

Donation and Spending Limits in Political Finance Law and their Compatibility with the Australian *Constitution*

ANTHONY GRAY

University of Southern Queensland

Events of 2014, particularly in New South Wales and Queensland, have sharpened focus on the relation between money and politics, with calls for increased regulation of donations to, and expenditure by, political parties. This is despite the existence of other features of our political system seeking to limit corruption, like disclosure laws, anti-corruption bodies, independent media, and Australia's standing as one of the least corrupt countries. This paper considers whether caps on political donations and limits on election spending are consistent with the Australian *Constitution*. The High Court has found that document requires freedom of political communication. This is subject to laws passed to further a legitimate objective, where their impact on the freedom is proportionate to a legitimate objective. Here, likely justifications for such restrictions are the need to reduce corruption and to create a level playing field. This article challenges both arguments, suggesting such restrictions are constitutionally invalid.

Introduction

The year of 2014 saw a flurry of activity in the area of electoral finance. The Newman Government controversially repealed donation limits, spending caps and other measures introduced by the former Queensland Government in 2011. Allegations that a major donor to the Queensland Government sought, but was refused, "special treatment" in relation to his business dealings were the subject of an anti-corruption investigation and are the subject of a pending defamation case.¹ Other jurisdictions have moved to regulate this area. Events at the 2014 Independent Commission Against Corruption (ICAC) inquiry in New South Wales suggested the ease with which measures designed to stamp out corruption can be circumvented by determined participants. With this flurry of reform, electoral finance law has become a fast-growing field of scholarly endeavour, in some ways "cornering the market" of electoral finance discussion, at least to date.

The law with respect to financial aspects of politics, or "electoral finance law", must contend with competing philosophies. In the classic liberal tradition, there are those who argue for very limited legal restriction on how politics is conducted, including laws with respect to political donations, and laws with respect to political spending, on the basis that the exercise of these freedoms should only be minimally impeded by regulation, for instance to the extent that the exercise of these freedoms impacts on rights of others, or where, if the contest between political actors and ideas (ideals) is seen as some kind of "market", there is observed to be market failure.

¹ "Palmer Claims Could Rebound on Premier", *Australian*, 9 June 2014, p.2.

This philosophy would emphasise the essential right of all in liberal democratic society to participate in electoral affairs, including standing for office, advocating a particular candidate and/or their views, criticising a particular candidate and/or their views, or otherwise participating in electoral life by expressing views on political matters, having access to views on political matters, being able to find out about processes of government in order to gauge the performance of a government, the right to associate with others in order to further particular causes, the right to (peacefully) protest, as well as the right to vote.² It would include the right to express support for a particular candidate, party or cause by donating money. Ewing states that the legitimacy of liberal democracy is dependent on the ability of individuals to participate in the process of representative government, by becoming members of and participants in the affairs of political parties.³ This has implications for electoral finance laws, since clearly many donations to political candidates or parties are drawn from members of that party or participants in that party's activities.

On the other hand, others believe that significant regulation is justified. This might reflect a view of liberalism as simply reflecting and reinforcing entrenched societal and economic interests.⁴ As will be elaborated upon below, typical justifications given for regulation include that the law must guard against the perennial danger of corruption, or perceptions of corruption, or that the law must work to make the playing field more "level", whatever the basis is of such an assertion, and with confidence that regulation can in fact achieve greater "equality", assuming that to be a desirable thing. Ewing writes that the argument for regulation has strengthened as the role of the state has evolved, away from service provider and towards facilitator of service provision, increasing the risk that some will seek to obtain favour with the government as a would-be "service provider".⁵

Advocates of this view might believe that a *laissez-faire* approach to electoral law perpetuates existing power structures within a society, that the existing systems serves to favour some "actors" over others, that the weak remain marginalised by such a system, and that a *laissez-faire* approach tends to reinforce the *status quo* of politics, which may be contrary to the wishes and will of the people.

There are various means by which the law might regulate financial aspects associated with elections and politics more generally. It might provide substantial public funding for political parties sufficient to meet the costs of modern campaigning. It might provide for the reporting of donations on a regular and timely basis, and for this to be publicly available information. This would include the declaration of gifts that politicians received from others, the subject of the recent downfall of the New South Wales Premier, Barry O'Farrell. Of course, this serves to increase accountability and helps to reduce the possibility, or the perception, of corruption. It is doubted that many would have a serious objection to regular and timely reporting by political parties

² Sarah Maddison, "Redefining Democracy", in Clive Hamilton and Sarah Maddison, *Silencing Dissent: How the Australian Government is Controlling Public Opinion and Stifling Debate* (Sydney, 2007), pp.28-29.

³ Keith Ewing, *The Costs of Democracy* (Oxford, 2007), p.33.

⁴ "There are many – not without cause – who see liberal democracy as an illusion, as a process in which economic power governs through political institutions": Ewing *The Costs of Democracy*, p.33.

⁵ Keith Ewing, "Political Party Finance: Themes in International Context", in Joo-Cheong Tham, Brian Costar and Graeme Orr, *Electoral Democracy: Australian Prospects* (Melbourne, 2011), pp.146-147; Ewing, *The Costs of Democracy*, pp.25-26.

or individuals of donations or gifts they have received, so this will not be further explored.

Most states by now have anti-corruption bodies charged with investigating allegations of corruption or impropriety, usually involving the political process. Events of 2014, particularly in New South Wales, reinforced the importance of such bodies in the uncovering of legally and/or morally questionable behaviour by public officials. The work of these bodies like ICAC and the Crime and Corruption Commission (CCC) in Queensland will not be further explored here, but it is important to acknowledge their work in light of the broader picture of regulation of political financing. Of course, police also have a role in investigating and prosecuting financial impropriety by public officials, including politicians. Testament to this has been the jailing of ex-government ministers in various jurisdictions for fraud in relation to financial dealings.

Obviously, the media also plays an important role in bringing to light many matters, including possible financial irregularities involving political parties and politicians. Perhaps the most famous example in recent Australian political history was the work of Phil Dickie (*Courier Mail*) and Chris Masters in his *Four Corners* story “The Moonlight State” regarding corruption in Queensland political life in the 1980s, leading to the setting up of the Fitzgerald Inquiry, and significant reforms to tackle then-endemic corruption in Queensland public life. A strong and independent media, as we currently have in Australia, also provides part of the “bigger picture” in which electoral finance laws operate.⁶

Having acknowledged the importance of transparency of donations, strong anti-corruption watchdogs, and a strong and independent media, in regulating political finance, the focus in this paper will be on newer types of regulation of political finance in Australia, specifically laws which limit donations to political parties, and laws which limit spending by political parties. The purpose is to assess their compatibility with the implied freedom of political communication found in the Australian *Constitution*, a freedom which itself reflects the tension between liberalism and “reasonable” government regulation. The existing New South Wales regime will be used as the exemplar.⁷

Outline of a Typical State Regime

The legislation limits the extent to which an individual can make a “political donation”.⁸ As enacted, the limit (subject to Consumer Price Index adjustment) is \$5,000 per year to a political party, and \$2,000 per year to a particular candidate, or to

⁶ “Freedom of the press is inextricably linked with the centuries-long evolution of Westminster-based democratic traditions”: Helen Ester, “The Media”, in Hamilton and Maddison, *Silencing Dissent*, p.108; Andrew Geddis, “The Press: The Media and the ‘Rupert Murdoch’ Problem”, in Keith Ewing, Jacob Rowbottom and Joo-Cheong Tham, eds., *The Funding of Political Parties* (New York, 2012); Sally Young, “Disclosure, Accountability and the Role of the Media”, in Tham, Costar and Orr, *Electoral Democracy*.

⁷ *Electoral Funding, Expenditure and Disclosure Act 1981* (NSW) (NSW Act); see also Part 13A *Electoral Act 1985* (SA) (to commence in mid-2015) and Part 14 *Electoral Act 1992* (ACT). The 2011 Queensland donation and expenditure caps were removed by the *Electoral Reform Amendment Act 2014* (Qld). See for discussion Graeme Orr, *Putting the Cartel Before the House? Public Funding of Parties in Queensland*, presentation at Electoral Regulation Research Network Seminar, 18 June 2014, Griffith University.

⁸ This is defined as a gift made to or for the benefit of a political party, candidate or third party, or a payment made to attend an event (s85).

a third party.⁹ It is unlawful for the political party, candidate or third party to receive political donations in excess of those amounts.¹⁰ The legislation also applies a cap on electoral expenditure. The cap applies in the period between 1 October in the year preceding when the election is held, and the election (which is always during March). The spending cap is \$100,000 multiplied by the number of electoral districts in which the party endorses a candidate,¹¹ with a cap of \$100,000 for an individual candidate endorsed by a party and running for the lower house¹² (\$150,000 if they are an independent).¹³ A spending cap of just over \$1 million applies to a registered third party, one half that amount for an unregistered third party.¹⁴ There is an additional cap on expenditure mentioning the name of a candidate or name of an electorate, if it is communicated mainly to those in the electorate, of \$50,000, or \$20,000 for a third party campaigner. These provisions formerly effectively¹⁵ prohibited corporations from making political donations, directly or through an individual, but this was declared invalid by the High Court in late 2013.¹⁶ Donations from property developers, or those in the business of tobacco, liquor or gambling, are prohibited.¹⁷ The question is whether there are any legal arguments that these laws might be constitutionally invalid.

Constitutional Validity of Regulation of Political Donations and Political Spending

Clearly enough the Australian system of government envisaged by our *Constitution* can be described as a liberal democracy.¹⁸ Obviously, those drafters had two model approaches open to them, that of a British Westminster system, and that of the United States Constitution. The Australian *Constitution* is often described as a “Westminster” model, intending to convey that it reflects an amalgam of principles, values, and provisions derived from both the United Kingdom and United States constitutional arrangements. On the question of rights protection, the drafters adopted the Westminster model, declining to incorporate an express bill of rights. Their experience had not taught them the need for an express protection of rights.¹⁹ Our *Constitution* was not crafted in the furious days following a rebellion against an autocratic government; it reflected an evolution, rather than a revolution. The drafters placed their faith in systems of representative and responsible government to preserve human rights. Human rights would be protected by the common law, but would be subject to being overridden by (valid) Act of parliament.

Importantly, and in contrast with the United Kingdom, Australia chose to have a written constitution, like the Americans. This was perhaps inevitable with the federal

⁹ s95A.

¹⁰ S95B.

¹¹ S95F(2).

¹² S95F(6).

¹³ S95F(7).

¹⁴ S95F(10).

¹⁵ This was in the form of a ban on accepting donations from an individual or entity not on the electoral roll (s96D(1)).

¹⁶ *Unions NSW v New South Wales* [2013] HCA 58, on the basis that it was contrary to the implied freedom of political communication. Further discussion appears in Graeme Orr, *The Law on Funding Party Campaigns*, 2nd Australian and New Zealand Workshop on Campaign Management and Political Marketing, Sydney University, July 2014.

¹⁷ S96AA.

¹⁸ A textual basis in the *Constitution* includes ss.7 and 24, expressly providing that representatives of the Senate and House of Representatives respectively shall be directly chosen by the people.

¹⁹ Sir Owen Dixon, *Jesting Pilate* (Buffalo, 1965) p.102.

structure that was itself inevitable given that the colonies preceded the national government. A key task of this document was the allocation of powers between different levels of government. Australia accepted the notion of judicial review, allowing a court to declare a law to be invalid if it was deemed to be contrary to the Australian *Constitution*. This path had been led by the United States Supreme Court in the celebrated decision of *Marbury v Madison* in the early nineteenth century, confirming the power of a court to pass judgment on the constitutionality of Acts.²⁰

Another feature of the Australian *Constitution* is its sparseness, comprising 128 generally short sections of no more than one paragraph. In this way it stands in marked contrast to much of the legislation made pursuant to it,²¹ with complaints often levelled against income tax legislation and company law legislation for its level of specificity, and complexity. It can be argued that the document was deliberately cast in sparse terms as the fundamental legal document of the nation, a document very difficult to formally amend. Arguably the drafters intended that the meaning of the words used would change over time, to reflect changes in community values, and challenges and issues that could not possibly be contemplated by the drafters.

Perhaps as a result of the relative sparseness of the document, questions have arisen as to the extent to which principles can be implied from the document. This is particularly important in the human rights area, given the general lack of express rights protection in the document. There is a history of High Court judges, including some who helped draft the document, holding that implications could and should be drawn from the document. For instance, in the early case of *Rex v Smithers*, Chief Justice Griffith and Justice Barton spoke of a citizen's right to come to the seat of government to assert claims on the government and to engage in administering its functions.²² In the landmark *Engineers* decision certain implications that had been drawn from the *Constitution* were rejected. However, Australian jurisprudence moved on, such that in 1937 perhaps our most revered High Court justice ever noted:

Since the *Engineers* case a notion seems to have gained currency that in interpreting the Constitution no implications can be made. Such a method of construction would defeat the intention of any instrument, but of all instruments a written constitution seems the last to which it could be applied.²³

In the 1990s, during a time in which the Court was in a progressive phase, it discerned in the system of democratic governance clearly established by the *Constitution* an implied freedom of political communication.²⁴ Given the similarity between the facts in that first case and the facts here, it is worthwhile considering them in some detail.

The case involved legislation banning a broadcaster from broadcasting political advertising during an election period. It also required broadcasters to provide free time for election broadcasts, based largely (90 per cent) on the number of votes obtained by the particular political party at the previous election. There was discretion in awarding 10 per cent of the free time, but it would likely be allocated to parties successful at the

²⁰ 5 US (1 Cranch) 137 (1803).

²¹ The *Constitution* is the enabling document for all legislation made in Australia. It confers power on the federal parliament to pass laws in nominated areas (see in particular s.51 of the Australian *Constitution*), and power on state parliaments to pass laws (s107). All legislation passed in Australia is subject to the Constitution, and must be consistent with the *Constitution*. The ability of both federal and state parliaments to pass legislation is conferred by the Australian *Constitution*.

²² (1912) 16 CLR 99, 108 (Chief Justice Griffith), 109-110 (Justice Barton).

²³ *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657, 681.

²⁴ *Australian Capital Television Pty Ltd v Commonwealth of Australia* (1992) 177 CLR 106.

previous election. This would disadvantage fledgling parties, or new independent candidates, from securing much (or any) free time. Other would-be advertisers, including businesses and unions, were also prohibited from advertising during the election period. A majority of the High Court declared the law to be invalid, infringing a constitutionally implied freedom of political communication.

The majority relied on provisions to the effect that parliament was to be chosen directly by the people to imply a freedom to communicate about political matters. Part of the freedom applied to elected representatives and their explanations of their decisions and actions, so voters could assess their performance. However, it was much broader, including the ability of voters, as well as other groups in society, to contribute to public debate about political matters. The freedom was not absolute in nature. In other words, some regulation of political communication might be acceptable, if it was proportionate to a legitimate end. A two-stage test was applied, considering (a) whether the law burdened political communication in terms or effect, and (b) whether, if it did, the burden was proportionate to the attainment of a legitimate objective (known as the “*Lange* limbs”).²⁵ The court emphasised, however, that it would not necessarily take at face value claims by politicians that restrictions on political communication were justified, for instance to deal with corruption.²⁶

Members of the court drew a distinction between restrictions based on content, and restrictions on the mode of communication. Restrictions of the former type would be much harder to justify.²⁷ In subsequent cases, this distinction has to some extent morphed into a discussion about laws with a direct impact on political communication, and laws with another purpose, with an incidental impact on political communication. Again, laws of the former type would be more difficult to justify.²⁸ Case law since the initial case has also clarified other dimensions of the implied freedom of political communication.²⁹

Andrew Norton has reflected on the Australian *Constitution*’s liberal democratic basis, and its connection with the implied freedom, as follows:

Creating checks and balances on the power (of the state) is the key goal of liberal-democratic constitutionalism [...] political rights and freedoms, including giving and spending money for political reasons, are a necessary element of this system [...] (so) liberal democrats should see state controls on political donations and spending as deeply suspicious. These controls limit the capacity of people who are not in power to oppose the people in power [...] donations caps limit the fundraising potential of opposition parties or candidates [...] donation bans partially strip some

²⁵ The limbs were developed in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567.

²⁶ *Australian Capital Television Pty Ltd*, 145 (Chief Justice Mason), 239-240 (Justice McHugh).

²⁷ *Australian Capital Television Pty Ltd*, 143 (Chief Justice Mason), 169 (Justices Deane and Toohey), 234-235 (Justice McHugh).

²⁸ *Hogan v Hinch* (2011) 243 CLR 506, 555 (Justices Gummow, Hayne, Heydon, Crennan, Kiefel and Bell); *Wotton v State of Queensland* (2012) 246 CLR 1, 16 (Chief Justice French, Justices Gummow, Hayne, Crennan, Kiefel and Bell); *Monis v The Queen* (2013) 295 ALR 259, [64] (Chief Justice French).

²⁹ For instance, the freedom is negative in nature, being a defence to the application of a particular law, rather than a source of positive rights. The freedom applies at both state and federal level (*Stephens v Western Australian Newspapers* (1994) 182 CLR 211), and it applies to verbal and non-verbal communication (*Levy v State of Victoria* (1997) 189 CLR 579). Generally a broad view of the word “political” in the first limb has been taken: *Coleman v Power* (2004) 189 CLR 579; *Monis v The Queen* (2013) 295 ALR 259.

organisations and individuals of political rights to oppose the government [...] general limits on 'third party' political expenditure protect governments from big campaigns against them.³⁰

In December 2013, the High Court in *Unions NSW v New South Wales* upheld a constitutional challenge to part of the New South Wales donation laws. The Court found the blanket ban in s96D on political donations by any person not on the electoral roll, and any organisation or corporation, was constitutionally invalid as offending the implied freedom of political communication. These individuals and organisations could make an important contribution to political debate, and had a legitimate interest in government action and policy.³¹ Provisions aggregating, for the purposes of expenditure limits, donations by industrial organisations were also declared invalid. Both provisions burdened political communication, in terms of (a) of the *Lange* limbs.³² In terms of (b), neither the ban on individuals and organisations donating, or the aggregation of donations by industrial organisations for the purposes of applying spending limits, related to a legitimate objective.³³

This case did not involve a challenge to the general caps on donations, or general spending limits. Nevertheless, the High Court made some comments about these that are considered relevant for current purposes. In applying the first *Lange* limb, the Court acknowledged that these restrictions burdened political communication. In terms of the second, their comments were somewhat opaque. They clearly believed they were more justifiable than the provisions invalidated in the case, finding the donation caps and spending limits "obviously directed to the mischief of possible corruption".³⁴ This does not mean that such provisions were valid. The court was not asked to consider that question, and did not answer it. It could not say that the provisions invalidated were obviously directed to avoiding corruption. As a result, the recent High Court decision answers some questions, but not the question of the constitutionality of general donation caps, and expenditure limits.³⁵

Comparable Nations

Our legal principles can only be enriched by considering the experience elsewhere. In relation to the implied freedom of political communication, the United States is an ideal source of wisdom. Though there are clearly some differences between the relevant American free speech provision and the Australian provision,³⁶ there are many case examples in Australia where the judges have themselves referred to the American learning in this area.³⁷ It seems sensible to see what we can learn from another great

³⁰ *Democracy and Money: The Dangers of Campaign Finance Reform* (Centre for Independent Studies Policy Monograph 119, Sydney, 2011), p.2.

³¹ [30].

³² [43].

³³ [53-54].

³⁴ [53].

³⁵ Anne Twomey, "Freedom of Political Communication and its Constitutional Limits on Electoral Laws", in Tham, Costar and Orr, eds., *Electoral Democracy*; Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* (Sydney, 2010), pp.246-247.

³⁶ The American protection is broader in several respects – it is a positive source of rights, rather than a negative protection from legislation interfering with the freedom, and it is not confined to speech in the "political" context, unlike the Australian freedom. The High Court has stated that the Australian principle should be referred to as a freedom, whilst the United States equivalent is often expressed to be a right.

³⁷ Some examples include: *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 140 and 143 (Chief Justice Mason), 231, 235 and 239 (Justice McHugh); *Nationwide News v*

democracy. Space restrictions do not allow a full amplification of the case law, but the following represents a summary of the current United States position:³⁸

(a) the right to participate in government elections, including donating money to a candidate or candidates of choice, is a fundamental democratic right (*McCutcheon*); (b) the Supreme Court has drawn a fundamental distinction between limits on donations and limits on spending by independent bodies, candidates or parties, with the former more likely to be constitutionally acceptable; (c) concerns about actual or perceived corruption arising from contributions may justify restrictions (*Buckley*), although recently the Court specifically held that independent expenditures did not give rise to corruption concerns; (d) while at one time supportive of restrictions on corporations financing political campaigning (*Austin, McConnell*), the Court now states that free speech protections apply to corporations as well as individuals (*Bellotti, Citizens United*); (e) individuals and parties will seek ways around legislation here, so any restrictions must be carefully drawn — specifically, tailored to a clearly justified interest, and should not be overbroad in seeking to achieve any legitimate objective/s; arguments that restrictions are needed to prevent the distorting effect of donations, prevent corruption or protect shareholders (a corporate donor) are not necessarily taken at face value; (f) distinctions between express advocacy and issue advocacy — specifically, counting the former, but not the latter, in terms of policing spending limits, may not be helpful, unless the concepts are carefully defined (*Wisconsin, McConnell*); and (g) aggregation provisions, restricting how much a donor can contribute in total to all candidates, are likely to breach free speech rights (*McCutcheon*).

Are the Current Australian Laws Valid?

As indicated above, the Australian implied freedom of political communication requires the asking of two questions. Firstly, whether the challenged act burdens freedom of political communication; secondly, if it does, whether the burden it places is compatible with and proportionate to the attainment of a legitimate objective. If the answer to the first question is yes and the answer to the second question is no, the Act is constitutionally invalid.

Clearly the New South Wales legislation burdens freedom of political communication. It does so in at least three ways. Firstly, it limits the amount that an individual or organisation can donate to a political party. It is clear that the act of

Wills (1992) 177 CLR 1, 32 (Chief Justice Mason), 79 (Justices Deane and Toohey); *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 130 (Chief Justice Mason, Justices Toohey and Gaudron); *Levy v Victoria* (1997) 189 CLR 579, 594 (Chief Justice Brennan), 623 (Justice McHugh), 638-642 (Justice Kirby); *Coleman v Power* (2004) 220 CLR 1, 75 (Justices Gummow and Hayne); *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 295 ALR 197, [151](Justice Heydon); *Monis v The Queen* (2013) 295 ALR 259, [27-28](Chief Justice French); *Wotton v Queensland* (2012) 246 CLR 1, 21 (Justice Heydon); Adrienne Stone, “Freedom of Political Communication, the Constitution and the Common Law”, *Federal Law Review*, Vol.26 (1998), p.220; cf the claim in *Monis v The Queen* (2013) 295 ALR 259, [326] that: “there is little to be gained (in considering the Australian implied freedom) by recourse to jurisprudence concerning the First Amendment” (Justices Crennan, Kiefel and Bell).

³⁸ *Buckley v Valeo* 424 US 1 (1976); *First National Bank of Boston v Bellotti* 435 US 765 (1978); *Austin v Michigan State Chamber of Commerce* 494 US 652 (1990); *McConnell v FEC* 540 US 93 (2003); *FEC v Wisconsin Right to Life* 551 US 449 (2007); *Citizens United v FEC* 558 US 310 (2010); *McCutcheon v FEC* 572 US --- (2014). The United States cases are discussed in a range of literature; see for example Francis Bingham, “Show Me the Money: Public Access and Accountability After *Citizens United*”, *Boston College Law Review*, Vol.52 (2011), pp.1027-1064; Lili Levi, “Plan B for Campaign Finance Reform: Can the FCC Help Save American Politics After *Citizens United*?”, *Catholic University Law Review*, Vol.61 (2012), pp.97-174; Richard Briffault, “WRTL and *Randall*: The Roberts Court and the Unsettling of Campaign Finance Law”, *Ohio State Law Journal*, Vol.68 (2007), pp.807-848; Stephanie Palmer, “The Courts: Legal Challenges to Political Finance and Election Laws”, in Keith Ewing, Jacob Rowbottom and Joo-Cheong Tham, eds., *The Funding of Political Parties* (New York, 2012).

donating itself is a type of “political communication”, suggesting support of that political party. Secondly, by limiting what a particular party/candidate can spend on an election. Clearly, the vast majority of this money would be spent communicating on political matters; in effect then, the restrictions burden freedom of communication. And thirdly, they burden the extent to which voters can hear the expression of views that would have occurred if the parties or candidates had been able to spend as much as they wished on communicating with the electorate. The answer to the first question is clearly “yes”.

The second question is more difficult — the question of whether the restrictions are “justified”. It acknowledges that freedom of political communication is not absolute. It recognises that some restrictions on political communication may be justified, if narrowly tailored to the achievement of a legitimate objective. However, the government must demonstrate how the laws assist in attaining the legitimate objective, given the burden placed on freedom of political communication. The Courts must balance important competing interests here. At least two arguments can be made to justify restrictions, as will now be discussed.

Prevention of Corruption or the Perception of Corruption

The most common justification for limits on donations, or limits on electoral expenditure, is that they are needed to avoid corruption of government, or a perception of corruption, when those subject to government laws are donating to government. The Explanatory Notes to the (now repealed) 2011 Queensland Act, and the speech of a former New South Wales Premier at the time of introducing the (current) New South Wales provisions, made clear that preventing corruption is a goal of these regimes.

On the other hand, a healthy dose of cynicism is in order. It appeared in the judgment of Chief Justice Mason in *Australian Capital Television Pty Ltd*. That great judge reminded us that courts must not accept at face value arguments by the legislature that limits on political communication were necessary to avoid corruption. That argument was very easy to mount. Chief Justice Mason rightly pointed out that any such assertion needed to be supported by evidence.

Is there evidence of widespread political corruption through the use of political donations and unlimited expenditure on elections? Revelations at the 2014 ICAC inquiry notwithstanding, very often the evidence has been lacking. The United States Supreme Court noted in its *Citizen United* decision of another case, *McConnell*, that of the 100, 000 pages of records in the case, there was no evidence of votes being exchanged for expenditure, and only very minor evidence of ingratiation. Similarly, in *Randall* the Court was not convinced of the case for regulation based on corruption.

Several leading political scientists have devoted research to this issue, with many doubting the evidence of a links between donations and political actions by donees. These comments summarise much of the literature:

Despite the claims of the institutional critics and the growing public concern over (lobby groups) during the past decade, the scientific evidence that political money matters in legislative decision making is surprisingly weak. Considerable research on members’ voting decisions offers little support for the popular view that (lobby groups’) money permits interests to buy or rent votes on matters that affect them.³⁹

³⁹ Richard Hall and Frank Wayman, “Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees”, *American Political Science Review*, Vol.84, 3 (1990), p.798; Ian Ramsey, Geoff Stapledon and Joel Vernon, “Political Donations by Australian Companies”, *Federal Law Review*, Vol. 29 (2001), p.193; Iain McMennamin, “Business, Politics and Money in Australia:

There is cause to doubt the power of outside money to deliver consistently favo(u)rable political outcomes. A correlative relationship between money and political outcomes is not the same as a causative relationship; more money may often simply reflect greater underlying constituent support for a candidate. At a minimum, the ‘hedging strategy’ of corporations [...] giving money to both parties [...] suggests that corporations lack complete confidence that their donations will lead to favo(u)rable political outcomes.⁴⁰

There is sparse literature suggestive of the argument that donations are intended to, or do, influence the votes of donees, or donee political parties.⁴¹ While it is difficult to draw conclusions from particular examples, it is worth considering the example of an industry which has derived very large quantities of government financial assistance in recent years, the Australian car industry. Of the three major players in that industry, Norton notes that neither Holden nor Toyota has made a contribution in recent history, and the last time Ford gave money was in the 2004-2005 year.⁴² Australia continues to rank as a country least affected by corruption, with a 2012 Transparency International Index ranking Australia seventh out of 176 in terms of countries with the least corruption.⁴³ Iain McMeniman comments that “illegal (corrupt) exchanges between politics and business are rare in Australia”.⁴⁴

Other factors to be considered in weighing the government claim that restrictions on donations or limits on expenditure are appropriate to a legitimate objective of reducing the risk of actual corruption, or the perception of corruption, is that existing measures require the disclosure of donations over a certain amount, gifts over a certain amount must be declared (as ex-Premier O’Farrell can attest), and that existing anti-corruption authorities exist to tackle corruption, or activities that may be seen as potentially corrupt. Anti-corruption bodies such as ICAC and the CCC clearly have strong powers to investigate possible corruption within the state.

Testing Economic, Political and Ideological Explanations”, *Australian Journal of Political Science*, Vol. 43 (2008), p.391; Brian Costar, “Equality, Liberty and Integrity and the Regulation of Campaign Finance”, in Tham, Costar and Orr, eds., *Electoral Democracy*, p.167; Susan Clark Muntean, “Corporate Independent Spending in the Post-BCRA to Citizens United Era”, *Business and Politics*, Vol. 13 (2011), pp.1-37; Bradley Smith, “Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform”, *Yale Law Journal*, Vol. 105 (1996), pp.1049-1092; Kathleen Sullivan, “Political Money and Freedom of Speech”, *University of California Davis Law Review*, Vol.30 (1997), p.679; Henry Chappell, “Campaign Contributions and Congressional Voting: A Simultaneous Probit-Tobit Model”, *Review of Economics and Statistics*, Vol. 62 (1982), pp.77-83; Janet Grenzke, “Shopping in the Congressional Supermarket: The Currency is Complex”, *American Journal of Political Science*, Vol. 33 (1989), pp.1-24; William Welch, “Campaign Contributions and Legislative Voting: Milk Money and Dairy Price Supports”, *Western Political Quarterly*, Vol. 35 (1982), pp.478-495; John Lott, “Empirical Evidence in the Debate on Campaign Finance Reform”, *Harvard Journal of Law and Public Policy*, Vol. 24 (2001), pp.9-16.

⁴⁰ Francis Bingham, “Show Me the Money: Public Access and Accountability After *Citizens United*”, *Boston College Law Review*, Vol. 52 (2011), pp.1054-1055. In the Australian context, the fact that most donors donate to both major political parties has also been noted: Joo Cheong-Tham, *Money and Politics: The Democracy We Can’t Afford* (Sydney, 2010) p.66.

⁴¹ Richard Briffault, “The Political Parties and Campaign Finance Reform”, *Columbia Law Review*, Vol. 100 (2000), pp.620-666; J Skelly Wright, “Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?”, *Columbia Law Review*, Vol. 82 (1982), pp.609-645; Jacob Rowbottom, “Cash for Amendments, Homes and Moats: Standards of Conduct in Westminster” in Tham, Costar and Orr, eds., *Electoral Democracy*.

⁴² Norton, *Democracy and Money*, p.4.

⁴³ Ian McAllister, “Corruption and Confidence in Australian Political Institutions”, *Australian Journal of Political Science*, Vol. 49, 2 (2014), pp.175-177.

⁴⁴ Iain McMenamin, *If Money Talks, What Does it Say?* (Oxford, 2013) p.90.

In short, a court might find that the restrictions in the New South Wales laws are not reasonably appropriate to meeting the legitimate end of preventing corruption of our political system, given the lack of real evidence of the connection between donations and corruption. It is even more difficult to justify expenditure limits on the need to avoid corruption, since there is even less of a link between the amount a political party might spend in an election campaign and any particular donor who might wish for political favours. I will now consider an alternative justification, the “level playing field” argument.

Level Playing Field

Another argument made in support of both donation and expenditure limits is that they are necessary to achieve some kind of equality across the political spectrum.⁴⁵ An example appears in the judgment of the Supreme Court of Canada:

To ensure a right of equal participation in democratic government, laws limiting spending are needed to preserve the equality of democratic rights and ensure that one person’s exercise of the freedom to spend does not hinder the communication opportunities of others [...] such spending limits are necessary to prevent the most affluent from monopolizing election discourse and consequently depriving their opponents of a reasonable opportunity to speak and be heard.⁴⁶

On the other hand, some experts in the field have questioned the suggestion that true equality is a desirable or realistic goal of electoral finance laws, and that fairness, rather than equality, might better reflect the legitimate goal of regulation here.⁴⁷ Even if this type of concept is a legitimate goal, questions arise regarding the efficacy of the tools chosen. Keith Ewing states that the impact of limits on political donations on electoral equality is “equivocal”⁴⁸ and suggests that caps on donations can lead to inadequate funding of political parties.⁴⁹ Further, it is not precisely clear what a “level playing field” would actually look like.

Further, as Justice McHugh said in the *Australian Capital Television* case, it is not enough to merely assert that the playing field is so unbalanced, compromising the ability of electors to make an informed choice amongst a range of views, as to justify government regulation.⁵⁰ Convincing evidence is required of the existence of the problem, and that the legislation is a legitimate and proportionate response to it. Does

⁴⁵ Joo-Cheong Tham and David Grove, “Public Funding and Expenditure Regulation of Australian Political Parties: Some Reflections”, *Federal Law Review*, Vol. 32 (2004), p.419; Tham, *Money and Politics*, p.109; Deborah Cass and Sonia Burrows, “Commonwealth Regulation of Campaign Finance – Public Funding, Disclosure and Expenditure Limits”, *Sydney Law Review*, Vol. 22 (2000), p.490; J. Skelly Wright, “Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?”, *Columbia Law Review*, Vol. 82 (1982), pp.609-645; Brian Costar, “Equality, Liberty and the Regulation of Campaign Financing”, in Tham, Costar and Orr, eds., *Electoral Democracy*; cf Orr, *The Law of Politics*, p.246: “small donations [...] represent little [...] threat to political equality”.

⁴⁶ *Libman v Quebec* [1997] 3 S.C.R. 569, para 47; see also *Harper v Canada* [2004] 1 S.C.R. 827, para 62-63.

⁴⁷ “(Political equality) cannot mean genuine equality, even if this could be quantified in electoral terms. Some parties will enjoy an advantage because they have better policies, better candidates or a better campaign [...] Nor does the principle of equality in this context mean that all parties must have exactly the same resources to spend at an election or the same opportunity to reach the electorate [...] treating all parties in the same way and in giving all parties access to the same benefits is not necessarily the same as treating them all fairly”: Ewing, *The Costs of Democracy*, pp.28-29.

⁴⁸ Ewing, *The Costs of Democracy*, p.46.

⁴⁹ *Ibid.*, p.47.

⁵⁰ *Ibid.*, pp.239-240.

the evidence suggest that there is domination of political communication by one voice at the expense of others?

The most recent evidence suggests broad equality in current electoral expenditure. According to the annual reports of political parties, available publicly on the Australian Electoral Commission website, the Australian Labor Party had federal receipts in the last year for which figures are available (2012-2013) of \$13.8 million, and expenditure of \$6.47 million. Together, the Liberal and National parties had federal receipts of \$14.1 million, and expenditure of \$11.8 million. The Greens had total receipts of \$2.7 million, with expenditure at very similar levels. Many other parties filed annual returns with the Commission. As between the “main” political parties, those with the only realistic opportunity of forming government, there is in fact remarkable equality, not inequality, in their ability to raise money and their spending levels. Further, the recent rise of the Greens, and the more recent rise of other minor parties such as the Liberal Democrats, tends to negate any suggestion that political communication is dominated by the major political parties, or that alternative voices cannot be heard.

It is also a possible consequence of the restrictions in New South Wales that, rather than create a level “playing field”, they will make it tougher for new players to enter that field. The corollary of the limits on political donations is an increase in public funding of parties, limited to those with at least 4 per cent of the vote (now 6 per cent in Queensland). This threshold potentially excludes new players. It does not compensate third parties for restrictions on their ability to donate or spend. Further, small parties that lack the membership numbers to become registered face even tighter restrictions on the donations they can receive and the electoral expenditure they can occur. Clearly, the ALP was strongly reliant on union donations to become established, as was the Liberal Party strongly reliant on business donations in its early years. These parties may not have existed if the right to donate had been tightly constrained.

Another argument is that the fact individuals want to donate large amounts to individual candidates or parties reflects the strength of support they have to the candidate or party. The level of individual funding support for Barack Obama leading up to the 2008 United States presidential elections is an example of this. As Ewing acknowledges, preventing that party or candidate from spending those donations is arguably unfair, preventing the strong support that the candidate or party has from being shown during the campaign through the level of spend.⁵¹

One must also acknowledge the growth of the Internet, Twitter and other forms of communication through which people access information.⁵² At one time, when newspapers and television dominated means of communication, there may have been an argument that it was only the richest players that could afford advertising in such media, creating an unlevel playing field in which the poor or minorities would struggle to enter. These days, when people have increasingly turned to electronic media for their news, the explosive growth of blogs, Twitter etc. reflect that lack of financial muscle is not the inhibitor it was in terms of communicating views. These trends must be borne in mind in seriously weighing claims that limits on spending and donations are necessary to create some kind of level playing field.

It is noted that the European courts, in interpreting Article 10 of the *European Convention on Human Rights* (the right to receive and impart information and ideas

⁵¹ *Ibid.*, p.50: “spending controls may be particularly unfair where a candidate or party enjoys high levels of support, which the spending limits prevent from being displayed in the campaign”.

⁵² Keith Ewing and Jacob Rowbottom, “The Role of Spending Controls”, in Ewing, Rowbottom and Tham, eds., *The Funding of Political Parties*, pp.85-87.

without interference by a public authority), have not validated restrictions based on arguments about a level playing field. Specifically, a limit on third party expenditure⁵³ and a ban on political advertising,⁵⁴ were held to be incompatible with the Convention right.

These measures are also typically easy to circumvent. Again, the United States experience is salient — the regulators were largely frustrated in their attempts to regulate political expenditure through the use of loopholes.⁵⁵ It is very difficult to draft legislation that will withstand determined efforts to circumvent its intent.⁵⁶ A cursory look at the (repealed) Queensland legislation shows broad loopholes; for instance, the donation cap applied to “political donations”. This was defined to mean a donation intended to be used for campaign purposes. A donor could circumvent this limit by making it clear there was no intention for it to be used in campaigning; the fact it actually was is irrelevant in terms of the definition. Further, s199 defined “electoral expenditure” importantly for the expenditure cap. It included material that advocated a vote for or against a candidate or political party. A clever advertiser could construct ads that did not “advocate”, but got the message across. Examples from the recent past might include advertising for or against the mining tax, carbon tax, or WorkChoices. This might not technically be “advocacy” within the expenditure limits.

Many more examples could be given; the point is to highlight the difficulty, if not futility, in seeking to control political donations and spending, in order to reach some ill-defined end point of a level playing field. And perhaps worse, the laws will have greatest impact on those players who do not have access to competent lawyers to advise them how to lawfully circumvent the restrictions, while leaving the established parties with access to such advice untouched.⁵⁷

In short, a court might find that the restrictions in the New South Wales laws are not appropriate to achieving an end of “levelling the playing field”, even if that is accepted to be a legitimate end. Firstly, there is limited evidence that the playing field is currently “unlevel”; secondly, it is not clear that the restrictions enacted will do much to “level it up”, given the sizeable loopholes apparent in the new laws, and the great difficulty in drafting watertight political donation and expenditure laws.

Conclusion

Our system of governance struggles to reconcile its liberal democratic nature with calls for government regulation of political finance laws in order to reduce levels of actual or perceived corruption, or to create a level, or more level, “playing field”. This article has considered New South Wales laws capping donations and limiting electoral

⁵³ *Bowman v United Kingdom* [1998] ECHR 4, [37].

⁵⁴ *Tv-Vest and Rogaland Pensjonistparti v Norway* [2008] ECHR 1687, [70-71].

⁵⁵ *Citizens United v Federal Electoral Commission* 558 US 310 (2010); Richard Hasen, “The Transformation of the Campaign Financing Regime for US Presidential Elections”, in Ewing, Rowbottom and Tham, eds., *The Funding of Political Parties*, p.231: “it is commonplace to observe [...] that campaign finance regulations intended to stem the flow of money into electoral activity often lead to the money emerging through different forms or groups”; see in the Canadian context Colin Feasby, “Constitutional Questions About Canada’s New Political Finance Regime”, *Osgoode Hall Law Journal*, Vol. 45 (2007) pp.532-536.

⁵⁶ Graeme Orr, “The Currency of Democracy: Campaign Finance Law in Australia”, *University of New South Wales Law Journal*, Vol. 26, 1 (2003), pp.22: “the larger concern with caps on donations [...] involves their workability. It is generally assumed that US-inspired contrivances would be adapted to avoid any caps”; Orr, *The Law of Politics*, p.259.

⁵⁷ Orr, *The Law of Politics*, p.262.

expenditure. It concludes that in light of the constitutional freedom of political communication, these restrictions burden that freedom in a way that is open to constitutional challenge given that they are arguably not appropriate to achieving a legitimate end, and that other effective mechanisms currently serve to deal with corruption, including the media, anti-corruption watchdogs, and disclosure laws. They will do little to reduce corruption, actual or perceived, and are not likely to contribute to any significant levelling of the “field”, an objective which itself is open to serious question.