

SUBMISSION TO JOINT STANDING COMMITTEE ON ELECTORAL MATTERS' INQUIRY INTO THE 2007 FEDERAL ELECTION

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I. INTRODUCTION

I welcome the Joint Standing Committee on Electoral Matters' ('the Committee') inquiry into the 2007 federal election, in particular, its focus on political funding. The reform of political funding is currently high on the public agenda and the work of the Committee will be crucial in informing this debate.

My submission is devoted to the question of political funding and has several parts. The first draws out how parliamentarians from across the political spectrum have expressed deep unease with the Australian system of political funding. This is followed by an analysis that sets out four central aims for a democratic political finance regime. Assessed against these aims, the federal system is found wanting. To inform the process of reform, the last section makes a series of recommendations.

II. A 'DANGEROUSLY UNSUSTAINABLE' SYSTEM

In his maiden speech to the New South Wales Legislative Council, Eric Roozendaal, a former General Secretary of the NSW ALP, took the opportunity to draw attention to the parlous condition of the Australian political finance regime. Speaking as 'someone who has had some involvement in this area', he observed that:

My experience tells me the current system is dangerously unsustainable. On a recent trip to the United States of America I was stunned by the amount of money being raised during the presidential primaries and the election campaign—in excess of \$US1 billion. This situation should be cause for concern in this country. If left unchecked, spiralling media costs will continue to fuel the need for our political parties to seek donations. There is no doubt the Australian public are uncomfortable with the interaction of donations and politics. They have every right to be. It is my strong belief that all political parties need to work together to change the funding of the political process.¹

¹ New South Wales, *Hansard*, Legislative Council, 21 September 2004, <[http://www.parliament.nsw.gov.au/prod/parlment/members.nsf/0/d9ccd231bed39458ca256ebe0004b5ab/\\$FILE/Roozendaal.pdf](http://www.parliament.nsw.gov.au/prod/parlment/members.nsf/0/d9ccd231bed39458ca256ebe0004b5ab/$FILE/Roozendaal.pdf)> at 28 January 2008 (Eric Roozendaal).

Another former general secretary of the NSW ALP, Mark Arbib has echoed Roozendaal's sentiments by calling for corporate contributions to be scrapped in favour of a publicly-funded system to 'ensure the integrity of the Australia's political system'.² They have been joined by the NSW Premier Morris Iemma who has instigated moves to completely ban private funding in New South Wales in favour of a system based on complete public funding of parties.³ At the federal level, parliamentarians from the main parties have called for a thorough shake-up of the federal funding regime. Discontent has been expressed by Malcolm Turnbull, current shadow Treasurer and a former Treasurer of the Liberal Party,⁴ former ALP President Carmen Lawrence⁵ and Democrats Senator Andrew Murray.⁶

These voices should be heeded. They testify to the gravity of the issues involved: a key index of the health of a nation's democracy is the character of its political finance regime. These voices also represent a vehement rejection of the status quo. Following the groove of current practices is, in the words of Roozendaal, 'dangerously unsustainable'. All this points to the need for a credible reform agenda. Such an agenda should be anchored in clear aims and principles. It is this to which we now turn.

III. AIMS OF A POLITICAL FINANCE REGIME

A political finance regime should:

- Protect the integrity of political representation
- Promote fairness in politics
- Facilitate democratic deliberation

² Simon Benson, 'When Politicians are Under the Influence', *Daily Telegraph* (Sydney), 2 February 2006, 28.

³ See Karl Bitar, NSW ALP Secretary, *Submission to NSW Inquiry into Electoral and Political Party Funding* (March 2008) (available at [http://www.parliament.nsw.gov.au/prod/parlament/committee.nsf/0/5e44ee94d5799e04ca25741d00031357/\\$FILE/Submission%20107a.pdf](http://www.parliament.nsw.gov.au/prod/parlament/committee.nsf/0/5e44ee94d5799e04ca25741d00031357/$FILE/Submission%20107a.pdf); accessed on 22 May 2008).

⁴ Malcolm Turnbull, *Submission to the Joint Standing Committee on Electoral Matters Inquiry into the 2004 Federal Election* (2005).

⁵ Carmen Lawrence, *The Democratic Project* (2005) Progressive Essays <<http://www.progressiveessays.org/files/The%20Democratic%20Project.pdf>> at 22 February 2008.

⁶ See Democrats Senator Andrew Murray, 'Dissenting Report' in Joint Standing Committee on Electoral Matters, *Funding and Disclosure: Inquiry into Disclosure of Donations to Parties and Candidates* (2006) http://www.aph.gov.au/house/committee/em/donations/report/dissent_murray.pdf> at 3 June 2008.

- Support parties in performing their functions

A. *Protecting the Integrity of Political Representation*

In a representative democracy, elected officials are accountable to the citizens and expected to act in the public interest. When officials trade away the public interest in exchange for money received, there arises the spectre of corruption. There are, however, various shades and meanings of corruption.⁷ The flow of private money into politics threatens the integrity of representative democracy by posing the danger of two kinds of corruption. First, *corruption as graft* occurs when the receipt of funds directly leads to political power being improperly exercised in favour of contributors. It is such corruption that was at issue with WA Inc and the Fitzgerald Inquiry into the Joh Bjelke Petersen Queensland government. Similarly, it is allegations of such corruption that is being ventilated in the current trial of former Queensland Minister, Gordon Nuttall.⁸

The second way in which political contributions threaten the integrity of democratic representation, *corruption as undue influence*, is more insidious. Substantial political contributions tend to create a conflict between private interests and public duty⁹ and, therefore, the possibility that holders of public office will give an undue weight to the interests of their financiers, rather than deciding matters in the public interest.¹⁰ In contrast with corruption as graft, corruption as undue influence does not require explicit bargains or that a *specific act* be actuated by the receipt of funds. 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 monied interests. Corruption as undue influence manifests itself in various ways. More blatant forms involve the sale of political access and influence. This brings in its wake less formal ways for money to influence politics. Contributors may receive more favourable hearings, with a phone call from a big donor more likely to be returned

⁷ See Oskar Kurer, 'Corruption: An Alternative Approach to its Definition and Assessment' (2005) 53 *Political Studies* 222.

⁸ See Renee Viellaris, 'Peter Beattie to Take Witness Stand at Gordon Nuttall Hearing', *Courier Mail* (Brisbane), 27 January 2008, <<http://www.news.com.au/couriermail/story/0,23739,23119053-3102,00.html>> at 28 January 2008.

⁹ Daniel Lowenstein, 'On Campaign Finance Reform: The Root of All Evil is Deeply Rooted' (1989) 18 *Hofstra Law Review* 301, 323-9.

¹⁰ Charles Beitz, 'Political Finance in the United States: A Survey of Research' (1984) 95(1) *Ethics* 129, 137.

than one from a constituent. With perceptions of the merits of any issue invariably coloured by the arguments at hand, preferential hearings mean that the cast of mind of politicians, when judging what is in the ‘public interest’, will be skewed towards the interests of their financiers. The last point shows how corruption as undue influence inflicts a double injury upon the democratic process: contributors are illegitimately *empowered* in the political process while others are illegitimately *disempowered*. Preference to contributors comes hand in hand with the marginalisation of other interests.¹¹

A political finance regime should aim to prevent both corruption as graft and corruption as undue influence. This was a point well recognised by Kim Beazley. In his Second Reading Speech to the Political Broadcasts and Political Disclosures Bill 1991 (Cth) – the Bill that introduced a ban on political advertising and 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*.¹²

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

(t)he 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.¹³

B. Promoting Fairness in Politics

¹¹ See Yasmin Dawood, ‘Democracy, power, and the Supreme Court: Campaign finance reform in comparative context’ (2006) 4(2) *International Journal of Constitutional Law* 269, 280-1.

¹² Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1991, 3477 (Kim Beazley, Minister for Transport and Communications, 2nd Reading Speech to Political Broadcasts and Political Disclosures Bill 1991).

¹³ Commonwealth, *Parliamentary Debates*, House of Representatives, 9 May 1991, 3482 (Kim Beazley, Minister for Transport and Communications, 2nd Reading Speech to Political Broadcasts and Political Disclosures Bill 1991) (emphasis added). For similar sentiments, see Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 1983, 2213 (Kim Beazley, Minister for Aviation, Special Minister of State and Minister Assisting the Minister for Defence, 2nd Reading Speech to Commonwealth Electoral Legislation Amendment Bill 1983) (emphasis added).

The principle of political equality lies at the heart of democracy. Without a doubt, this principle infuses Australia's constitutional and electoral institutions. The 'great underlying principle' of the Constitution, it has been said, is that citizens have 'each a share, and an equal share, in political power'.¹⁴ Similarly, the key objective advanced by the original *CEA* was that of 'equality of representation throughout the Commonwealth'.¹⁵

The principle of political equality insists not only that political freedoms be formally available to all citizens but also, as John Rawls has argued, that such freedoms have 'fair value'.¹⁶ Citizens should be free from legal constraints on political activity *as well as* have a meaningful capacity to engage in such activity. In Ronald Dworkin's words, citizens must have 'a genuine chance to make a difference'¹⁷ or, to put it simply, leverage. 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 and community groups that a citizen is capable of securing meaningful political power. Citizens and their political organisations will only obtain leverage when there is fair access to the public arena, that is, the forums in which public opinion is articulated, influenced and shaped. It is such access that is the principal guarantee that the public agenda is responsive to the opinions of the citizenry.¹⁸ The 'public arena' is a multifarious and complex notion with public opinion voiced and shaped in numerous ways including door-to-door campaigning, party newsletters and, increasingly, advertisements through the mass media. It is also a finite and 'limited space'¹⁹, where the loudness of one voice can drown out others. In particular, those

¹⁴ Harrison Moore, *The Constitution of the Commonwealth of Australia* (1st ed, 1902) 329. This statement was cited with approval in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 139-40 (Mason CJ).

¹⁵ Commonwealth, *Parliamentary Debates*, Senate, 30 January 1902, 9529 (Senator O'Connor, 2nd Reading Speech introducing Commonwealth Electoral Bill 1902).

¹⁶ John Rawls, *A Theory of Justice* ((first published 1972, revised ed, 1999) 225; John Rawls, *Justice as Fairness: A Restatement* (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) *The Sydney Papers* 58.

¹⁷ Ronald Dworkin, 'Equality, Democracy, and Constitution: We the People in Court' (1990) XXVIII (2) *Alberta Law Review* 324, 338.

¹⁸ See Charles Beitz, *Political Equality* (1989).

¹⁹ Rawls, *Justice as Fairness*, above n 16, 150.

with far superior means of communication can exclude less resourced citizens. This is one of the central risks that must be addressed by a political finance regime.

Most importantly perhaps a political finance regime should promote fairness in electoral contests. Fairness in this context implies fair competition amongst candidates and parties. This 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’²⁰ of parties that seek to outbid each other by spending excessive amounts in campaigning. Further, parties that have significant public support should have adequate resources to wage an election campaign. This may require ‘compensating steps’,²¹ 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’.²²

A political finance regime will also promote fair electoral competition by advancing ‘fair rivalry’²³ between the main parties. It will act as an antidote to ‘(a) serious imbalance in campaign funding’²⁴ 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’.²⁵ 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

²⁰ T H Marshall, ‘Citizenship and Social Class’ in T H Marshall, *Class, Citizenship and Social Development* (1964) 65, 90.

²¹ John Rawls, *A Theory of Justice* (first published 1972, revised ed, 1999) 198.

²² Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 1983, 2215 (Kim Beazley, Minister for Aviation, Special Minister of State and Minister Assisting the Minister for Defence, 2nd Reading Speech to Commonwealth Electoral Legislation Amendment Bill 1983). This specific aim is long-standing. When introducing the original *CEA*, Senator O’Connor justified the need for limits on electoral expenditure in this fashion: ‘(i)f 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’: Commonwealth, *Parliamentary Debates*, Senate, 30 January 1902, 9542 (Senator O’Connor, 2nd Reading Speech to Commonwealth Electoral Bill 1902).

²³ Keith Ewing, *The Funding of Political Parties in Britain* (1987) 182.

²⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 1983, 2213 (Kim Beazley, Minister for Aviation, Special Minister of State and Minister Assisting the Minister for Defence, 2nd Reading Speech to Commonwealth Electoral Legislation Amendment Bill 1983).

²⁵ Keith Ewing, *Money, Politics and Law: A Study of Electoral Finance Reform in Canada* (1992) 18.

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'.

C. *Facilitating Democratic Deliberation*

Democracy is not simply a matter of the majority getting what it wants. Such crude majoritarianism fails to recognise that at the heart of political competition is 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.²⁶

In the field of political finance, the principle of democratic deliberation has several implications. It operates as a constraint upon regulation. Freedom of political communication is indispensable to democratic deliberation. Hence, any regulation of political funding should not unduly restrict such freedoms. This does not mean, however, that political communication should not be restricted. On the contrary, so-called free speech – i.e., the complete absence of state regulation – typically leads to the powerful and the wealthy dominating the airwaves to the marginalisation of other voices. In this sense, democratic deliberation cannot be separated out from fair access to the public arena and restrictions on freedom of political communication may be required to guarantee such access.²⁷ Respecting freedom of political communication,

²⁶ See Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (2004) 4-5. For a fuller discussion of the purposes of democratic deliberation, see *ibid* 10-3 and Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (1996) 41-4.

²⁷ The connection between political finance and democratic deliberation is powerfully made by Gutmann and Thompson, *Democracy and Disagreement*, above n 26, 134; Gutmann and Thompson, *Why Deliberative Democracy*, above n 26, 48-9. See also Ian Shapiro, 'Enough of Deliberation: Politics is about Interests and Power' in Stephen Macedo (ed), *Deliberative Politics: Essays on Democracy and Disagreement* (1999) 28, 34-6.

however, implies that any such restriction should be based on a legitimate aim and be proportionate to that aim.²⁸

A political finance regime should also promote democratic deliberation by facilitating informed voting. It already does so ‘by providing details of the funding sources of political parties’.²⁹ As emphasised by Kim Beazley, when introducing the amendments to the federal funding and disclosure regime:

(t)he 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.³⁰

Democratic deliberation is however, not confined to election time. It also extends to the actions of the parties and candidates in between elections. Indeed, such conduct profoundly shapes the judgments of voters. Further, electoral accountability, while crucial, is nevertheless limited. Elections are usually contested on broad issues. Relatedly, the electoral policies of parties are sometimes vague and allow them significant room to manoeuvre once in office. This is arguably much more so the case with the Liberal Party, given that the parliamentary wings of the party are not tightly bound by the party’s platforms and policies.³¹ This means that *electoral politics* do not always govern what parties do in parliament, i.e. *parliamentary politics*, or what a party in office does in relation to executive action, i.e. *policy politics*.³² All three types of politics, however, should be subject to democratic deliberation. Put succinctly by Gutmann and Thompson, ‘(r)eiterated deliberation, punctuated by periodic elections,

²⁸ This roughly corresponds to the test laid down by the High Court in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 in relation to the implied freedom of political communication under the Commonwealth Constitution.

²⁹ Joint Standing Committee on Electoral Matters, *Interim Report on the Inquiry into the Conduct of the 1993 Election and Matters Related Thereto: Financial Reporting by Political Parties* (1994) [7].

³⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 1983, 2215 (Kim Beazley, Minister for Aviation, Special Minister of State and Minister Assisting the Minister for Defence, 2nd Reading Speech to Commonwealth Electoral Legislation Amendment Bill 1983). 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].

³¹ See Liberal Party of Australia Federal Constitution cl 56-7. Cf., Rules of the Australian Labor Party (NSW) 2005-2006 cl N.11(c); Constitution of the Greens (NSW) cl 12.1.

³² For the distinction between electoral, parliamentary and policy politics, see Ian Marsh, *Beyond the Two Party System: Political Representation, Economic Competitiveness and Australian Politics* (1995) 35-43.

is the best hope for the principle of accountability'.³³ Again this underlines the importance of fair access to the public arena. A political finance regime should also facilitate such deliberation by making public the funding details of parties and parliamentarians on a continuous basis.

D. Supporting Parties in Performing their Functions

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

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.³⁴

Parties are central to Australia's democracy and, indeed, 'modern democracy is unthinkable save in terms of parties'.³⁵ What these observations highlight is that in a system of representative government, representation of citizens occurs in a complex and often indirect manner. Intermediary organizations are crucial in providing a link between citizens and the machinery of government. Arguably, the most important of all of these organizations are political parties.

The federal 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 that the only function that parties perform are as vehicles to gain political power. This is true but only a partial truth. What it obscures are the various public functions that parties perform by engaging in electoral

³³ Gutmann and Thompson, *Democracy and Disagreement*, above n 26, 144.

³⁴ Dean Jaensch, *Power Politics: Australia's Party System* (1994) 1-2.

³⁵ Elmer E Schattschneider, *Party Government* (1942) 1. See Gerald Pomper, 'Concept of Political Parties' (1992) 4(2) *Journal of Theoretical Politics* 143 on the connection between different types of parties and democracy

contests to secure power. Foremost, parties play a *representative* function. A healthy party-system should represent the diverse strands of opinion existing in Australia. This system would offer genuine electoral choice, such that the party platforms cater to the different preferences of Australian voters. Second, parties perform an *agenda-setting* function in stimulating and generating ideas for Australian politics. The richness of ideas informing Australian politics will depend heavily on how vigorous the parties are in promoting new ideas and in particular, the priority they place on policy development and research. Third, parties perform a *participatory* function, as they offer a vehicle for political participation through membership, meetings and engagement in the development of party policy. Both the agenda-setting and participatory functions indicate how parties play a central role in facilitating democratic deliberation.³⁶ Fourth, parties perform a *governance* function. This function largely relates to parties who succeed in having elected representatives. These parties determine the pool of people who govern through their recruitment and pre-selection 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 law-making process and scrutinise the actions of the executive government.³⁷

The *principle of pluralism* is implicit in all of these functions. Party politics should provide citizens with different ways to engage in political activity and to be represented. Party policies and programmes should also offer clear and meaningful choices. For such pluralism to exist, parties will necessarily have diverse structures. Some parties, such as the Liberal Party³⁸ and the National Party³⁹, may restrict themselves to individual memberships and are, in this way, *direct parties*. Others like the Australian Labor Party⁴⁰ and the NSW Greens⁴¹ allow both individual membership and collective membership of groups and are therefore, *mixed parties*. The Constitution of the Federal National Party also allows it to be a mixed party as

³⁶ For Blondel, these functions would be characterise as the representative and mobilising aims of parties: Jean Blondel, *Political Parties: A Genuine Case for Discontent?* (1978) 21-4.

³⁷ For similar functions ascribed to political parties, see Karl-Heinz Nassmacher, 'Introduction' in Reginald Austin and Maja Tjenstrom (eds), *Funding of Parties and Election Campaigns* (2003) 2.

³⁸ See, for example, Constitution and Regulations of the Liberal Party of Australia (NSW) cl 2.1.

³⁹ See, for example, Constitution and Rules of the National Party of Australia (NSW) cl 2.

⁴⁰ See, for example, Rules of the Australian Labor Party (NSW) 2005-2006 cl A.2-A.3

⁴¹ Constitution of the Greens (NSW) cl 2.1.

organizations can become associations of the party where there is no State branch.⁴² Some parties like the NSW Shooters Party fall somewhere in the middle: membership is formally restricted to individuals⁴³, while close links are maintained with various groups.⁴⁴ In these situations, such groups, while not members of the party, act as *ancillary organizations*.⁴⁵ 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.⁴⁶

The principle of pluralism points to the need to respect freedom of party association, the ability of citizens to band together in political parties and to organise their parties as they see fit. Such freedom is not based on an intrinsic right of parties to be free from regulation but based on functions they perform in a democratic society⁴⁷ and, in particular, the principle of pluralism: pluralism cannot be sustained without parties have meaningful autonomy in organising their affairs. Respecting freedom of party association does not, however, mean that such freedom is absolute. Indeed, the functions of the parties themselves may 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.

⁴² Constitution of the National Party of Australia (Cth) cl 71.

⁴³ Constitution of The Shooters Party (NSW) By-law (2).

⁴⁴ 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': Constitution of The Shooters Party (NSW) 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* (2003) <http://www.efa.nsw.gov.au/data/assets/pdf_file/0008/30140/2003PartyContributions.pdf> at 5 February 2008.

⁴⁵ For fuller explanations of direct and indirect party structures, see Maurice Duverger, *Political Parties: Their Organization and Activity in the Modern State* (Barbara and Robert North trans, first published 1954, 2nd ed, 1959) [trans of: *Les Partis Politiques*] 6-17.

⁴⁶ For fuller discussion, see K D Ewing, *The Cost of Democracy: Party Funding in Modern British Politics* (2007) 35-8.

⁴⁷ 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 *Columbia Law Review* 274.

IV. PROBLEMS WITH THE CTH POLITICAL FINANCE REGIME

Evaluated against these aims, there are key problems with the federal political finance regime:

- It provides for poor transparency;
- It allows the political process to be corrupted through the sale of access and influence and the corporatisation of politics;
- It contributes to an unfair playing field in the context of an intensifying arms race; and
- It undermines the health of the parties.

A. Poor Transparency

In a co-authored submission to the 2004-2006 Committee's inquiry into disclosure of donations to political parties and candidates, I detailed the lack of transparency provided by the federal political finance regime. This submission is available at <http://www.aph.gov.au/house/committee/em/donations/subs/sub5.pdf> and pages 10-24, in particular, deal with the weaknesses of the federal disclosure regime.

B. Corrupting the Political Process: the Sale of Access and Influence and the Corporatisation of Politics

Corruption as undue influence pervades Australian politics with the sale of access and influence regularly giving rise to conflicts of interest. Many examples can be given to illustrate this point. For \$102 000, a company can become a 'foundation partner' of the NSW ALP's Business Dialogue and secure five places to events, such as boardroom lunches and dinners with Premier Morris Iemma and State government ministers.⁴⁸ In late 2006, a few months prior to the State Election, the NSW ALP held a fund-raising event at the Convention Centre, Darling Harbour, which was attended by nearly 1000 people. General admission was at \$500 per head, while attending an

⁴⁸ Andrew Clennell, 'Coalition Wins Vote for Donations Inquiry', *Sydney Morning Herald* (Sydney), 28 June 2007, 4.

exclusive cocktail party with ministers costed \$15 000 for nine guests and dining with the Premier Morris Iemma was priced at a hefty \$45 000.⁴⁹

The NSW Liberal Party runs a body called the Millennium Forum. Its website used to contain a message from former Prime Minister John Howard, stating that it is ‘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 framework’.⁵⁰ ‘Wealth’, it seems, is the operative word. For sponsorship 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’⁵¹, but previously also had a chance to play golf with John Howard on Sydney’s Boonie Doon golf course.⁵² Corporate Australia has not been reluctant to seize these opportunities. The major sponsors of the Forum are Australian Hotels Association (AHA), Blue Star Print Group, Clubs NSW, Deloitte, Meriton Apartments Pty Ltd., O’Neil Australia, Dr Harry Segal and zer0lzer0.⁵³ The roll-call of the Forum’s sponsors also includes British American Tobacco, Publishing and Broadcasting Ltd., major construction companies like Leighton Holdings and Multiplex Constructions and defence contractors, ADI Ltd. and Tenix Group.⁵⁴ Through the Millenium Forum, businesses can also join the 500 Club. According to the Forum’s website:

The 500 Club provides a tailored series of informal, more personally styled, early evening events. These events have a club atmosphere and feature “Off the Record briefings” from political and business leaders while also providing the opportunity for members to meet, establish new networks and exchange ideas.

⁴⁹ Anne Davies and Jonathan Pearlman, ‘Top Libs Split on Corporate Donations’, *Sydney Morning Herald* (Sydney), 3 November 2006, 1.

⁵⁰ Liberal Party of Australia, New South Wales, *Millennium Forum* <<http://www.millenniumforum.com.au/john.htm>> at 7 June 2007.

⁵¹ Liberal Party of Australia, New South Wales, *Millennium Forum* (2008) <<http://www.millenniumforum.com.au/first.htm>> at 7 June 2007 (emphasis original).

⁵² Emiliya Mychasuk and Pilita Clark, ‘Howard and His Team Rented by the Hour’, *Sydney Morning Herald* (Sydney), 13 June 2001, 1.

⁵³ In order of price, the four types of sponsorships are major, programme, business and individual sponsorship: see Liberal Party of Australia, New South Wales, *Millennium Forum* (2008) <<http://www.millenniumforum.org.au/packages.htm>> at 12 February 2008.

⁵⁴ Liberal Party of Australia, New South Wales, *Millennium Forum* (2008) <<http://www.millenniumforum.org.au/sponsors.htm>> at 22 January 2008.

All this, according to the website, will add ‘a new level of value for . . . Club members’.⁵⁵

The NSW ALP and Liberal Party are more than matched by their federal counterparts in the peddling of influence. Major companies, including NAB, Westpac and Telstra engaged a high-price escort service at the 2007 federal ALP conference. At a fee of \$7,000 per person, their representatives were accompanied by federal ALP frontbenchers. For the privilege of sitting next to ALP luminaries, businesses also purchased tables at the conference dinner for up to \$15,000.⁵⁶ Not to be outdone, Liberal Party ministers auctioned off their time at the 2007 Liberal Party federal council: a harbour cruise with Tony Abbott, the Health Minister, fetched \$10,000, while a night at the opera with Helen Coonan, the Minister for Communications, Information Technology and the Arts, picked up a princely sum of \$12,000. All this was embraced under the council theme of ‘Doing what’s right for Australia’.⁵⁷

Indeed, the former Prime Minister has not been shy in using Kirribilli House and the Lodge for fund-raising.⁵⁸ In June last year, a Liberal Party meeting held in Kirribilli House was attended by business observers who paid more than \$8,000 each.⁵⁹ The prize for the most successful fund-raiser perhaps goes to Malcolm Turnbull who charged \$55 000 per head for a fund-raising dinner to support his bid for re-election.⁶⁰ Not much seems to have changed since the election of the Rudd government with the *Sydney Morning Herald* reporting that a deal has been struck between the federal ALP national secretary, Tim Gatrell, 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 fund-raising purposes.⁶¹

⁵⁵ Liberal Party of Australia, New South Wales, *Millennium Forum* (2008) <<http://www.millenniumforum.com.au/programmes.htm>> at 12 February 2008.

⁵⁶ Michelle Grattan and Katharine Murphy, ‘Hope in the Hearts of Labor Faithful’, *The Age* (Melbourne), 27 April 2007, 1.

⁵⁷ Misha Schubert, ‘Party Hopes Party Won’t End So Soon’, *The Age* (Melbourne), 4 June 2007, 6.

⁵⁸ For details, see Michelle Grattan, ‘Labor Legal Advice: PM function was a gift’, *The Age* (Melbourne), 16 June 2007, 2.

⁵⁹ Brendan Nicholson, ‘Rudd Open to Melbourne PM Pad’, *The Age* (Melbourne), 11 June 2007, 5.

⁶⁰ Clare Masters, ‘How \$55, 000 will Buy You a Slice of Malcolm’, *Daily Telegraph* (Sydney), 1 August 2007, 23.

⁶¹ Alan Ramsey, ‘Junee farmer tables dinner time complaint’, *Sydney Morning Herald*, 5 April 2008 <<http://www.smh.com.au/news/opinion/junee-farmer-tables-dinner-time-complaint/2008/04/04/1207249457708.html>> at 27 May 2008.

Those defending such fund-raisers 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 beggars belief: influence is inseparable from access. 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.⁶² The website of Progressive Business, the fund-raising arm of the Victorian ALP, used to be very up-front on what was being traded when it stated that ‘(j)oining this influential group allows you to participate in the decision making progress (sic)’.⁶³

The simple truth too is that corporations cannot and do not make *donations*. Under *Corporations Law*, directors and senior executives of companies are under a duty to act in good faith in the interests of shareholders. When deciding to contribute to political parties, they can only comply with this duty if the company is receiving something in return. In other words, directors and managers who authorise political donations in the strictest sense – i.e. money given with no strings attached – seriously risk breaching the law.⁶⁴ In such a context, the frank admission of David Clarke, former Macquarie Bank chairman, that political contributions were useful not only in making the company known to politicians but could also ‘lead to direct fees and government business’⁶⁵ should not surprise us. With each corporate ‘donation’ then, there is invariably a quid pro quo.

What that quid pro quo consists of, in relation to the purchase of access and influence, can be quite subtle. Reporting on the fund-raisers of Progressive Business, *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.⁶⁶

⁶² Liberal Party of Australia, New South Wales, *Millennium Forum* (2008) <<http://www.millenniumforum.com.au/first.htm>> at 12 February 2008.

⁶³ <<http://www.alp.org.au/action/progressive>> at 13 November 2005.

⁶⁴ See discussion in Ian Ramsay, Geof Stapledon and Joel Vernon, *Political Donations by Australian Companies* (2000) 194-5.

⁶⁵ Quoted in Bill Birnbauer and David Elias (2001), ‘Coming to the party’, *The Age* (Melbourne), 14 February, 13.

⁶⁶ Michael Bachelard, ‘Taking Their Toll’, *The Age* (Melbourne), 14 May 2007, 9.

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 smooths the path to get something heard'.⁶⁷ The subtle nature of such influence does not, however, detract from the conclusion that it constitutes corruption as undue influence. It is the payment of money by a company that allows it to influence politicians, not the merit of its ideas or the strength of its popular support. Typically occurring in clandestine circumstances, such influence clearly distorts the consideration of issues by politicians.

What's worse is how such corruption pervades Australian politics. The examples given above illustrate how the major parties have no qualms in selling access and influence. On the corporate side, complicity with such practices has, in fact, become a hallmark 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'.⁶⁸ Terry Barnes, chief executive of the NSW Urban Taskforce, has justified contributions from NSW developer companies to the major parties on the basis that 'the system's there and that's how things are done'.⁶⁹ With similar forthrightness, Ashley Mason, the external affairs executive for Leighton Holding, observed of the purchase of access and influence through Progressive Business:

It's part of the system . . . It's seen as part of the process.⁷⁰

The corruption that occurs through the sale of access and influence throws light on a broader phenomenon: the corporatisation of politics. This refers to the normalisation of corporate funding of politics and the commercial ethos that comes in the wake of this practice. One of the clearest indicators of the normalisation of corporate contributions is how major businesses are contributing funds to both sides of politics. To illustrate this phenomenon, Table 2 provides examples of companies (and in the

⁶⁷ Ibid.

⁶⁸ Richard Baker, 'Are Our Politicians for Sale?', *The Age* (Melbourne), 24 May 2006, 15.

⁶⁹ Quoted in Editorial, 'Cash for Concrete', *Sydney Morning Herald* (Sydney), 3 November 2006, 10.

⁷⁰ Richard Baker, 'Are Our Politicians for Sale?', *The Age* (Melbourne), 24 May 2006, 15.

case of AHA, industry organisations) that contributed to both the NSW ALP and Liberal Party in the 2006/2007 financial year.⁷¹

Table 1: Examples of businesses contributing to both NSW ALP and Liberal Party

Company	ALP (NSW)	Liberal Party (NSW)
Manildra Group of Companies	\$213 000	\$100 000
Australian Hotels Association (NSW)	\$189 999	\$45 000
Meriton Premier Apartments	\$100 000	\$50 000
Grocon Pty Ltd	\$82 500	\$11 000
Westfield Capital Corporation Ltd	\$75 000	\$75 000
Tenix Corporate Pty Ltd	\$30 000	\$11 000

Source: 2006/2007 Annual Returns under *Commonwealth Electoral Act 1918* (Cth)⁷²

Corporate money does not only inject funds into politics, but also reshapes the ethics of politics. The sale of access and influence is perhaps the most egregious instance of the corporatisation of politics. Here, 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 the 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 the best product we have to sell'.⁷³ Like other markets, the greater the value of the product, the higher the price. Discussing the 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 \$10,000.⁷⁴

While there are various circumstances driving the corporatisation of politics and its offspring, the sale of access and influence, one key factor is clearly the perception of the major parties that they must outspend each other in order to win elections. This

⁷¹ Note that all contributions over \$10 300 are included, whether classified as 'donation' or 'other receipt'. There are significant problems with the system of self-classification under the *CEA*. For discussion, see Joo-Cheong Tham and David Grove, 'Public Funding and Expenditure Regulation of Australian Political Parties: Some Reflections' (2004) 32(3) *Federal Law Review* 397-424.

⁷² See Australian Electoral Commission, *Funding and Disclosure: Annual Returns Locator Service* (2007) <<http://fadar.aec.gov.au/>> at 22 February 2008.

⁷³ Richard Baker, 'Are Our Politicians for Sale?', *The Age* (Melbourne), 24 May 2006, 15.

⁷⁴ Bachelard, above n 66.

perception creates the demand for funds that is then met through unsavoury fund-raising practices. The major parties may become caught in the vice of destructive competition. In order to understand their fund-raising practices, we must therefore turn to their spending patterns.

C. An Unfair Playing Field in the Context of an Intensifying Arms Race

The proposition that ‘campaign expenditure buys votes’ is untenable.⁷⁵ The voting decisions of citizens might be formed before the campaigns and remain impervious to campaign tactics. Moreover, demographic and class factors will shape a voter’s decision. Not surprisingly then, there is a complex relationship between campaign expenditure and voter support⁷⁶ or put differently, between ‘spending and electoral payoffs’.⁷⁷ For instance, the biggest spender on political broadcasting for the federal elections running from 1974 to 1996 only won half of these contests.⁷⁸ While money does not buy elections in the sense that campaign expenditure is clearly not *decisive* in determining electoral outcomes, it is erroneous to say that campaign expenditure has no or little positive impact on electoral outcomes or the public agenda. Furthermore, the perception that money has a significant impact on political outcomes can in turn have a crucial bearing on the spending and fund-raising practices of the parties.

All this points to the importance of analysing the spending patterns of parties when assessing the fairness of an electoral system. Table 2 attempts to gauge the election spending for the 1998, 2001 and 2004 federal elections through the total spending made by the federal branches of the ALP, Liberal Party and the National Party.⁷⁹ It should be noted that these figures do not precisely indicate the amount spent by the parties on these federal elections: they are over-inclusive as they cover non-election spending⁸⁰ and also under-inclusive as they do not include spending by state and

⁷⁵ Committee on Standards in Public Life, *Fifth Report: The Funding of Political Parties in the United Kingdom* (1998) 117.

⁷⁶ Sally Young, ‘Spot On: The Role of Political Advertising in Australia’ (2002) 37 *Australian Journal of Political Science* 81, 89.

⁷⁷ Justin Fisher, ‘Next Step: State Funding for the Parties?’ (2002) 73 *Political Quarterly* 392, 396.

⁷⁸ Young, above n 140, 91.

⁷⁹ The 2007 federal election has not been included as the party returns for the 2007/2008 financial year have not been lodged.

⁸⁰ There are no precise figures of federal election spending as the obligation to lodge electoral expenditure returns was scrapped in 1998, see Joo-Cheong Tham and Graeme Orr, *Submission to*

territory branches. Nevertheless, they give some indication of the magnitude of federal election spending and general trends.

Table 2: Total spending for financial years during which past federal elections occurred

Party/Total Payments	1998/1999	2001/2002	2004/2005
ALP (Federal)	\$20 294 641	\$25 401 056	\$30 142 887
Liberal Party (Federal)	\$12 255 957	\$17 113 520	\$26 976 772
National Party (Federal)	\$494 506	\$958 036	\$1 663 765
Combined total	\$33 045 104	\$43 472 612	\$58 783 424

Source: AEC Annual Returns

These figures indicate increasingly higher levels of federal election spending. The combined spending of the ALP and the Coalition parties in the 2001/2002 financial year was 32% higher than that of 1998/1999; a figure that increased again by 35% by the 2004/2005 financial year. In a span of six years, that is from the 1998/1999 financial year to the 2004/2005 financial year, the combined spending of these parties dramatically increased by 78%. It can be reasonably presumed that these increases can be principally traced to greater election spending. What this points to is an *intensifying arms race* amongst the major parties. 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 with regular elections and drives much of party activity especially fund-raising practices. What Table 2 suggests is that the stakes are getting exponentially higher with the major parties having increasingly larger war-chests for federal election spending.

Similar conclusions can be drawn by looking at the electoral expenditure in Victoria and New South Wales. Table 3 shows how the total payments of the Victorian branches of the ALP and the Liberal Party have increased in the financial years which have had a State election.

Table 3: Total payments of ALP (Victorian Branch) and Liberal Party (Victorian Division)

Financial year	ALP (Victorian Branch)	Liberal Party (Victorian Division)
2006/2007 (State election year)	\$15 152 874	\$12 873 133
2002/2003 (State election year)	\$9, 862, 006.00	\$12, 697, 762.00
1999/2000 (State election year)	\$6, 745, 974.00	\$10, 101, 732.00

Source: AEC Annual Returns⁸¹

More precise data is available in relation to New South Wales because NSW parties are required to disclose the amount of election spending. Although it is only based on data for two state elections, Table 4 also offers some evidence of an intensifying arms race amongst the NSW parties: total electoral expenditure increased by 17.8% in this period, whilst average expenditure per vote went up by 6.4%.

Table 4: Electoral expenditure for 1999 and 2003 NSW State Elections

Party	1999 State Election: electoral expenditure (\$)	1999 State Election: Total expenditure for each first preference vote, Legislative Council (\$)	2003 State Election: electoral expenditure (\$)	2003 State Election: Total expenditure for each first preference vote, Legislative Council (\$)
ALP (NSW)	6 972 749	5.26	11 387 667	7.03
Liberal Party (NSW)	5 690 699	7.06	3 081 051	3.52
National Party (NSW)	1 190 242		1 276 798	
Greens (NSW)	165 743	1.60	547 974	1.71
Christian Democratic Party (Fred Nile Group)	336 595	2.99	458 275	4.06

⁸¹ The last three State elections were held on 18 September 1999, 30 November 2002 and 25 November 2006, see <http://www.vec.vic.gov.au/stateresults.html> (accessed on 30 May 2007).

Shooters Party ⁸²	201 846	3.40	401 971	5.28
Average expenditure per vote		4.06		4.32
Total expenditure	14 557 874		17 153 736	

Sources: NSW Electoral Commission, *Legislative Council Results for 1999 and 2003 State Elections*;⁸³ Election Funding Authority (NSW), *Summaries of Political Contributions Received and Electoral Expenditure Incurred by Parties that endorsed a Group or by Independent Groups at Legislative Councils 1999 and 2003*⁸⁴

Moreover, the data suggests that the electoral playing field in New South Wales is unfair in certain respects. For both the 1999 and 2003 State Elections, there was no ‘equality of arms’ amongst the contenders for government. In the 1999 State Election, the Coalition outspent the ALP by more than a third in terms of expenditure per first preference vote. The position was dramatically reversed in the 2003 State Election with ALP’s expenditure per vote nearly double that of the Coalition. The disparity between the Coalition and the ALP might have worsened in the recent State Election. While the data on electoral expenditure for that election has yet to be posted online by the Funding Authority, the 2006/2007 returns lodged by the NSW ALP, Liberal Party and National Party under the CEA provide some indication of the relative spending of the major parties. For the 2006/2007 financial year, the NSW branch of the ALP made payments amounting to \$24.7 million – 30% more than the total Coalition expenditure for that period, which stood at \$18.9 million.⁸⁵ When government advertising is thrown into the mix, the inequality between parties becomes even

⁸² The Shooters Party was identified as ‘John Tingle – The Shooters Party’ in the 1999 State Election Summary.

⁸³ For 1999 State Election results, see NSW Electoral Commission <http://www.elections.nsw.gov.au/state_government_elections/election_results/legislative_council_results/1999_legislative_council_results> at 16 January 2008. For 2003 State Election results, see NSW Electoral Commission <http://www.elections.nsw.gov.au/state_government_elections/election_results/legislative_council_results/2003_legislative_council_results> at 16 January 2008.

⁸⁴ Election Funding Authority (NSW) <http://www.efa.nsw.gov.au/_data/assets/pdf_file/0010/30142/2000schedc.pdf> and <http://www.efa.nsw.gov.au/_data/assets/pdf_file/0015/30138/2003SummaryPartiesGroups.pdf> at 5 February 2008.

⁸⁵ See Australian Electoral Commission, *Funding and Disclosure: Annual Returns Locator Service* (2007) <<http://fadar.aec.gov.au/>> at 22 February 2008.

sharper.⁸⁶ Table 4 also suggests unfairness in two other respects. First, there is the financial disadvantage experienced by the minor parties. In the 1999 State Election, the Greens, Christian Democratic Party and Shooter Party expended less than the average expenditure per vote, while the same applied to the Greens and Christian Democratic Party in the 2003 State Election. Second, the exorbitant costs of electioneering may be reducing competitiveness of elections by deterring new contenders unable to afford the money required to run a campaign.

C. Undermining the Health of 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:

(t)he 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.⁸⁷

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 fund-raising. 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 fund-raisers.⁸⁸ The quality of the candidates that parties recruit may also suffer by this pre-occupation with fund-raising. For example, 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

⁸⁶ Andrew Stoner, Leader of the NSW Nationals, has estimated that the NSW ALP spent up to \$90 million on political advertising and government advertising: Andrew Stoner, 'Counting the Cost of Political Advertising', *Daily Telegraph* (Sydney), 27 September 2007, 30.

⁸⁷ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 159.

⁸⁸ Michelle Grattan, 'Our Political Guns for Hire', *The Age* (Melbourne), 25 May 2005, 21.

restore the party's depleted funds.⁸⁹ This has also been mentioned of Alan Stockdale's candidature for presidency of the federal Liberal Party.⁹⁰ 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 fund-raise and, arguably, has detracted attention from more important leadership attributes such as their policies and ability to challenge the ALP.

The fund-raising 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 monied interests, they 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.⁹¹ This occurs through corporate fund-raising, but also through the growing reliance of the major parties on investment arms.⁹² This 'business' model of the party vests control over fund-raising in the party leadership and tends to centralise power. With growing centralisation, responsiveness to rank-and-file members correspondingly decreases. This development directly undermines 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.

V. THE WAY FORWARD: A REFORM AGENDA

Australian citizens are poorly served by the federal political finance regime. It currently provides for poor transparency. The major parties appear to demonstrate a

⁸⁹ See, for example, Tony Wright, 'Bold offer might help Lib reset', *The Age*, 26 November 2007 <<http://www.theage.com.au/articles/2007/11/25/1195975872419.html>> at 25 February 2008.

⁹⁰ See, for example, Michelle Grattan, 'Lib Senate leader urges conservatives to unite', *The Age*, 26 January 2008 <http://www.theage.com.au/cgi-bin/common/popupPrintArticle.pl?path=/articles/2008/01/25/1201157673214.html#> at 25 January 2008.

⁹¹ Duverger, above n 45, 63.

⁹² See Editorial, 'Secret Donations Aid Political Parties', *The Age* (Melbourne), 1 February 2008.

laissez-faire attitude to the law and the ethics of fund-raising. With neither law nor self-regulation providing sufficient restraint, the sale of access and influence has become so normalised, such that corruption as undue influence is now an endemic feature of Australian politics. Unfairness in accessing political power is paralleled by unfairness in electoral competition, with the playing field far from level in the context of an intensifying arms race. The parties themselves both benefit and suffer from this dire situation. As the major parties grow rich on corporate money, they are less able to serve the community and their members. All of this casts a pall of illegitimacy on Australian parties and brings the crucial activity of politics into disrepute.

The relationship between money, politics and the law needs to be radically reshaped in Australia. This should involve a fundamental reform of the law to put in place:

- A robust disclosure scheme;
- Campaign expenditure limits;
- Other measures to deal with corruption;
- A Party Support Fund.

Before detailing these measures, this submission will argue against two particular measures: uniform contribution limits and tax relief.

A. A Case Against Uniform Contribution Limits

Measures restricting the supply of political money seem to be commanding the most support amongst the reform-minded,⁹³ in particular, restrictions on political contributions. In a response to the Wollongong City Council scandal, the New South Wales Premier Morris Iemma has advanced the radical proposal of completely banning political contributions in favour of a system of complete public funding.⁹⁴ Following not too far behind, his predecessor, Bob Carr has advocated banning political contributions from organizations like trade unions and companies and only allowing those made by individuals. Proposals of this kind, in fact, have support

⁹³ For instance, the federal minister in charge of this area, Senator John Faulkner, has flagged the prospect on banning contributions from lobbyists, property tycoons and tobacco companies, see Katherine Murphy, 'Political donors to face new limitations', *The Age*, 17 May 2008 (available at <http://www.theage.com.au/news/national/political-donors-to-face-new-limitations/2008/05/16/1210765176377.html>; accessed on 22 May 2008).

⁹⁴ See Karl Bitar, NSW ALP Secretary, *Submission to NSW Inquiry into Electoral and Political Party Funding* (March 2008) (available at [http://www.parliament.nsw.gov.au/prod/parlament/committee.nsf/0/5e44ee94d5799e04ca25741d00031357/\\$FILE/Submission%20107a.pdf](http://www.parliament.nsw.gov.au/prod/parlament/committee.nsf/0/5e44ee94d5799e04ca25741d00031357/$FILE/Submission%20107a.pdf); accessed on 22 May 2008).

across the political spectrum. The current Liberal Party shadow treasurer, Malcolm Turnbull,⁹⁵ and the NSW Greens⁹⁶ have similar positions. Amongst academics too, there is strong support for restricting or banning contributions from organizations. For instance, influenced by the Canadian model of regulation, a submission by the Democratic Audit of Australia to the New South Wales inquiry into political funding has called for a ban on organizations making contributions while only allowing limited individual donations.⁹⁷

A common feature of these proposals is that restrictions on political contributions will apply equally to all types of organizations; in this sense, they are uniform contribution limits.⁹⁸ In particular, there will be no differentiation between money from commercial corporations and trade union money. This reveals a fundamental flaw in the case for uniform contribution limits: a false equation of corporate and trade union contributions. There are other difficulties with the push for uniform contribution limits: it is misdirected at ‘trade union bosses’; adoption of uniform contribution limits will produce anomalies and give rise to an unjustified limitation on the freedom of political association.

1 *False Equation of Corporate and Trade Union Contributions*

The appeal of uniform contribution limits lies in its apparent fairness. As the argument goes, ‘(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’.⁹⁹ Why should trade unions be allowed to freely donate, especially to the Australian Labor Party (ALP), while business donations are largely prohibited? After all, shouldn’t the

⁹⁵ Malcolm Turnbull, *Submission to the Joint Standing Committee on Electoral Matters Inquiry into the 2004 Federal Election* (2005).

⁹⁶ See

[http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/dfc9200362cf2c4aca257402000e38aa/\\$FILE/080303%20corrected%20hearing%20transcript.pdf](http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/dfc9200362cf2c4aca257402000e38aa/$FILE/080303%20corrected%20hearing%20transcript.pdf) (accessed on 22 May 2008).

⁹⁷ New South Wales Parliament’s Inquiry into Electoral and Political Party Funding, *Public Hearings Transcript: 3 March 2008*, 33 (available at

[http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/dfc9200362cf2c4aca257402000e38aa/\\$FILE/080303%20corrected%20hearing%20transcript.pdf](http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/dfc9200362cf2c4aca257402000e38aa/$FILE/080303%20corrected%20hearing%20transcript.pdf); accessed on 22 May 2008).

⁹⁸ They contrast with tailored limits on organisational contributions, see, for example, *The Power Inquiry, Power to the People: An Independent Inquiry into Britain’s Democracy* (2006) 210-1 (copy on file with author).

⁹⁹ Janet Albrechtsen, ‘End the stench of political donations’, *The Australian*, 24 February 2008 (available at

http://blogs.theaustralian.news.com.au/janetalbrechtsen/index.php/theaustralian/comments/end_the_stench_of_political_donations/; accessed on 25 February 2008)

interests of labour and capital be fairly represented in the political arena? These claims, however, falsely equate corporate and trade union money. Being often informed by a notion of balance between capital and labour,¹⁰⁰ they seem also influenced by the pluralist assumption of ‘equality amongst groups’.¹⁰¹ As the logic goes, if unions and business are already equal in political power then fairness is maintained by having measures that treat them in a similar way.¹⁰² These understandings of balance, however, neglect the *greater capacity of business to influence politics through money*¹⁰³ as ‘great aggregations of wealth’.¹⁰⁴ To illustrate, in 1995/96 to 1997/98, for instance, a total of \$29 million was given by business to the major parties.¹⁰⁵ Compare this with the total capitalisation of companies listed on the Australian Stock Exchange in 1998, an astronomical \$536.2 billion.¹⁰⁶

Moreover, the wealth of business influences politics not only through direct contributions to parties but also through its ownership of the means of production, distribution and exchange. It is such power that gives rise to what Lindblom rightly described as the ‘privileged position of business’.¹⁰⁷ Such a position means that business have tremendous power in the market *and* in the political sphere. The latter results from political representatives being heavily reliant on the decisions on business for their own electoral success.¹⁰⁸ As Lindblom has observed, ‘(b)usinessmen cannot be left knocking at the doors of the political systems, they must be invited in’.¹⁰⁹ Unions collectively do not enjoy parity of influence except in

¹⁰⁰ For the notion of balance informing US restrictions on union and corporate political speech, see David J Sousa, ‘“No Balance in the Equities”: Union Power in the Making and Unmaking of the Campaign Finance Regime’ (1999) 13 *Studies in American Political Development* 374. For a good analysis of the constitutional issues relating to these restrictions, see John Bolton, ‘Constitutional Limitations on Restricting Corporate and Union Political Speech’ (1980) 22 *Arizona Law Review* 373.

¹⁰¹ Charles Lindblom, *Politics and Markets: The World’s Political-Economic Systems* (1977) 141.

¹⁰² It has been observed that US restrictions on union and corporate political speech have been influenced by ‘the pluralists’ concern for the maintenance of a democratic balance among interest groups’: Sousa, above n 100, 377. A classic text on pluralism is Robert Dahl, *A Preface to Democratic Theory* (1965). For a trenchant Marxist critique, see Ralph Miliband, *The State in Capitalist Society: The Analysis of the Western System of Power* (1969).

¹⁰³ See generally Lindblom, above n 101, 198-9.

¹⁰⁴ Elihu Root quoted in *U S v U A W* 353 US 572 (1956).

¹⁰⁵ Ian Ramsay, Geof Stapledon and Joel Vernon, ‘Political Donations by Australian Companies’ (2001) 29 *Federal Law Review* 179, 201.

¹⁰⁶ *Ibid* 204 quoting Australian Stock Exchange data.

¹⁰⁷ Lindblom, above n 101, Chapter 13.

¹⁰⁸ It can be added that trade union officials are also dependent on the decisions of business for their ability to maintain the support of their membership with the welfare of their constituency profoundly shaped by the decisions of business on how to use and deploy its capital.

¹⁰⁹ Lindblom, above n 101, 175.

exceptional circumstances. So much can be seen by comparing the respective ability of business and unions to withhold their main asset: the freedom of business to withdraw their capital is largely unfettered while the ability of union members to withdraw their labour is severely constrained.¹¹⁰ With such imbalance between business and trade unions especially heightened in an era of economic globalisation, the equation between corporate and trade union money holds out a specious kind of equality where unequals are treated in an identical fashion.

Another crucial difference between corporate and trade union money stems from the ALP being a labour party with trade unions as members.¹¹¹ As members of State and Territory branches of the ALP, affiliated trade unions are guaranteed 50% representation at State and Territory conferences¹¹² that, among others, determines State and Territory branch policies and elects State party officials and delegates to National Conference.¹¹³ The latter functions as ‘the supreme governing authority of the Party’¹¹⁴ and elects members of the National Executive, ‘the chief administrative authority’ of the party.¹¹⁵ The bulk of the money¹¹⁶ that trade unions provide to the ALP cannot be separated from their participation as members within the party: *trade union affiliation fees are membership fees*.

Being membership fees, they implicate freedom of political association at its core: the ability to form a party and act in association as party.¹¹⁷ In other words, trade union affiliation fees draw in the principle of respecting the nature and diversity of party structures.¹¹⁸ By comparison, even if corporate contributions were seen as a form of political association, it cannot be said that it implicates the freedom of political association as profoundly as membership fees paid by trade unions. Another point of

¹¹⁰ Ibid 175-7. For current restrictions on the industrial action, see *Workplace Relations Act 1996* (Cth) Part 9.

¹¹¹ See generally John Warhurst, ‘The Labor Party’ in Andrew Parkin et al (eds), *Government, Politics, Power and Policy in Australia* (1993) Chapter 8. For the different meanings of party membership, see discussion in Duverger, above n 45, 61-89; Blondel, above n 36, 145-8.

¹¹² See, for example, Rules of Australian Labor Party (NSW Branch) cl B.25(a), B.26; Rules of Australian Labor Party Victorian Branch cl 6.3.2.

¹¹³ See, for example, Rules of Australian Labor Party (NSW Branch) cl B.2; Rules of Australian Labor Party Victorian Branch cl 6.2.

¹¹⁴ National Constitution of the ALP cl 5(b).

¹¹⁵ Ibid cl 7(a).

¹¹⁶ Some trade unions also provide money to the ALP separately.

¹¹⁷ K D Ewing, *Trade Unions, the Labour Party and Political Funding: The next step: reform with restraint* (2002) para 3.4.

¹¹⁸ Ewing, above n 46, 37.

difference relates to transparency. Membership subscriptions, whether by individuals or groups need to be accompanied by an open declaration that the member supports the party's Constitution, policies and principles.¹¹⁹ With corporate contributions, on the other hand, such principled support is not required. There is also transparency due to the formalisation of influence wielded by members. The NSW ALP's Constitution, for example, sets up a Labor Advisory Council whose role 'is to provide a formal consultative mechanism between the Party and the union movement in NSW'.¹²⁰ Corporate money, however, tends to work its influence in much more informal ways and, indeed, we are reminded by Duverger that these contributions are usually 'cloaked in great discretion'.¹²¹

The difficulties with this false equation become apparent when analysing the problem of corruption as undue influence. As noted earlier, the risk of such corruption arises because substantial political contributions tend to create a conflict between public duty and the financial interests of the party or candidate and, therefore, the possibility that holders of public office will give an undue weight to the interests of their financiers, rather than deciding matters in the public interest. Such corruption occurs when corporate financiers are able to wield informal influence within the party simply by virtue of the money they have contributed. Most clearly, it exists with the purchase and sale of access and influence. For instance, when businesses become sponsors of the NSW Liberal Party's Millennium Forum, their influence through this organization is secured principally because they paid sponsorship fees amounting to thousands of dollars.¹²² By paying such fees, these companies are then able to exercise influence in clandestine circumstances, for example, through 'off the record' briefings.¹²³ This is an emphatic instance of what Walzer characterises as a 'blocked exchange' where money is used to buy political power.¹²⁴

¹¹⁹ See, for example, National Constitution of the ALP cl 5.

¹²⁰ Rules of the Australian Labor Party (NSW) 2005-2006 cl Q.2.

¹²¹ Duverger, above n 45, xxxiv.

¹²² Liberal Party of Australia, New South Wales, *Millennium Forum* (2008) <<http://www.millenniumforum.com.au/first.htm>> at 21 May 2008.

¹²³ 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.*

¹²⁴ Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (1983) 100.

Compare this with the influence of trade unions that accompanies their affiliation fees: such influence is exercised as members of the ALP with greater transparency relating to the objectives and modes of influence. There will be times, of course, when trade union officials informally leverage the fees paid by their unions to secure policy outcomes and also times when ALP party officials secretly alter the content of party policy because of the party's structural dependence on unions funds. In such situations, there will be corruption as undue influence with dependence on union funds conflicting with the public functions of the ALP. Arguably, however, these situations are not typical of trade union participation within the ALP. What is perhaps more characteristic is the 'publicness' of such activity: affiliated trade unions seek to advance through the ALP their understanding of what is in the 'public interest' with a view to putting that conception of the public interest to the electorate. It is through this process of public deliberation and advocacy that affiliation fees are paid to the ALP. There is something terribly odd about characterising such a situation as giving rise to undue influence or, more specifically, a conflict between public interest and private interest, when it is the meaning of 'public interest' that is being debated and contested.

Underlying this analysis is the view that the presence of undue influence in this context cannot be concluded merely from the fact that political influence *accompanies* the payment of money. Otherwise individual members of parties would be guilty of undue influence simply by exercising their membership rights. Whether influence is undue depends on three other issues: 1) To what extent did such influence result from the payment of money? 2) What is the level of transparency attending such influence? 3) To what degree was such influence directed at a public articulation of the 'public interest'? The thrust of this analysis also means that if wealthy individuals and commercial corporations affiliate as members of a party or spend large sums on political advertising, there is unlikely to be corruption as undue influence; as with trade union membership of the ALP, money is being openly devoted to advancing a particular conception of the 'public interest'. This does not, however, mean that such funding receives a clean bill of health. Whilst the problem of corruption is less pressing, the threat to political equality remains. Because of the greater capacity of business to influence politics through money, the 'public interest' risk being shaped through its disproportionate wealth. The simple truth is that the financial involvement

of business in politics, whether through political contributions, spending on ads or lobbying, always poses this risk regardless of the prospect of corruption.

2 *Misdirected at 'Trade Union Bosses'*

Uniform contribution limits 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. This has, in fact, been welcomed by those discontented with the power wielded by 'trade union bosses' within the ALP. For example, former NSW Premier, Bob Carr, has endorsed his successor's call for banning organisational contributions on the basis that unions will not be able to affiliate to the ALP on a collective basis and instead will have to secure the consent of their members on an individual basis.¹²⁵

There are, in fact, three main complaints bundled up in the epithet, 'trade union bosses', that should be disentangled. The first can be dispensed with quickly. It is the claim that 'trade union bosses' or more kindly, the ALP's link to trade unions is making the ALP unelectable or at least preventing it from becoming 'the natural party of federal government'.¹²⁶ Even if so, this is a matter for the ALP and the voters to decide and not one for regulation, let alone uniform contribution limits.

There are, however, two other complaints that warrant greater examination: one relating to internal party democracy and the other to trade union democracy. It has been argued that the ALP organised in 'a most undemocratic way'¹²⁷ because affiliated trade unions exercise 'a grossly out-of-proportion, even extraordinary, influence over policy formulation'.¹²⁸ 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% of delegates

¹²⁵ Editors, 'Limit political donations: Carr', *The Australian*, 4 May 2008 (available at <http://www.theaustralian.news.com.au/story/0,25197,23643124-2702,00.html> at 21 May 2008).

¹²⁶ Mark Aarons, 'The Unions and Labor' in Robert Manne (ed), *Dear Mr Rudd: Ideas for A Better Australia* (2008) 86, 91.

¹²⁷ *Ibid* 88.

¹²⁸ *Ibid* 88.

in ALP conferences when less than one-fifth of the workforce is unionised?¹²⁹ 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. 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 this context, characterising manner in which ALP organised as being undemocratic simply because its membership base is not wholly representative of the Australian public is somewhat perverse.

It is also perverse for a different reason: reducing trade union influence will not necessarily revitalise the internal democracy of the ALP.¹³⁰ So much can be seen through a rough depiction of the power relations within the ALP by the table below. The party elite comprises the parliamentary leadership, the members of parliament and their staff;¹³¹ the union leadership (including union delegates) and the party officials and bureaucrats. The rank and file, on the other hand, can be said to consist of party members and members of affiliated unions.

Party elite	Union leadership	Parliamentary leadership	Party officials and bureaucracy
Rank and file	Members of affiliated unions	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

¹²⁹ In 2007, union density stood at 19% of the Australian workforce: Australian Bureau of Statistics, *Employee Earnings, Benefits and Trade Union Membership, Australia, August 2007* (cat. no. 6310.0).

¹³⁰ This point is made well by Bolton: Bolton, above n 100, 417.

¹³¹ This would include political advisers; some of which has been criticised as exercising ‘power without responsibility’: Anne Tiernan, *Power Without Responsibility* (2007). Tiernan’s study was focussed on ministerial advisers.

ALP,¹³² 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 ‘party on the ground’ as well as ‘party central office’,¹³³ 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’¹³⁴ of the ALP, that is, its relationship with class forces, diminishing the influence of trade unions will likely mean a corresponding empowerment of business interests but not of the rank and file. Moreover, with the ALP in power at all levels of government, the power of the government bureaucracy needs to be factored in with its influence 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, the answer is not to excise trade unions from the life of the party. Collective organizations like trade unions play a necessary, though at times problematic, role in empowering citizens. The ambivalent character of such organizations is well captured by Michels. He is, of course, famous for his iron law of oligarchy: ‘Who says organization, says oligarchy’.¹³⁵ He is perhaps less well-known for his observation that ‘(o)rganization . . . is the weapon of the weak in their struggle with the strong’.¹³⁶ Within the ALP, collective organizations 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 organizations themselves, functioning well they provide ‘effective internal polyarchal controls’¹³⁷ that counter the oligarchical tendencies of

¹³² For figures, see Gary Johns, ‘Party organisation and resources: Membership, funding and staffing’ in Ian Marsh (ed), *Political Parties in Transition?* (2006) 46, 47; Ian Ward, ‘Cartel parties and election campaigns’ in Ian Marsh (ed), *Political Parties in Transition?* (2006) 70, 73-5.

¹³³ Ward, *ibid.*, 70, 72, 85-8.

¹³⁴ Tom Bramble and Rick Kuhn, ‘The Transformation of the Australian Labor Party’, Joint Social Sciences Public Lecture 8 June 2007, ANU, available at <http://dspace.anu.edu.au/handle/1885/45410>; accessed on 6 May 2008).

¹³⁵ Robert Michels, *Political Parties: A Sociological Study of the Oligarchical Tendencies of Modern Democracy* (1962) 365. Michels’ iron law is better understood as point to the ‘oligarchical tendencies’ of organizations. The title of the last part of Michels’ book is, in fact, ‘Synthesis: The Oligarchical Tendencies of Organizations’: *ibid.*

¹³⁶ *Ibid.* 61. Schattscheider has similarly observed that ‘(p)eople do not usually become formidable to governments until they are organised’: Schattscheider, above n 35, 28.

¹³⁷ Lindblom, above n 101, 141.

the party. By severely diminishing the role of trade unions within the ALP, uniform contribution limits will ironically 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’.¹³⁸ 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 government from systems based on direct democracy and, indeed, this is exactly 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’¹³⁹ that are insulated from effective membership control; a point that may gain some support from the voting record of union members.¹⁴⁰ Yet, and this brings us to the second misconception, uniform contribution limits will do little to meaningfully address this problem.¹⁴¹ At best, what they do is carve out certain decisions from the remit of trade union oligarchies while still leaving the oligarchies intact. Indeed, an argument based on trade union democracy can be mounted against uniform contribution limits: why shouldn’t trade unions be allowed to make political contributions if these decisions are made democratically?

3 *Anomalies of Uniform Contribution Limits*

¹³⁸ Aarons, above n 126, 89.

¹³⁹ Andrew Parkin, ‘Party Organisation and Machine Politics: the ALP in Perspective’ in Andrew Parkin and John Warhurst (eds), *Machine Politics in the ALP* (1983) 15, 22.

¹⁴⁰ Only 63% of union members from 1966 to 2004 voted for the ALP: 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.

¹⁴¹ 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*, 18 March 2008 <<http://www.theaustralian.news.com.au/story/0,25197,23391595-7583,00.html>> at 19 May 2008)

By limiting or even banning contributions from organizations, uniform contribution limits threaten to produce two 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 (e.g. environmental groups seeking to affiliate to the Greens) or those based on occupation or class (e.g. farmers' groups seeking to affiliate to the National Party)?

If uniform limits applying to party contributions are enacted without limits on contributions to third parties and their spending then money will very well flow on to third party activity.¹⁴² 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. 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 parties.¹⁴³ It may also to shift politics away from electoral politics to parliamentary politics, what parties do in parliament, and policy politics, what a party in office does in relation to executive action.¹⁴⁴ In doing so, the challenge of accountability becomes more acute as the control of popular sovereignty is much weaker in relation to parliamentary and policy politics.¹⁴⁵

4 *Unjustified Limitation of Freedom of Political Association*

As discussed earlier, there should be respect for the freedom of parties to organise themselves as they see fit based on the functions they perform. Such respect includes allowing parties to have diverse structures.¹⁴⁶ When viewed from this perspective, the impact of uniform contributions limits on the freedom of party association is quite

¹⁴² See Samuel Issacharoff and Pamela Karlan, 'The Hydraulics of Campaign Finance Reform' (1999) 77 *Texas Law Review* 1705, 1714-5.

¹⁴³ See also Keith Ewing, *Trade Unions, the Labour Party and Political Funding: The Next Step – Reform With Restraint* (2002) para 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.

¹⁴⁴ For the distinction between electoral, parliamentary and policy politics, see Ian Marsh, *Beyond the Two Party System: Political Representation, Economic Competitiveness and Australian Politics* (1995) 35-43.

¹⁴⁵ See discussion in Schattscheider, above n 35, Chapter 8.

¹⁴⁶ See text above accompanying nn 38-46.

severe. Such measures, while not directly banning indirect parties, generally make them unviable unless such parties are able to secure sufficient public funding.¹⁴⁷ The specific impact on the unions-ALP relationship can be illustrated through typology developed by Bodah, Coates and Ludlam. According to these authors, there are two dimensions to union-party linkages, formal organisational integration and level of policy-making influence, thereby giving rise to four types of linkages:

- external lobbying type, i.e. no formal organisational integration between unions and parties with unions have no or little influence in party policy-making;
- internal lobbying type, i.e. no formal organization integration but unions regularly consulted in policy-making;
- union/party bonding type, i.e. unions occupy important party positions but do not enjoy domination of party policy-making; and
- union dominance model, i.e. unions occupy important party positions and dominate party policy-making¹⁴⁸

By making organization integration between the ALP and unions much less viable, the menu of options is effectively restricted to the external/internal lobbying types. As a consequence, the representative and participatory functions of the ALP and, quite possibly, also its agenda-setting function will be impaired.

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. Preventing corruption as undue influence founders upon a false equation of corporate and trade union money.¹⁴⁹ As the previous discussion has argued, complaints of ‘trade union bosses’ are misdirected as uniform contribution limits will neither enhance internal

¹⁴⁷ This seems to be the position in relation to Canadian New Democratic Party that still allows trade unions to affiliate on a collective basis: see Harold Jansen and Lisa Young, ‘Solidarity Forever? The NDP, Organised Labour, and the Changing Face of Party Finance in Canada’, Paper presented to the Annual Meeting of the Canadian Political Science Association, London, Ontario, 2-4 June 2005 (available at <http://www.partyfinance.ca/publications/OrganizedLabour.pdf> at 21 May 2008). See also discussion in Ewing, above n 46, 220-1.

¹⁴⁸ 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, 233-241. 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.

¹⁴⁹ See discussion above accompanying nn 121-124.

party democracy nor invigorate trade union democracy.¹⁵⁰ Absent any compelling justification, it is hard to escape the conclusion that uniform contribution limit represent an unjustified limitation on freedom of party association.

B. Tax Relief is not the Answer

In a co-authored submission to the Committee's inquiry into Schedule 1 of Tax Laws Amendment (2008 Measures No 1) Bill 2008, I drew out how tax relief for political contributions is both inefficient and inequitable. This submission is available at <http://www.aph.gov.au/house/committee/em/taxlawbill/subs/sub009.pdf>

C. A Robust Disclosure Scheme

In arguing a case against uniform contribution limits, this submission may leave a question lingering: if uniform contribution limits are not justified, how do we deal with corruption as undue influence that arises through the sale of access and influence? The answer should involve a mix of measures. Demand-side measures like spending limits are most crucial as it is clear that unsavoury practices in selling access and influence is largely driven by the perceived need to match the spending of competing parties in the context of rising campaigning costs. Focussed measures directed at situations giving rise to serious conflicts of interest should be supported including bans on contributions from companies and persons holding or tendering for government contracts. We should also look to increasing the accountability of company directors to share-holders for their decisions to make political contributions by requiring that share-holders periodically authorise such contributions.

Another vital regulatory measure is a robust disclosure scheme. The Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill 2008 (Cth) should be welcomed for putting in place key elements of such a scheme. In particular, its banning of foreign-sourced and anonymous contributions, its introduction of bi-annual reporting together with the reversal of the regressive increase in disclosure thresholds enacted by the previous Parliament are measures that will significantly enhance the transparency of Australian political finance. They should also be supplemented by other amendments, in particular, weekly reporting during election

¹⁵⁰ See discussion above accompanying nn 128-140.

campaigns and more detailed disclosure returns. These and other measures are detailed in the co-authored submission I made to the Committee's 2005-2006 inquiry into Electoral Funding and Disclosure.¹⁵¹

That submission, while arguing for increased transparency of Australian political funding, also stressed that disclosure schemes are inherently limited in their ability to prevent corruption as graft and undue influence. While disclosure schemes expose details of the funding received by parties, they do not cast light on the effect of such funding. It then becomes a matter of conjecture as to whether, in the case of graft, favourable treatment by a political party or its representative resulted from a donation. Similarly, in some cases of undue influence, a bystander can only speculate as to whether political access or influence secured by a donor resulted from a donation. In other words, the effectiveness of funding disclosure schemes in preventing graft and undue influence flounders upon the problem of proving a causal link between preferential treatment and donations, which is always of course denied.¹⁵² Apart from the problem of proof inherent in the funding disclosure scheme, this scheme is also limited in another respect. It cannot *solely* prevent the selling of political access and influence, because parties, which engage in such sales, clearly accept that fund-raising practices are acceptable. Political parties affirm these fund-raising practices even when they clearly involve the undue influence of politicians: i.e. access to and influence on political power is secured through the payment of money.

The inherent limitations of the funding disclosure scheme must be taken seriously. They are one of the key reasons for considering other regulatory methods. They do not, however, signify that the funding disclosure scheme has no role in achieving the sort of transparency that can deter *some* corruption as graft or undue influence. Instead, such schemes should not be invested with elixir-like qualities and expected,

¹⁵¹ See Joo-Cheong Tham and Graeme Orr, *Submission to JSCEM's Inquiry into Electoral Funding and Disclosure* (2005) 10-19 (available at <http://www.aph.gov.au/house/committee/em/donations/subs/sub5.pdf>; accessed on 27 May 2008).

¹⁵² This problem of proof was in fact, highlighted by the recent report by the Senate Select Committee on Ministerial Discretion on Migration Matters, which investigated, among others, the 'cash for visa' allegations. After referring to its attempt to 'explore any connection between Mr Karim Kisrwni's political donations and the minister's exercise of his discretion', the Committee concluded that it 'was unable to determine the extent of community or political bias in the exercise of the powers because there was no way it could check who or what influenced the minister's decision to intervene': Senate Select Committee on Ministerial Discretion in Migration Matters, *Report* (2004) xv-xvi.

even if ‘loophole free’, to banish graft and undue influence simply by virtue of making transparent the funding of parties. A much more modest role should be reserved for funding disclosure schemes in the fight against graft and undue influence.¹⁵³ Such a role, while attenuated, will still be significant. For example, funding disclosure schemes still serve to put the public – via a virile media – on notice of the risk of corruption. If armed with such information, independent journalists (and indeed in a truly competitive electoral system, rival parties) will vigorously ‘shine a bright light and poke around with a long stick’,¹⁵⁴ thereby forming a useful antidote against graft and undue influence. In the context of lazy journalism and lax political morality, however, the information disclosed by the disclosure scheme will by and large remain meaningless. In the worse case scenario, the disclosure of the frequency and the amount of donations received by the parties may simply contribute to the perception that political parties are regularly trading away the public interest to monied interests. In such situations, a funding disclosure scheme, far from shoring up the integrity of the electoral system, may corrode the public’s trust in democracy.

It is important though to note that a funding disclosure scheme is still relevant in preventing corruption as graft and undue influence, because other regulatory devices will not work without it. For instance, caps on contributions and expenditure limits will help prevent graft and undue influence. Neither, however, could work without a funding disclosure scheme that ensures that party finances are sufficiently transparent.

D. *Campaign Expenditure Limits*

As argued by Eric Roozendaal, there is a strong case for putting in place limits on campaign spending. There are two main reasons. First, it helps protect the integrity of political representation (‘the anti-corruption rationale’) and, secondly, as Roozendaal puts it, it has ‘the purpose of achieving a fairer political process’ (‘the fairness rationale’).¹⁵⁵

¹⁵³ Such schemes clearly have a role beyond preventing corruption and undue influence. For one, they provide invaluable information relating to the funding of parties.

¹⁵⁴ Ewing, above n 135, 29.

¹⁵⁵ New South Wales, *Hansard*, Legislative Council, 21 September 2004, <[http://www.parliament.nsw.gov.au/prod/parliament/members.nsf/0/d9ccd231bed39458ca256ebe0004b5ab/\\$FILE/Roozendaal.pdf](http://www.parliament.nsw.gov.au/prod/parliament/members.nsf/0/d9ccd231bed39458ca256ebe0004b5ab/$FILE/Roozendaal.pdf)> at 28 January 2008 (Eric Roozendaal).

The anti-corruption rationale¹⁵⁶ argues that expenditure 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.¹⁵⁷ The need for such limits is underscored by the fund-raising practices of the parties and the evidence of an intensifying ‘arms race’. If effective, expenditure limits will also regulate the time spent by the parties on fund-raising and allow them to devote more time to their legitimate functions. The 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 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, expenditure limits can also perform a *remedial function*. For instance, if present spending levels were judged to be excessive and to carry an inordinate risk of corruption, expenditure limits could be aimed at decreasing the amount of real spending and, in turn, the risk of graft and undue influence.

The fairness rationale contends that fair electoral contests demands the imposition of constraints on campaigning costs through campaign expenditure limits.¹⁵⁸ Campaign expenditure has positive, albeit limited electoral impact (something parties implicitly recognise) and expenditure limits can promote fair access to the public arena and fair rivalry amongst the parties. The fairness rationale can, in fact, be explained in a way that every Australian who follows sport will clearly understand. By analogy with the ‘salary cap’, expenditure limits on campaigns will help avoid unhealthy monopolisations of campaign advertising/marketing systems (helping to ensure that ideas and policies – assuming a responsible media – are not drowned out). But also by dampening down inflation in campaigning, expenditure limits will help ensure the long-term stability of the parties and their branches.

¹⁵⁶ Keith Ewing, ‘Promoting Political Equality: Spending Limits in British Electoral Law’ (2003) 2 *Election Law Journal* 499, 507.

¹⁵⁷ Neill Committee Report, above n 75, 116-7.

¹⁵⁸ *Ibid.*

Nonetheless, it remains to be considered various arguments against expenditure limits. There is the argument that expenditure limits are ‘unenforceable’¹⁵⁹ or ‘unworkable’, which are usually presupposed by Australia’s experience with expenditure limits.¹⁶⁰ 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 proxy for two specific arguments. It is said that ‘(a)ny limits set would quickly become obsolete.’¹⁶¹ Moreover, these limits are seen overly susceptible to non-compliance.¹⁶²

It is possible to quickly dispense with the first argument. For instance, the problem with obsolescence can be dealt with 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.

¹⁵⁹ Ibid 172.

¹⁶⁰ Commonwealth of Australia, *Inquiry into Disclosure of Electoral Expenditure* (1981) 8-9 (‘Harders Report’) 13.

¹⁶¹ Neill Committee Report, above n 75, 172.

¹⁶² 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: Harders Report, above n 207, 18. But 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* (1981) 499-500.

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 fairly robust approach towards ‘front organisations’ found in the *CEA*. 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.¹⁶³

A separate issue faced by political finance laws lies with third parties, that is, political actors which are not parties or sufficiently related to the political 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 were substantial third-party electoral activity, a regulatory framework centred upon parties and their associated entities would, in many ways, miss the mark by failing to regulate key political actors.

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, given that it is unenforceable to some extent because of these circumstances. 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.

¹⁶³ 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.

Lastly, it is said that expenditure limits constitute an unjustified interference with freedom of speech.¹⁶⁴ 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 freedom of political communication will be unconstitutional.¹⁶⁵ The question of principle can in fact be usefully approached by applying the test for constitutionality. In short, the question of principle and that of constitutional validity can be approached in the same breath.

The High Court has held that a legislative provision will be invalid if:

- it effectively burdens freedom of communication about government or political matters either in its terms, operation or effect; and
- it is not reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with representative and responsible government.¹⁶⁶

With respect to the first criterion of invalidity, expenditure limits do not, on their face, burden freedom of political communication, because their immediate impact is on the spending of money. Indirectly however, these limits do impose a tangible burden on such a freedom. This occurs because the lion share's of such expenditure is spent on communicating political matters whether it be promoting a policy or criticising parties. This is especially the case with political broadcasting which has been found by the High Court to come within the scope of protected communication.¹⁶⁷

It is important to note, however, that the weight of this burden will depend on the design of limits. The level at which the limit is pitched will be significant, with the lower the level, the heavier its burden on the freedom of political communication. Clearly, following the *Australian Capital Television* case, such limits would have to be high enough to allow for a reasonable amount of broadcast advertising by the party or group concerned. It might be noted here that quite low expenditure limits apply

¹⁶⁴ Neill Committee Report, above n 75, 118.

¹⁶⁵ The vulnerability of expenditure limits to arguments based on political freedoms also exist in the UK, see discussion of *Bowman v United Kingdom* (1998) 26 EHRR 1 in Ewing, above n 156, 505-7.

¹⁶⁶ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567. A modification of the second limb of the *Lange* test was accepted by four of the judges in *Coleman v Power* (2004) 220 CLR 1.

¹⁶⁷ See *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

across the board in Tasmanian Upper House elections.¹⁶⁸ Similarly, the burden will depend on whether the limit is instituted through a simple prohibition, as in the UK, or as a condition on public funding.¹⁶⁹ If the latter is adopted, the burden on freedom of political communication will be much less as parties can still choose not to receive public funding and hence, be exempt from campaign expenditure limits.

Given that campaign expenditure limits invariably impose, to some degree, a burden on the freedom of political communication, the critical question then is whether the instituted limit is reasonably appropriate and adapted to a legitimate aim. At the outset, it can be categorically said that expenditure limits do not *necessarily* fail this test of proportionality. There are clearly legitimate aims that can be invoked, namely, the anti-corruption¹⁷⁰ and the fairness rationales. Whether an expenditure limit is an unjustifiable interference with freedom of political speech and/or unconstitutional cannot be answered in advance. The answers to these questions will depend on the design of the limits.

It should be noted that electoral expenditure limitations apply in our chief common law comparators: the UK, Canada and New Zealand (see Table 5). Each of those countries has not only strong traditions of liberal democracy, but constitutional and court jurisprudence based on rights including liberty rights (Canada in particular with its *Charter of Rights* and the UK with the *Human Rights Act*). There is no reason to presume that similarly crafted expenditure limits for Australian elections would infringe the ‘implied freedom’ doctrine.

Table 5: Expenditure limits of selected countries

	Canada	New Zealand	UK	Australia
Spending limits	Yes and calculated according to the number of listed electors in the	Yes If contests party vote, limit of NZ\$1 million plus NZ\$20	Yes and calculated according to seats contested	Only for Tasmanian Legislative Council elections

¹⁶⁸ Approximately \$9000 per Legislative Council candidature – this amount includes parties and supporters.

¹⁶⁹ If this method were adopted, other measures would have to be implemented to bring third parties, which do not receive public funding, within regulatory regime.

¹⁷⁰ This rationale was accepted in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

	contested electoral district	000 for each electorate candidate nominated by the party If does not contest the party vote, limit NZ\$20 000 per nominated candidate
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Finally, it should be emphasised that the question of campaign expenditure by the parties cannot be separated from the ability of governing parties to use government resources for partisan purposes, in particular, government advertising. Indeed, restricting the amount Opposition parties can spend while leaving governing parties free access to the public purse to run their ads will be deeply inequitable. While this submission has not tried to do justice to the question of government advertising,¹⁷¹ it recommends a separate inquiry into that topic.

It is therefore recommend that:

- campaign expenditure limits be supported in principle;
- the design of such limits be further investigated, particularly with reference to recent reforms in the UK, Canada and New Zealand; and
- an inquiry be conducted into government advertising.

E. Other Measures to Deal with Corruption

1 Ban on Contributions From Companies and Individuals With Government

Contracts

The potential for political donations to become linked to Government decisions benefiting donors was most starkly illustrated in Australia by the Queensland “Fitzgerald” Royal Commission. The Bjelke-Petersen National Party Government awarded lucrative contracts to donors to the Party’s Bjelke-Petersen Foundation.¹⁷²

¹⁷¹ See generally Sally Young and Joo-Cheong Tham, *Political Finance in Australia: A Skewed and Secret System* (Audit Report No 7), Chapter 4.

¹⁷² Tony Fitzgerald, *Report of a Commission of Inquiry into Pursuant to Orders in Council* (1989).

While there is no evidence that such corrupt processes occur on a widespread basis in Australia, the sums involved in government contracts for goods and services provide massive incentives for prospective suppliers to attempt to influence decisions on awarding those contracts.

In other jurisdictions, firm regulatory measures have been enacted to deal with the risk of graft that stems from such decisions. Canadian law imposes a ban on contributions from Crown corporations and corporations that receive more than 50 per cent of their income from the federal government. In the United States, a broader ban applies, with contributions from persons or companies with contracts with the federal government rendered completely illegal. Such regulation reflects the notion that contributions from donors that have a particularly strong interest in governmental action carries a serious danger of graft and, therefore, should be limited.

It is thus recommended that a ban on contributions from persons or companies with government contracts be instituted, based either on Canadian or United States law.

2 *Limits on Individual Contributions and Tailored Limits on Organisational Contributions*

There is a strong case for instituting limits on contributions from individuals in order to protect the integrity of political representation. Such limits will 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 as undue influence and counter the corporatisation of politics. The United States and Canada, for example, have instituted caps on individual donations.

Table 6: United States and Canadian caps on individual donations

	Limits on individual donations to candidates	Limits on individual donations to parties etc
United States	US\$2100 to each candidate per election cycle	US\$26 700 to each national party committee per election cycle

	US\$40 000 to all candidates per election cycle	US\$5000 to each political committee or state party committees per election cycle
	US\$101 400 per election cycle for all contributions	US\$61 400 for political committees per election cycle
		US\$101 400 per election cycle for all contributions
Canada	C\$1000 to each registered political group (i.e. party, district associations and endorsed candidates) per annum	
	C\$1000 to each candidate not endorsed by a registered party per election	

More difficult questions may arise in relation to extending these limits to organisations like companies, trade unions and community groups. Earlier in the submission, a case was made against *uniform* contribution limits. This still leaves the question: should organisational contributions be restricted if individual contributions are to be capped? The answer is yes. Otherwise, the caps on individual contributions can be easily evaded. Also, the corruption of politics that has occurred through the sale of access and influence needs to be dealt with. Restrictions on organisational contributions should, however, pay heed to the differences between trade union and corporate contributions.

One way forward is to adopt the recommendation of the UK Power Inquiry that organisational contributions be subject to caps that vary according to the number of members who are natural persons and be subject to full democratic scrutiny within the organisation.¹⁷³ This recommendation has several virtues. By linking the level of caps

¹⁷³ The Power Inquiry, *Power to the People: An Independent Inquiry into Britain's Democracy* (2006) 210-1 (copy on file with author).

to the number of individual members, it is informed by the principle of political equality. It requires intra-organisational democracy and, in doing so, promotes greater transparency. In addition, by allowing for collective or group membership affiliations, it respects the diversity of party structures. Under this recommendation, trade unions, religious and environmental groups, as well as organisations of farmers and shareholders can still contribute to and be members of parties. Businesses will still be able to contribute funding, but the amount they can give will depend on the number of shareholders who are natural persons.

Two final points should be made. The condition of full democratic scrutiny within the contributing organisation is likely to require that trade union and corporations respectively seek specific authorisation from their members and shareholders before making political contributions. 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.¹⁷⁴ Similarly, 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.¹⁷⁵ Another possible model are the UK controls on the 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 which individual members have a right to refrain from contributing to. 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.¹⁷⁶

These models are certainly worth considering. If they are instituted, the controls on trade union and business donations should be simultaneously introduced as a matter of political equality. Imposition of trade union controls without equivalent restrictions on business donations would, for example, be a serious violation of this principle: it

¹⁷⁴ Former section 97P of the *Industrial Relations Act 1979* (WA). This requirement was in force from 1997 to 2002.

¹⁷⁵ Murray, above n 6, [2.2] (trade unions) and [5.5] (corporations)).

¹⁷⁶ For the requirements applying to trade union political expenditure, see discussion in Ewing, above n 23, Chapter 3; and Keith Ewing, *Trade Unions, the Labour Party and the Law: A Study of the Trade Union Act 1913* (1982).

would disadvantage political participants that have a prima facie entitlement to democratic representation, while favouring those who have no such right.

Lastly, it is quite possible that adoption of this recommendation will result in a disparity of resources between the ALP and the Coalition parties, with trade union funding still flowing strongly to the ALP, while corporate funding is restricted. This is not necessarily unwelcome. Indeed, it is a natural consequence of distinguishing between democratically constituted and plutocratic organisations: trade unions and democratically organised groups whether be of people of faith, environmentalists or farmers should not be placed on the same footing as commercial corporations. At the same time, it does give rise to unfairness in elections when one of the parties contending for the office of government has resources far superior to its competitors. This, however, is not a sufficient reason for rejecting caps on organisational contributions. Such unfairness should be prevented instead by appropriate campaign expenditure limits.

It is therefore recommended that:

- caps be placed on individual contributions;
- caps be placed on organisational contributions varying according to the number of members who are natural persons and subject to full democratic scrutiny; and
- Measures to improve the internal accountability of companies and trade unions be considered and, if instituted, introduced simultaneously.

F. Establishment of Party Support Fund

A Party Support Fund should be established with three components. First, it should provide *election funding payments*. The threshold for eligibility for these payments should be 2% of first preference votes cast in Senate elections and 4% of first preference votes cast in a House of Representative election. The amount of payments should be subject to a tapered scheme with the payment rate per vote decreasing according to the number of first preference votes received. For instance, the first 5% of first preference votes received by a party could entitle it to a payment of \$2.00 per vote, while a payment rate of \$1.50 per vote applied to the next 20% of first

preference votes and a payment rate of \$1.00 per vote attached to votes received beyond the 25% mark.

Second, the Fund 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. Third, the Party Support Fund should include *policy development grants*. These could be modelled upon the policy development grants under the UK political finance scheme.¹⁷⁷ 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 establishment of a Party Support Fund as described above will ensure that parties are adequately funded especially in light of the drop in private funding once contribution limits are adopted. More than this, a Party Support Fund scheme funds parties in a way that promotes fairness, especially by financially assisting parties with significant electoral and/or membership support through a tapered scheme. This is akin to a progressive income tax system, with less resourced parties helped to a greater degree. Also, the payment of public funds is explicitly tied to the promotion of party functions. The policy development grants should encourage parties to devote more time and energy to generating new ideas and policies. Linking annual allowances to membership figures may result in the parties recruiting more members and thereby, invigorating themselves. Both may result in a richer democratic deliberation.

It is therefore recommended that a Party Support Fund be established providing for:

- Election funding payments;
- Annual allowances; and
- Policy development grants.

¹⁷⁷ *Political Parties, Elections and Referendum Act 1998* (UK) s 12.