompanied by campaign material for the party.²²⁹ Worse, such use gave rise to obvious waste: 16.5 million applications were printed in this way, 2.9 million more postal vote applications than the total number of voters enrolled.²³⁰ The Auditor-General found a similar (ab)use of the printing entitlement to produce ‘How to Vote’ cards (included as ‘other voting information’),²³¹ with cards sent by parliamentarians tailored to reflect key elements of their party’s election campaign strategy.²³²

Here, an officially sanctioned use of the printing entitlement for particular electioneering purposes (such as printing ‘postal vote applications and other voting information’) intermingles with an illegitimate use for other electioneering purposes. This tension is clearly illustrated by the Auditor-General’s analysis of items produced by the printing entitlement in the months leading up to the 2007 federal election. The Report found that 74 per cent of the analysed sample was at risk of being deemed illegitimate, principally because the content of the printed material contained ‘high levels of material promoting party political interests and/or directly attacking or

²²⁶ The printing entitlement has now been merged with the communications allowance: see *Parliamentary Entitlements Regulations 1997* (Cth) reg 3AA.

²²⁷ Ibid reg 3(1)(c), 3A(1)(c), as repealed by *Parliamentary Entitlements Amendment Regulations 2009* (No 1) (Cth).

²²⁸ Australian National Audit Office, *Administration of Parliamentarians’ Entitlements: Auditor-General Report No 3/2009-2010*, above n 218, 146.

²²⁹ Ibid 148.

²³⁰ Ibid 147.

²³¹ Ibid 163.

²³² Ibid 165–66.

scorning the views, policies or actions of others, such as the policies and opinions of other parties’.²³³

In light of its findings, it is not surprising that the Auditor-General concluded that ‘fundamental reform of the overall entitlements framework is needed’.²³⁴ The Auditor-General’s damning findings have not gone unheeded. In September 2009, the ALP Government took important steps to curb the use of the printing entitlement and the communications allowance for electioneering and campaigning. Taking effect from 1 October 2009, amendments to the *Parliamentary Entitlements Regulations 1997* (Cth) merged both allowances into one printing and communications entitlement, with a decrease in the total amount of the entitlement. As a result, Senators are entitled to \$40 000 per annum²³⁵ while the annual entitlement for Members of the House of Representatives is now \$75 000 plus an amount equal to the standard rate of postage multiplied by the number of voters enrolled in each respective constituency.²³⁶ The amendments further stipulate that this entitlement ‘must only be used for parliamentary or electorate purposes and must not be used for party, electioneering, personal or commercial purposes’.²³⁷ ‘Electioneering’ is defined as communication that explicitly:

- ‘seeks support for, denigrates or disparages... the election of a particular person or persons... or a particular political party or political parties’;
- ‘encourages a person to become a member of a particular political party, or political parties’; or
- ‘solicits subscriptions or other financial support’.²³⁸

The ability of the Special Minister of State to approve further uses of this entitlement has been removed and use of the entitlement to produce how-to-vote material is now prohibited.²³⁹ Limits on the number of postal vote applications that can be printed

²³³ Ibid 36–37. See also Ibid 199–214.

²³⁴ Ibid 18.

²³⁵ *Parliamentary Entitlements Regulations 1997* (Cth) reg 3AC(2).

²³⁶ Ibid reg 3AB(6).

²³⁷ Ibid regs 3AA(3)–(4).

²³⁸ Ibid reg 3AA(11).

²³⁹ Ibid reg 3AA(3).

using the entitlement have also been introduced.²⁴⁰ The federal government has also committed to installing a more rigorous vetting and checking system within the Department of Finance to ensure that the entitlement is being properly used.²⁴¹

Unfortunately, the resolve, which the ALP federal Government initially demonstrated in reforming the printing and communications entitlement, seems to have dissipated. In December 2009, three months after the above changes were made, regulations were quietly tabled changing the rules governing this entitlement, the most important of which removed the prohibition on using this entitlement for ‘electioneering’, a change that was backdated to 1 October 2009.²⁴² With an imminent federal election, this timing of this change is hardly coincidental.

Principle Three: The Amount of Parliamentary Entitlements Should not Confer an Unfair Electoral Advantage upon Parliamentarians

Parliamentary entitlements provide an enormous amount of resources to parliamentarians. In 2008–09, entitlements provided to federal parliamentarians were worth \$331 million.²⁴³ Similarly the cost of federal parliamentary entitlements during the 1999–2000 financial year amounted to \$354 million.²⁴⁴ To get a sense of proportion, the total combined budget for the ALP, the Coalition, the Greens and the Democrats for the *three* financial years of 1999–2000, 2000–01 and 2002–03 was less than this amount and stood at approximately \$248 million.²⁴⁵ Based on reports of the Auditor-General, Sally Young has estimated that between \$887 024 and \$899 324 worth of parliamentary entitlements was available to each federal parliamentarian in 2002.²⁴⁶

²⁴⁰ Ibid reg 3AA(10).

²⁴¹ Senator Joe Ludwig, ‘Reform of Parliamentary Entitlements’ (Media Release, 8 September 2009) <http://www.smos.gov.au/media/2009/mr_352009.html>.

²⁴² *Parliamentary Entitlements Amendment Regulations 2009 (No 2)* (Cth), sch 1 reg 1.

²⁴³ Australian National Audit Office, *Administration of Parliamentarians’ Entitlements: Auditor-General Report No 3/2009-2010*, above n 218, 11, 45–46.

²⁴⁴ Australian National Audit Office, *Parliamentarian Entitlements: 1999–2000*, above n 218, [2]–[3].

²⁴⁵ Tham and Grove, ‘Public Funding and Expenditure Regulation of Australian Political Parties’, above n 81, 401 (calculated from Table 1).

²⁴⁶ Sally Young & Joo-Cheong Tham, *Political Finance in Australia: A Skewed and Secret System* (Democratic Audit of Australia, 2006) 58 (Table 3.7).

There is a serious risk that these entitlements will provide an unfair electoral advantage to parliamentarians. As noted above, several of these entitlements can easily (and unavoidably) be used for electioneering. This is especially the case with the electorate allowance which currently provides \$22 685 – \$32 895 per annum to each federal parliamentarian.²⁴⁷ Even if these amounts were not used for electioneering – an assumption that flies in the face of reality – the amounts provided by parliamentary entitlements are likely to confer an unfair electoral advantage upon incumbent parliamentarians because the performance of parliamentary duties is inseparable from campaigning activity. Of note is that this advantage is distributed inequitably even amongst incumbent parliamentarians. The ALP and the Liberal Party tend to reap a disproportionate benefit because their parliamentary representation is greater than their electoral support. This can be explained by two features of Australia's electoral system. First, House of Representatives seats are single-member electorates (unlike the Senate, where politicians are elected according to a proportional system).²⁴⁸ This favours the larger parties. For example, in the 2001 federal election, the Liberal Party and ALP respectively received 37.08 per cent and 37.84 per cent of the first preference votes, while their share of seats in the House of Representatives stood at 45.3 per cent and 43.3 per cent.²⁴⁹ Secondly, the number of House of Representatives members is constitutionally mandated to be twice the number of Senators.²⁵⁰

In order to avoid, or at least ameliorate this risk, the position of parties with no elected representatives needs to be 'levelled up', a strategy that involves a reconfiguration of the system of public funding of parties (as discussed earlier). Further, the financial resources specifically available to parliamentarians need to be 'levelled down'. At the very least, there should be an urgent review of the amounts provided for such entitlements. Moreover, when Remuneration Tribunals determine the amount to allocate for various parliamentary entitlements, they should be required to give effect to Principle Three.

²⁴⁷ *Remuneration and Allowances Act 1990* (Cth) s 6 sch 3 cl 2.

²⁴⁸ *Commonwealth Electoral Act 1918* (Cth) ss 273 (Senate), 274 (House of Representatives).

²⁴⁹ Figures derived from Australian Electoral Commission, *AEC: When: Past Electoral Events* <<http://results.aec.gov.au/10822/Website/index.html>> Historical election result data also available from Parliamentary Library, Parliament of Australia, *Detailed Results: House of Representatives* <<http://www.aph.gov.au/library/Pubs/RB/2004-05/05RB11-1f.HTM>>.

²⁵⁰ *Commonwealth of Australia Constitution Act 1900* (Cth) s 24.

F *Party-political Government Advertising*

There is no doubting the significance of government advertising. Australian governments are amongst the biggest advertisers in the country.²⁵¹ Between 1996 and 2003, Australian state and federal governments spent a total of US\$14.95 per capita on advertising, making Australia the country that spent the most on government advertising per head for that period (see Table 15).

Table 15: Worldwide Spending on Government Advertising, 1996–2003

Country	Amount spent (in US\$ million)	Population	Spending per head of population (in US\$)
Australia (state and federal governments)	\$294.10	19 731 984	\$14.91
Belgium	\$69.70	10 330 824	\$6.74
Ireland	\$19.00	3 924 023	\$4.84
United Kingdom	\$271.40	60 094 648	\$4.51
Singapore	\$13.50	4 276 788	\$3.15
Spain	\$58.80	40 217 413	\$1.46
South Africa	\$45.90	44 481 901	\$1.03
Mexico	\$46.60	103 718 062	\$0.44
Thailand	\$27.80	63 271 021	\$0.43
Brazil	\$68.10	182 032 604	\$0.37
Peru	\$2.30	27 158 869	\$0.08
Paraguay	\$0.41	6 036 900	\$0.06

Source: Sally Young, 'Government and the Advantages of Office' in Sally Young and Joo-Cheong Tham (eds), *Political Finance in Australia: A Skewed and Secret System* (Democratic Audit of Australia, 2006) 81.

According to official figures, the federal government spent over AU\$1.5 billion (in 2004–2005 prices) for the period 1991–92 to 2004–05 (see Table 16 below) on government advertising. Moreover, these figures underestimate the full amounts spent on government advertising as they only relate to the 'media spend' (the purchase of advertising space) and do not include the cost of advertising agency services, the

²⁵¹ Sally Young, 'Government and the Advantages of Office' in Sally Young and Joo-Cheong Tham (eds), *Political Finance in Australia: A Skewed and Secret System* (Democratic Audit of Australia, 2006) 74.

production of advertising material and the market research that informed advertising campaigns.²⁵² The extent of this underestimate is probably quite significant. For instance, the *Strengthening Medicare* advertising campaign involved \$15.7 million in ‘media spend’ but had a total campaign cost of \$21.5 million.²⁵³

Table 16: Federal Government Expenditures for Advertising Campaigns over \$10 000, 1991–92 to 2004–05

	AUD\$million (nominal amounts)	AUD\$million (in 2004–05 prices)
1991–92	\$48	\$63
1992–93	\$70	\$91
1993–94	\$63	\$81
1994–95	\$78	\$100
1995–96	\$85	\$106
1996–97	\$46	\$56
1997–98	\$76	\$92
1998–99	\$79	\$96
1999–00	\$211	\$250
2000–01	\$156	\$177
2001–02	\$114	\$126
2002–03	\$99	\$106
2003–04	\$143	\$149
2004–05	\$138	\$138
TOTAL	\$1406	\$1525

Source: Fiona Childs, ‘Federal Government Advertising 2004–2005’ (Research Note No 2/2006-07, Parliamentary Library, Parliament of Australia, 2006).

To draw attention to the vast amount of money spent on federal government advertising does not necessarily lead to the conclusion that such advertising is problematic. Indeed, government advertising clearly has a legitimate role in a representative democracy. At a general level, governments should (and need to) communicate with citizens. Laws and policies need to be publicised so citizens can

²⁵² Senate Finance and Public Administration References Committee, Parliament of Australia, *Government Advertising and Accountability* (2005) 16–17.

²⁵³ *Ibid* 17.

organise their lives. Such publicity is not only necessary in order to provide justice to citizens who are bound by these laws and policies but also to promote efficacy of government. It is also vital in terms of ensuring accountability as publicity is a necessary pre-requisite for public comment and criticism of government. Routine operations also require governments to engage in particular forms of communication, for instance, by advertising job vacancies.

We can further understand the specific role that government advertising plays in a representative democracy by distinguishing between two broad types of government advertising: ‘campaign’ advertising, namely, advertising relating to specific government programs; and ‘non-campaign’ advertising, for example, job vacancies and public notices.²⁵⁴ There is clearly a role for ‘non-campaign’ advertising and, in the controversies surrounding government advertising, this type of advertising has not been at issue. While more susceptible to controversy, there is also a legitimate place for ‘campaign’ advertising. For instance, the detail of specific government programs may need to be communicated to citizens so they can access these programs. Or laws may have been passed requiring citizens to change their behaviour, a change that may be effectively brought about by bringing the law to the attention of the public through advertising. It is also increasingly accepted that government advertising can be used as a form of social marketing, that is, used to bring about positive behaviour change (whether or not such change is legally required). The advertisements run by the Victorian Transport Accident Commission to reduce the road toll is a good example of such use.²⁵⁵

At one level, it is not surprising then that millions are (legitimately) spent on ‘campaign’ advertising. As Table 17 indicates, the federal government currently spends more than a hundred million dollars per annum on such advertising.

Table 17: Federal Government ‘Campaign’ Advertising, 2004–05 to 2008–09

Financial year	\$million
2008–09	\$130.10

²⁵⁴ Ibid 6–7.

²⁵⁵ See Sally Young, ‘A History of Government Advertising in Australia’ in Sally Young (ed), *Government Communication in Australia* (Cambridge University Press, 2007) 181, 185–190.

2007–08	\$185.30
2006–07	\$170.10
2005–06	\$120.50
2004–05	\$70.60

Source: Department of Finance and Management, Australian Government, *Campaign Advertising by Australian Government Departments and Agencies: Full Year Report 2008-09* (2009) 46.

Controversy, however, arises when ‘campaign’ advertising is said to be party-political. Party-political advertising occurs when government advertising is aimed at enhancing the electoral prospects of the governing party rather than advancing the legitimate needs of government. As so understood, party-political advertising involves two wrongs: *corruption through the misuse of public resources* because government advertising is principally directed at the illegitimate purpose of securing electoral advantage for the governing party, and *electoral unfairness* because such resources are only available to the governing party. As with the abuse of parliamentary entitlements, corruption through misuse of public resources that involves electoral unfairness tends to take the form of institutional corruption: the gain is typically political not personal, being aimed at enhancing the electoral position of the party in government, and the use of public resources is procedurally improper of its illegitimate purpose, a purpose which clearly damages the democratic process by resulting in greater electoral unfairness.

At the very least, suspicions of party-political advertising have been aroused by spikes in the amount of federal government advertising in the lead up to elections.²⁵⁶ There have been a number of notable controversies. To mention a few, prior to the 1993 federal election, the Keating ALP Government spent \$3.5 million on a Medicare advertising campaign and just prior to the 1996 election, an additional \$9.4 million on ‘Working Nation’ advertisements on employment.²⁵⁷ In the months leading up to the 1998 federal election, the Howard Coalition Government spent \$14.9 million on its

²⁵⁶ See generally Senate Finance and Public Administration References Committee, *Government Advertising and Accountability*, above n 252, 31–32.

²⁵⁷ Sally Young, *The Persuaders: Inside the Hidden Machine of Political Advertising*, (Pluto Press, 2004) 124–25.

proposal to implement a Goods and Services Tax, a tax which was to be introduced if the Coalition were re-elected.²⁵⁸

More recently, there was heated controversy over the Howard Coalition Government's 'WorkChoices' advertisements. Costing an estimated \$55 million,²⁵⁹ the advertisements were aired in two tranches, during July 2005 and October 2005, both prior to the actual legislation being introduced in the federal Parliament on 2 November 2005. Included in such advertisements were the following statements:

- 'Australia can't afford to stand still';
- 'Countries have the choice of either going forward or backwards. Marking time is not an option'; and
- WorkChoices 'will improve productivity, encourage more investment, provide a real boost to the economy and lead to more jobs and higher wages'.²⁶⁰

The use of government advertising for party-political campaigns has continued under the federal ALP government. The most glaring example relates to the government's 'mining tax' ads. On 24 May 2010, the Cabinet Secretary exempted this advertising campaign from compliance with the government's guidelines on advertising 'on the basis of urgency and compelling reasons'.²⁶¹ In a space of less than a month, 29 May to 24 June 2010, \$9.7 million of public funds were spent on this exempted campaign.²⁶²

G *Unfair Playing Field*

The flow of private money creates a dramatic funding inequality amongst the parties. When the private money received by the main parties between 1999–2000 and 2001–

²⁵⁸ For fuller details, see Australian National Audit Office, *Performance Audit: Taxation Reform: Community Education and Information Program* (1998) 8, 20–21. For comment, see Geoffrey Lindell, 'Parliamentary Appropriations and the Funding of the Federal Government's Pre-Election Advertising in 1998' (1999) 2(2) *Constitutional Law and Policy Review* 21.

²⁵⁹ Senate Finance and Public Administration References Committee, *Government Advertising and Accountability*, above n 252, xv. For fuller details of the expenditure, see *ibid* 47.

²⁶⁰ For fuller detail, see Senate Finance and Public Administration References Committee, *Government Advertising and Accountability*, above n 252, 50–51.

²⁶¹ Department of Finance and Deregulation, Australian Government, *Campaign Advertising by Australian Government Departments and Agencies: Full Report 2009/2010* (2010) 9.

²⁶² *Ibid* 37.

02 is divided by the first preference votes they received in the 2001 federal election, a sharp cleavage emerges between the major parties, on one hand, and the minor parties on the other. For each dollar of private money received per vote by the Democrats, more than three dollars was received by the ALP. And for each dollar of private money received per vote by the Greens, the Liberal Party received two dollars. It is this unequal flow of private money that largely explains why the major parties received more than \$20 per 2001 election vote, while the minor parties received less than half that amount.²⁶³

The imbalance stems from various sources. We saw earlier that the ALP and the Coalition very much have a monopoly over corporate political money. The parties also enjoy significant income from their investment vehicles. The financial position of the ALP is further consolidated by its receipt of trade union money. Come election time then, the playing field is far from level. Armed with larger war chests, the major parties are able to vastly outspend their competitors. The unfair advantage secured by these parties through private funds is further amplified by inequitable election funding of parties and incumbency benefits like parliamentary entitlements and government advertising. The result is that, rather than having fair elections, there is a skewed situation with electoral competition favouring the Coalition and the ALP. This highlights a corrosive dynamic where money follows the (greater) political power of the major parties and their power, in turn, is consolidated by such money.

The unequal flow of private money highlights how big corporations that hedge their bets by giving to the ALP and the Coalition parties rely upon a pseudo-notion of fairness. For these companies like Leighton Holdings, there is even-handedness as donations are given ‘in a bipartisan way’.²⁶⁴ Rather than explaining away any unfairness, such bipartisanship, in fact, underscores the inequity of such practices. Because the major parties are the principal beneficiaries of corporate money, not only are other parties and groups placed at a financial disadvantage but their views are also sidelined in the marketplace of ideas.

²⁶³ Tham & Grove, ‘Public Funding and Expenditure Regulation of Australian Political Parties’, above n 81, 403–4.

²⁶⁴ Bachelard, above n 131, 9.

There is also an interesting twist to the inequality stemming from corporate money. The receipt by the ALP of corporate money *and* trade union funds has led the Liberal Party to cry foul. In the 2007 Liberal Party federal council, the party treasurer, Mark Bethwaite, criticised the fact that '[c]orporate attitudes to political donations have become fixed on achieving a balance between Liberal and Labor'. He warned the business community that it:

must realise that we do not face a level playing field at the coming election. We will need to fund-raise at a much more significant level than we have achieved before if we are able to match Labor and their union bosses.²⁶⁵

There is considerable force to these claims: the ALP is the principal recipient of trade union money and, as will be explained below, there was a lack of 'equality of arms' between the Coalition and the ALP in the 2007 federal election favouring the ALP. At the same time, it is important to keep these claims in perspective. As was noted earlier, trade union money, even at its highest proportion for the financial years 2006–07 and 2007–08, constituted less than one-sixth of the ALP's total income. Moreover (as will explained below), the inequality of arms favouring the ALP is a recent phenomenon pertaining to the 2007 federal election with the position reversed for the previous three elections. Having lodged these caveats, it remains the case that the inequality between the ALP and the Coalition parties is of significance in terms of political fairness. The submission will now take up this matter by firstly, examining the impact of election spending on election outcomes and, secondly, by detailing the unfairness resulting from the current patterns of election spending.

1 *Money Buying Elections?*

As election campaign spending increases, concerns grow that such spending distorts election outcomes. In its strongest form, the argument is that money can buy elections and, consequently, to the biggest spender go the spoils of office. If correct, there is a clear subversion of democratic process with elections determined not by open deliberation in which citizens can fairly participate, but by the amount of money that

²⁶⁵ Michelle Grattan, 'Liberals' treasure attacks two-bob each-way donors', *The Age* (Melbourne), 2 June 2007, 2.

is spent. In these circumstances, we have grave reason to suspect that the trappings of democracy merely conceal a plutocracy.

The proposition that ‘campaign expenditure buys votes’ is, however, untenable.²⁶⁶ For instance, the biggest spenders on political broadcasting for the federal elections running from 1974 to 1996 only won half of these contests.²⁶⁷ The flaw in this proposition is its assumption of the overriding significance of campaign spending in determining voting behaviour. Such behaviour is, on the contrary, shaped by a complex series of factors. There is the influence of long-term variations, whether it is cultural (e.g. a history of loyalty to a particular party), demographic (e.g. different voting inclinations between older versus younger citizens) or class-based (e.g. voting behaviour of low-income versus high-income citizens); there is also the effect of short-term circumstances including the impact of election campaigns.²⁶⁸ Moreover, the impact of election campaigns is not *solely* determined by the amount of campaign spending, as ‘money is only one of several kinds of campaign resources’.²⁶⁹ Further, these factors, both short and long-term, interact in complicated ways with their respective weight varying not only in different electoral systems but also for elections held in the same electoral system.

Not surprisingly then, there is a complex relationship between campaign expenditure and voter support²⁷⁰ or put differently, between ‘spending and electoral payoffs’.²⁷¹ Given the complexity *and* variability of this relationship, it is perhaps unsurprising that the academic literature has reported mixed findings on the effect of campaign spending on voting behaviour. Much of the overseas research has concluded that increasing relative spending on campaigning has a positive impact on a party or candidate’s share of vote. This was a key finding of analyses of the 1981²⁷² and

²⁶⁶ Committee on Standards in Public Life, above n 194, 117.

²⁶⁷ Sally Young, ‘Spot On: The Role of Political Advertising in Australia’ (2002) 37 *Australian Journal of Political Science* 81, 91.

²⁶⁸ James Forrest, ‘Campaign Spending in the New South Wales Legislative Assembly Elections of 1984’ (1991) 26 *Australian Journal of Political Science* 526, 526.

²⁶⁹ Charles Beitz, *Political Equality* (Princeton University Press, 1989) 199.

²⁷⁰ Young, ‘Spot On’, above n 267, 89.

²⁷¹ Justin Fisher, ‘Next Step: State Funding for the Parties?’ (2002) 73 *Political Quarterly* 392, 396.

²⁷² R J Johnston and P J Perry, ‘Campaign Spending and Voting in the New Zealand General Election 1981: A Note’ (1983) 39 *New Zealand Geographer* 81.

2005²⁷³ New Zealand elections, and also recent Canadian elections.²⁷⁴ Extensive investigation into the impact of constituency-level campaigning in British general elections has also issued the same conclusion.²⁷⁵ Academic research is, however, not of one voice on this issue with several studies of British general elections casting doubt on whether there is a positive correlation between increased campaign spending and voter support.²⁷⁶

Another finding reported by much of the literature is that the electoral value of campaign spending varies according to whether the candidate is a challenger or an incumbent. Some studies of American and British elections have concluded that such spending is of greater value to a challenger candidate.²⁷⁷ Similarly, an analysis of the 2005 New Zealand election concluded that the key beneficiaries of increased spending during this election were the smaller parties.²⁷⁸ Research on recent Canadian elections has, however, drawn the seemingly opposite conclusion that incumbent candidates benefited more from expenditure compared to challengers.²⁷⁹ Various American studies have qualified the proposition that challenger spending is of more value by contending that, while such spending is more effective when the total absolute amount was low, it was subject to diminishing returns, and that incumbent candidates spent larger amounts more profitably.²⁸⁰

²⁷³ Ron Johnston and Charles Pattie, 'Money and Votes: A New Zealand Example' (2008) 27 *Political Geography* 113.

²⁷⁴ Marie Rekkas, 'The Impact of Campaign Spending on Votes in Multiparty Elections' (2007) 89(3) *Review of Economics and Statistics* 573.

²⁷⁵ R J Johnston, C J Pattie and L C Johnston, 'The Impact of Constituency Spending on the Result of 1987 British General Election' (1989) 8 *Electoral Studies* 143; R J Johnston and C J Pattie, *Putting Voters in their Place: Geography and Elections in Great Britain* (Oxford University Press, 2006).

²⁷⁶ R J Johnston, 'Campaign Expenditure and the Efficacy of Advertising at the 1974 General Election' (1979) 27 *Political Studies* 114; R J Johnston, 'Campaign Spending and Voting in England: Analysis of the Efficacy of Political Advertising' (1983) 1 *Environment and Planning C: Government and Policy* 117; R J Johnston, 'Information Flows and Votes: An Analysis of Local Campaign Spending in England' (1986) 17 *Geoforum* 69; Justin Fisher, 'Party Expenditure and Electoral Prospects: A National Level Analysis of Britain' (1999) 18 *Electoral Studies* 519.

²⁷⁷ G C Jacobson, 'Money and Votes Reconsidered: Congressional Elections, 1972–1982' (1985) 47 *Public Choice* 7; Charles Pattie, Ronald Johnston & Edward Fieldhouse, 'Winning the Local Vote: The Effectiveness of Constituency Campaign Spending in Great Britain, 1983–1992' (1995) 89(4) *American Political Science Review* 969; R J Johnston and C J Pattie, 'Campaigning and Advertising: An Evaluation of the Components of Constituency Activism at Recent British General Elections' (1998) 28 *British Journal of Political Science* 677.

²⁷⁸ Johnston and Pattie, 'Money and Votes', above n 273, 130–32.

²⁷⁹ Rekkas, above n 274, 573.

²⁸⁰ See D P Green & J S Krasno, 'Salvation for the Spendthrift Incumbent: Reestimating the Effects of Campaign Spending in House Elections' (1988) 32 *American Journal of Political Science* 884; R B Grier, 'Campaign Spending and Senate Elections 1978–84' (1989) 63 *Public Choice* 201; D P Green &

Given that the effect of campaign spending on increasing voter support depends on the type of electoral system, it is research on Australian elections to which we must pay most attention. There is a relatively small body of research that has been undertaken on this topic, all by academic geographer James Forrest.²⁸¹ Forrest has undertaken an analysis of the New South Wales state elections held in 1984, 1988, 1991 and 1995, and the 1990 federal election. At the risk of some oversimplification, the following conclusions can be drawn from these studies. All of the studies concluded that an increase in spending *relative* to that by competitors resulted in more votes. The effect of spending in increasing voter support, while significant, was modest given other factors that influence voting behaviour including industry, demographic and employment factors. This was especially so in elections where support for major parties is volatile.²⁸² Moreover, *how* money was spent was as important as the level of spending in determining voter support.²⁸³ The impact of this spending also varied according to the target groups. According to Forrest:

different aspects of media activity impact differently on each. Wavering ... voters more actively use the election campaign to determine how to vote, and for these subsets campaign advertising in its widest sense has an important persuading role. For the committed voter, partisanship is the dominant influence.²⁸⁴

J S Krasno, 'Rebuttal to Jacobson's "New Evidence for Old Arguments"' (1990) 34 *American Journal of Political Science* 363.

²⁸¹ As Forrest has noted, 'one area ... largely if not totally ignored in the Australian context surrounds the impact on voter behaviour of party spending during the course of an election campaign': Forrest, 'Campaign Spending in the New South Wales Legislative Assembly Elections of 1984', above n 268, 526.

²⁸² J Forrest, R J Johnston & C J Pattie, 'The Effectiveness of Constituency Campaign Spending in Australian State Elections During Times of Electoral Volatility: the New South Wales Case, 1988-95' (1999) 31 *Environment and Planning A* 1119, 1127.

²⁸³ The summary of Forrest's research has been distilled from the following: Forrest, 'Campaign Spending in the New South Wales Legislative Assembly Elections of 1984', above n 268, 531-32; James Forrest, 'The Geography of Campaign Funding, Campaign Spending and Voting at the New South Wales Legislative Assembly Elections of 1984' (1992) 23 *Australian Geographer* 66, 75; James Forrest, 'The Effect of Local Campaign Spending on the Geography of the Flow-of-the-Vote at the 1991 New South Wales State Election' (1997) 28(2) *Australian Geographer* 229, 229, 234; James Forrest and Gary Marks, 'The Mass Media, Election Campaigning and Voter Response: The Australian Experience' (1999) 5 *Party Politics* 99, 110.

²⁸⁴ Forrest and Marks, 'The Mass Media, Election Campaigning and Voter Response', above n 283, 110.

2 *Elements of Unfairness*

On the best available research, we can conclude that an increase in relative election spending tends to result in more votes in Australian elections. The impact of such spending, however, is likely to go beyond its specific impact on the level of voter support. While research has yet to determine the exact relationship between election spending and political debate, patterns of election spending are likely to influence the boundaries and content of political debate (what issues are on the public agenda and what are not, what topics are given prominence and what fall by the wayside). If so, the *amount* of election spending can influence the outcomes of elections in terms of voter support as well as the character of such contests. These relationships between election campaign spending and election outcomes give rise to the acute risk of unfair elections.

The question of unfairness in elections can be more specifically analysed. Part II, ‘The Aims of a Democratic Political Finance Regime’, identified key dimensions of electoral fairness: open access to electoral contests; fair rivalry amongst competing candidates and parties (including an absence of a serious imbalance between major and minor parties and some degree of ‘equality of arms’ between the major parties); and fairness between parties and candidates on the one hand, and third parties on the other.

Determining whether these principles are met is not a straightforward task. They involve comparative judgments admitting questions of degree. The various criteria of fairness are also far from precise: what does ‘open access’ or ‘serious imbalance’ actually mean?²⁸⁵ That said, these principles and their criteria are not meaningless: as the following discussion will show, their meaning can be elaborated upon by a close consideration of actual patterns of election campaign spending.

Open access to electoral contests requires at least that the sums involved in engaging in a meaningful campaign should not deter candidates or parties that enjoy significant support in the electorate. There are clearly challenges in meeting this principle in the

²⁸⁵ This is part of the difficulty in developing criteria for fairness. See Stanley Ingber, above n 67, 51–55.

Australian context – millions of dollars need to be raised for a meaningful national campaign with the amount running to hundreds of thousands of dollars at the state level. These amounts will typically pose a barrier to newcomers, as they would usually not have ready access to resources that established political parties enjoy. Whilst this barrier to open access stems from the (ineradicable) fact that national and state elections involve campaigns reaching out to thousands of voters, it is, however, exacerbated by the intensifying arms races as they increase the amounts that are necessary for a meaningful election campaign.

As noted earlier, fair rivalry amongst the competing parties implies an absence of a serious imbalance between minor and major parties. Any notion of imbalance clearly depends on a conception of the appropriate balance among the parties. One way to understand the appropriate balance is through the idea of ‘barometer equality’.²⁸⁶ What this idea conveys is the notion that, all things being equal, parties and candidates should spend amounts of money commensurate to the public support they enjoy.

Table 18 attempts to assess whether there is a serious imbalance amongst major and minor parties in federal elections according to this idea of ‘barometer equality’. The measure it uses is the amount of election spending per first preference vote secured in the previous election. As there is no specific data on election campaign spending, total expenditure by all branches of the parties for a financial year in which a federal election was held has been used as a proxy for election spending. The rationale in using the number of first preference votes secured in the *previous election* is that these figures provide a crude indicator of the public support enjoyed by the parties in a particular election.

²⁸⁶ R Hasen, *The Supreme Court and Election Law: Judging Equality from Baker v. Carr to Bush v. Gore* (NYU Press, 2003) 111.

Table 18: Election Spending per First Preference Vote for Previous Election

Party	1998 federal election	2001 federal election	2004 federal election	2007 federal election
ALP ²⁸⁷	\$7.15	\$6.63	\$7.59	\$12.86
Coalition ²⁸⁸	\$6.35	\$7.73	\$8.31	\$8.16
Greens	\$3.49	\$6.73	\$5.72	\$4.41
Democrats	\$1.93	\$3.60	\$0.77	\$1.88

Source: AEC Annual Returns 1998–99, 2001–02, 2004–05, 2007–08 available from Australian Electoral Commission, *Annual Returns Locator Service*, (28 January 2011) <<http://periodicdisclosures.aec.gov.au/>>.; AEC Election Results 1996, 1998, 2001, 2004, available from Australian Electoral Commission, *Federal Elections* (15 February 2011) <http://www.aec.gov.au/Elections/federal_elections/>.

According to the notion of ‘barometer equality’ adopted by Table 18, there is good reason to conclude that, with the exception of the 2001 federal election, there is a serious imbalance between the minor parties (the Democrats and Greens) on one hand and the major parties (the ALP and Coalition parties) on the other.

What about ‘equality of arms’ amongst the major parties in federal elections? Table 19 provides data specifying ALP election spending as a proportion of Coalition election spending. Again because there is no specific data on election spending, the figures for total payments made in a financial year in which a federal election was held have been used as proxies. We can see from this table that for the past four federal elections, there has not been ‘equality of arms’ between the ALP and the Coalition. This absence has not, however, consistently favoured one side over the other. In the 2007 federal election, the ALP spent a bit over 120 per cent of the amount spent by the Coalition. In the 2001 and 2004 federal elections, however, ALP spending constituted roughly 80 per cent of Coalition spending and in the 1998 federal election, ALP spending was around 93 per cent of Coalition spending.

²⁸⁷ ALP figures in these two tables include Country Labor (abbreviated in AEC election voting data as ‘CLR’).

²⁸⁸ Coalition’ figures in these two tables include the Liberal Party, the National Party (including the Liberal/National joint Senate ticket) and the Country Liberal Party.

Table 19: ALP Election Spending as a Proportion of Coalition Election Spending for Federal Elections: 1998, 2001, 2004 and 2007

	1998 federal election	2001 federal election	2004 federal election	2007 federal election
ALP spending as a proportion of Coalition spending	92.4%	85.9%	82.6%	124.7%

Source: AEC Annual Returns 1998–99, 2001–02, 2004–05, 2007–08 available from Australian Electoral Commission, *Annual Returns Locator Service*, (28 January 2011) <<http://periodicdisclosures.aec.gov.au/>>.

Fairness in electoral contests is also determined by the amount and pattern of third party expenditure. There are two aspects of fairness implicated by such spending: first, fairness between the parties and candidates on one hand, and third parties on the other; and, second, fair rivalry amongst the parties and candidates. With the first aspect, political parties and candidates have a privileged role during election time because they are standing for election. This implies that their role should not be swamped by third parties, in particular, by such groups being able to outspend political parties and candidates. While third party expenditure clearly increased in the previous federal election, we have not yet reached the point where we can say that third parties are outspending political parties and candidates. Table 11 (above) has shown that third party expenditure stands at slightly over half the spending of the federal branches of the major parties.

Third party expenditure can also impact upon fair rivalry amongst political parties and candidates as such expenditure can be directed at supporting or opposing particular political parties. A full examination of how such expenditure has been used to support or oppose the various political parties is beyond the scope of this submission, as it would require detailed analysis of campaigning messages and techniques used by third parties. We can, however, get a very rough sense by dividing the amount of third party expenditure according to the type of third party, that is, whether the third party was a business, trade union, individual or a group (other than a business or trade union). Table 20 does this in relation to third party expenditure for the 2007 federal election. It can be seen here that of the various groups, trade unions were the biggest spenders with more than half of the third party expenditure coming from this source.

Business groups came in second having spent nearly a third of the total third party expenditure (Interestingly, this pattern of political expenditure stands in contrast with the pattern of political contributions where corporate contributions predominate).

Table 20: Third Party Political Expenditure for 2007 Federal Election
Categorised According to Type of Third Party

	Business	Trade unions	Other groups	Individuals	Total
Total expenditure	\$16 357 542.59	\$27 040 514.33	\$6 881 568.97	\$312 579.00	\$50 592 204.89
Proportion of total third party expenditure	32.3%	53.4%	13.6%	0.6%	100.0%

Source: AEC Annual Returns 2007–08 available from Australian Electoral Commission, *Annual Returns Locator Service*, (28 January 2011) <<http://periodicdisclosures.aec.gov.au/>>.

In the context of an election fought on industrial relations issues, we can make a crude assumption that business spending would have tended to favour the Coalition through its support for the *Work Choices* regime while trade union spending, mostly carried through the ACTU's 'Rights at Work' campaign,²⁸⁹ would have typically favoured the ALP through its opposition to this regime. Could it be said that the relatively greater trade union spending tipped the balance unfairly in favour of the ALP and, therefore, further undermined 'equality of arms' between the ALP and the Coalition? It is true that the trade union campaign generally worked in the ALP's favour but this does not mean that it worsened the problem in relation to 'equality of arms'. This principle relates to fairness in the resources of major parties as they *compete for electoral support*. The principle does *not* require that major parties shall have *equal support*; to require the latter would clearly be contrary to the idea of a competition. Because the principle of 'equality of arms' concerns the level of resources as the major parties compete for electoral support, it only requires evaluation of the position of the major parties themselves and not the position of the major parties *together with* their supporters. The number of supporters that a major party has and the intensity of

²⁸⁹ See generally K Muir, *Worth Fighting For: Inside the Your Rights At Work Campaign* (University of New South Wales Press, 2008) chs 3–5.

the campaigning engaged by these supporters are more an indicator of the success of the party in gathering support rather than a factor counting towards unfairness.

Could it, however, be said that the trade union campaign, specifically the ‘Rights at Work’ campaign, was an ALP campaign or, in more colloquial terms, a ‘front group’ for the ALP? There is, of course, good reason to suspect so because of trade union affiliation to the ALP. There is, however, strong countervailing evidence. True, there was clearly co-operation between ‘Rights at Work’ and the ALP but this does not yield the conclusion that the campaign was *controlled or directed* by the ALP. This is not least because the ‘Rights at Work’ campaign contemplated issuing ‘how to vote’ cards that did not endorse a vote for the ALP because of dissatisfaction with the ALP’s industrial relations policy.²⁹⁰

The argument so far has been built upon complex concepts and various calculations. This thicket of figures and abstraction should not obscure – indeed, the argument depends on it – what is the central conclusion of this analysis: current patterns of federal election spending have meant increasingly unfair elections. Such spending has placed limits on open access to such elections, resulted in a serious imbalance between the major and minor parties and compromised ‘equality of arms’ amongst the major parties in a manner that favours the ALP.

Such unfairness also has significant implications for the principle of respecting political freedoms, in particular, freedom of political expression as election spending is largely directed at political communication, notably through political advertisements. Respect for freedom of political expression requires both ‘freedom from’ state regulation and ‘freedom to’ engage in political expression (see Part II, ‘Aims of a Democratic Political Finance Regime’). ‘Freedom from’ clearly prevails in the Australian context with virtually no legal restrictions on the ability of parties, candidates and third parties to engage in election campaign spending in order to promote their positions (see below). The patterns of such spending, however, have undermined ‘freedom to’ or, put differently, the fair value of freedom of political

²⁹⁰ Ibid 179–82. In insisting that the ‘Rights at Work’ campaign be controlled or directed by the ALP, the approach taken by this article bears some affinity to the concept of ‘co-ordinated expenditure’ under American campaign finance laws: see Samuel Issacharoff, Pamela Karlan and Richard Pildes, *The Law of Democracy: Legal Structure of the Political Process* (Foundation Press, 2007) 353–54.

expression, specifically, that of newcomers, minor parties and, to a lesser extent, the Coalition.

IV A BLUEPRINT FOR REFORM

In order to address the serious deficiencies relating to federal political funding and its regulation, broad-ranging reform is necessary. The key elements of such change are:

- Comprehensive and integrated regulation through federal, State and Territory schemes;
- A scheme for transparency;
- Election spending limits;
- Contribution limits (with an exemption for membership fees);
- Enhanced accountability for third party political spending;
- A Party and Candidate Support Fund;
- Measures to reduce the risk of parliamentary entitlements being used for electioneering; and
- Measures to prevent party-political government advertising.

A *Comprehensive and Integrated Regulation through Federal, State and Territory Schemes*

In devising a reform agenda for the federal scheme, it is vital to appreciate the role that such a scheme plays in broader regulation of Australian political funding. A crucial point here is that federal regulation *cannot* (and should not) provide a *comprehensive* political funding scheme – a scheme that fully regulates political funding at all levels of government.

This is due to constitutional constraints. Whilst the Commonwealth Parliament has legislative power over federal²⁹¹ (and Territory)²⁹² elections, it does not have an express power over State elections. Even when the Commonwealth Parliament has power to regulate particular aspects of State elections (for instance, through its regulation of federal elections), there may be limits on such power due to the doctrine of intergovernmental immunities.²⁹³ This means that federal law cannot fully regulate the funding and spending involved in State elections.

²⁹¹ *Australian Constitution* ss 29-31, 34.

²⁹² *Australian Constitution* s 122.

²⁹³ See *Austin v Commonwealth* (2003) 215 CLR 185.

State laws clearly cannot provide for a comprehensive *national* scheme due to their (limited) territorial reach. Moreover, State laws, even when restricted to election funding and spending occurring within the particular State, are constitutionally constrained from regulating those aspects related to federal elections.²⁹⁴ Comprehensive national regulation of political funding then has to consist of federal, State and Territory laws.

It is not enough, however, that such laws be comprehensive in scope but they should also be *integrated*. This is especially given that inconsistencies between federal laws, on one hand, and State and Territory laws, on the other, will result in the latter be rendered inoperative.²⁹⁵ The process of ensuring integration should be driven by both the executive and parliamentary arms of government; the Council of Australian Governments (COAG) provides an appropriate forum for the former while the various federal, State and Territory electoral matters committees should be the vehicle for the latter.

Recommendation 2: COAG and the electoral matters committees should liaise to ensure that federal, State and Territory laws governing political funding are properly integrated.

B *A Scheme for Transparency*

Currently before the Commonwealth Parliament is the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010 (Cth).²⁹⁶ It is this Bill that represents the most important disclosure measure proposed in recent times. If adopted, it will significantly enhance the transparency of political finance in Australia.

²⁹⁴ See discussion in Queensland Government, *Reforming Queensland's Electoral System*, above n 6.

²⁹⁵ *Australian Constitution* s 109.

²⁹⁶ This Bill is based on two previous Bills, the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008 (Cth) and the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2009 (Cth). The later Bills were amended to take into account two of the recommendations made by the Joint Standing Committee on Electoral Matters, *Advisory Report: Commonwealth Electoral Amendment Bill 2008*, above n 118.

The Bill seeks to introduce a biannual disclosure system for registered parties, associated entities, donors and third parties based on a \$1000 (non-indexed) threshold.²⁹⁷ The threshold will not apply to political parties separately; instead, ‘related’ political parties will be treated as one.²⁹⁸ Lodgement periods have been shortened and penalties have also been increased.²⁹⁹ The Bill also proposes various bans in relation to gifts of foreign property. If enacted, it will be unlawful for:

- registered political parties and their state branches to receive such gifts;³⁰⁰
- candidates and groups of candidates to receive such gifts for specified periods;³⁰¹ and
- third parties, candidates and groups of candidates to incur political expenditure if a gift of foreign property enabled such expenditure and the donor’s main purpose was to enable such persons or entities to incur political expenditure.³⁰²

The Bill also proposes various prohibitions relating to anonymous gifts. Subject to an exemption for certain anonymous gifts under \$50,³⁰³ it will be unlawful under these prohibitions for:

- registered political parties and their state branches to receive anonymous gifts;³⁰⁴
- candidates and groups of candidates to receive such gifts for specified periods;³⁰⁵

²⁹⁷ Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010 (Cth), proposed amendments to *Commonwealth Electoral Act 1918* (Cth) ss 303A–305B, 314AA–314AEC.

²⁹⁸ *Ibid* s 4(1).

²⁹⁹ *Ibid* ss 304(2)–(3), 305A(3), 305B(1), 309(2)–(3), 314AB(1), 314AEA(1), 314AEB(3)(a), 314AEC(3)(a), 315(1)–(4). For details, see Joint Standing Committee on Electoral Matters, *Advisory Report: Commonwealth Electoral Amendment Bill 2008*, above n 118, 66–70.

³⁰⁰ Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010 (Cth), proposed amendments to *Commonwealth Electoral Act 1918* (Cth) s 306AC.

³⁰¹ *Ibid*.

³⁰² *Ibid* ss 306AD(1)–(2).

³⁰³ See definition of ‘permitted anonymous gift’: *Ibid* s 306AF. This exception is an adoption of a recommendation made in the Joint Standing Committee on Electoral Matters, *Advisory Report: Commonwealth Electoral Amendment Bill 2008*, above n 118, 64.

³⁰⁴ Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010 (Cth), proposed amendments to *Commonwealth Electoral Act 1918* (Cth) s 306AH.

³⁰⁵ *Ibid* s 306AH.

- associated entities to receive such gifts if the donor's main purpose was to enable the entities to incur political expenditure;³⁰⁶ and
- third parties, candidates and groups of candidates to incur political expenditure if an anonymous gift enabled such expenditure.³⁰⁷

The bans relating to anonymous gifts and gifts of foreign property will be enforced in two ways: the amount involved in breaches of the bans will be payable to the Commonwealth and such breaches will also be criminal offences.³⁰⁸

Table 21 summarises the key differences between the current provisions and the provisions that will apply if the Bill is passed.

Table 21: Comparison of Current Provisions (*Commonwealth Electoral Act 1918*) with those of the Electoral Amendment (Political Donations and Other Measures) Bill 2010 (Cth)

	Current provisions: <i>Commonwealth Electoral Act 1918</i>	Proposed provisions: Electoral Amendment (Political Donations and Other Measures) Bill 2010 (Cth)
Registered political parties	Annual return (2009/2010) <ul style="list-style-type: none"> • Amounts exceeding \$11 200 (indexed) to be itemised • Return to be lodged 20 weeks after financial year 	Biannual return <ul style="list-style-type: none"> • Amounts of \$1000 or more to be itemised • Return to be lodged 8 weeks after reporting period
Associated entities		
Candidates and groups of candidates	Post-election gift disclosure return (2009/2010) <ul style="list-style-type: none"> • Amounts exceeding \$11 200 (indexed) to be itemised • Return to be lodged 15 weeks after polling day Post-election election expenditure return <ul style="list-style-type: none"> • Return to be lodged 15 weeks after polling day 	Post-election gift disclosure return <ul style="list-style-type: none"> • Amounts of \$1000 or more to be itemised • Return to be lodged 8 weeks after polling day Post-election election expenditure return <ul style="list-style-type: none"> • Return to be lodged 8 weeks after polling day

³⁰⁶ Ibid s 306AD(3).

³⁰⁷ Ibid s 306AJ.

³⁰⁸ Ibid s 315.

<p>Donors</p>	<p>Post-election return for gifts made to candidates and groups of candidates (2009/2010)</p> <ul style="list-style-type: none"> Any gifts received by the donor exceeding \$11 200 (indexed) that were then used to make gifts to candidates or groups of candidates must be itemised Return to be lodge 15 weeks after polling day <p>Annual return for gifts made to registered political parties (2009/2010)</p> <ul style="list-style-type: none"> Any gifts received by the donor exceeding \$11 200 (indexed) that were then used to make gifts to registered political parties must be itemised Return to be lodged 20 weeks after end of financial year <p>Annual political expenditure return (2009/2010)</p> <ul style="list-style-type: none"> Expenditure exceeding \$11 200 (indexed) to be detailed Return to be lodged 20 weeks after financial year 	<p>Post-election return for gifts made to candidates and groups of candidates</p> <ul style="list-style-type: none"> Any gifts received by the donor exceeding \$1000 that were used by the donor to make gifts to candidates or groups of candidates must be itemised Return to be lodged 8 weeks after polling day <p>Biannual return for gifts made to registered political parties</p> <ul style="list-style-type: none"> Any gifts received by the donor exceeding \$1000 that were then used to make gifts to registered political parties must be itemised Returns to be lodged 8 weeks after reporting period <p>Biannual political expenditure return</p> <ul style="list-style-type: none"> Expenditure of \$1000 or more must be detailed Return to be lodged 8 weeks after reporting period
<p>Third parties</p>	<p>Annual returns for gifts enabling political expenditure if such expenditure exceeds \$11 200 (indexed) (2009/2010)</p> <ul style="list-style-type: none"> Gifts that enabled political expenditure that exceed \$11 200 (indexed) to be itemised Return to be lodged 20 weeks after end of financial year <p>Annual political expenditure return if such expenditure exceeds \$11 200 (indexed) (2009/2010)</p> <ul style="list-style-type: none"> Return to be lodged 20 weeks after end of financial year 	<p>Biannual returns for gifts enabling political expenditure if such expenditure \$1000 or more</p> <ul style="list-style-type: none"> Gifts that enabled political expenditure of \$1000 or more to be itemised Return to be lodged 8 weeks after end of reporting period <p>Biannual political expenditure return if such expenditure exceeds \$1000</p> <ul style="list-style-type: none"> Return to be lodged 8 weeks after end of reporting period

Bans on anonymous gifts	Ban on receipt of anonymous gifts exceeding \$11 200 (indexed) (2009/2010)	Ban on receipt of all types of all anonymous gifts except for certain anonymous gifts that are of less than \$50 Ban on incurring political expenditure enabled by such anonymous gifts (excepting those of less than \$50)
Ban on gifts of foreign property	None	Ban on receipt of foreign property Ban on incurring political expenditure enabled by gifts of foreign property

Source: *Commonwealth Electoral Act 1918* (Cth); Electoral Amendment (Political Donations and Other Measures) Bill 2010 (Cth).

There is great merit to most of the measures proposed by the Bill. The Bill will address the gaping holes in the federal disclosure scheme that result from the increasingly high disclosure thresholds and the ability to split contributions between different branches of a political party. It will also remove the current (nominal) prohibition against anonymous gifts and put in its place a much sturdier ban. It clearly increases the timeliness of disclosure by registered parties, associated entities, donors and third parties through biannual returns. Compliance is promoted through higher penalties and bans on gifts of foreign property.

In other respects, however, the Bill does not go far enough. It fails to propose any electoral (or political) expenditure disclosure obligations on registered political parties and their associated entities, an especially anomalous limitation given the obligations imposed on third parties. Further, no amendments have been proposed to make the disclosed information more meaningful. One way forward in this respect would be to adopt the British system of donation reports, whereby political parties are required to submit reports for all transactions considered to be donations which not only disclose the amount and date of such donations but also identify the status of the donor as an individual, trade union, company or other entity.³⁰⁹

³⁰⁹ *Political Parties, Elections and Referendums Act 2000* (UK) c 41, sch 6.

Biannual returns do improve the frequency of disclosure but still do not provide the ‘real time disclosure’ required for informed voting (as discussed earlier). Various options can be adopted to address this issue. The Queensland provision of disclosure of gifts exceeding \$100 000 within 14 days, or weekly donation reports during election periods such as applies under the British system could be required.³¹⁰ Another possibility worth seriously considering is that proposed by the Democratic Audit of Australia, a continuous disclosure scheme modelled upon the system supervised by the New York Campaign Finance Board.³¹¹

In other respects, the Bill goes too far. The offences relating to gifts of foreign property can be committed even when the recipient has conducted ‘due diligence’ on whether the gift had such a status and concluded that it did not. This stems from penalties relating to the offences generally applying as a matter of strict liability.³¹² For instance, a party official who reasonably believed that a gift was not foreign-sourced based on the information s/he had, and after making extensive inquiries, might still be caught by these offences. These provisions should be amended to allow for a ‘due diligence’ defence.

The Bill also imposes overly onerous obligations in relation to third parties. The Bill preserves the structure of third party disclosure obligations whilst increasing their frequency from annual to biannual, and lowering the disclosure threshold from \$11 200 (indexed) to \$1000. This exacerbates current problems with these obligations. First, third parties are required to detail ‘political expenditure’ made in any financial year if such expenditure exceeds \$11 200 (indexed). This includes ‘the public expression of views on an issue in an election by any means’.³¹³ As Andrew Norton has correctly observed, this is difficult to determine prospectively, giving rise to

³¹⁰ Ibid ss 62–63.

³¹¹ Democratic Audit of Australia, Submission to the Joint Standing Committee on Electoral Matters, Parliament of Australia, *Inquiry into the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008 (Cth)*, undated; New York Campaign Finance Board, *About Us* (2008) <<http://www.nycfb.info/about/>>.

³¹² See Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010 (Cth), proposed amendments to *Commonwealth Electoral Act 1918* (Cth) s 315.

³¹³ *Commonwealth Electoral Act 1918* (Cth) s 314AEB(1)(a)(ii).

challenges in complying with the obligations.³¹⁴ Second, third parties are required to disclose gifts enabling ‘political expenditure’ if such gift/s exceed \$11 200 (indexed). This, as Norton pointed out, captures donations to third parties that are not intended to fund ‘political expenditure’.³¹⁵ The Bill represents a missed opportunity to tighten up these provisions.

Recommendation 3: The Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2010 (Cth) should be enacted subject to the following changes:

- ‘due diligence’ defences be available in relation to offences; and
- the definition of ‘political expenditure’ (which applies to third parties) be tightened up.

Recommendation 4: Registered political parties and associated entities be required to provide:

- expenditure disclosure returns; and
- donation reports (modelled upon the British system).

Recommendation 5: Weekly donations reports be required during the election period.

C *Election Spending Limits*

1 *The Case for Election Spending Limits*

A range of measures needs to be adopted to tackle such unfairness and its impact upon freedom of political expression. The position of newcomers and minor parties needs to be *levelled up* in order to ameliorate the barriers to open access and the imbalance between minor and major parties. This task largely falls on the provision of public funding (discussed below). Also, the spending of the major parties, in particular that of the ALP, needs to be *levelled down*. This will help address the problems relating to open access and the imbalance between minor and major parties

³¹⁴ Andrew Norton, ‘Diminishing Democracy: The Threat Posed by Political Expenditure Laws’ (2009) 114 *The Centre for Independent Studies: Issue Analysis 7* <<http://www.cis.org.au/images/stories/issue-analysis/ia114.pdf>>.

³¹⁵ *Ibid* 9.

but also those concerning ‘equality of arms’ amongst the major parties. A key measure in levelling down the spending of major parties is election spending limits and it is such regulation that forms the focus of the rest of this chapter.

Until the *EFED Act* came into effect on 1 January this year, the only election spending limits were those that apply to elections for the Tasmanian Legislative Council. These limits firstly ban persons and entities other than Legislative Council candidates and their agents from spending money in order to promote or secure the election of a candidate.³¹⁶ Second, they limit the amount that can be spent by Legislative Council candidates (and their agents). In 2011, the limit, which increases by \$500 each year, stands at \$13 000.³¹⁷ At the federal level, and in all other states and territories, there were no overall limits on the election spending of parties or candidates. This was not always the case. Expenditure limits on *candidate spending* were, in fact, a long-standing feature of political finance regulation in Australia. They were in place at the federal level for 80 years and were also common at the state level, including Victoria, South Australia and Western Australia. However, after decades in operation these limits on the campaign expenditure of candidates were removed in 1980.³¹⁸ Moreover, an attempt in 1991 to restrict campaign spending through a ban on political advertising together with a ‘free-time’ regime came unstuck after being ruled constitutionally invalid by the High Court (further discussed below).

There are compelling reasons to reinstate election spending limits, particularly at the federal level. The *fairness* rationale has already been alluded to. As Eric Roozendaal, former General Secretary of the New South Wales ALP and current New South Wales Treasurer has argued, these limits have ‘the purpose of achieving a fairer political process’.³¹⁹ This rationale was implicit in the justification that Senator O’Connor gave more than a century ago for candidate expenditure limits enacted by the original *Commonwealth Electoral Act*:

³¹⁶ *Electoral Act 2004* (Tas) s 159.

³¹⁷ *Ibid* s 160.

³¹⁸ See Deborah Cass and Sonia Burrows, ‘Commonwealth Regulation of Campaign Finance – Public Funding, Disclosure and Expenditure Limits’ (2000) 22 *Sydney Law Review* 477, 484–85, 491.

³¹⁹ New South Wales, *Parliamentary Debates*, Legislative Council, 21 September 2004, 11118 (Eric Roozendaal).

If we wish to secure a true reflex of the opinions of the electors, we must have ... a system which will not allow the choice of the electors to be handicapped for no other reason than the inability of a candidate to find the enormous amount of money required to enable him [sic] to compete with other candidates.³²⁰

There are clear connections between the fairness rationale and election spending limits: if properly designed, they will facilitate open access to electoral contests by reducing the costs of meaningful campaigns, thereby increasing the competitiveness of these contests; they will further assist in addressing the imbalance between the minor and major parties and will contain departures from ‘equality of arms’ amongst the major parties.

Research on New Zealand and Canadian spending limits support these arguments. Academics Johnston and Pattie have argued that:

In New Zealand, the low spending limits for candidates in the MMP electorate contest clearly do [create a relatively ‘level playing field’], by making it possible for the smaller parties’ candidates in the MMP electorates contests to campaign as intensively as those representing the two larger parties [Labour and National], without having to raise large sums. This clearly acts as a substantial constraint on those two larger parties whose candidates are generally able to outspend their opponents and in many places to obtain sufficient money to come close to the expenditure maximum.³²¹

Similarly, research on the Canadian spending limits has concluded that these measures are mostly binding on incumbent candidates and that higher limits correlated with lower electoral turnout, less close races and fewer candidates running.³²²

³²⁰ Commonwealth, *Parliamentary Debates*, Senate, 30 January 1902, 9542 (Richard O’Connor).

³²¹ Johnston and Pattie, ‘Money and Votes’, above n 273, 132.

³²² Kevin Milligan and Marie Rekkas, ‘Campaign Spending Limits, Incumbent Spending, and Election Outcomes’ (2008) 41(4) *Canadian Journal of Economics* 1351.

The other rationale for regulating political spending lies not so much with its impact upon electoral outcomes but its relationship to fundraising. While research into this relationship is virtually non-existent, a tight relationship between the demand for funds and the supply of funds can be assumed.³²³ Notwithstanding the complicated effect of election campaign spending on voter support, what is crucial in this dynamic is that parties and candidates *perceive* increased spending to have a positive impact on voter support (or at least not to have a negative impact). It is this perception that fuels the need to engage in more intensive fundraising like the sale of access. These fundraising practices, in turn, undermine the ability of political parties to perform their legitimate functions. The New South Wales Select Committee on Electoral and Political Party Funding captured these problems in lucid terms when it stated:

The Committee is concerned about escalating spending levels, and in particular the extensive use of political advertising. The Committee does not consider this escalation to be healthy or sustainable. It increases pressure on parties and candidates to engage in more fundraising, thus taking time from their other representative and policy functions ... The increased reliance on private funding also fosters strong ties between politicians and donors, giving rise to perceptions of undue influence.³²⁴

What this suggests is that there is a separate case for regulating spending in order to tackle *corruption*. The anti-corruption rationale³²⁵ argues that election spending limits can perform a *prophylactic* function by *containing* increases in campaign expenditure and therefore, the need for parties to seek larger donations, especially donations which carry the risk of graft and undue influence.³²⁶ If effective, these limits will also regulate the time spent by the parties on fundraising and allow them to devote more time to their other functions, for instance, their agenda-setting and governance functions (see Part II, ‘Aims of a Democratic Political Finance Regime’). The

³²³ There are, of course, other factors that influence fundraising including incumbency (in assisting in raising funds) and the marginality of a seat (that is, the more marginal, the more emphasis on fundraising). See Forrest, ‘The Geography of Campaign Funding, Campaign Spending and Voting at the New South Wales Legislative Assembly Elections of 1984’ above n 268, 67.

³²⁴ Select Committee on Electoral and Political Party Funding, Parliament of New South Wales, *Electoral and Political Party Funding in New South Wales* (2008) [8.8].

³²⁵ Keith Ewing, ‘Promoting Political Equality: Spending Limits in British Electoral Law’ (2003) 2 *Election Law Journal* 499, 507.

³²⁶ Committee on Standards in Public Life, above n 194, 116–17.

prophylactic function of expenditure regulation can be performed by limits set at present levels of campaign expenditure. Such limits will clearly ensure that campaign expenditure does not increase beyond this point. Otherwise, a future increase in real campaign expenditure would lead political parties, in the absence of more generous public funding, to seek extra and/or larger donations to meet burgeoning campaign costs. This pressure will increase the risk of corruption that arises with political donations.

Besides a prophylactic function, spending limits can also perform a *remedial function*. In light of the recent rapid increases in election spending, there is good cause to conclude that present spending levels are excessive and to carry an inordinate risk of corruption. If so, spending limits should be aimed at decreasing the amount of real spending and, in turn, the risk of graft and undue influence.

Election spending limits will also assist in ensuring that other regulatory measures work more effectively. Increased public funding of political parties and candidates (as recommended below) raises a serious danger of inflating campaign expenditure, a risk which can be dealt with by properly designed election spending limits.

Election spending limits further enhance the operation of contribution limits in two ways. First, it will be recommended below that these limits be subject to an exemption for membership fees including trade union affiliation fees. This exemption would likely mean that the ALP would increase its funding advantage over the Coalition. Election spending limits are necessary to meet this problem by preventing the ALP from being able to *use* its funding advantage.

Second, contribution limits will significantly reduce the private income of the major parties with consequent impact on their 'freedom to' engage in political expression. Election spending limits can, however, go some way to ameliorating this impact. As philosopher John Rawls has correctly observed, the public arena is a finite and 'limited space'.³²⁷ Hence, what matters in terms of political deliberation is the *relative* capacity of citizens and their groups to engage in political expression. This is

³²⁷ Rawls, *Justice as Fairness: A Restatement*, above n 37, 150.

especially true in relation to electoral *contests*. For instance, what matters more is whether the Coalition can match the level of ALP spending rather than the objective levels of its spending (e.g. how many millions are being spent?). It is here that election spending limits can make a distinct contribution. By capping the maximum amount that any party can spend, it does, at the very least, contain the costs of an ‘adequate’ campaign for the major parties. If set at a level lower than present campaign expenditure, it can also reduce such costs. Thus, if election spending limits are enacted together with contribution limits, the adverse impact of the latter on ‘freedom to’ can be significantly contained by the former.

There are then cogent reasons for election spending limits. Nevertheless, various arguments have been made against such measures. It might be said that rather than having election spending limits, there should be a ban on political advertising like that enacted by the *Political Broadcasts and Political Disclosures Act 1991* (Cth). While the High Court did find this ban to be constitutionally invalid in the *ACTV* case (discussed below), this decision does not rule out a differently designed ban that more fully addressed the concerns raised by the High Court.

However, there are good reasons in principle why a ban on political advertising should not be adopted. If enacted without spending limits, the ban will be under-inclusive and fail to capture key items of election spending, for instance, direct mail, opinion polling and consultancies. Even if enacted with spending limits, there are reasons for not proceeding with a ban on political advertising. Principally, the aims that are pursued by a ban are similar to those that underlie election spending limits, the fairness and anti-corruption rationales. The difference between a ban and such limits, aside from their different scope, is that the former by its nature involves a much more severe limitation of freedom of political communication. There is, however, little justification for such limitation if spending limits can effectively pursue the fairness and anti-corruption rationales.

There are two other arguments against election spending limits. There is the argument that expenditure limits are ‘unenforceable’³²⁸ or ‘unworkable’, which are usually

³²⁸ Committee on Standards in Public Life, above n 194, 172.

presupposed by Australia's experience with expenditure limits.³²⁹ Arguments based on 'unenforceability' or 'unworkability', however, typically suffer from vagueness. In Australia, these arguments, as they relate to campaign expenditure limits, appear to be a proxy for two specific arguments: that '[a]ny limits set would quickly become obsolete';³³⁰ and that such limits would be overly susceptible to non-compliance.³³¹

It is possible to quickly dispense with the first argument. For instance, the problem with obsolescence can be dealt with by automatic indexation of limits together with periodic reviews. As to the question of non-compliance, it is useful at the outset to make some general observations concerning the challenges faced by the enforcement of party finance regulation. Certainly, all laws are vulnerable to non-compliance. Political finance regulation is no exception and the degree of compliance will depend on various factors. It will depend on the willingness of the parties to comply. This, in turn, will be shaped by their views of the legitimacy of the regulation process and their self-interest in compliance. The latter cuts both ways. For example, breaching expenditure limits might secure the culpable party a competitive advantage through increased expenditure, but this needs to be balanced against the risk of being found out and the resulting opprobrium. Weak laws without adequate enforcement or penalties invite weak compliance.

The extent of compliance will also depend on methods available to the parties to evade their obligations. The effectiveness of political finance laws invariably rubs up against the 'front organisation' problem. This problem arises when a party sets up entities that are legally separate from the party but can still be controlled by that party. Political finance laws will be undermined if parties channel their funds and expenditure to these entities and these entities fall outside the regulatory net or are subject to less demanding obligations. The answer to this problem is to adopt the

³²⁹ Commonwealth of Australia, *Inquiry into Disclosure of Electoral Expenditure* (1981) 8–9, 13.

³³⁰ Committee on Standards in Public Life, above n 194, 172.

³³¹ Before they were repealed, the Australian expenditure limits were, in fact, subject to widespread non-compliance. For example, 433 out of 656 candidates for the 1977 federal elections did not file returns disclosing their expenditure: Commonwealth of Australia, *Inquiry into Disclosure of Electoral Expenditure*, above n 329, 18. However, this is largely because the laws were left to decay. Indeed as early as 1911 the Electoral Office and the Attorney-General's Department signalled lax compliance in a policy of not prosecuting unsuccessful candidates for failure to make a return: Patrick Brazil (ed), *Opinions of the Attorneys-General of the Commonwealth of Australia: Vol 1 1901–14* (Australian Government Publishing Service, 1981) 499–500.

fairly robust approach towards ‘front organisations’ found in the *Commonwealth Electoral Act*. The definition of ‘associated entity’ is potentially broad and the scheme treats ‘associated entities’ as if they were registered political parties by subjecting both to identical obligations.³³²

A separate issue faced by political finance laws lies with third parties. The challenge posed by third parties is not that the laws provide a vehicle for parties to evade their obligations simply because third parties are, by definition, not appendages of the parties. Political finance laws that do not deal adequately with the ‘third party’ problem risk not evasion but irrelevance. For instance, if there was substantial third-party electoral activity, then a regulatory framework centred upon parties and their associated entities would, in many ways, miss the mark by failing to regulate key political actors. This is not an insurmountable problem though and can be easily dealt with by extending regulation to third parties (discussed below).

The above circumstances demonstrate that political finance regulation will *always* face an enforcement gap. But to treat these circumstances as fatal to any proposal to regulate party finance would be to give up on such regulation. By parity of reasoning, it should not necessarily be fatal to the proposal to impose expenditure limits because it experiences the problem of enforcement attending all political finance regulation. The key issue is whether there is something peculiar to such limits that make it particularly vulnerable to non-compliance. It is this that is hard to make out. On its face, the regulation of political expenditure would be easier to enforce than regulation of political funding because a large proportion of such expenditure is spent on visible activity like political advertising and broadcasting. Further, the parties themselves, in a competitive system, have incentives to monitor each others’ spending.

Finally, there is the argument that election spending limits constitute an unjustified interference with freedom of political communication.³³³ This argument must be taken seriously, not only because it poses a question of principle but also because in Australia, a statute which unjustifiably infringes the constitutional freedom of

³³² The principle of subjecting ‘front organisations’ to the same obligations which apply to political parties dates back to the Joint Select Committee on Electoral Reform, Parliament of Australia, *First Report*, (1983) 166.

³³³ See Committee on Standards in Public Life, above n 194, 118.

political communication will be unconstitutional. These questions will be taken up in the following section.

2 *A Case Against Election Spending Limits? Freedom of Political Expression and the Commonwealth Constitution*

The High Court has implied a freedom of political communication from sections of the *Commonwealth Constitution* relating to representative and responsible government, specifically sections 7, 24, 64 and 128.³³⁴ This freedom, while derived from the *Commonwealth Constitution*, also applies to state and territory legislation by virtue of the fact that discussion of matters at the level of State and Territory (or local government) are able to bear upon the choices to be made at federal elections. According to the High Court, this inter-relationship results from national political parties, the financial dependence of state, territory and local governments on federal funding and ‘the increasing integration of social, economic and political matters in Australia’.³³⁵

The current test for determining whether this freedom has been breached (often referred to as the *Lange* test) has two limbs:

- Does the law (of a state or federal parliament or a territory legislature) effectively burden freedom of communication about government or political matters either in its terms, operation or effect?
- If the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end (in a manner) which is compatible with the prescribed system of representative and responsible government?³³⁶

At the outset, it is important to clear up a possible misunderstanding: the view that the High Court’s decision in *Australian Capital Television Pty Ltd v Commonwealth*³³⁷ (*ACTV*) stands in the way of regulating election spending. What follows is an

³³⁴ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 566–67.

³³⁵ *Ibid* 571–72. See also *ACTV* (1992) 177 CLR 106, 142 (Mason CJ), 168–69 (Deane and Toohey JJ), 215–17 (Gaudron J); *Coleman v Power* (2004) 220 CLR 1, 45 (McHugh J).

³³⁶ The test stated in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 571–72 as modified by a majority in *Coleman v Power* (2004) 220 CLR 1, 50 (McHugh J), 78 (Gummow and Hayne JJ), 82 (Kirby J).

³³⁷ (1992) 177 CLR 106.

extended treatment of this decision and its implications for regulating election spending.

The provisions challenged in that case were found in Part IIID of the *Broadcasting Act 1942* (Cth). These provisions, which were added into the principal statute by the *Political Broadcasts and Political Disclosures Act 1991* (Cth), had several key elements. Foremost, they prohibited political advertising on radio and television during federal, state, territory and local government elections. Exceptions were, however, made for various types of broadcasts including policy launches, news and current affairs programs. Alongside the bans on political advertising was a scheme that provided ‘free’ broadcasting time to political parties. While allocated by the Australian Broadcasting Tribunal, 90% of the time was reserved to parties represented in the previous parliament that were contesting the current election.

In a 5–2 decision, the High Court struck down the legislation for breaching the implied freedom of political communication. All the judges accepted that there were legitimate objectives underlying the legislation, but the majority did not regard the scheme as pursuing these objectives in a constitutionally appropriate manner. In his leading judgment, Mason CJ focussed on what his Honour saw as the discriminatory aspects of the legislation. Speaking of the ban on political advertising, Mason CJ said:

Pt IIID severely restricts freedom of communication in relation to the political process, particularly the electoral process, in such a way as to discriminate against potential participants in that process. The sweeping prohibitions against broadcasting directly exclude potential participants in the electoral process from access to an extremely important mode of communication with the electorate. Actual and potential participants include not only the candidates and established political parties but also the electors, individuals, groups and bodies who wish to present their views to the community.³³⁸

The ‘free-time’ scheme, according to Mason CJ, was similarly defective as it was ‘weighted in favour of established political parties represented in the legislature

³³⁸ Ibid.

immediately before the election and the candidates of those parties; it discriminates against new and independent candidates'.³³⁹

While welcomed by some academic commentators as reflecting a concern for freedom of political speech, the *ACTV* decision has also had its share of detractors. While recognising that the invalid scheme was far from perfect, some critics have argued that it still improved the fairness of Australian elections. Tucker, for instance, has contended that 'it is difficult to maintain that the proposed changes would have made the system of electoral competition more unfair than it is now'.³⁴⁰ Fastening upon the established parties-bias of the 'free-time' scheme, Sarah Joseph has similarly argued that:

It is true that Division 3 [of Part IIID: 'Free election broadcasting time'] effectively guaranteed that the little remaining broadcast advertising would be dominated by established political elites. However, statistics indicate that newer political parties use *less than* 10% of broadcast political advertising space. Therefore, Division 3 largely improved broadcast access for non-incumbents, while Part IIID as a whole removed the advantage gained by wealthy parties able to engage in saturation advertising.'³⁴¹

This outcome led Joseph to conclude that 'the High Court majority essentially reinforced the entrenched power of wealthy political elites and their corporate backers by giving them a constitutional 'right' to drown out the voices of less wealthy political players'.³⁴² For Tucker, what appears at first glance as a general defence of freedom of political expression has much more partisan implications with 'the judges who support the majority in *Australian Capital Television* ... more concerned to protect the right of wealthy citizens, corporations and lobby groups to distort the system of communications'.³⁴³ All this seems to stem from the High Court's neglect

³³⁹ Ibid.

³⁴⁰ David Tucker, 'Representation-Reinforcing Review: Arguments about Political Advertising in Australia and the United States' (1994) 16 *Sydney Law Review* 274, 284.

³⁴¹ Sarah Joseph, 'Political Advertising and the Constitution' in Glenn Patmore (ed), *Labor Essays 2002: The Big Makeover: A New Australian Constitution* (Pluto Press in association with the Australian Fabian Society, 2001) 53.

³⁴² Ibid.

³⁴³ Tucker, 'Representation-Reinforcing Review', above n 340, 283–86.

of the context in which the legislation was introduced and its passing over of crucial questions like ‘who is doing all the speaking, how they are doing it, how much they are paying for it and what effect it is having upon the democratic system which free speech is designed to protect’.³⁴⁴

Deeper concerns have also been expressed as to the legitimacy of the High Court’s decision. The act of implying the freedom itself has been criticised,³⁴⁵ as has the High Court majority’s rejection of the conception of democracy and freedom of political communication advanced by the legislature. As Tucker³⁴⁶ and Campbell³⁴⁷ have noted, the Commonwealth Parliament was motivated by the aim of enhancing the democratic process and the *ACTV* decision is not a case where the High Court majority upheld democratic principles against a self-serving Parliament but rather a case of disagreement between the legislative and judicial branches as to which conception of democratic principles should prevail.³⁴⁸

These criticisms remain relevant to the current debate as to the constitutionality of election spending limits. They put the *ACTV* case in better perspective and clearly suggest that its outcome was far from inevitable. A differently-constituted High Court might very well follow the dissent of Brennan J which accepted that there was an implied freedom of political communication, but nevertheless found that the scheme was not invalid as it was ‘comfortably proportionate to the important objects which it seeks to obtain ... ensuring an open and equal democracy’.³⁴⁹ Indeed, in 2008, the UK House of Lords upheld a ban on political advertising that was much more severe than the scheme challenged in the *ACTV* case as being compatible with the free speech guarantee of the *Human Rights Act 1998* (UK).³⁵⁰

³⁴⁴ Deborah Cass, ‘Through the Looking Glass: The High Court of Australia and the Right to Political Speech’ in Tom Campbell & Wojciech Sadurski (eds), *Freedom of Communication* (Dartmouth, 1994) 170, 193.

³⁴⁵ See generally Tom Campbell, ‘Democracy, Human Rights, and Positive Law’ (1994) 16 *Sydney Law Review* 195.

³⁴⁶ Tucker, ‘Representation-Reinforcing Review’, above n 340, 283–84.

³⁴⁷ Campbell, ‘Democracy, Human Rights, and Positive Law’, above n 345, 202–3.

³⁴⁸ The latter would often characterise judicial decisions on the protection of rights: see Jeremy Waldron, *Law and Disagreement* (Clarendon Press, 1999) chs 10–13.

³⁴⁹ *ACTV* (1992) 177 CLR 106, 161.

³⁵⁰ *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] 3 All ER 193.

In any event, the *ACTV* decision, or for that matter the implied freedom of political communication, does not prohibit regulation of political communication, in particular election campaign spending. Neither stand for the proposition that bans on political advertising are necessarily unconstitutional. As George Williams has correctly observed, while the High Court struck down the ban challenged in *ACTV*, ‘the Court did not indicate that other schemes regulating political advertising will also be unconstitutional’.³⁵¹ On the contrary, in the *ACTV* case even judges in the majority considered that restrictions on political communication may still be constitutional. For instance, Chief Justice Mason, after accepting that there were legitimate concerns regarding corruption and the advantage of the wealthy in the political debate, stated:

Given the existence of these shortcomings or possible shortcomings in the political process, it may well be that some restrictions on the broadcasting of political advertisements and messages could be justified, notwithstanding that the impact of the restrictions would be to impair freedom of communication to some extent. In other words, a comparison or balancing of the public interest in freedom of communication and the public interest in the integrity of the political process might well justify some burdens on freedom of communication.³⁵²

More fundamentally perhaps, the regulation of political communication is clearly permitted (or, more accurately, not prohibited) by the *Lange* test. In *Coleman v Power*, Justice McHugh explained one of the key reasons for this:

Communications on political and governmental matters are part of the system of representative and responsible government, and they may be regulated in ways that enhance or protect communication of those matters. Regulations that have that effect do not detract from the freedom. On the contrary, they enhance it.³⁵³

³⁵¹ George Williams, Submission to the Joint Standing Committee on Electoral Matters, Parliament of Australia, *Inquiry into Disclosure of Donations to Political Parties and Candidates*, 5 April 2004).

³⁵² *ACTV* (1992) 177 CLR 106, 145.

³⁵³ *Coleman v Power* (2004) 220 CLR 1, 52 (McHugh J).

In brief, the *raison d'être* of the implied freedom itself permits regulation of political communication in order to enhance political communication.

Having cleared this possible misunderstanding, we can now proceed to specifically analyse the election spending limits. With the first limb of the *Lange* test, it is clear that such limits burden the freedom to communicate about government or political matters because election spending is principally devoted to covering the costs of paid political communication, notably radio, television and newspaper advertisements.

In relation to the second limb of the *Lange* test and the question of legitimate aims, election spending limits are animated by two central purposes: they aim to prevent corruption and its risk, as well as seek to promote fairness in elections (see earlier discussion). Both the anti-corruption and fairness rationales of election spending limits will most likely be considered legitimate aims under the *Lange* test. The anti-corruption rationale is directed at protecting the integrity of representative government; in *ACTV*, Chief Justice Mason accepted as legitimate the aim of the legislation 'to safeguard the integrity of the political system by reducing, if not eliminating, pressure on political parties and candidates to raise substantial sums of money in order to engage in political campaigning on television and radio, a pressure which renders them vulnerable to corruption and to undue influence by those who donate to political campaign funds'.³⁵⁴

In relation to the fairness rationale, both Chief Justice Mason and Justice McHugh in *ACTV* accepted the objective of promoting a 'level playing field' in elections as a legitimate aim.³⁵⁵ This conclusion is perhaps unsurprising from the perspective of first principles. A key element of the system of representative government prescribed by the *Commonwealth Constitution* is that members of the federal Parliament be 'directly chosen' by the people of the Commonwealth.³⁵⁶ In *Lange*, the High Court variously characterised this element as requiring a 'true choice' 'with an opportunity to gain an appreciation of the available alternatives' or as mandating a 'free and

³⁵⁴ *ACTV* (1992) 177 CLR 106, 129.

³⁵⁵ *Ibid* 146 (Mason CJ), 239 (McHugh J).

³⁵⁶ *Australian Constitution* ss 7, 24.

informed choice as electors’.³⁵⁷ This was a key step towards implying the freedom of political communication, the reasoning being that there could not be such choice if electors were not able to obtain information relevant to their voting decisions.³⁵⁸

The aim of promoting fair elections is similarly aimed at supporting ‘true’ or ‘informed’ choice. By lessening the risk of those with more money dominating elections through their spending, it allows other parties and candidates to put forth their policies and positions. In the words of Justice Brennan in *ACTV*, it seeks ‘to reduce the untoward advantage of wealth in the formation of political opinion’,³⁵⁹ thereby providing electors with fuller information concerning the various alternatives in making their voting decisions. In accordance with the sentiments expressed by Justice McHugh in *Coleman v Power*, the fairness rationale in this respect, whilst burdening or regulating political communication, is aimed at enhancing such communication.

To sum up the argument so far: election spending limits do place a burden on freedom of political communication but do so in pursuit of the legitimate aims of preventing corruption and promoting fairness in elections. The final question under the *Lange* test remains: Are these limits reasonably appropriate and adapted to serve such aims? This question cannot be answered in the abstract and much will depend upon the design of the limits,³⁶⁰ a matter that will be taken up in the following discussion.

³⁵⁷ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560 (adopting Dawson J’s dicta in *ACTV* (1992) 177 CLR 106, 187).

³⁵⁸ *Ibid.*

³⁵⁹ *ACTV* (1992) 177 CLR 106, 158.

³⁶⁰ For fuller discussion of the constitutional issues concerning specifically designed election spending limits, see Tham, *Towards a More Democratic Political Funding Regime in New South Wales*, above n 8, 101-109.

3 *Australian and Overseas Spending Limits*

There is a range of ways to configure election spending limits so that they lessen the risk of corruption and promote electoral fairness (thereby enhancing ‘freedom to’ engage in political expression), whilst also ensuring that political expression enjoys meaningful ‘freedom from’ regulation, so as to conform to constitutional restrictions.

The key aspects of such limits that need to be determined are:

- the political expenditure to which they apply;
- the period for which they apply;
- the political participants covered by the limits (for example, political parties, candidates, third parties);
- types of limits (national, state and/or electorate); and
- the amounts at which they are set and how they are calculated.

In designing federal spending limits, there are various precedents that can be relied upon both locally and overseas. As mentioned earlier, Tasmania currently has spending limits that apply to its upper house elections. The *Election Funding, Expenditure and Disclosures Act 1981* (NSW) (*‘EFED Act’*) presently has the most comprehensive spending limits in Australia. They apply to ‘electoral communication expenditure’ during the ‘capped expenditure period’.³⁶¹ Section 87 of the Act defines ‘electoral communication expenditure’ in the following way:

87 Meaning of “electoral expenditure” and “electoral communication expenditure”

(1) For the purposes of this Act, "electoral expenditure" is expenditure for or in connection with promoting or opposing, directly or indirectly, a party or the election of a candidate or candidates or for the purpose of influencing, directly or indirectly, the voting at an election.

(2) For the purposes of this Act, "electoral communication expenditure" is electoral expenditure of any of the following kinds:

³⁶¹ *EFED Act* s 95I.

- (a) expenditure on advertisements in radio, television, the Internet, cinemas, newspapers, billboards, posters, brochures, how-to-vote cards and other election material,
- (b) expenditure on the production and distribution of election material,
- (c) expenditure on the Internet, telecommunications, stationery and postage,
- (d) expenditure incurred in employing staff engaged in election campaigns,
- (e) expenditure incurred for office accommodation for any such staff and candidates (other than for the campaign headquarters of a party or for the electorate office of an elected member),
- (f) such other expenditure as may be prescribed by the regulations as electoral communication expenditure,

but is not electoral expenditure of the following kinds:

- (g) expenditure on travel and travel accommodation,
- (h) expenditure on research associated with election campaigns,
- (i) expenditure incurred in raising funds for an election or in auditing campaign accounts,
- (j) such other expenditure as may be prescribed by the regulations as not being electoral communication expenditure.

(3) Electoral expenditure (and electoral communication expenditure) does not include:

- (a) expenditure incurred substantially in respect of an election of members to a Parliament other than the NSW Parliament, or
- (b) expenditure on factual advertising of:
 - (i) meetings to be held for the purpose of selecting persons for nomination as candidates for election, or
 - (ii) meetings for organisational purposes of parties, branches of parties or conferences, committees or other bodies of parties or branches of parties, or
 - (iii) any other matter involving predominantly the administration of parties or conferences, committees or other bodies of parties or branches of parties.

‘Capped expenditure period’ is the concept that captures the period to which these limits apply. For the March 2011 NSW elections, this period will run from 1 January 2011 to the end of the polling day, 26 March 2011.³⁶² In subsequent elections, section 95H provides for the following rules:

95H Capped expenditure period

The applicable cap on electoral communication expenditure for a State election applies to electoral communication expenditure during each of the following periods (the "capped expenditure period"):

...

(b) in the case of a subsequent general election to be held following the expiry of the Legislative Assembly by the effluxion of time—the period from and including 1 October in the year before which the election is to be held to the end of polling day for the election

(c) in any other case—the period from and including the day of the issue of the writ or writs for the election to the end of polling day for the election.

What these rules provide is a default position where the spending limits apply for close to six months prior to the NSW elections.

Table 22 summarises other aspects of the spending limits under *EFED Act*.

Table 22: Spending Caps under *Election Funding, Expenditure and Disclosures Act 1981* (NSW)

Political actor	Applicable cap
Political parties with Legislative Assembly candidates	<ul style="list-style-type: none"> \$100,000 x number of electoral districts in which a candidate is endorsed; Additional cap of \$50,000 for each electorate.
Political parties that have 10 or fewer Legislative Assembly candidates	\$1, 050, 000

³⁶²Ibid s 95H(a).

Group of Legislative Council candidates not endorsed by any party	\$1,050,000
Party-endorsed Legislative Assembly candidates	\$100,000
Legislative Assembly candidates not endorsed by any party	\$150,000
Third-party campaigners	<ul style="list-style-type: none"> • \$1,050,000 if registered prior to commencement of capped expenditure period; • \$525,000 in any other case; • Additional cap of \$20,000 for each electorate.

Source: *EFED Act* s 95F

It should be noted that NSW scheme has important provisions aggregating expenditure for the purposes of these limits.³⁶³ Notably, there are provisions relating to 'associated parties'. Section 95G(1) provides that registered parties are "associated" if:

- (a) they endorse the same candidate for a State election, or
- (b) they endorse candidates included in the same group in a periodic Council election, or
- (c) they form a recognised coalition and endorse different candidates for a State election or endorse candidates in different groups in a periodic Council election.

Section 95G(2) further provides that:

(2) Aggregation of expenditure of associated parties If 2 or more registered parties are associated:

- (a) the amount of \$100,000 of electoral communication expenditure in respect of any electoral district in which there are candidates endorsed by the associated parties is, for the purpose of calculating the applicable cap on electoral communication expenditure by those parties under section 95F (2), to be shared by those parties (and is not a separate amount for each of those parties), and

³⁶³ See *EFED Act* s 95G.

(b) the amount of \$1,050,000 of electoral communication expenditure in respect of any group of candidates endorsed by those parties is, for the purpose of calculating the applicable cap on electoral communication expenditure by those parties under section 95F (4), to be shared by those parties (and is not a separate amount for each of those parties).

The Queensland Government's publication, *Reforming Queensland's Electoral System*³⁶⁴ proposes spending limits modelled upon the NSW scheme. The Queensland proposals bear the following similarities to the NSW scheme:

- the limits will apply for six months prior to the latest possible date for a State election;
- there will be state-wide and electorate specific limits (it is unclear, however, whether there will be provisions aggregating expenditure – in particular, those relating to 'associated parties');
- Political parties, candidates and third parties will be to these limits.³⁶⁵

An important difference between the Queensland proposal and the NSW scheme, however, concerns the political expenditure to which the respective limits apply. As noted above, the NSW scheme applies to 'electoral communication expenditure', a sub-set of 'electoral expenditure' under the *EFED Act* (see above). The Queensland Government, however, proposes to subject all 'electoral expenditure' under the *Electoral Act 1992* (Qld) to the spending limits. Under this Act, 'electoral expenditure' is defined in the following way:³⁶⁶

electoral expenditure, for an election, means expenditure incurred (whether or not incurred during the election period) on—

- (a) the broadcasting, during the election period, of an advertisement relating to the election; or
- (b) the publishing in a journal, during the election period, of an advertisement relating to the election; or

³⁶⁴ Queensland Government, *Reforming Queensland's Electoral System*, above n 6.

³⁶⁵ *Ibid* 11-12.

³⁶⁶ *Electoral Act 1992* (Qld) sch 1 s 308.

- (ba) the publishing on the internet, during the election period, of an advertisement relating to the election, even if the internet site on which the publication is made is located outside Queensland; or
- (c) the display, during the election period, at a theatre or other place of entertainment, of an advertisement relating to the election; or
- (d) the production of an advertisement relating to the election, being an advertisement that is broadcast, published or displayed as mentioned in paragraph (a), (b) or (c); or
- (e) the production of any material (other than material mentioned in paragraph (a), (b) or (c)) that is required under section 161 to include the name and address of the author of the material or of the person authorising the material and that is used during the election period; or
- (f) the production and distribution of electoral matter that is addressed to particular persons or organisations and is distributed during the election period; or
- (g) the carrying out, during the election period, of an opinion poll, or other research, relating to the election.

The significance of this difference will be discussed later.

Guidance can also be sought from the spending limits that exist in Canada, New Zealand and the United Kingdom. Table 23 sets out the main features of these spending limits as they apply to parties and candidates.

Table 23: Election Spending Limits in Canada, New Zealand and the United Kingdom

	Period for which limits apply	Spending covered	Level of limits
<i>Canada</i>			
Parties	'Election period', that is, the period beginning with the issue of the writ and ending on poll day	'Election expenses', that is, costs incurred to directly promote or oppose a registered political party, its leader or its candidate during an 'election period'	Based on the number of electors for the electoral district in which a party has fielded a candidate (For the 2006 general election, the maximum stood at C\$18.3 million)
Candidates			Based on the number of electors in an electoral district with limits varying amongst districts, with adjustments for geographically large districts and increases in limits proportionately reducing with the number of electors (For the 2006 general election, the average limit was C\$81,159)
<i>New Zealand</i>			
Parties	'Regulated period', that is, generally three months before poll day or the period starting from 1 January of election year, whichever is longer	'Election expenses', that is, costs incurred in producing party advertisements	NZ\$1 million plus NZ\$20 000 per electoral district contested
Candidates		'Election expenses', that is, costs incurred in producing candidate advertisements	NZ\$20 000 per candidate
<i>United Kingdom</i>			

Parties	One year before poll day	<p>‘Campaign expenditure’ that is, expenditure aimed at promoting or procuring electoral success for the party or directed at enhancing the standing of the party</p> <p>(Expenses are ‘campaign expenditure’ if they fall within one of the eight separate categories of expenses listed in Part I, Schedule 8 of the PPERA, namely, party political broadcasts, advertising, unsolicited material, manifestos and other documents, market research, press conferences and dealings with the media, transport and rallies and other events.)</p>	<p>Generally based on number of seats with £30 000 per seat</p> <p>(For the 2005 general election, parties contesting all Great Britain seats were subject to a limit of £18.84 million)</p>
Candidates	No specific period laid down, applies after individual becomes a candidate	‘Election expenses’, that is, generally all expenses used for the purposes of the candidate’s election	<p>Varies for each constituency with formula taking into account the size and nature of the constituency</p> <p>(For the 2005 general election, the limit for country and borough/burgh constituencies were respectively £7150 plus 7p per elector and £7150 plus 5 p per elector)</p>

Source: *Canada Elections Act*, SC 2000, c 9, ss 2, 407, 422, 440–441; Elections Canada, *Report of the Chief Electoral Officer of Canada on the 39th General Election of January 23, 2006* (2006) 94; *Electoral Finance Act 2007* (NZ) ss 4, 72(1)–(2), 76, 94(1)–(2), 98; *Political Parties, Elections and Referendum Act 2000* (UK) c 41, s 79, sch 9, cl 3; UK Electoral Commission, *Election 2005: Campaign Spending* (2006) 13; *Representation of People Act 1983* (UK) ch 2, ss 76, 90ZA; UK Electoral Commission, *Election 2005: Campaign Spending* (2006) 30.

4 *Preliminary Observations on the Design of Federal Spending Limits*

If election spending limits are to apply to federal elections, they should apply for a period long enough to capture the main period of campaigning. The Canadian system of applying limits upon the issuing of writs, for example, seems to be too short. A period of six months prior to the day of polling would seem to be a minimum period. Here the NSW scheme (as well as the Queensland proposal) provides excellent precedent.

It should also be noted that the absence of fixed-term federal elections is not a bar to the workability of spending limits. All the above overseas spending limits exist in electoral systems where the terms are not fixed.³⁶⁷ While the absence of fixed-term elections clearly renders the workings of spending limits more difficult,³⁶⁸ the continued existence of these limits strongly suggest that it is far from impossible to have effective limits without fixed-term elections.

The question does arise, however, as to how to determine when the six-month period should commence (and end). The Queensland proposal uses the latest possible date for an election as a general reference point, dating the six-month period from that point.³⁶⁹ This approach, however, will result in the spending limits applying in practice for less than six months as elections (whether federal or State) are usually called before the latest possible date. A preferable approach that will result in practice to a longer capped period is to use the date of the last election as the reference point and have the spending limits commence a certain period after that date. On the basis of the federal elections held from 1990 to 2010, Table 24 indicates that the average duration between federal elections is approximately 2 years and 11 months. Using this average, the capped period should begin 2 years and 5 months after the previous election.

³⁶⁷ See Elections Canada, *The Electoral System of Canada* (2nd ed, 2007); Elections New Zealand, *General Election Date and Timetable*, undated <<http://www.elections.org.nz/rules/timetable-overview.html>>. It should be noted that after the 2009 Canadian general election, Canada now has four-year term elections: *Canada Elections Act*, SC 2000, c 9, s 56.

³⁶⁸ The UK Electoral Commission has observed that '[t]he difficulty for parties is, of course, that elections to Westminster are not fixed and parties do not know when the 365-day period begins. It can only be calculated retrospectively once the Prime Minister announces the date': UK Electoral Commission, *Election 2001: Campaign Spending* (2002) 45.

³⁶⁹ Queensland Government, *Reforming Queensland's Electoral System*, above n 6, 11.

Recommendation 6: Federal election spending limits should apply 2 years and 5 months after the previous election.

Table 24: Duration Between Federal Elections, 1990-2010

	Election	Election Date (Polling Day)	Duration between Elections (period between polling days)	Average Duration Between Elections
1	1990 Election	24 March 1990		1066 days, or 2 years, 11 months, 1 day (approximately)
2	1993 Election	13 March 1993	1086 days, or 2 years, 11 months, 18 days	
3	1996 Election	2 March 1996	1086 days, or 2 years, 11 months, 19 days	
4	1998 Election	3 October 1998	946 days, or 2 years, 7 months, 2 days	
5	2001 Election	10 November 2001	1135 days, or 3 years, 1 month, 8 days	
6	2004 Election	9 October 2004	1065 days, or 2 years, 11 months	
7	2007 Election	24 November 2007	1142 days, or 3 years, 1 month, 16 days	
8	2010 Election	21 August 2010	1002 days, or 2 years, 8 months, 29 days	

In terms of spending to be covered by the limits, the ‘electoral communication expenditure’ approach adopted by the NSW scheme (see above) suffers from two vices. It is, firstly, too narrow in excluding various forms of campaign expenditure (e.g. travel, research). Second, it is overly complicated with three steps involved in

determining expenditure is ‘electoral communication expenditure’ under the *EFED Act*:

- whether the expenditure is ‘electoral expenditure’;
- if yes, whether the ‘electoral expenditure’ comes within the identified categories of ‘electoral communication expenditure’; and
- whether the expenditure is caught by the various exclusions.

The Queensland proposal of basing the spending limits on ‘electoral expenditure’ is to be preferred as it is broader and simpler (by removing one of the three steps above). There also should not be so many exclusions as currently exist under the NSW scheme – the only one that is justified (for constitutional reasons) is the exclusion for ‘expenditure incurred substantially in respect of an election to members of Parliament other than the NSW Parliament’.³⁷⁰

Recommendation 7: Federal spending limits should apply to ‘electoral expenditure’ under the *Commonwealth Electoral Act* with an exclusion for expenditure incurred substantially in respect of an election to members of Parliament other than the Commonwealth Parliament.

Alongside election spending limits being applied to political parties and candidates, there should also be limits on third party election spending. The first reason lies with preserving the integrity of the limits applied on parties and candidates. Without third party limits, political parties and candidates may be able to use front groups to engage in spending otherwise prohibited if they had done so directly. The other reason concerns fairness to those who are standing for office. Limits on candidate and party spending without corresponding limits on third parties mean that parties are at a disadvantage in relation to third parties in election contests. This turns on its head the principle that parties and candidates should have a privileged role in election contests and clearly has the effect of undermining the party system.³⁷¹

³⁷⁰ *EFED Act* s 87(3)(a).

³⁷¹ Samuel Issacharoff & Pamela Karlan, ‘The Hydraulics of Campaign Finance Reform’ (1999) 77 *Texas Law Review* 1705, 1714–15.

Here we see a complex interplay between the fairness and anti-corruption rationales of spending limits. The latter applies with greater force to parties and candidates as they are seeking to become public office-holders. Emphasising the anti-corruption rationale without full regard to the fairness rationale may insist only on limits being applied to political parties and candidates. Such a lopsided approach will, however, leave parties and candidates less at risk of corruption but in a much weakened state to effectively assert their role in elections.

Are such limits, however, likely to be unconstitutional for breaching the implied freedom of political communication? In a report to the New South Wales government, Anne Twomey concluded in the affirmative: '[i]f [expenditure] limits are imposed on third parties, there is a high risk of constitutional invalidity'.³⁷² The report does not, however, properly substantiate this conclusion. Its discussion of the topic of third party expenditure limits primarily comprises descriptions of third-party limits in Canada, New Zealand and the United Kingdom together with discussion of some of the cases involving challenges to these limits.³⁷³ Why such description results in a conclusion that these limits are fraught with a 'high risk of constitutional invalidity' is unclear. There is, firstly, no attempt to draw out why such decisions are relevant in the application of the implied freedom of political communication, a weakness that is especially notable in light of the caution some High Court judges have strongly urged in using overseas jurisprudence for this purpose.³⁷⁴ Second, the limits in all three of these countries remain intact and while some cases have struck down the limits for being too low,³⁷⁵ others have upheld differently designed limits.³⁷⁶

Given that third party spending limits are not necessarily unconstitutional in Australia, we can now turn to the design of such limits. Table 22 above provides details of the third party limits under the NSW scheme while Table 25 documents the

³⁷² Anne Twomey, *The Reform of Political Donations, Expenditure and Funding: Report prepared for the Department of Premier and Cabinet of New South Wales* (2008) 2.

³⁷³ *Ibid* 32–37.

³⁷⁴ See *Levy v Victoria* (1997) 189 CLR 579, 598 (Brennan CJ); *Coleman v Power* (2004) 220 CLR 1, 48 (McHugh J).

³⁷⁵ For example, see discussion of *Bowman v United Kingdom* (1998) 26 Eur Court HR 1 in Anne Twomey, above n 372, 35–36.

³⁷⁶ See, for example, discussion of *Harper v Canada* [2004] 1 SCR 827 in Anne Twomey, above n 372, 33–35.

main features of these limits as they exist in Canada, New Zealand and the United Kingdom.

Table 25: Third Party Spending Limits in Canada, New Zealand and United Kingdom

	Requirement to register	Period for which limits apply	Spending covered	Level of limits
Canada	Required to register if have incurred more than C\$500 in election advertising expenses	'Election period', that is, period beginning with issue of the writ and ending on poll day	Election advertising expenses	For 2006 general election, C\$172 050 for a national campaign and C\$3441 for an electoral district
New Zealand	Obligation to register if spend more than NZ\$12 000 nationally or NZ\$1000 in relation to an individual candidate	'Regulated period', that is, generally three months before date of poll or period from 1 January of election year, whichever is longer	'Election advertisement', that is, any form of words that can be reasonably regarded as encouraging or persuading voters to vote or not to vote for a party or candidate (including material that describes a candidate or party by reference to views etc held or not held by the candidate or party)	Registered third parties can spend up to NZ\$120 000 nationally or NZ\$4000 in relation to an individual candidate
United Kingdom	Required to register if wanting to spend more than £10 000 in England or £5000 in Scotland, Wales and Northern Ireland respectively	One year before date of poll	'Controlled expenditure', that is, spending on publicly-available material and that can be reasonably regarded as intended to promote or procure electoral success for a party or a candidate	Registered third parties, that is, 'recognised third parties' can respectively spend up to £793 500; £108 000; £60 000 and £27 000 in England, Scotland, Wales and Northern Ireland

Source: *Canada Elections Act*, SC 2000, c 9, ss 2, 349–50, 353; Elections Canada, *Report of the Chief Electoral Officer of Canada on the 39th General Election of January 23, 2006* (2006) 95; *Electoral Finance Act 2007* (NZ) ss 4, 5(1), 63(3)(d), 118; *Political Parties, Elections and Referendum Act 2000* (UK) c 41 ss 85, 88, 94(1), 94(3)–(5), sch 10, cl 3(2)–(3).

Australian third party limits should follow these examples, firstly, by requiring third parties to register should they wish to spend above a certain amount (say \$10 000) in the six months prior to polling day. In common with these other countries, the level of third party limits should be set at a level lower than political party spending limits. Australian federal elections are (and should be) primarily contests amongst rival political parties and, while third parties have a legitimate role in these contests, they should not be allowed to swamp the centrality of contesting political parties by outspending the political parties. On the other hand, the level should not be set so low as to preclude meaningful participation by third parties. As for the period and the spending covered by third party limits, they should be identical to that which applies to party and candidate spending limits.

Recommendation 8: Federal spending limits should apply to parties, candidates and third parties.

In terms of the level of limits, this should be further investigated. At the very least, the national limit should not be higher than the largest amount currently spent by a single party. Moreover, election spending limits should be imposed not only at a national and constituency level but also at a state level to address the question of spending for Senate elections. In terms of the level of state and constituency limits, the Canadian approach is appealing. Under the *Canada Elections Act*, the limit is calculated according to the number of electors but the amount allocated per elector decreases as the number of electors increases. Under the current provisions, C\$2.07 is allocated for each of the first 15 000 electors, C\$1.04 for each of the next 10 000 electors and then C\$0.52 each for the remaining electors. The amount allocated for each elector also increases according to a formula for districts with lower population density.³⁷⁷

Recommendation 9: There should be federal spending limits applying at the national, State and electorate levels.

³⁷⁷ *Canada Elections Act*, SC 2000, c 9, s 441(3), (10).

D *Contribution Limits (with an Exemption for Membership Fees)*

Greater restrictions on political contributions have support across the political spectrum. In a response to the Wollongong City Council scandal, former New South Wales Premier Morris Iemma advanced the radical proposal of completely banning political contributions in favour of a system of complete public funding.³⁷⁸ Following not too far behind, his predecessor Bob Carr has advocated banning political contributions from organisations like trade unions and companies and only allowing those made by individuals. Former Leader of the Opposition Malcolm Turnbull³⁷⁹ and the New South Wales Greens³⁸⁰ have similar positions. In a bipartisan report, the New South Wales Legislative Council Select Committee on Electoral and Political Party Funding (NSW Select Committee) recommended that there be a ban on all political donations except for those by individuals. Contributions by individuals are further to be limited to \$1000 for each political party per annum (and \$1000 for each independent candidate per electoral cycle).³⁸¹ The spirit of this recommendation has now been adopted in legislative form with the *EFED Act* putting in place a regime of contribution limits (see below). Moreover, the Queensland Government is proposing to follow the NSW example by enacting contribution limits for Queensland.³⁸²

There are compelling arguments for contribution limits such as those found in the *EFED Act*. Such limits will clearly act as a preventive measure in relation to graft. Moreover, as the amount of money contributed by an individual increases, the risk of undue influence heightens. Therefore, bans on large contributions can directly deter corruption through undue influence (and also obviate the need for selective bans on property developers³⁸³ and holders of gambling licences³⁸⁴). On a related point, such limits will promote fairness in politics as they prevent the wealthy from using their money to secure a disproportionate influence on the political process. The result is to

³⁷⁸ See Australian Labor Party (NSW Branch), Submission No 107 to the Select Committee on Electoral and Political Party Funding, Parliament of New South Wales, *Inquiry into Electoral and Political Party Funding*, 15 February 2008.

³⁷⁹ Malcolm Turnbull, Submission No 196 to the Joint Standing Committee on Electoral Matters, *Inquiry into the 2004 Federal Election*, 11 August 2005.

³⁸⁰ See Select Committee on Electoral and Political Party Funding, Parliament of New South Wales, *Report of Proceedings Before the Select Committee on Electoral and Political Party Funding: Inquiry into Electoral and Political Party Funding* (2008).

³⁸¹ Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, above n 324, 105 (recommendation 7).

³⁸² Queensland Government, *Reforming Queensland's Electoral System*, above n 6, 9-11.

³⁸³ *Election Funding and Disclosures Act 1981* (NSW) ss 96GA-96GE.

³⁸⁴ *Electoral Act 2002* (Vic) ss 216-217.

promote the fair value of political freedoms despite limiting the formal freedom to contribute.³⁸⁵ By doing so, they break the hold of the commodity principle that is implicit in the sale of access and influence (see Part IV). Further, by requiring parties to secure the support of a large base of small contributors, such limits are likely to enhance their participatory function.

Significant objections to contribution limits do, however, need to be addressed.³⁸⁶ First and foremost, instituting such limits by themselves will leave the parties seriously under-funded given that they are presently heavily reliant on large contributions (see Part II). In the context of party government, jeopardising the existence of the parties must mean placing the system of government at risk. It is also unclear what impact the contribution limits will have on fairness amongst the parties. Further, contribution limits are likely to mean that parties will spend more time fundraising – they will need to persuade more individuals to part with their money, a development that is likely detract from the performance of their democratic functions (apart from the participatory function). This will intensify especially if the ‘arms race’ between the parties continues (see Part II).

These objections are, however, not insurmountable. It is, firstly, imperative that contribution limits be adopted as part of a broader package of reform. One of the central difficulties with the position of those who advocate contribution limits as the principal, at times the only, reform measure is that they do not fully deal with potential (adverse) impact of such limits. To ameliorate such impact, there needs to be a reconfiguration of public funding of parties and candidates, including a significant increase in such funding to make up for the shortfall resulting from limits on contributions (discussed below). Such funding should provide for sustainable parties, redress any inequities that arise from contribution limits and also lessen the risk of parties devoting an undue amount of time to fundraising. Further, contribution limits must be accompanied by election spending limits (advocated above). The latter limits will staunch the demand that fuels the parties’ aggressive fundraising activities.

³⁸⁵ John Rawls has referred to restrictions on contributions as a possible means for ensuring fair value of political liberties: see John Rawls, *Political Liberalism* (Columbia University Press, 1996) 357–58; Rawls, *Justice as Fairness: A Restatement*, above n 37, 149.

³⁸⁶ See K D Ewing, *The Cost of Democracy*, above n 200, 227-230.

1 *An Exemption for Membership Fees (Including Union Affiliation Fees)*

Whilst recommending a ban on all but small donations by individuals, the NSW Select Committee proposed that membership fees be exempted from the ban provided that they are set at a reasonable level (with that level being determined by the Auditor-General).³⁸⁷ This is a position with considerable merit. As the NSW Select Committee correctly recognised, ‘membership of political parties is an important means for individuals to participate in the political process’.³⁸⁸ Specifically, it involves participation *within* political parties, thereby directly enhancing the participatory function of parties with party members taking out membership in order to advance their understanding of what is in the ‘public interest’ through the respective party, with a view to putting that conception of the public interest to the electorate; These features of membership fees explain why there should be an exemption for membership fees. Whilst contribution limits permit membership fees below the limits, an exemption goes beyond such permissiveness by *encouraging* party membership.

What perhaps is the most controversial aspect of this exemption for membership fees is whether it should be extended to organisational members, in particular, trade union affiliates of the ALP. Indeed, what is shaping up as one of the most controversial issues concerning contribution limits is how it should apply to trade union affiliation fees.

This very much looks like a case of union obstructionism thwarting the public interest. One could be excused for asking: If political contributions are to be restricted, why should union affiliation fees be exempt? Aren’t such fees, like other political contributions, paid as an attempt to influence the political process through money and, if so, shouldn’t they be regulated as any other contribution? As some

³⁸⁷ New South Wales Select Committee, *Electoral and Political Party Funding in New South Wales*, above n 324, 113 (recommendation 9).

³⁸⁸ *Ibid.*

would further argue, '[i]f big business is to be prevented from bankrolling political parties in return for favourable policies, surely the same rule must apply to unions'.³⁸⁹

This submission takes a contrary view: the exemption for membership fees should extend to organisational membership fees including trade union affiliation fees. As will be argued below, a ban on organisational membership fees will give rise to anomalies, is misdirected at 'trade union bosses' and constitutes an unjustified limitation on freedom of party association.

4 *The Anomalies of Banning Organisational Membership Fees*

A ban on organisational membership fees will produce striking anomalies. Presumably, parties will still be allowed to have state and territory-based branches with intra-party transfers exempted from contribution limits. If so, collective affiliation based on geographical areas will still be allowed. But if collective affiliation is permitted on this basis, why limit collective affiliation based on ideological grounds (for example, environmental groups seeking to affiliate to the Greens) or those based on occupation or class (for example, farmers' groups seeking to affiliate to the National Party)?

A ban on organisational membership will also detract from the participatory function of parties. In case of the ALP, there will be the loss of membership participation provided by trade union affiliates. However attenuated, such participation is still a form of participation. If limits applying to party contributions are enacted without limits on third parties and their spending then money may very well flow on to third-party activity.³⁹⁰ This would express a preference for pressure group politics over party politics as it will strongly encourage political groups to engage in independent third-party activity rather than become members of political parties. Such a preference may favour issue politics over broader and more inclusive forms of politics that are more likely to emerge through the interest-aggregation performed by political

³⁸⁹ Janet Albrechtsen, 'End the stench of political donations', *The Australian* (Australia), 24 February 2008.

³⁹⁰ See Issacharoff and Karlan, 'The Hydraulics of Campaign Finance Reform', above n 371, 1714–15.

parties.³⁹¹ By weakening the party system, these (likely) effects fly in the face of one of the key principles of a democratic political finance regime, support for parties in performing their functions.

3 *A Ban on Organisational Membership Fees: Misdirected at 'Trade Union Bosses'*

A ban on organisational membership fees (including trade union affiliation fees) will have a severe impact upon the trade union-ALP link by either prohibiting or severely limiting the amount of money that trade unions can contribute to the ALP. By banning or at least reducing significantly the flow of trade union affiliation fees to the ALP, such measures will most likely weaken the relationship that the trade union movement has with the ALP.

Indeed, this is one of key aims of some advocates of contribution limits. For example, former NSW Premier Bob Carr has endorsed his successor, Morris Iemma's call for banning organisational contributions on the basis that unions will not be able to affiliate to the ALP on a collective basis.³⁹² Discontented with the power wielded by 'trade union bosses' within the ALP, some would prefer that the ALP-union link be made illegal.

There are, in fact, three main complaints bundled up in the epithet, 'trade union bosses' and it is crucial to consider them separately. The first is the claim that the presence within the party of 'trade union bosses', or more kindly, the influence of trade union officials within the ALP, is making the ALP unelectable or at least preventing it from becoming 'the natural party of Federal government'.³⁹³ The concern here is that the influence of trade unions has the effect of the ALP not being properly representative of the Australian community, thereby impairing – perhaps even severely damaging – its electoral prospects.

³⁹¹ See also Ewing, *Trade Unions, the Labour Party and Political Funding*, above n 206, [4.6]–[4.7]. This is not to deny that the Australian Labor Party is already influenced by pressure group politics. For a case-study, see Philip Mendes, 'Labourists and the Welfare Lobby: The Relationship Between the Federal Labor Party and the Australian Council of Social Service (ACOSS)' (2004) 39(1) *Australian Journal of Political Science* 145.

³⁹² Editorial, 'Limit political donations: Carr', *The Australian* (Australia) 4 May 2008.

³⁹³ Mark Aarons, 'The Unions and Labor' in Robert Manne (ed), *Dear Mr Rudd: Ideas for A Better Australia* (Black, 2008) 86, 91.

Such views may or may not be correct. The issue here, however, does not turn on the veracity of these views; the question here is whether a ban on organisational membership fees is a legitimate way of dealing with concerns regarding the electability of the ALP (or for that matter, the electability of any party). The answer is “surely not”: these are matters for the ALP and its members to decide, not one for regulation, let alone contribution limits involving a ban on organisational membership fees. Should these concerns not be dealt with properly then the discipline of the ballot box will operate with voters choosing not to support the ALP.

There are two other complaints implied by criticisms of ‘trade union bosses’: one relating to internal party democracy and the other to trade union democracy. Mark Aarons, a former union official who was also an adviser to Bob Carr when he was New South Wales Premier, has argued that the ALP is organised in ‘a most undemocratic way’³⁹⁴ because affiliated trade unions exercise ‘a grossly out-of-proportion, even extraordinary, influence over policy formulation’.³⁹⁵ This lack of proportion is said to arise because the level of power trade union delegates exercise within the ALP is not justified by the level of union density: how can it be right that trade unions have 50 per cent of delegates in ALP conferences when less than one-fifth of the workforce is unionised?³⁹⁶

This argument, however, turns on a fallacious use of the term, ‘undemocratic’. It is true that parties have a representative function in that *parties or the party system as a whole* should represent the diversity of opinion within a society (as discussed in Part II, ‘Aims of a Democratic Political Finance Regime’). This is, however, not the same as saying that *a single party* should seek to represent the entire spectrum of this opinion. Not only is this practically impossible but paradoxically, parties discharge their representative function by representing different sections of society. It is the cumulative effect of such sectional representation that stamps a party system as representative in overall terms. In this context, characterising the manner in which the

³⁹⁴Ibid 88.

³⁹⁵Ibid 88.

³⁹⁶In 2007, union density stood at 19 per cent of the Australian workforce: Australian Bureau of Statistics, ‘Employee Earnings, Benefits and Trade Union Membership, Australia, August 2007’ (Statistics, Australian Bureau of Statistics, 2007) cat. no. 6310.0.

ALP is organised as being undemocratic simply because its membership base is not wholly representative of the Australian public is somewhat perverse.

To say this is to emphasise that there is nothing self-evidently ‘undemocratic’ about such influence. It is not to imply that the extent of union influence over the ALP is justifiable or desirable. Some, for example, might argue that such influence results in a rather partial notion of the ‘public interest’. Just as the relationships between the Liberal Party and its business supporters, the National Party and agricultural producers, and the Greens and the environmental groups, are relevant considerations for the voters in deciding whether a political party adequately represents the ‘public’ or ‘national’ interest, such matters are clearly legitimate considerations for citizens deciding whether or not to vote for the ALP.

There is another difficulty with characterising the manner in which the ALP is organised as being undemocratic: reducing trade union influence will not necessarily revitalise the internal democracy of the ALP.³⁹⁷ So much can be seen through a rough depiction of the power relations within the ALP as given in Table 26. The party elite comprises the parliamentary leadership, the members of parliament and their staff,³⁹⁸ the union leadership (including union delegates), and the party officials and bureaucrats. The rank and file, on the other hand, consists of the party members.

Table 26: Power Relations within the ALP

Party elite	Union leadership	Parliamentary leadership	Party officials and bureaucracy
Rank and file	Party members		

These relations can be analysed according to horizontal and vertical dimensions. Reducing the influence of the union leadership does not mean that power will flow vertically to the rank and file. In the context of shrinking party membership within the

³⁹⁷ This point is made well by Bolton: John R Bolton, ‘Constitutional Limitations on Restricting Corporate and Union Political Speech’ (1980) 22 *Arizona Law Review* 373, 417.

³⁹⁸ This would include political advisers, some of which have been criticised as exercising ‘power without responsibility’: Anne Tiernan, *Power Without Responsibility: Ministerial Staffers in Australian Governments from Whitlam to Howard* (University of New South Wales Press, 2007). Tiernan’s study was focussed on ministerial advisers.

ALP,³⁹⁹ it is far more likely that power will be redistributed horizontally to others remaining within the party elite. Where the ‘party in public office’, the parliamentary leadership, is already ascendant over the ‘party on the ground’ as well as the ‘party central office’,⁴⁰⁰ it is a fair bet that the parliamentary leadership will be a key beneficiary of this redistribution of power. A similar conclusion results when one casts an eye to power relations beyond the party. Looking at the ‘material constitution’⁴⁰¹ of the ALP, that is, its relationship with class forces, diminishing the influence of trade unions within the ALP is likely to mean a corresponding empowerment of business interests but not of the rank and file. Moreover, the power of the government bureaucracy also needs to be factored in, especially when the ALP is in government: its influence is likely to increase as sources of countervailing power like trade unions weaken in strength.

Underlying all this is a risk of throwing the baby out with the bath water. While it is true that the internal democracy of the ALP is undermined in some cases by trade unions because of their oligarchical tendencies (see above discussion), the answer is not to excise trade unions from the party. Collective organisations like trade unions play a necessary, though at times problematic, role in empowering citizens. The ambivalent character of such organisations is well captured by sociologist Robert Michels. As noted earlier, Michels is famous for his iron law of oligarchy: ‘[w]ho says organization, says oligarchy’.⁴⁰² He is perhaps less well known for his observation that ‘[o]rganization ... is the weapon of the weak in their struggle with

³⁹⁹ For figures, see Gary Johns, ‘Party Organisation and Resources: Membership, Funding and Staffing’ in Ian Marsh (ed), *Political Parties in Transition?* (Federation Press, 2006) 46, 47; Ward, ‘Cartel Parties and Election Campaigns’ in *ibid* 73–75.

⁴⁰⁰ Ward, ‘Cartel Parties and Election Campaigns’, above n 399, 70, 72, 85–88. On the power of trade unions within the ALP, see Kathryn Cole, ‘Unions and the Labor Party’ in Kathryn Cole (ed), *Power, Conflict and Control in Australian Trade Unions* (Pelican Books, 1982) where it was concluded that ‘the power of unions within the ALP is far more circumscribed than is commonly believed and the process which each of the party’s two sections (i.e. industrial and political wings) accommodates to the demands and needs of the other is complex and tortuous’: Cole, *Power, Conflict and Control in Australian Trade Unions*, 100.

⁴⁰¹ Tom Bramble & Rick Kuhn, ‘The Transformation of the Australian Labor Party’ (Speech delivered at the Joint Social Sciences Public Lecture, Australian National University, 8 June 2007).

⁴⁰² Robert Michels, *Political Parties: A Sociological Study of the Oligarchical Tendencies of Modern Democracy* (Collier Books, 1962) 365. Michels’ iron law is better understood as pointing to the ‘oligarchical tendencies’ of organisations. The title of the last part of Michels’ book is, in fact, ‘Synthesis: The Oligarchical Tendencies of Organizations’: Michels, *Political Parties*, 365.

the strong'.⁴⁰³ Within the ALP, collective organisations like trade unions allow individual members to band together to secure a voice that they would not have otherwise. While they do give rise to the risk of oligarchy within the organisations themselves, functioning well they provide 'effective internal polyarchal controls'⁴⁰⁴ that counter the oligarchical tendencies of the party. By severely diminishing the role of trade unions within the ALP, undifferentiated contribution limits will likely increase the oligarchical tendencies within the party.

The other complaint in relation to 'trade union bosses' concerns trade union democracy. Aarons has argued that because 'individual unionists have no practical say in whether they are affiliated to the ALP and whether a proportion of their membership fees pay for this [and] ... in how their union's votes will be cast', there is 'not a democratic expression of the union membership's wishes'.⁴⁰⁵ This criticism, however, is doubly misconceived. First, under any system of representative governance, most decisions are made by representatives without the direct say of their constituencies. It is this feature that contrasts representative systems from those based on direct democracy and, indeed, this is how the Australian system of parliamentary representation is supposed to work. The key question in such contexts is not whether members have a direct say but whether the representatives are effectively accountable to their constituencies, in this case, trade union delegates to their members. The real problem here is one of 'union oligarchies'⁴⁰⁶ that are insulated from effective membership control (discussed above). Yet, and this brings us to the second misconception, a ban on organisational membership (including trade union affiliation fees) will do little to meaningfully address this problem.⁴⁰⁷ At best, what they would do is carve out certain decisions from the remit of trade union oligarchies while still leaving the oligarchies intact.

⁴⁰³ Michels, above n 402, 61. Schattscheider has similarly observed that '[p]eople do not usually become formidable to governments until they are organised': E E Schattscheider, *Party Government* (Holt, Rinehart and Winston, 1942) 28.

⁴⁰⁴ Charles E Lindblom, *Politics and Markets: the World's Political Economic Systems*, (Basic Books, 1977) 141.

⁴⁰⁵ Aarons, 'The Unions and Labor,' above n 393, 86, 89.

⁴⁰⁶ Andrew Parkin, 'Party Organisation and Machine Politics: the ALP in Perspective' in Andrew Parkin and John Warhurst (eds), *Machine Politics in the Australian Labor Party* (George Allen & Unwin, 1983) 15, 22.

⁴⁰⁷ Aarons has argued that problems with 'trade union bosses' requires review of the funding provided by trade unions to the ALP: Mark Aarons, 'Rein in union strongmen's ALP power', *The Australian* (Australia), 18 March 2008.

4 *Unjustified Limitation of Freedom of Political Association*

It is essential that political finance regulation respect freedom of political association because such freedom is crucial to the proper workings of Australian democracy. Specifically, it is necessary in order to ensure pluralism in Australian politics, pluralism that is required both to protect the integrity of representative government as well as fairness in politics. This does not, however, mean that state regulation of political associations is impermissible. There can be public interest grounds for limiting freedom of political association. Whether particular measures are justified will depend upon the weight of such rationales, the extent to which the limitation is adapted to advancing such rationale/s and the severity of the limitation (see further Part II, ‘Aims of a Democratic Political Finance Regime’).

In evaluating a ban on organisational membership fees, it is convenient to begin with the last factor, the severity of the ban. Freedom of political association possesses several key aspects, notably:

- the individual’s right to form political associations, act through such associations and to participate in the activities of these associations; and
- the association’s ability to determine its membership, the rules and manner of its governance and the methods it will use to promote its common objectives.⁴⁰⁸

Here we focus on freedom of party association and, in particular, the ability of political parties to determine their membership. Some parties, such as the Liberal Party⁴⁰⁹ and the National Party⁴¹⁰, for instance, may restrict themselves to individual memberships and are, in this way, *direct parties*. Others like the ALP⁴¹¹ and the New South Wales Greens⁴¹² allow both individual membership and membership by groups

⁴⁰⁸ Affidavit of Keith Ewing to IDSA litigation. See also Howard Davis, *Political Freedom*, above n 75, 46.

⁴⁰⁹ See, for example, Liberal Party of Australia (NSW), ‘Constitution and Regulations of the Liberal Party of Australia (NSW)’ (Constitution, Liberal Party of Australia (NSW), 1978) cl 2.1.

⁴¹⁰ See, for example, National Party of Australia (NSW), ‘Constitution and Rules of the National Party of Australia (NSW)’ (Constitution, National Party of Australia (NSW), 1988) cl 2.

⁴¹¹ See, for example, Australian Labor Party (NSW), ‘Rules of the Australian Labor Party (NSW) 2005-2006’ (Constitution, Australian Labour Party (NSW) 2006) cl A.2–A.3.

⁴¹² The Greens (NSW), ‘Constitution of the Greens (NSW)’ (Constitution, The Greens (NSW), 1993) cl 2.1.

and are therefore *mixed parties*. The Constitution of the federal National Party also allows it to be a mixed party as organisations can become associations of the Party where there is no state branch.⁴¹³ Some parties like the New South Wales Shooters Party fall somewhere in the middle: membership is formally restricted to individuals,⁴¹⁴ while close links are maintained with various groups.⁴¹⁵ In these situations such groups, while not members of the party, act as *ancillary organisations*.⁴¹⁶ Such diversity of party structures should be respected because it is one of the main ways in which the pluralism of Australian politics is sustained (see further Part II, ‘Aims of a Democratic Political Finance Regime’).⁴¹⁷

When viewed from this perspective, the impact of a ban on organisational membership fees on the freedom of party association is quite severe: it will mandate a particular party structure, direct parties and, while not directly banning parties that allow for organisational membership, generally make them unviable unless such parties are able to secure sufficient public funding.⁴¹⁸

The specific impact on the trade union-ALP relationship can be illustrated through the typology developed by industrial relations experts Matthew Bodah, Steve Coates and David Ludlam. According to these authors, there are two dimensions to union-party

⁴¹³ National Party of Australia (NSW), ‘Constitution and Rules of the National Party of Australia (NSW)’, above n 410, cl 71. Before 1945, various farmers’ organisations had formal relationships with the Country Party, the predecessor of the National Party: Keith O Campbell, ‘Australian Farm Organizations and Agricultural Policy’ in Colin Hughes (ed), *Readings in Australian Government* (University of Queensland Press, 1968) 438.

⁴¹⁴ Australian Shooters and Fishers Party (NSW), ‘Constitution of The Shooters Party (NSW)’ (Constitution, Australian Shooters and Fishers Party (NSW) by-law (2)).

⁴¹⁵ In the case of the Shooters Party, this is made clear by its Constitution, which states that one of its aims is ‘[t]o exert a discipline through shooting organizations and clubs and within the non-affiliated shooting community, to curb the lawless and dangerous element; and to help shooters understand that they hold the future of their sport in their own hands by their standards of conduct’: Australian Shooters and Fishers Party (NSW), above n 414, cl 2(g) (emphasis added). In relation to the 2003 State Election, The Shooters Party received thousands of dollars in contributions from various hunting and pistol clubs including the Federation of Hunting Clubs Inc, Singleton Hunting Club, St Ives Pistol Club, Illawarra Pistol Club and the NSW Amateur Pistol Association: Election Funding Authority (NSW), *Details of Political Contributions of More than \$1,500 Received by Parties that Endorsed a Group and by Independent Group at the Legislative Council 2003* <http://efa.nsw.gov.au/__data/assets/pdf_file/0007/63718/2003PartyContributions.pdf>.

⁴¹⁶ For fuller explanations of direct and indirect party structures, see Duverger, above n 175, 6–17.

⁴¹⁷ For fuller discussion, see Ewing, *The Cost of Democracy*, above n 200, 35–38.

⁴¹⁸ This seems to be the position in relation to the Canadian New Democratic Party that still allows trade unions to affiliate on a collective basis: see Harold Jansen & Lisa Young, ‘Solidarity Forever? The NDP, Organised Labour, and the Changing Face of Party Finance in Canada’ (Paper presented at the Annual Meeting of the Canadian Political Science Association, London Ontario, 2–4 June 2009). See also the discussion in Ewing, *The Cost of Democracy*, above n 200, 220–21.

linkages, formal organisational integration and a level of policy-making influence, which give rise to four types of linkages:

- external lobbying type – that is, no formal organisational integration between unions and parties, with unions having no or little influence in party policy-making;
- internal lobbying type – that is, no formal organisation integration between unions and parties, but unions are regularly consulted in policy-making;
- union/party bonding type – that is, unions occupy important party positions but do not enjoy domination of party policy-making; and
- union dominance model – that is, unions occupy important party positions and dominate party policy-making.⁴¹⁹

According to this typology, the trade union-ALP link fits either the union/party bonding type or the union dominance model because of the organisational integration of trade union affiliates into the ALP. As members of state and territory branches of the ALP, affiliated trade unions are guaranteed 50 per cent representation at state and territory conferences.⁴²⁰ These conferences determine state and territory branch policies and elect state party officials and delegates to National Conference.⁴²¹ The latter functions as ‘the supreme governing authority of the Party’⁴²² and elects members of the National Executive, ‘the chief administrative authority’ of the party.⁴²³ A ban on organisational membership fees will, however, make organisational integration between the ALP and unions much less viable; the menu of options is effectively restricted to the external/internal lobbying types.

⁴¹⁹ Matthew Bodah, Steve Ludlam and David Coates, ‘The Development of an Anglo-American Model of Trade Union and Political Party Relations’ (2003) 28(2) *Labor Studies Journal* 45, 46; see also Steve Ludlam, Matthew Bodah and David Coates, ‘Trajectories of Solidarity: Changing Union-Party Linkages in the UK and the USA’ (2002) 4(2) *British Journal of Politics and International Relations* 222, 233–41. For an application of the typology to the Australian context, see Gerard Griffin, Chris Nyland and Anne O’Rourke, ‘Trade Unions, the Australian Labor Party and the Trade-Labour Rights Debate’ (2004) 39(1) *Australian Journal of Political Science* 89.

⁴²⁰ See, for example, Australian Labor Party (NSW), above n 411, cl B.25(a), B.26; Australian Labor Party (Victoria), ‘Rules of Australian Labor Party Victorian Branch’ (Constitution, Australian Labor Party, 2009) cl 6.3.2.

⁴²¹ See, for example, Australian Labor Party (NSW), above n 411, clause B.2; Australian Labor Party (Victoria), above n 411, cl 6.2.

⁴²² Australian Labor Party, ‘National Constitution of the ALP’ (Constitution, Australian Labor Party, 2009) cl 5(b).

⁴²³ *Ibid* cl 7(a).

Is there a compelling justification for such a severe incursion into the freedom of the ALP to organise itself as it sees fit? It is exceedingly difficult to see one. There is, firstly, the prima facie legitimacy of membership fees. Further, as the previous discussion has argued, the ‘trade union bosses’ objections are misdirected: amongst others, a ban on organisational membership fees will neither enhance internal party democracy nor invigorate trade union democracy. Absent an adequate rationale for limiting freedom of party association, it is hard to escape the conclusion that such a ban represents an unjustified limitation on freedom of party association.

It was such a concern with freedom of party association that led the NSW Select Committee to include trade union affiliation fees in their exemption for membership fees.⁴²⁴ The key reasons given by the six-member committee, which had only two ALP members, are worth reproducing:

The Committee considers that membership fees should not be encompassed by the Committee’s proposed ban on all but small individual donations ... *Similarly, the Committee believes that trade union affiliation fees should be permissible, despite the proposed ban on union donations. To ban union affiliation fees would be to place unreasonable restrictions on party structures.*⁴²⁵

This view has further been adopted by the *EFED Act* with party subscriptions of \$2,000 or less disregarded for the purpose of its donation caps. This includes affiliation fees with the exclusion limited, in the case of party subscriptions calculated by reference to the number of members of the affiliate, to an amount of \$2,000 times the number of these members (the limit is \$2,000 otherwise).⁴²⁶ The Queensland Government has also followed this approach: it proposes to exclude membership fees of \$500 or less per financial year from the State’s donations caps; this will include

⁴²⁴ Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales*, above n 324, 107–8, 113 (recommendation 9).

⁴²⁵ *Ibid* 113 (emphasis added).

⁴²⁶ *EFED Act* s 95D.

affiliation and organisational fees (although it is unclear what limits apply to these fees) which cannot be used for campaign purposes.⁴²⁷

5 *Re-emphasising the Scope of the Argument*

There are many critics of the trade union-ALP relationship: considerable number of voters believe that this relationship casts doubt on the ability of the ALP to govern for all; within the union movement there are union members – even union leaders⁴²⁸ - who strongly take the view that this relationship fails to serve their best interests; and, even within the ALP this relationship does not enjoy unqualified support with some rank-and-file members feeling disenfranchised by the influence enjoyed by union affiliates and more than a few key party officials expressing concern that the relationship undermines the party's ability to win public office.

For the most part, this submission says very little, often nothing, on these questions. It has focussed on whether there should be a ban on organisational membership fees (including trade union affiliation fees) under a regime of contribution limits. In concluding that there should be an exemption for such fees, the submission does not amount to a general defence of the trade union-ALP relationship. The central point is that this relationship should not be prohibited as a matter of law. The broader question as to whether this relationship is desirable or justified raises a complex range of issues, most of which fall outside the scope of this submission.

One issue that does fall within the scope of this submission is the unfairness that is likely to result from an exemption for membership fees including trade union affiliation fees. As has been explained above, there is currently a lack of 'equality of arms' between the ALP and the Coalition parties resulting in part from the fact that the ALP receives trade union income together with corporate money. This inequality will likely worsen under an exemption for membership fees. Such unfairness should be addressed but not through contribution limits (or removing the exemption for

⁴²⁷ Queensland Government, *Reforming Queensland's Electoral System*, above n 6, 10.

⁴²⁸ See, for example, Dean Mighell, 'Unions must leave Labor', *The Age* (Melbourne), 11 February 2010.

membership fees). Rather, as has been argued above, the burden of this task falls on election spending limits.

6 *Contribution Limits and the Implied Freedom of Political Communication*

What is perhaps the most controversial constitutional issue concerning contributions limits⁴²⁹ is whether these limits are in breach of the implied freedom of political communication, a question that will form the focus of the present discussion.

As noted earlier, the current test for determining whether this freedom has been breached (often referred to as the *Lange* test) has two limbs:

- Does the law (of a state or federal parliament or a territory legislature) effectively burden freedom of communication about government or political matters either in its terms, operation or effect?
- If the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end (in a manner) which is compatible with the prescribed system of representative and responsible government?⁴³⁰

Applying the first limb of the *Lange* test, it is clear that limits on political contributions burden the freedom to communicate about government or political matters. This occurs in two ways. First, making a political contribution is, in most cases, a way of communicating support for the recipient party or candidate. Limits on contributions, therefore, burden the formal ability of citizens to communicate in this way by making contributions exceeding the limits. Second, political contributions enable parties and candidates to communicate about government and political matters hence, limits on such contributions will impact upon their ability to do so.

Turning to the second limb of the *Lange* test, there are two principal issues:

⁴²⁹ Tham, *Towards a More Democratic Political Funding Regime in New South Wales*, above n 8, 95-102.

⁴³⁰ The test was stated in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 571-72 as modified by a majority in *Coleman v Power* (2004) 220 CLR 1, 50 (McHugh J), 78 (Gummow and Hayne JJ), 82 (Kirby J).

- Do the contribution limits serve legitimate aims that are compatible with the system of representative and responsible government prescribed by the *Commonwealth Constitution*?
- Are such limits reasonably appropriate and adapted to serve such aims in a manner compatible with the system of representative and responsible government prescribed by the *Commonwealth Constitution*?

On the question of legitimate aims, the key rationales of contribution limits are to lessen the risk of corruption through graft and undue influence as well as its perception. They are also aimed at promoting the fair value of political freedoms by preventing wealth from enabling a disproportionate influence over the political process.

Reasoning from first principles, both the anti-corruption and fair value rationales of contribution limits are mostly likely compatible with the system of representative and responsible government prescribed by the *Commonwealth Constitution*. The former aim is directed at protecting the integrity of representative government. Not surprisingly, in *Australian Capital Television Pty Ltd v Commonwealth (ACTV)*, the High Court fully accepted that a ban on political broadcasting (together with the free-time regime) served a legitimate aim of lessening the risk of corruption.⁴³¹ The fair value rationale is directly derived from the principle of political equality (see further Part II, ‘Aims of a Democratic Political Finance Regime’), a principle that informs the system of representative government prescribed by the *Commonwealth Constitution*. In *ACTV*, for instance, then High Court Chief Justice Mason quoted with approval Harrison Moore’s observation that the ‘great underlying principle’ of the *Commonwealth Constitution* is that citizens have ‘each a share, and an equal share, in political power’.⁴³²

It remains to be considered whether the types contribution limits proposed are reasonably appropriate and adapted to serving these rationales. In determining this

⁴³¹ See, for example, *ACTV* (1992) 177 CLR 106, 144–45 (Mason CJ).

⁴³² Harrison Moore, *The Constitution of the Commonwealth of Australia* (John Murray, 1st ed, 1902) 329. This statement was cited with approval in *ACTV* (1992) 177 CLR 106, 139–40 (Mason CJ).

issue, the High Court will provide a ‘margin of appreciation’⁴³³ or ‘margin of choice’⁴³⁴ to legislative judgment as to what regulation should be adopted. The terms of the *Lange* test reflects this judicial deference: the test is whether the regulation is *reasonably* appropriate and adapted to serve a legitimate end and not whether it is *best suited* to serve this end. In particular, the *Lange* test does not require that Australian legislatures adopt regulation serving a legitimate end that involves the least burden on freedom of political communication. Whilst two High Court judges have considered that regulation of the content of political communication would require a higher level of justification,⁴³⁵ this view does not apply to contribution limits.

The deference informing the *Lange* test rests on two crucial considerations. The first concerns the proper role of Australian courts. Contrasting the implied freedom of political communication with the United States First Amendment jurisprudence, then High Court Chief Justice Brennan in *Levy v Victoria* stated that:

Under our Constitution, the courts do not assume the power to determine that some more limited restriction than that imposed by an impugned law could suffice to achieve a legitimate purpose. The courts acknowledge the law-maker’s power to determine the sufficiency of the means of achieving the legitimate purpose, reserving only a jurisdiction to determine whether the means adopted could reasonably be considered to be appropriate and adapted to the fulfilment of the purpose.⁴³⁶

This approach is, as noted by Gleeson CJ in *Coleman v Power*, based on ‘the respective roles of the legislature and the judiciary in a representative democracy’.⁴³⁷ Second, the concepts of representative and responsible government that inform the provisions of the Constitution which gave rise to the implied freedom are ‘descriptive of a whole spectrum of political institutions’, permitting ‘scope for variety’ in the design of electoral institutions, including the regulation of political finance.⁴³⁸

⁴³³ *ACTV* (1992) 177 CLR 106, 15 (Brennan J).

⁴³⁴ *Coleman v Power* (2004) 220 CLR 1, 52–53 (McHugh J).

⁴³⁵ *ACTV* (1992) 177 CLR 106, 143 (Mason CJ), 234–235 (McHugh J).

⁴³⁶ *Levy v Victoria* (1997) 189 CLR 579, 598.

⁴³⁷ *Coleman v Power* (2004) 220 CLR 1, 31 (Gleeson CJ).

⁴³⁸ *Attorney-General (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 57 (Stephen J).

Taking account of such deference, whether contribution limits are reasonably appropriate and adapted to serving their aims in a manner compatible with the system of representative and responsible government prescribed by the Commonwealth Constitution depends on a range of factors. Chief amongst these are ‘the extent of the restriction, the nature of the interest served and the proportionality of the restriction to the interest served.’⁴³⁹

Turning first to the extent of the restriction, contribution limits burden the freedom of political communication by: firstly, restricting the ability of citizens to communicate by making contributions above the limit; and secondly, by reducing the income available to parties and candidates and therefore their ability to engage in political communication. The first burden is likely to be very limited. Contributions below the limits can still convey a message of support to the recipient party or candidate. Further, the limits only affect those having the ability to make contributions above them. A limit of \$1000 per annum (as recommended by the NSW Select Committee) would probably only affect the small minority of citizens having the ability to make contributions exceeding this limit (see Part III).

The more significant burden is on the ability of parties and candidates to engage in political communication. Specifically, contribution limits will reduce the private funding available to political parties. The extent of this reduction will, of course, depend on the level at which the limits are set. This burden is, however, offset by the exemptions for membership fees and volunteer labour. Parties that are successful in attracting more members and supporters are likely to be able to retain, if not enhance, their ability to engage in political communication. Importantly, the burden placed by contribution limits is also offset by other measures recommended by this submission. Public funding will compensate for the fall in private income through the Party and Candidate Support Fund and, in particular, provide greater subsidies to newcomers (than currently is the case). Election spending limits will limit the significance in the reduction of the overall budgets of the major parties by containing the costs of electioneering (see further above).

⁴³⁹ *ACTV* (1992) 177 CLR 106, 144–45 (Brennan J).

As with the nature of the interests being served, both the anti-corruption and fair value rationales of contribution limits go to the heart of representative and responsible government. Both rationales have heightened importance in light of the corruption through undue influence that now pervades Australia's political system, developments that threaten to worsen due to the intensifying arms races.

The final consideration under this head is the proportionality of restriction to the interest served. This aspect concerns the design of the contribution limits and the extent to which they are properly tailored to its anti-corruption and fair value rationales. There are compelling reasons in principle for considering these limits to be proportionate to their anti-corruption rationale: they do not impose a blanket ban on political contributions but only prohibit those which carry a significant risk of corruption (i.e. large contributions) and further provide exemptions for contributions (e.g. membership fees) where such a risk is minimal or non-existent. Similarly, with the fair value rationale, by prohibiting large contributions the limits should target contributions which allow wealth to have a disproportionate influence.

In conclusion, there are cogent reasons to conclude that contribution limits set at appropriate levels do not breach the implied freedom of political communication. True, they do burden the freedom but they do so in service of the legitimate aim of preventing corruption and promoting the fair value of political freedoms. Further, there are strong arguments that they are reasonably appropriate and adapted to serve these aims because of the limited burden they involve (in the context of election spending limits and increased public funding), the importance of the aims and the proportionality of the limits to these aims.

7 *Design of Federal Contribution Limits*

The *EFED Act* provides for (indexed)⁴⁴⁰ caps on political donations in relation to State elections.⁴⁴¹ The following caps took effect on 1 January 2011:

- political donations to registered political parties will be capped at \$5,000 per financial year⁴⁴² and \$2,000 per financial year for unregistered political parties;⁴⁴³

⁴⁴⁰ *EFED Act* s 95A(5).

⁴⁴¹ *Electoral Funding and Disclosures Act 1981* (NSW), inserting *EFED Act* div 2A.

- political donations to candidates⁴⁴⁴ and elected members⁴⁴⁵ will be capped at \$2,000 per financial year (donations to candidates and elected members endorsed by a political party will be aggregated for this purpose);⁴⁴⁶
- political donations to groups of candidates will be capped at \$5,000 per financial year;⁴⁴⁷
- third parties (referred to in Act as ‘third-party campaigners’) may not receive more than \$2,000 per financial year from each donor;⁴⁴⁸
- each donor is limited to no more than three donations of up to \$2,000 per financial year to ‘third-party campaigners’;⁴⁴⁹
- political donations that are that is paid into accounts kept exclusively for the purposes of federal or local government election campaigns are exempted from the caps;⁴⁵⁰ and
- party subscriptions of \$2,000 or less disregarded for the purpose of its donation caps (including affiliation fees with the exclusion limited, in the case of party subscriptions calculated by reference to the number of members of the affiliate, to an amount of \$2,000 times the number of these members (the limit is \$2,000 otherwise).⁴⁵¹

The NSW scheme of contribution limits provides an excellent model for federal measures. They should, however, be adopted subject to two modifications. First, the limits are set at too high a level. The limits should be closer to the \$1,000 per annum limit recommended by the NSW Select Committee. Second, the limits applying to the party subscriptions exclusion are too generous at \$2,000 per member – the Queensland model of \$500 per member is preferable.

⁴⁴² *EFED Act* ss 95A(1)(a), 95B(1).

⁴⁴³ *Ibid* ss 95A(1)(b), 95B(1).

⁴⁴⁴ *Ibid* ss 95A(1)(e), 95B(1).

⁴⁴⁵ *Ibid* ss 95A(1)(c), 95B(1).

⁴⁴⁶ *Ibid* s 95A(3).

⁴⁴⁷ *Ibid* ss 95A(1)(d), 95B(1).

⁴⁴⁸ *Ibid* ss 95A(1)(f), 95B(1).

⁴⁴⁹ *Ibid* s 95C.

⁴⁵⁰ *Ibid* s 95B(2).

⁴⁵¹ *Ibid* s 95D.

Recommendation 10: Federal contribution limits should be introduced based on limits that apply under *EFED Act* with the following modifications:

- the limits should be set at a lower level (e.g. \$1,000 per annum); and
- the limits applying to the party subscriptions exclusion should be lower (e.g. \$500 per member).

E *Enhanced Accountability for Third Party Political Spending*

Third parties are significant actors in Australian politics (and perhaps increasingly so). Whilst third parties by definition are not running for office, this simple fact means they should be subject to the principle of accountability. Moreover, there is good reason to devise specific accountability measures for third party political spending given that they are not subject to accountability through the ballot box – third parties can neither be voted in nor voted out.

Accountability in this context has two aspects, external accountability to the citizens and internal accountability to the members of the third parties. In relation to external accountability, at the very least basic information regarding third parties should be made public including their constitutions and decision-making structures (including membership policies). The relationships third parties have with other third parties as well as political parties should also be made public. Such information allows the public to hold third parties accountable for their political activities.

An effective way to provide for such information is through compulsory registration of third parties that spend above a certain amount. It is such a system that has been introduced by the *EFED Act*. Under this Act, ‘third-party campaigners’ (defined as ‘an entity or person (not being a registered party, elected member, group or candidate) who incurs electoral communication expenditure during a capped expenditure period . . . that exceeds \$2,000 in total) are prohibited from making payments for electoral communication expenditure during a capped expenditure period, or accept political donations for the purpose of incurring such expenditure, unless they are registered under the Act.⁴⁵² The Register of Third-party Campaigners under the Act will make

⁴⁵² Ibid s 96AA(1)(a).

public the names and addresses of the third-party campaigners and ‘such other particulars as the (NSW Election Funding) Authority thinks fit’.⁴⁵³ The timing of registration also has an effect on the ‘electoral communication expenditure’ cap that applies to the third party.⁴⁵⁴

There should also be a compulsory third party registration scheme at the federal level. There should, however, be two departures from the NSW scheme. Rather than basing the scheme on ‘electoral communication expenditure’, the scheme should be based on the notion of ‘electoral expenditure’ for the reasons explained earlier.⁴⁵⁵ Moreover, the information to be disclosed should be expanded to include those just discussed.

Recommendation 11: There should be a compulsory third party registration scheme at the federal level requiring third parties that spend more than \$2,000 in ‘electoral expenditure’ during the period which election spending limits apply to register.

Recommendation 12: This scheme should make public the following information regarding registered third parties:

- their constitutions and decision-making structures (including membership policies);
- the relationships third parties have with other third parties as well as political parties should also be made public.

We can now turn to the question of internal accountability. This question takes different forms with different third parties. For trade unions, this is a question of democratic accountability.⁴⁵⁶ At present, federal industrial legislation require federally registered trade unions to set out rules in relation to the spending of monies,⁴⁵⁷ and to spend sums of more than \$1000 only when authorised by the union committee of management, which must be satisfied that such spending is in

⁴⁵³ Ibid s 38B(2).

⁴⁵⁴ Ibid s 95F(10).

⁴⁵⁵ See text above accompanying n 370.

⁴⁵⁶ See, for example, *Fair Work (Registered Organisations) Act 2009* (Cth) s 5(3)(d).

⁴⁵⁷ Ibid ss 141(1)(b)(ix)–(xi).

accordance with the rules of the union.⁴⁵⁸ There is *no* requirement that such unions adopt specific rules in relation to political spending.

In some cases, unions have of their own volition adopted specific rules in relation to political spending. The rules of the AMWU, for example, require that any spending to further political objectives shall only be made from a Political Fund. The Political Fund is financed by members making a specific contribution and is segregated from other union monies. Under the AMWU rules, members also have a right to be exempted from making this contribution.⁴⁵⁹ In most cases, however, it seems that the rules of unions do not make specific provision for political spending. The rules of the CEPU (General),⁴⁶⁰ LHMU⁴⁶¹ and CFMEU,⁴⁶² for example, essentially reproduce the statutory requirements and generally authorise their committees of management to make decisions in relation to spending.

These arrangements in the context of formally democratic elections⁴⁶³ provide a notional guarantee of internal accountability. Such a guarantee is, however, liable to be subverted by the reality of power relations. Here we confront the problem of oligarchy in relation to large organisations identified by Robert Michels more than four decades ago. Michels famously argued that there was a tendency towards oligarchy in large organisations, that is, the ruling elite holding effective control, because of the general passivity of rank-and-file members and the elite's superior political skills and its control over finances and the means of communications. This, according to Michels, was the iron law of oligarchy.⁴⁶⁴ Studies of trade union internal democracy, whilst identifying particular circumstances where such democracy can flourish (most importantly, the institutionalisation of organised opposition), have been

⁴⁵⁸ *Ibid* s 149.

⁴⁵⁹ 'Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union' known as the Australian Manufacturing Workers' Union (AMWU), 'Rules of the AMWU' (Rules, AMWU, November 2009) cl 21.

⁴⁶⁰ Communication, Electrical, Electronic, Energy, Information, Postal, Plumbing, and Allied Services Union of Australia (CEPU), 'Rules of the CEPU' (Rules, CEPU, 2009) cl 19.

⁴⁶¹ Liquor, Hospitality and Miscellaneous Union (LHMU), 'Rules of the LHMU' (Rules, LHMU, 2011), cl 31.

⁴⁶² Construction, Forestry, Mining and Energy Union (CFMEU), 'Rules of the CFMEU' (Rules, CFMEU, 2010) c 49.

⁴⁶³ See, for example, *Fair Work (Registered Organisations) Act 2009* (Cth), ss 143–44.

⁴⁶⁴ Michels, above n 402.

similarly pessimistic.⁴⁶⁵ These various studies underscore the persistent and complex challenge of installing internal democracy in large organisations including unions.

Promoting internal union democracy in relation to political expenditure is not exempt from this challenge. Indeed, decisions relating to political expenditure may involve particularly serious threats to internal union democracy. The processes of making such decisions are often hidden from the gaze of ordinary union members. With decisions on strictly industrial issues, for instance, wage rises to be claimed, union members ordinarily need to be consulted not least to enlist their support for the industrial claims to be made by the union. This is, however, not the case with decisions to engage in political expenditure whether through contributions to political parties or independent political spending, that is, third party spending. For unions that affiliate to the ALP, the influence their representatives wield by virtue of their membership of the ALP, for instance in the pre-selection of candidates, is also typically shrouded in secrecy. For example, in 2009, unions affiliated to the Victorian ALP were involved in a ‘secret peace deal’ that decided who should be pre-selected as ALP candidates in the upcoming federal and state elections.⁴⁶⁶

There is also a long list of union officials who have moved on to become ALP parliamentarians with recent additions including Greg Combet, former Secretary of the Australian Council of Trade Unions, now a Minister in the Rudd Labor Government, and Bill Shorten, former National Secretary of the Australian Workers’ Union, currently a parliamentary secretary. There is of course nothing wrong in itself with these transitions. These established pathways do, however, throw up a risk that the prospect of a parliamentary career will tempt some union officials, whether

⁴⁶⁵ See, for example, the study by Seymour Martin Lipset, Martin Trow and James Coleman of the International Typographical Union where the authors concluded: ‘[w]e have shown that there is much more variation in the internal organization of associations than the notion of an iron law of oligarchy would imply, but nevertheless, the implications of our analysis for democratic organizational politics are almost as pessimistic as those postulated by Robert Michels’: Lipset, Trow and Coleman, *Union Democracy: The Internal Politics of the International Typographical Union* (Free Press, 1956) 405. For discussion of the Australian situation, see S Deery, D Plowman and C Fisher, *Australian Industrial Relations* (McGraw-Hill, 1980) 247-253; Peter Fairbrother, ‘Union Democracy in Australia: Accommodation and Resistance’ in Lawson Savery and Norman Dufty (eds), *Readings in Australian Industrial Relations* (Harcourt Brace Jovanovich, 1991) 297; Carol Fox, William Howard and Marilyn Pittard, *Industrial Relations in Australia: Development, Law and Operation* (Longman Australia, 1995) 209–15.

⁴⁶⁶ Mathew Dunckley, ‘ALP peace deal falls foul of unions’ *Australian Financial Review* (Australia), 19 January 2009; Paul Austin and Marc Moncrief, ‘“Peace” deal has ALP in turmoil’, *The Age* (Melbourne), 20 January 2009.

consciously or not, to either prefer their interests or the interests of the ALP over that of their members when making decisions on political spending.

Some may also infer oligarchical decision-making in relation to these decisions from the voting record of union members. This record clearly shows that not all union members support the ALP. For example, only 63 per cent of union members from 1966 to 2004 voted for the ALP.⁴⁶⁷ This figure, however, does not necessarily provide any further evidence of oligarchical decision-making in relation to trade union political spending. Several key unions have neither affiliated nor contributed to the ALP (see above). While further examination is required, it may be the case that the number of members in unions that are supportive of the ALP corresponds to the number who voted for it. Moreover, it is quite rational for union members to endorse their union's decision to support the ALP in order to promote the importance of the union agenda, while deciding in overall terms that the Coalition is better suited for government.

Turning to corporate contributors, we are also faced with the problem of internal accountability but in a different form. It is not a question of democratic accountability or the problem of oligarchy simply because commercial corporations, as plutocratic organisations, have no pretensions to democratic decision-making. As Lipset, Trow and Coleman correctly pointed out, '[o]ligarchy becomes a problem only in organizations which assume as part of their public value system the absence of oligarchy, that is, democracy'.⁴⁶⁸

Plutocratic organisations nevertheless still rely upon notions of accountability, but these notions are based on accountability to providers of capital. With corporate political contributions, there is the specific question of accountability to shareholders and whether these contributions have been made in the interests of the shareholders. Dangers analogous to those that threaten democratic decision-making in relation to trade union political spending are also present. Secrecy generally attends processes in relation to whether political contributions should be made, as they tend to be made by

⁴⁶⁷ Andrew Leigh, 'How Do Unionists Vote? Estimating the Causal Impact of Union Membership on Voting Behaviour from 1966 to 2004' (2006) 41(4) *Australian Journal of Political Science* 537.

⁴⁶⁸ Lipset, Trow & Coleman, *Union Democracy*, above n 465, 5.

company boards rather than the shareholders at large. There is also the risk of managers making contributions in order to further their self-interest rather than the interest of the company.⁴⁶⁹

For some, the dangers are all the more acute given that companies tend not to be overtly political organisations. To illustrate, a senior business figure has been quoted as being uneasy with the decision of the Business Council of Australia and Australian Chamber of Commerce and Industry to create the National Business Action Fund to fund advertisements to campaign in favour of *Work Choices*, on the basis that '[b]usiness associations are about issues and the best interests of their members. They shouldn't be part of the political process like this'.⁴⁷⁰ In a similar vein, the policy of the Australian Shareholders Association on political donations states that:

Companies must operate within the legal and regulatory system applying in the places in which they operate. Theirs is an economic role – as expressed in the dictum 'The business of business is business' – not a political one.

Accordingly, the Australian Shareholders Association completely opposes political contributions by public companies.⁴⁷¹

With other third parties, the question of internal accountability also arises but sometimes, it is not clear what kind of internal accountability does – and should – apply. Take, for example, GetUp! At time of writing, GetUp! states that it has 432 966 members.⁴⁷² It appears from the website that one can join to be a member online by providing an email address, name and postcode⁴⁷³ - no payment or declaration of support for GetUp!'s objectives is required.

These members presumably should have a crucial role in GetUp!'s decision-making processes given that GetUp! states that it 'is an independent, *grass-roots* community

⁴⁶⁹ See Ramsay, Stapledon & Vernon, 'Political Donations by Australian Companies', above n 92, 186–87, 189–90.

⁴⁷⁰ Phillip Coorey, 'Exposed: the Secret Business Plot to Wreck Labor', *Sydney Morning Herald* (Sydney), 20 June 2007, 1.

⁴⁷¹ See Australian Shareholders' Association, *Political Donations: Policy Statement* (2004).

⁴⁷² Getup, *Getup! Action for Australia* <<http://www.getup.org.au>>.

⁴⁷³ Getup, *Getup! Register* <<https://www.getup.org.au/community/join/>>.

advocacy organisation giving everyday Australians opportunities to get involved and hold politicians accountable on important issues'.⁴⁷⁴ It is, however, not easy to discern what role GetUp! provides for its members in its decision-making processes. Indeed, it is not clear what GetUp!'s decision-making processes are. The annual reports it has made public on its website reveals that GetUp! is a company with a board of directors that advises its staff.⁴⁷⁵ There is, however, little information on GetUp!'s decision-making processes beyond this. Important questions arise here:

- Who appoints (or elects) the board of directors?
- Who appoints the staff?
- What is the formal relationship between the board of directors and the staff?
- What formal role do members have in relation to the board of directors and the staff?
- Who determines the campaign priorities of GetUp! and how the campaigns are run?

I think I am a 'member' of GetUp! in the sense of having signed up to receive its emails. In my experience, I have not had the opportunity to:

- vote for GetUp!'s board of directors; and
- attend an annual meeting assessing GetUp!'s activities for the year.

I suspect my experience would mirror those of other 'members' of GetUp!. If so, 'members' of GetUp!, then, are not able to effectively hold its staff and board of directors properly accountable. We have to ask then: in what sense are 'members' of GetUp! genuine members of the organisation?⁴⁷⁶

There are then significant challenges to internal accountability in relation to third party political spending. To meet these challenges, there should be a requirement that third parties respectively seek specific authorisation from their members (or shareholders) before making political contributions or engaging in political spending.

⁴⁷⁴ Getup, *Getup! About Getup* <<https://www.getup.org.au/about/>> (emphasis added).

⁴⁷⁵ According to the latest annual report on the website, the 2008/2009 annual report, the members of the board of directors are Dr Amanda Tattersall, Jeremy Heimans, David Madden and Catriona Faehrmann: see Getup, 'Final Annual Report 2008-2009' (Report, Getup, 2009) <<https://www.getup.org.au/filaes.campaigns/finalannualreport200809.pdf>>.

⁴⁷⁶ I have made these points previously in a public lecture, see Joo-Cheong Tham, 'Money and Politics: Why It Matters to Human Rights' (Speech delivered at the Castan Centre for Human Rights Law, Monash University, Melbourne, 4 November 2010).

An authorisation requirement in relation to trade union political expenditure has Australian precedent: for a few years, Western Australian trade unions were required to set up a separate fund for political spending.⁴⁷⁷ Similarly, former Democrats Senator Andrew Murray has recommended that businesses and trade unions respectively seek authorisation from their shareholders and members at annual general meetings or at least every three years.⁴⁷⁸

Another possible model (which can be broadened) is the UK controls on donations made by trade unions and companies. British trade unions are required to ballot their members every ten years for authority to promote their political agendas. Once authorised, political expenditure by a trade union must be made from a separate political fund to which individual members have a right to refrain from contributing. British companies, on the other hand, are required to seek authorisation from their shareholders every four years to make political donations and/or political expenditure.⁴⁷⁹

Recommendation 13: Third parties should be required to seek specific authorisation from their members (or shareholders) before making political contributions or engaging in political spending on a periodic basis.

F *A Party and Candidate Support Fund*

Public funding can play a vital role in democratising the federal political finance regime. If contribution limits are imposed, such funding will be necessary to (partly) make up for the shortfall in income experienced by political parties. In doing so, public funding will directly support these parties in discharging their functions. Together with such limits, public funding will also wean these parties off of large political contributions, thereby lessening the risk of corruption. Most importantly

⁴⁷⁷ *Industrial Relations Act 1979* (WA), s 97P (repealed). This requirement was in force from 1997 to 2002.

⁴⁷⁸ See Andrew Murray, 'Dissenting Report' in Joint Standing Committee on Electoral Matters, Parliament of Australia, *Funding and Disclosure: Inquiry into Disclosure of Donations to Parties and Candidates* (2006), [2.2] (trade unions), [5.5] (corporations).

⁴⁷⁹ For the requirements applying to trade union political expenditure, see discussion in Ewing, *The Cost of Democracy*, above n 200, ch 3; and Keith Ewing, *Trade Unions, the Labour Party and the Law: A Study of the Trade Union Act 1913* (Edinburgh University Press, 1982).

perhaps, public funding is, as John Rawls has recognised, an important way to promote the fair value of political freedoms,⁴⁸⁰ in particular greater electoral fairness.

There are, however, significant faults with current election funding schemes: their positive effect in promoting electoral fairness is limited; unfairness results from the 4 per cent threshold and through the schemes possibly inflating campaign expenditure. There is also no evidence to suggest that they have reduced reliance on private funding or lessened the risk of corruption through graft and undue influence (indeed, there is good argument to the contrary). Further, such schemes do little to enhance the participatory function of parties and may even detract from it.

Some of these problems cannot be addressed through changes to election funding schemes alone. Election spending limits (as advocated above) are necessary in order to deal with the increase in campaign expenditure that may result from providing public funding. Other deficiencies will be better dealt with through other regulatory measures. The aim of lessening dependence on private funding may be achieved by making receipt of election funding contingent upon various conditions, but is more effectively achieved through contribution limits (as proposed above). Alongside these other measures, however, there should be significant changes to the federal election funding scheme - it should be more expressly directed at promoting the functions of parties (including but going beyond their electoral function).

One possible model for such changes are those introduced by the *EFED Act*. There are three separate funds under this Act, Election Campaigns Fund, Administration Fund and the Policy Development Fund. While these funds have different eligibility criteria and amounts, their basic design can be summarised as such:

- the Election Campaigns Fund is a post-election reimbursement (of electoral expenditure) scheme that has an eligibility threshold of 4% of first preference votes (or an elected member) and provides for reimbursement on a declining scale;⁴⁸¹

⁴⁸⁰ Rawls, *Political Liberalism*, above n 37, 357–58; Rawls, *Justice as Fairness: A Restatement*, above n 37, 149.

⁴⁸¹ *EFED Act* ss 56-60.

- the Administration Fund is a scheme for independent members and parties that have elected members and provides for annual payments of ‘administrative expenditure’ with maximum payments calculated according to the number of elected members; ⁴⁸² and
- the Policy Development Fund is a scheme for parties that are not eligible for payments from the Administration Fund (i.e. those without elected members) and provides for annual payments for ‘policy development expenditure’ with maximum payments calculated according to the number of first preference votes received in the previous State election.⁴⁸³ Parties are for the first eight years after registration under the *EFED Act* entitled to at least maximum annual payments of \$5,000 (indexed).⁴⁸⁴

We see here that the *EFED Act* provides for three ways to calculate public funding to parties and candidates: reimbursement of electoral expenditure; number of elected members; and number of first preference votes. The last, being the most accurate measure of electoral support, is the fairest way to allocate public funding. The number of elected members is more indirect a measure while a reimbursement model bears no relationship to electoral support. A reimbursement model does, however, have the advantage of providing parties and candidates with some certainty as to the public funding they would receive to cover their electoral expenditure (a point to which will be revisited very shortly).

Rather than follow the NSW public funding scheme, the federal election funding scheme should be reconfigured into Party and Candidate Support Funds. These funds should have three components. The first, *election funding payments*, will replicate the payments made under current election funding schemes but, instead of the 4 per cent threshold, there should be a lower threshold (e.g. 2 per cent).⁴⁸⁵ To better promote electoral fairness, the payment amount should be subject to a tapered scheme with the payment rate per vote decreasing according to the number of first preference votes received. For example 5 per cent of first preference votes could entitle a party to a

⁴⁸² Ibid ss 97B, 97D-97G.

⁴⁸³ Ibid ss 97H-97I.

⁴⁸⁴ Ibid s 97I(5).

⁴⁸⁵ For instance, whereas a 2 per cent threshold used to apply in relation to the ACT funding and disclosure regime, the threshold is now 4 per cent: *Electoral Act 1992* (ACT) s 208.

payment of \$2.00 per vote, while a payment rate of \$1.50 per vote applies to the next 20 per cent of first preference votes and a payment rate of \$1.00 per vote attaches to votes received beyond the 25 per cent mark. This tapered scheme is akin to a progressive income tax system, with less resourced parties helped to a greater degree. This tapered scheme should operate with a floor of 20% of electoral expenditure, that is, parties and candidates, regardless of the number of first preference votes they receive, will be entitled to election funding payments that cover at least 20% of their electoral expenditure.

Second, Party Support Funds should provide for *annual allowances*. Parties and candidates eligible for election funding payments should be eligible for these annual allowances. In addition, parties that have individual membership exceeding a certain level, for example 500, should also be eligible for these payments. The formula for distributing these allowances should be based on both votes received in the previous election and current membership figures. Linking annual allowances to membership figures may result in parties recruiting more members and thereby, invigorating their participatory function.

Third, the Party Support Funds should include *policy development grants*. These could be modelled on the policy development grants operating under the British political finance scheme.⁴⁸⁶ Eligibility for these grants should be the same as that which applies to annual allowances. These funds should only be used to fund activities that are strictly aimed at policy development and not electioneering. The policy development grants should encourage parties to devote more time and energy to generating new ideas and policies and, hopefully, enhancing their agenda-setting function.

Recommendation 14: There should be a Party and Candidate Support Fund comprising three components:

- election funding payments (calculated according to a tapered scale based on the number of first preference votes with 20% of electoral expenditure floor);

⁴⁸⁶ *Political Parties, Elections and Referendums Act 2000* (UK) c 41, s 12.

- annual allowances (calculated according to number of first preference votes and membership);
- policy development grants (calculated according to number of first preference votes and membership).

G *Reducing the Risk of Parliamentary Entitlements Being Used for
Electioneering*

The earlier analysis of parliamentary entitlements⁴⁸⁷ leads to the following recommendation:

Recommendation 15:

- The rules governing federal parliamentary entitlements should:
 - be made accessible and transparent; and
 - clearly limit the use of such entitlements to the discharge of parliamentary duties and prevent their use for electioneering.
- The amount of federal parliamentary entitlements should not be such so as to confer an unfair electoral advantage on federal parliamentarians.

In October 2009, the federal government established an independent Parliamentary Entitlements Review Committee.⁴⁸⁸ The committee provided its report to the government on 9 April 2010 but this report has not been publicly released as yet; nor has the government issued its response to the report.⁴⁸⁹ At the time of writing, ten months would have elapsed since the committee submitted its report to the government. There is little justification for the report being kept secret for such a period.

Recommendation 16: The report of the Parliamentary Entitlements Review Committee should be released as soon as possible.

⁴⁸⁷ See text accompanying nn 218-250.

⁴⁸⁸ Joe Ludwig, 'Government Welcomes Submissions to Parliamentary Entitlements Review Committee' (Media Release, 40/2009, 9 October 2009) <http://www.smos.gov.au/media/2009/mr_402009.html>.

⁴⁸⁹ Department of Finance and Deregulation, 'Annual Report 2009-2010' (Report, Department of Finance and Regulation, 2010) Outcome 3 <<http://www.finance.gov.au/publications/annual-reports/annualreport09-10/index.html>>.

H *Preventing Party-political Government Advertising*

The acute risk of party-political government advertising by the party in power would strongly suggest a need for robust regulation of government advertising so as to prevent its abuse as a vehicle for party-political messages. Two related but distinct arguments have, however, been made against such regulation. The first contends that it is impossible to regulate to prevent party-political government advertising because everything can be portrayed as party-political.⁴⁹⁰ This objection is misconceived. It is not government advertising that is political in a broad sense that is to be regulated but advertising that is aimed at enhancing the electoral prospects of the governing party (or damaging the electoral prospects of its competitors). To be sure, much government advertising will tend to have as *one of its purposes (or effects)*, the enhancement of the electoral prospects of the governing party. As the South Australian Auditor-General perceptively observed:

A government is elected on a party political platform and, once elected, is entitled to inform the public about the implementation of that political platform. Consequently, the party which forms government may derive a collateral benefit in electoral terms from any advertising undertaken about the implementation of the policy platform on which it was elected.⁴⁹¹

In such circumstances, government advertising should not be characterised as party-political and illegitimate simply because one of the purposes is boosting the electoral prospects of the governing party. A higher threshold is required and one option is to adopt the position of the South Australian Auditor-General that ‘where the substantial purpose was the advancement of the electoral prospects of the party in power’, government advertising would be considered improper.⁴⁹²

⁴⁹⁰ Elements of this objection can be found in Liberal MP Petrou Georgiou’s objection to federal government advertising being subject to a guideline that ‘[m]aterial should not be liable to misrepresentation as party political’ on the basis that ‘in a highly combative political system, materials which are totally non-partisan are open to misrepresentation as party political’: see Joint Committee of Public Accounts and Audit, Parliament of Australia, *Report 377: Guidelines for Government Advertising* (2000) 3.

⁴⁹¹ South Australian Auditor-General, *Report of the Auditor-General for the Year Ending 30 June 1997* (1998) Part A.4.

⁴⁹² *Ibid.*

The second argument against regulation claims that determining what is party-political advertising is highly contextual and regulation will not be sufficiently precise in order to provide effective guidance.⁴⁹³ It is true that '[i]t is a question of fact and law as to whether any expenditure is or is not appropriate in this context'.⁴⁹⁴ This argument, however, overreaches. The presence of party-political government advertising, or advertising where a substantial purpose is to enhance the electoral prospects of the party in power (or damage those of its competitors), will be clear in various situations. Government advertising that expressly advocates a vote for the party in power or directly criticises the Opposition are cases on point. The Victorian Auditor-General has also identified various situations where material could be reasonably interpreted as party-political including regular use of the name of the State Premier (for example 'the Bracks Government' or 'the Bracks Labour Government') and attacking or scorning views of others (for example: 'Under the former Kennett Government, Melbourne's hospitals were not only surviving on the smell of an oily rag but were secretly selling off the family silver').⁴⁹⁵

Other situations would provide strong circumstantial evidence of party-political advertising. A circumstance suggestive of party-political advertising is when government advertising takes place close to election time. Another circumstance is when the advertising relates to policies that have yet to be adopted. Both these circumstances combined in the case of the 'WorkChoices' advertising campaign, lending compelling force to the following observations of the majority of the Senate Finance and Public Administration Committee:

in the absence of enacted legislation and detailed information, what can the WorkChoices campaign achieve? The real purpose of the campaign seems to be to try to persuade the public, in advance of any scrutiny or debate on the

⁴⁹³ See, for example, Petrou Georgiou's dissent at Joint Committee of Public Accounts and Audit, *Report 377*, above n 490, 3.

⁴⁹⁴ South Australian Auditor-General, *Report of the Auditor-General for the Year Ending 30 June 1997*, above n 491, Part A.4.

⁴⁹⁵ Victorian Auditor-General, *Report on Public Sector Agencies* (2002) 306–307 <http://download.audit.vic.gov.au/files/PSA_report_2002.pdf>.

substance of the reforms, that whatever the legislation contains it must be supported. Such a campaign is properly called propaganda.⁴⁹⁶

That said, the point remains that the question whether government advertising is party-political is deeply contextual. Whether such advertising is party-political will depend on various factors including whether it can be justified by reference to specific informational needs; its content and timing; the amount spent; and the broader political context of such advertising. The complexity attending such judgments does not mean regulation is unworkable in practice. What it means is that there must be an emphasis on requiring governments to *justify* the need for the advertising in which they engage with a specific onus on governments to explain why such advertising is not party-political.

This implies a focus on strengthening the broader framework of political accountability applying to government advertising. The argument here is not only that specific measures directed at preventing party-political government advertising are important. Equally, and this point should be emphasised, a robust accountability framework is essential to prevent party-political government advertising. For instance, requiring governments to justify advertising campaigns based on specific informational needs will be one way to filter out party-political advertisements because such advertising is often not directed towards specified information need.⁴⁹⁷

1 *Accountability Through Parliamentary Scrutiny*

Accountability relating to government advertising can occur through parliamentary scrutiny either prospectively, through the appropriation process, or retrospectively, after the money has been spent on the advertising.

Prospective parliamentary scrutiny arises through the requirement that there be an appropriation of money through the parliamentary process before public funds can be

⁴⁹⁶ Senate Finance and Public Administration References Committee, *Government Advertising and Accountability*, above n 252, 51.

⁴⁹⁷ See generally The Audit Office of New South Wales, *Performance Audit: Government Advertising*, (2007) 28.

spent by the executive.⁴⁹⁸ This requirement is of vital importance in terms of democratic accountability. The relevant provisions of the *Commonwealth Constitution*, sections 81 and 83,⁴⁹⁹ for instance, have been described by the High Court as assuring ‘the people effective control of the public purse’.⁵⁰⁰

While of general importance in ensuring democratic accountability, this mechanism is significantly limited when it comes to government advertising. More often than not, government advertising is not specifically itemised in appropriation bills making it difficult, if not impossible, for parliamentarians to evaluate whether money should be allocated to such advertising. This difficulty has been compounded by the move to outcome budgeting, that is, the practice of allocating monies against outcomes rather than for the provision of particular services or activities.

The limitations of the parliamentary appropriation process at the federal level have been highlighted *and* exacerbated by the High Court’s decision in *Combet v Commonwealth*.⁵⁰¹ The key issue in this case was whether the ‘WorkChoices’ advertising was authorised by Schedule 1 of the *Appropriation Act No 1 2005–2006 2005* (Cth) (*Appropriation Act No 1 2005*). Schedule 1 (reproduced below) was based on outcome budgeting with millions of dollars, and sometimes more than a billion dollars, allocated against broad outcomes (e.g. ‘Higher productivity, higher pay workplaces’).

⁴⁹⁸ For equivalent provisions in other jurisdictions, see *Constitution Act 1902* (NSW) s 45; *Constitution of Queensland Act 2001* (Qld) s 66; *Public Finance and Audit Act 1987* (SA) s 6; *Public Accounts Act 1986* (Tas) s 8; *Constitution Act 1975* (Vic) s 92; *Constitution Act 1889* (WA) s 72; *Financial Management Act 1996* (ACT) ss 6, 8; *Financial Management Act 1995* (NT) s 5(2).

⁴⁹⁹ For a recent article examining these provisions, see Charles Lawson, ‘Reinvigorating the Accountability and Transparency of the Australian Government’s Expenditure’ (2008) 32 *Melbourne University Law Review* 879.

⁵⁰⁰ *Brown v West* (1990) 169 CLR 195, 205.

⁵⁰¹ For excellent analyses of this decision, see Lotta Ziegert, ‘Does the Public Purse Have Strings Attached? *Combet & Anor v Commonwealth of Australia & Ors*’ (2006) 28 *Sydney Law Review* 387; Geoffrey Lindell, ‘The *Combet* Case and the Appropriation of Taxpayers’ Funds for Political Advertising – An Erosion of Fundamental Principles?’ (2007) 66(3) *Australian Journal of Public Administration* 307; Graeme Orr, ‘Government Communication and the Law’ in Sally Young (ed), *Government Communication in Australia* (Cambridge University Press, 2007) 22–24.

Table 27: Appropriations (Plain Figures) Listed in Schedule 1, Employment and Workplace Relations Portfolio of *Appropriation Act No 1 2005–2006 2005* (Cth), 78.

	Departmental outputs	Administered expenses	Total
Outcome 1 – Efficient and effective Labour market assistance	\$1 235 216 000	\$1 970 400 000	\$3 205 616 000
Outcome 2 – Higher productivity, higher pay workplaces	\$140 131 000	\$90 559 000	\$230 690 000
Outcome 3 – Increased workforce participation	\$72 205 000	\$560 642 000	\$632 847 000
Total	\$1 447 552 00	\$2 621 601 000	\$4 069 153 000

Source: *Appropriations Act (No 1) 2005–06 2005* (Cth) sch 1.

By a 5–2 majority, the High Court found that Schedule 1 authorised the ‘WorkChoices’ advertising. Then Chief Justice of the High Court Gleeson, as part of the majority, found that there was a rational connection between such advertising and Outcome 2. His Honour reasoned that because the Portfolio Budget Statement which informed the interpretation of Schedule 1 stipulated that ‘providing policy advice and legislation services’ met Outcome 2, it followed that informing the public and obtaining their acceptance of such legislation would also meet this outcome.⁵⁰²

The joint judgment of Justices Gummow, Hayne, Callinan and Heydon went further in concluding that there was *no* need for any connection between the ‘WorkChoices’ expenditure and the outcomes stated in Schedule 1. According to their Honours, such expenditure was a ‘departmental output’ / ‘departmental item’ and not an ‘administered expense’ / ‘administered item’. In their view, ‘[d]epartmental items are not tied to outcomes; administered items are’.⁵⁰³ This conclusion, firstly, rested upon a comparison of s 7(2) of the *Appropriation Act No 1 2005* which stated that money allocated ‘for a departmental item for an entity may only be applied for the

⁵⁰² *Combet v Commonwealth* (2005) 224 CLR 494, 530.

⁵⁰³ *Ibid* 565 (Gummow, Hayne, Callinan and Heydon JJ).

departmental expenditure of the entity’ and s 8(2) which provided that the amount issued for an administered item ‘may only be applied for expenditure for the purpose of carrying out activities for the purpose of contributing to achieving that outcome’ – a comparison that suggested to their Honours that departmental items were not tied to outcomes. A further reason for this conclusion was the note for the definition of ‘departmental item’ which provides as follows:

The amounts set out opposite outcomes, under the heading ‘Departmental Output’ are ‘notional’. They are not part of the item, and do not in any way restrict the scope of the expenditure authorised by the item.⁵⁰⁴

The dissenting judges, Justices McHugh and Kirby, concluded that there needed to be a rational connection between the advertising expenditure and the outcomes stipulated in Schedule 1. They found this connection to be absent.⁵⁰⁵ Justice McHugh, for instance, curtly observed that ‘[t]he advertisements provide no information, instruction, encouragement or exhortation that could lead to higher productivity or higher pay’.⁵⁰⁶ In strong words, the dissenters variously described the majority judgment as ‘erroneous’⁵⁰⁷ and ‘seriously flawed’.⁵⁰⁸

The majority decision in the *Combet* case has been heavily criticised by commentators with one going so far as to query whether it erodes fundamental constitutional principles.⁵⁰⁹ Whatever the merits of these criticisms, it is clear that *Combet* has broader implications for the general appropriation process at the federal level and not just federal government advertising. Specifically, it has brought to the fore the challenge to financial accountability that may arise with outcome budgeting.⁵¹⁰ The problem here is not with outcome budgeting itself but the practice of describing outcomes in vague terms. This was clearly brought out by former

⁵⁰⁴ Ibid 564–65 (Gummow, Hayne, Callinan and Heydon JJ).

⁵⁰⁵ Ibid 532 (McHugh J), 605–08 (Kirby J).

⁵⁰⁶ Ibid 532.

⁵⁰⁷ Ibid 535.

⁵⁰⁸ Ibid 610.

⁵⁰⁹ See Lindell, ‘The *Combet Case* and the Appropriation of Taxpayers’ Funds for Political Advertising’, above n 501, 307.

⁵¹⁰ See, for example, discussion at Senate Standing Committee on Finance and Public Administration, Parliament of Australia, *Transparency and Accountability of Commonwealth Public Funding and Expenditure* (2007) 46–49.

Democrats Senator Andrew Murray in his report to the federal ALP Government, *Review of Operation Sunlight: Overhauling Budgetary Transparency*. In this report, Senator Murray observed that ‘many agencies have formulated broad and potentially meaningless outcome descriptions that counter the Parliament’s ability to understand, assess, monitor and approve Government expenditure’.⁵¹¹ In a stinging criticism, Senator Murray said:

In the worst cases you have to wonder at the attitude that encourages useless and generalised outcome descriptions, and then ties large appropriations to them, consequently allowing for such wide ministerial and bureaucratic discretion that accountability loses any meaning. Such latitude, especially if rubber-stamped by a supine or Executive-dominated Parliament, can result in legitimacy being confirmed simply because the law does not prohibit such practice.⁵¹²

There are promising signs that some of the deficiencies associated with outcome budgeting will be addressed by the federal ALP Government. Its policy document, *Operation Sunlight: Enhancing Budget Transparency*,⁵¹³ criticises current practices on the basis that ‘[s]ome outcomes are so broad and general as to be virtually meaningless for the Budget accounting purposes leading taxpayers to only guess what billions of dollars are being spent on’,⁵¹⁴ giving as an example the hundreds of millions of dollars allocated to the Department of Employment and Workplace Relations for ‘Higher pay, higher productivity’.⁵¹⁵ In that document, the ALP Government has committed to a range of measures to tighten up the outcomes budget framework, in particular: making specified outcomes as detailed as possible; requiring agencies to include in their annual reports the outcomes of their funding; and instigating a systematic process of evaluating results against targets that will be undertaken by the Department of Finance and Deregulation subject to a performance audit by the Australian National Audit Office.⁵¹⁶

⁵¹¹ Andrew Murray, *Review of Operation Sunlight: Overhauling Budgetary Transparency* (June 2008) 86.

⁵¹² *Ibid* 86.

⁵¹³ Australian Government, *Operation Sunlight: Enhancing Budget Transparency* (2008).

⁵¹⁴ *Ibid* 4.

⁵¹⁵ *Ibid*.

⁵¹⁶ *Ibid* 5–6.

If implemented effectively – what perhaps is the key challenge for these changes⁵¹⁷ – these measures will enhance financial accountability in relation to federal government expenditure including spending on federal government advertising. They do not, however, necessarily provide for specific scrutiny of such advertising. More detailed budget outcomes do not mean and will not result in specific itemisation of such advertising. When it comes to government advertising there are clear limits to the prospective financial accountability that can be secured through the appropriations process.

These limitations do not equally apply when parliaments hold the executive accountable for its spending on advertising after such spending has been incurred. There are various mechanisms to secure such retrospective accountability. Notably, parliaments in all jurisdictions have public accounts committees that could scrutinise such spending.⁵¹⁸ The effectiveness of such committees in scrutinising the spending involved in government advertising will depend on a complex range of factors: the willingness and vigour with which members of these committees seek to hold the executive accountable, their knowledge and expertise, and the resources provided to the committees.

Importantly, the effectiveness of these committees (and public scrutiny more generally) will depend upon the information these committees have at their disposal and, in particular, whether detailed information relating to government advertising is publicly disclosed. Drawing upon the practices of the Canadian Government, the Senate Finance and Public Administration Committee has produced an extremely useful set of recommendations that detail what it considers to be an adequate disclosure regime in relation to government advertising. The central elements are contained in Table 28.

⁵¹⁷ Andrew Murray, above n 511, 87.

⁵¹⁸ They are the Commonwealth Joint Committee of Public Accounts and Audit; NSW Public Accounts Committee; Queensland Public Accounts Committee; SA Economic and Finance Committee; Tasmanian Parliamentary Public Accounts Committee; Victorian Public Accounts and Estimates Committee; WA Legislative Assembly Public Accounts Committee; WA Legislative Council Estimates and Financial Operations Committee; ACT Standing Committee on Public Accounts; NT Public Accounts Committee.

Table 28: Key Recommendations Made by the Senate Finance and Public Administration Committee

Recommendation 10	<ul style="list-style-type: none"> • An annual report should be published by the Department of Prime Minister and Cabinet providing : <ul style="list-style-type: none"> ○ a total figure for government expenditure on advertising activities; ○ total figures, listed by agency, for expenditure on advertising activities; ○ figures for expenditure on media placement by type; ○ figures for expenditure on media placement by month; and ○ detailed information about major campaigns, including a statement of the objectives of the campaign, the target audience, a detailed breakdown of media placement, evaluation of the campaign including information about the methodology used and the measurable results, and a breakdown of the costs into 'production', 'media placement' and 'evaluative research'.
Recommendation 11	<ul style="list-style-type: none"> • Annual reports of each government agency to provide: <ul style="list-style-type: none"> ○ a total figure for the agency's advertising expenditure; and ○ a consolidated figure for the cost for each campaign managed by that agency.
Recommendation 12	<ul style="list-style-type: none"> • Annual reports of each government agency to provide: <ul style="list-style-type: none"> ○ a total figure for departmental expenditure on public opinion research; ○ a breakdown of the type of research, including the expenditure on research for advertising as a percentage of total research costs; ○ highlights of key research projects; and ○ a listing of research firms used by business volume.

Source: Senate Finance and Public Administration References Committee, Parliament of Australia, *Government Advertising and Accountability* (2005)[7.94]–[7.96].

The Commonwealth arrangements relating to government advertising do fare well against these recommendations in key respects. For some time, Commonwealth Government departments have been required to attach information to their annual reports detailing the amounts they paid to advertising agencies, market research organisations, polling organisations, direct mail organisations and media advertising organisations for amounts exceeding an indexed threshold.⁵¹⁹ In 2009–2010, the

⁵¹⁹ *Commonwealth Electoral Act 1918* (Cth) s 311A.

indexed threshold stood at \$11 200.⁵²⁰ In 2009, the Commonwealth Government significantly supplemented this reporting obligation by releasing biannual reports on advertising campaigns. The reports that have been released thus far provide the total amount of Commonwealth Government advertising, identify campaigns costing more than \$250 000, detail the expenditure involved in these campaigns for media placement, market research, advertising production and public relations, and provide brief explanations of the objectives of the campaigns.⁵²¹

These reports clearly enhance transparency in relation to Commonwealth Government advertising. Specifically, they go a long way towards implementing Recommendation 10 of the Senate Finance and Public Administration Committee's report on government advertising. They nevertheless fail to implement the Committee's recommendations in important respects. Recommendation 12 is only implemented to the extent that the total amount spent on public opinion research is documented. Even the stipulation that there be detailed information about major campaigns (Recommendation 10) has only been partially implemented. In particular, the reports do not provide full information on the campaign's target audience and fail to include an evaluation of the campaign including information about the methodology used and the measurable results (see further Table 28 above).

Recommendation 17: Recommendations 10 and 12 of the Senate Finance and Public Administration Committee in relation to the disclosure of information concerning government advertising should be fully adopted.

⁵²⁰ Ibid s 321A.

⁵²¹ Asset Management Group, Commonwealth Department of Finance and Deregulation, *Campaign Advertising by Australian Government Departments and Agencies Half Year Report 1 July to 31 December 2008* (March 2009) <http://www.finance.gov.au/advertising/campaign_advertising_2008-09.html>; Asset Management Group, Commonwealth Department of Finance and Deregulation, *Campaign Advertising by Australian Government Departments and Agencies: Full Report 2008-2009* (September 2009) <http://www.finance.gov.au/advertising/campaign_advertising_2008-09.html>.

2 *Accountability Through Statutory Rules and Guidelines*

We can see now that parliamentary scrutiny, in both its prospective and retrospective forms, *can* play a crucial role in addressing the risk of party-political government advertising. There are, however, serious limitations to these processes. With prospective parliamentary scrutiny through the appropriation process, government advertising is not specifically itemised in Appropriation Bills, preventing focussed scrutiny into such advertising. With retrospective parliamentary scrutiny, the lack of specific information on government advertising clearly does not bode well for meaningful scrutiny. Further, both forms of parliamentary accountability are unable to deal with the content of government advertising *prior* to such advertising being undertaken. This brings us to the importance of accountability through rules and guidelines on government advertising.

Guidelines currently exist at the federal level as an executive document, *Guidelines on Information and Advertising Campaigns by Australian Government Departments and Agencies*.⁵²² These guidelines should take legislative form like those found in the *Government Agencies (Campaign Advertising) Act 2009* (ACT)⁵²³ (and those proposed by the Preventing the Misuse of Government Advertising Bill 2010 (Cth)).

Recommendation 18: Federal government advertising guidelines and rules should be in a legislative form.

Another set of questions concerning these guidelines relates to their content. Such content can be evaluated according to five principles. The first three, drawn from various reports of parliamentary committees and Auditors-General on the topic of government advertising, concern the material presented through government advertising. They are as follows:

⁵²² Asset Management Group, Department of Finance and Regulation, *Guidelines on Information and Advertising Campaigns by Australian Government Departments and Agencies* (March 2010) <<http://www.finance.gov.au/advertising/docs/Guidelines-on-Information-and-Advertising-Campaigns-by-Australian-Government-Departments-and-Agencies-March-2010.pdf>>.

⁵²³ See, in particular, *Government Agencies (Campaign Advertising) Act 2009* (ACT) s 17.

Principle One: Material should be relevant to government responsibilities;

- Principle Two: Material should be presented in an objective, fair, and accessible manner; and
- Principle Three: Material should not be directed at promoting party political interests.

The fourth principle (which is also sourced from the reports above) states that material in government advertising should be produced and distributed in an efficient, effective and relevant manner with due regard to accountability.⁵²⁴ The final principle is that of regular independent scrutiny. This is essential if these guidelines are to be effectively implemented. Leaving the implementation of the guidelines to the government departments alone is unlikely to provide a secure basis for effective implementation.

Table 29 provides a summary evaluation of the federal government advertising guidelines.

⁵²⁴ Australian National Audit Office, *Performance Audit*, above n 258, 57–60; Joint Committee of Public Accounts and Audit, *Report 377*, above n 490, 4–7; Victorian Auditor-General, *Report on Public Sector Agencies*, above n 495, 314–315; Senate Finance and Public Administration References Committee, *Government advertising and Accountability*, above n 252, 123–26; The Audit Office of New South Wales, *Performance Audit*, above n 497, 36–37.

Table 29: Government Advertising Guidelines

Material relevant to government responsibilities	
<i>General</i>	✓
<i>Identified information need</i>	✓
<i>Target recipients clearly identified</i>	✓
<i>Require legislation or Cabinet decision for program being advertised</i>	✓
Fair and objective presentation	
<i>General</i>	✓
<i>Distinguishing fact from opinion</i>	✓
<i>Content to be substantiated</i>	✓
Prohibition of party-political advertisements	
<i>General</i>	✓
<i>Specific prohibition on mentioning party in government by name etc</i>	✓
<i>Prohibition on pre-election advertising</i>	✗
Cost-effective and efficient	
<i>General</i>	✓
Independent scrutiny	
<i>General</i>	✓

Source: Department of Finance and Deregulation, Australian Government, *Guidelines on Campaign Advertising by Australian Government Departments and Agencies* (March 2010) [18], [8-35] (incl. Principles 1-5).

It can be seen from this table that the federal government advertising guidelines largely meet these principles. It is, however, deficient in fully implementing Principle Three (material should not be directed at promoting party political interests) by failing to provide for a prohibition on (certain) pre-election advertising. In four jurisdictions, the government advertising guidelines do provide for such a prohibition. The

Victorian and Western Australian guidelines state that government advertising is generally prohibited when the government is in caretaker mode while the ACT, New South Wales and Queensland guidelines provide for a longer ban by respectively prohibiting government advertising 37 days, two months and six months prior to a territory/state election.⁵²⁵ A ban similar to the Queensland ban of six months (which also corresponds with the period to which election spending limits should apply) should be adopted.

Recommendation 19: There should be a general ban on government advertising during the period that election spending limits apply.

One final matter concerns the ability of federal government to unilaterally exempt advertising from compliance with the guidelines. Paragraph 5 of the current guidelines provides that:

The Cabinet Secretary can exempt a campaign from compliance with these Guidelines on the basis of a national emergency, extreme urgency or other compelling reason. Where an exemption is approved, the Independent Communications Committee will be informed of the exemption, and the decision will be formally recorded and reported to the Parliament.

The current version of this exemption clause was adopted in March 2010. The previous version restricted exemptions on the basis of ‘extraordinary reasons’ whilst the current version allows for exemptions based on ‘compelling’ reasons.⁵²⁶ It was this avenue of exemption that the ALP federal government relied upon in exempting the ‘mining tax’ government advertising from compliance with the guidelines.

The fundamental question here is: should there be an exemption clause in the first place? One can approach this question in this way. Even in a situation involving a national emergency – take, for instance, the recent Queensland floods – should government advertising be:

⁵²⁵ See Joo-Cheong Tham, *Money and Politics: The Democracy We Can't Afford* (2010) 178-179.

⁵²⁶ See Joint Committee of Public Accounts and Audit, *Reference: Role of the Auditor-General in scrutinising government advertising* (17 June 2010) PA 3.

- irrelevant to government responsibilities (non-compliance with Principle One);
- presented in a biased, unfair and inaccessible manner (non-compliance with Principle Two);
- directed at promoting party political interests (non-compliance with Principle Three);
- produced and distributed in an inefficient, ineffective and irrelevant manner with little regard to accountability (non-compliance with Principle 4); and
- free from regular independent scrutiny (non-compliance with Principle 5)?

The answer is obviously 'no'. There is then no defensible basis for the exemption clause.

Recommendation 20: Paragraph 5 of the Guidelines on Campaign Advertising by Australian Government Departments and Agencies which allows for exemption by Cabinet Secretary should be deleted.

VI CONCLUSION

This year presents a crucial opportunity to address the malaise brought about money in federal politics: there is support across the political spectrum for ‘root and branch’ reform and there is now a comprehensive regulatory model in the form of the *EFDA*. It is imperative that this opportunity be seized, not squandered.