

## *Abstract*

Various governments around the world have sought to pass legislation regulating electoral campaigns, in particular their financial aspects. Electoral reform is high on the Australian Government's agenda. In a Green Paper published in December 2008, the Australian Government canvasses some possible reforms to Australia's electoral system, most especially in the funding area.<sup>1</sup> These proposals to some extent mirror developments elsewhere. In this paper, I consider the specific suggestion that caps or bans should be placed on private funding of political parties. This policy suggestion is considered primarily from a constitutional point of view in terms of its validity. In so considering, comparisons will be made with other jurisdictions in which such reforms have been made, and political science issues pertinent to the discussion will also be considered. Much can be learned from experiences in this regard overseas.

## *Introduction*

Electoral legislation can take many forms. One form is the requirement for disclosure of donations they receive. I will not consider the question of disclosure of donations in detail in this paper, because I have no difficulty with, and see the benefit of, requiring political parties to publicly disclose funding donations they receive, including at relatively low levels.<sup>2</sup> Nor will I take issue with the existing system by which some public funding is provided to political parties, although it is important to acknowledge in the discussion of issues in this article that this source of funding exists.<sup>3</sup> I will focus in this paper on the suggestion that caps or bans should be placed on private funding or expenditure.<sup>4</sup> Of course, private donations are just one means by which political parties derive revenue; they derive revenue from return on the investment of assets, membership dues, as well as funding from the public purse.<sup>5</sup>

## *Outline of Green Paper Proposals*

While the Green Paper makes it clear that many issues need to be considered and that no final decisions on any possible reforms have been made, some of the argument in favour of the introduction of a cap or ban on private funding, or relatedly a cap on the amount of money that a candidate might spend on an electoral campaign, appear in the paper. They are sufficiently important to warrant direct quoting:

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<sup>1</sup> Australian Government *Electoral Reform Green Paper: Donations, Funding and Expenditure* December 2008 (*Green Paper*).

<sup>2</sup> Further discussion of disclosure rules appears in K D Ewing 'The Legal Regulation of Electoral Campaign Funding in Australia: A Preliminary Study' (1992) 22 *University of Western Australia Law Review* 239.

<sup>3</sup> The system works by reimbursing parties a certain sum for each first preference vote cast in their favour, provided they gain at least 4% of those votes: *Commonwealth Electoral Act* 1918 s294, 297. This regime is discussed in more detail in Joo-Cheong Tham and David Grove 'Public Funding and Expenditure Regulation of Australian Political Parties: Some Reflections' (2004) 32 *Federal Law Review* 397, 405-415 and Graeme Orr 'The Currency of Democracy: Campaign Finance Law in Australia' (2003) 26 *University of New South Wales Law Journal* 1; Owen Fiss 'Money and Politics' (1997) 97 *Columbia Law Review* 2470.

<sup>4</sup> Until 1980, limits were imposed in Australia on the amount of campaign expenditure – a good history of electoral funding regulation in Australia appears in: Deborah Cass and Sonia Burrows 'Commonwealth Regulation of Campaign Finance – Public Funding, Disclosure and Expenditure Limits' (2000) 22 *Sydney Law Review* 477, 491.

<sup>5</sup> The Australian Government estimates that approximately 20% of the funding of the Labor Party and the Liberal Party is derived from the scheme by which the public funds parties based on their results at the last election: *Green Paper* p12.

Australia does not currently limit the amount individuals and organisations can contribute to political parties, candidates and others in the political process, on the basis that such support is a legitimate exercise of the right to freedom of political association and expression. A criticism of that approach is that permitting donations of any amount .. risks making the recipients of the donations potentially dependent on a small number of large donors, vulnerable to possible undue influence or corruption ...<sup>6</sup> Banning or capping private funding could assist in addressing concerns about the effectiveness of Australia's federal public funding and financial disclosure scheme to achieve the aim of reducing political parties' and candidates' reliance on donations and other private sources of funding for contesting elections<sup>7</sup>... Eliminating or reducing private funding with bans or caps would address concerns about undue influence. It is argued that both bans and caps go towards ensuring that all citizens have equal opportunity to participate in the political process – either by reducing the level of permissible donations to that affordable by a larger number of people through a cap, or with a complete ban, by eliminating private funding altogether. It is suggested that in such a situation, political participation and support for the political party of choice would then be limited for all to the level of volunteer involvement and party activism.<sup>8</sup>

The paper recognises that the effect of such regulation might be to broaden the membership base of parties.<sup>9</sup> A critical issue would be the level at which the cap was set.<sup>10</sup> Differential arrangements may apply depending on whether the donor is an individual or non-individual.<sup>11</sup> It is possible some donors may seek to circumvent caps through indirect means.<sup>12</sup>

On the related question of the possibility of caps on electoral spending, the Green Paper again takes no concluded position, however it includes this comment:

With or without matching caps on private donations, capping expenditure has the potential to minimise the 'arms race' between major parties in election campaigning. By imposing an upper limit on election spending, the need for and advantages in attracting large donations and other financial support would be removed, and the incentive for any political party to chase dollars and potentially trade benefits or access for funding would be minimised.<sup>13</sup>

As the Green Paper specifically recognises, but does not resolve, suggestions of funding and/or expenditure caps raise possible constitutional difficulties in Australia, given the High Court of Australia's findings of an implied freedom of political speech. I will now turn to this jurisprudence, and explore how other democracies have sought to reconcile such freedoms with a perceived need to regulate election finance.

### *Part A: Campaign Finance Regulation and Freedom of Speech*

#### *(a) Political Free Speech Cases in Australia<sup>14</sup>*

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<sup>6</sup> 7.7 -7.8.

<sup>7</sup> 7.10.

<sup>8</sup> 7.37.

<sup>9</sup> 7.12.

<sup>10</sup> 7.13.

<sup>11</sup> 7.15-7.22.

<sup>12</sup> 7.11. The experience in other jurisdictions will be noted later in the paper.

<sup>13</sup> 8.28.

<sup>14</sup> Commentary on these cases appears in several articles, for example Adrienne Stone 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication Under the Australian Constitution' (2001) 25 *Melbourne University Law Review* 374; 'Freedom of Political Communication, the Constitution and the Common Law' (1998) 26 *Federal Law Review* 219; James Stellios 'Using Federalism to Protect Political Communication: Implications from Federal Representative Government' (2007) 31 *Melbourne University Law Review* 239; Michael Coper 'The High Court and Free Speech: Visions of Democracy or Delusions of Grandeur?' (1994) 16 *Sydney Law Review* 185;

*Australian Capital Television Pty Limited v Commonwealth; State of New South Wales v Commonwealth*<sup>15</sup> (ACTV)

Interestingly for present purposes, it was in the context of legislation purporting to limit spending on political advertising that the High Court of Australia recognised for the first time a constitutional freedom of political discussion in the ACTV case. These provisions of the *Broadcasting Act* 1942 (Cth) introduced by the *Political Broadcasts and Political Disclosures Act* 1991 (Cth) were challenged on constitutional grounds. In effect, the provisions prohibited a government or non-government body from political advertising during election periods, by prohibiting the broadcaster from broadcasting such advertising. The Act also required broadcasters to make available free of charge units of time for election broadcasts to a political party, person or group ('party'), based on the relative numerical strength of that party in the Parliament that had been dissolved when the election was called. The Act was claimed by the relevant Minister to be necessary to 'prevent potential corruption and undue influence of the political process'. It was said the high cost of advertising meant that most people could not afford to pay for advertising.

Five justices<sup>16</sup> declared these provisions to be invalid on the basis that a citizen's freedom to communicate on political matters, essential for representative democracy implicit in the *Constitution*, was unacceptably infringed by the provisions. The majority judges saw the freedom as necessary for accountability of elected officials. It was necessary to allow criticism of public officials, to allow citizens to seek to bring about change, call for action and otherwise influence elected representatives.<sup>17</sup> In words particularly relevant for current purposes, Mason CJ was prepared to concede the possibility that the need to raise substantial funds to conduct an electoral campaign could lead to a risk of corruption and undue influence,<sup>18</sup> so some regulation might be justified. However, the Court should

scrutinize very carefully any claim that freedom of communication must be restricted in order to protect the integrity of the political process. Experience has demonstrated on so many occasions in the past that, although freedom of communication may have some detrimental consequences for society, the manifest benefits it brings to an open society generally outweigh the detriments. All too often attempts to restrict the freedom in the name of some imagined necessity have tended to stifle public discussion and criticism of government. The Court should be astute not to accept at face value claims by the legislature and the Executive that freedom of communication will, unless curtailed, bring about corruption and distortion of the political process.<sup>19</sup>

McHugh J likewise was convinced of the necessity in a representative democracy that electors be able to communicate their own arguments and opinions to other members

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Nicholas Aroney 'A Seductive Plausibility: Freedom of Speech in the Constitution' (1995) 18(2) *University of Queensland Law Journal* 249; Jeffrey Goldworthy 'Constitutional Implications and Freedom of Political Speech' (1997) 23 *Monash University Law Review* 362; H P Lee 'The Australian High Court and Implied Fundamental Guarantees' (1993) *Public Law* 606.

<sup>15</sup> (1992) 177 CLR 106.

<sup>16</sup> Mason CJ Deane Toohey Gaudron McHugh JJ, Brennan and Dawson JJ dissenting).

<sup>17</sup> Mason CJ p137-138.

<sup>18</sup> 144-145.

<sup>19</sup> 145; Deane and Toohey JJ were similarly unconvinced that the desire to eliminate corruption justified the legislation's impact on political communication during an election period (175).

of the community concerning those issues. Electors needed information to make an informed judgment of governments and policies.<sup>20</sup>

### *Subsequent Australian Cases*

Subsequent High Court decisions have clarified the scope and nature of the freedom and the approach to be applied in determining the validity of laws said to conflict with the freedom.<sup>21</sup> It has been determined that the freedom is a protection from laws which seek to unjustifiably derogate from the freedom, rather than a source of positive rights. The High Court in *Lange v Australian Broadcasting Corporation*<sup>22</sup> clarified that a two stage approach was required when assessing laws against the freedom, asking whether the law effectively burdens freedom of communication about government or political matters in terms, operation or effect; and secondly, if so, whether the law is reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the constitutionally prescribed system of representative and responsible government.

The High Court has also made clear that the freedom of political communication in Australia can, like the equivalent provision in the United States Bill of Rights, include non-verbal communication. Brennan CJ in *Levy v Victoria*<sup>23</sup> cited American authority for the proposition that silent protests, flag burning and other communication could fall within the freedom.<sup>24</sup> After summarising the American authorities, Smith concludes

Given this case history, it is too late to argue that a gift of money, at least when made to a political candidate, is not a form of protected symbolic speech. Such a gift is an action intended to convey support for a candidate and, one can presume, his or her views.<sup>25</sup>

While this principle has not been clarified in many of the Australian cases, given our relatively fewer number of decisions, it seems from the *Levy* decision that one can extrapolate that the High Court would consider a political donation to attract the description of 'political communication'. Certainly this is the basis on which Australian commentators have proceeded,<sup>26</sup> as have the American cases.<sup>27</sup>

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<sup>20</sup> 231; to like effect Gaudron J 211-212.

<sup>21</sup> Eg *Theophanous v Herald and Weekly Times Limited* (1994) 182 CLR 104; *Levy v Victoria* (1997) 189 CLR 579; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Coleman v Power* (2004).

<sup>22</sup> (1997) 189 CLR 520, 567.

<sup>23</sup> (1997) 189 CLR 579, 594; to like effect McHugh J (622) and Kirby J (638)(both also citing American cases).

<sup>24</sup> American cases have found the following to be 'speech' within the First Amendment: refusing to salute the American flag (*West Virginia State Board of Education v Barnette* (1943) 319 US 624, 642; displaying a flag (*Stromberg v California* (1931) 283 US 359, 369; burning a flag (*Texas v Johnson* (1989) 491 US 397, 405; wearing an armband to protest war (*Tinker v Des Moines Independent Community School District* (1969) 393 US 503, 505-506; displaying a swastika (*National Socialist Party of America v Village of Skokie* (1977) 432 US 43, 44; holding a parade although it had no particular theme (*Hurley v Irish-American Gay, Lesbian and Bisexual Group of Boston* (1995) 515 US 557, 570).

<sup>25</sup> Bradley Smith 'Money Talks: Speech, Corruption, Equality and Campaign Finance' (1997) 86 *Georgetown Law Journal* 45, 50.

<sup>26</sup> Deborah Cass and Sonia Burrows 'Commonwealth Regulation of Campaign Finance: Public Funding, Disclosure and Expenditure Limits' (2000) 22 *Sydney Law Review* 447, 456-460; Joo-Cheung Tham and David Grove 'Public Funding and Expenditure Regulation of Australian Political Parties: Some Reflections' (2004) 32 *Federal Law Review* 397, 420-421.

(b) *United States Jurisprudence*<sup>28</sup>

The leading American case in this field is *Buckley v Valeo*<sup>29</sup> where the Supreme Court considered legislation, passed in response to Watergate, that (a) capped political donations by individuals or groups to \$1000 for any single federal candidate; (b) limited contributions to any such candidate by political committees to \$5000; (c) imposed a \$25 000 annual limitation on total contributions by any contributor; (d) limited independent expenditures by an individual or group advocating the election or defeat of a federal candidate to \$1000 per year; and set limits, depending on the office involved, of expenditure by candidates for federal office during any calendar year, and overall limits. A disclosure obligation was also imposed in respect of contributions. The legislation was challenged on the basis of the First Amendment (freedom of speech) and Fifth Amendment (equal protection).

A majority of the Supreme Court found the provisions imposing limits on political donations did not infringe First Amendment speech and were supported by substantial governmental interests in limiting corruption and the appearance of corruption. However, provisions limiting independent political expenditures by individuals and groups and fixing ceilings on overall campaign expenditures by candidates were unconstitutional as contrary to the First Amendment, and were not justified by the government interest in preventing actual or perceived corruption or from equalisation concerns. For similar reasons, provisions limiting the amount of personal expenditures by a candidate were also invalid as conflicting with the First Amendment.

The majority invalidated the expenditure provisions because

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money ... The electorate's increasing dependence on television, radio and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech. Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline.<sup>30</sup>

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<sup>27</sup> Eg *Central Hudson Gas and Electric Corp v Public Service Commission of New York* (1980) 447 US 557, the court finding that a corporation's advertising amounted to speech.

<sup>28</sup> We must exercise the usual caution here with international comparisons – the provisions are not identical. For example, the United States provision is applied to speech, while the Australian version relates to communication; in the United States the provision is a source of positive rights, while in Australia the right is a negative one, in that it is a freedom from laws that (unreasonably) interfere; the American right is express, while the Australian freedom is implicitly derived from the text and structure of the Constitution. Another view regarding the use of United States materials in interpreting the freedom of political communication appears in Dan Meagher 'The Fighting Words Doctrine: Off the First Amendment Canvas and Into the Implied Freedom Ring?' (2005) 28 *University of New South Wales Law Journal* 852.

<sup>29</sup> (1976) 424 US 1; see for detailed discussion Frank Sorauf 'Politics, Experience and the First Amendment: The Case of American Campaign Finance' (1994) 94 *Columbia Law Review* 1348; J Skelly Wright 'Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?' (1982) 82 *Columbia Law Review* 609; and Kenneth Levit 'Campaign Finance Reform and the Return of Buckley v Valeo' (1993) 103 *Yale Law Journal* 469.

<sup>30</sup> 19 (Burger CJ, Brennan Stewart Powell Blackmun Rehnquist JJ)(Marshall J agreed the provisions limiting independent political expenditures by individual groups and fixing overall ceilings on

The majority agreed that the act of donating money to a candidate was a form of speech.<sup>31</sup> While First Amendment freedoms were not absolute and needed to be balanced against legitimate government interests, and while the government interest in preventing corruption or the perception of corruption was legitimate, the majority found the interest did not justify the ceiling on expenditures,<sup>32</sup> or the limit on candidate's personal expenditure. It was not clear that such limits were reasonably necessary to prevent corruption, particularly as they were set at very low levels. Arguments that the funds available to candidates needed to be 'equalised' were not accepted by the court as legitimate considerations.<sup>33</sup> The majority was not convinced, however, that the contribution limitations imposed by the Act would have any real effect on the funding of campaigns and political associations; it would merely lead to candidates seeking contributions from a broader base.<sup>34</sup> As a result, these were valid, reflecting legitimate governmental interests,<sup>35</sup> as were the disclosure requirements.<sup>36</sup> In dissent on this point, Burger CJ would also have invalidated the private donation limits.<sup>37</sup>

The Court in *Buckley* also introduced a distinction between two types of 'political' speech: communication that expressly advocated the election or defeat of a clearly identifiable candidate (which would not be entitled to protection under the First Amendment), and communication that was issues-based (which would be entitled to a higher level of protection under the First Amendment). This became known as the 'magic words' test – ads which avoided the magic words such as 'vote for', 'elect', 'support', 'defeat' etc could not be the subject of regulation. This distinction would seem to be a difficult one to make, as a later case would attest. One might wonder whether the distinction between advocacy and issue-based communication is easy to make, given that often the issue-based communication was taking place during or near election periods.

As indicated above, subsequent decisions have largely confirmed these principles, and the Supreme Court struck down a provision whereby if a self-funding candidate reached a certain spending limit, their opponent would be able to receive outside donations at treble the normal limit from individuals. The court found that differential

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expenditure by candidates was unconstitutional, but would have upheld limits on the amount of personal expenditure by a candidate); White J dissenting and Stevens J not participating.

<sup>31</sup> 'The plain effect of the (section) is to prohibit all individuals ... from voicing their views relative to a clearly identified candidate through means that entail expenditures of more than \$1000 during a calendar year' (39).

<sup>32</sup> 45; for further discussion of the case see Deborah Goldberg and Brenda Wright 'Defending Campaign Contribution Limits After *Randall v Sorrell* (2008) 63 *New York University Annual Survey of American Law* 661 and Richard Briffault 'The Return of Spending Limits: Campaign Finance After *Landell v Sorrell* (2005) 32 *Fordham Urban Law Journal* 399.

<sup>33</sup> 54; the Supreme Court was similarly unimpressed with such arguments in the recent decision of *Davis v Federal Election Commission* (2008) 128 S Ct 2759, 2772.

<sup>34</sup> 21-22.

<sup>35</sup> The Supreme Court had a similar view of limits on campaign contributions by an individual in *Nixon v Shrink Missouri Government Pac et al* (2000) 528 US 377.

<sup>36</sup> The Supreme Court recently clarified in *Davis* that disclosure requirements impact privacy of donors so a clear justification is required: *Davis v Federal Electoral Commission* (2008) 128 S Ct 2759, 2774.

<sup>37</sup> 'We do little but engage in word games unless we recognise that people – candidates and contributors – spend money on political activity because they wish to communicate ideas, and their constitutional interest in doing so is precisely the same whether they or someone else utters the words' (244).

contribution limits for candidates in competition with one another was not acceptable to First Amendment rights.<sup>38</sup> In some cases, a distinction has been drawn depending on whether the donor is an individual or a large organisation,<sup>39</sup> on the basis that an individual might be more constitutionally entitled to communication through the making of a donation as a democratic right, compared with an organisation. Further, if an organisation is larger, then it may be in a position to make a larger donation. The size of a donation might influence perceptions of corruption or bias.

The status quo changed in 2006 when the Supreme Court decided *Randall v Sorrell*,<sup>40</sup> a case involving a challenge to a Vermont law limiting individual contributions to state candidates (such limits had been upheld in *Buckley*) and imposing campaign spending limits. A majority of the Court struck down the limits as too low, as well as the limits on total election spending.<sup>41</sup> Although the Court apparently endorsed the *Buckley* dichotomy between contributions and spending, this was the first occasion that the Supreme Court had found that a contribution limit was unconstitutional, apparently indicating less ability to regulate contributions than had been thought to be the case in the years after *Buckley*.<sup>42</sup> The majority found the actual limits imposed in the Act to be disproportionate to the public purposes they were intended to advance.<sup>43</sup>

In the other recent Supreme Court decision in this area, *Federal Election Commission v Wisconsin Right to Life Inc.*,<sup>44</sup> (*Wisconsin II*) the court re-affirmed First Amendment principles in this area and thereby reduced the scope for campaign funding regulation. The case involved the distinction noted in *Buckley* between express advocacy and issues-based discussion. Congress had passed a law that purported to restrict advertising referring to a candidate for federal office within 60 days of a general election or 30 days of a primary, where they were targeted at the candidate's constituency. Ads began appearing which focussed on a current legislative issue, took a position on it and tried to convince the public to adopt that position, and then urged viewers to contact named public officials about that issue to find out their views, or in some cases told viewers what the views of public officials was in relation to the issue. In *McConnell*, the Supreme Court found that, taking into account the context of such ads, they were express advocacy so the law regulating them was valid and did not offend the First Amendment.<sup>45</sup> However, a differently constituted court in *FEC v*

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<sup>38</sup> *Davis v Federal Election Commission* (2008) 128 S Ct 2759 (per Roberts CJ Scalia Kennedy Thomas and Alito JJ, Stevens, Souter, Ginsburg and Breyer JJ dissenting in part).

<sup>39</sup> *Austin v Michigan Chamber of Commerce* (1990) 494 US 652.

<sup>40</sup> (2006) 126 S Ct 2479.

<sup>41</sup> Of the majority, three (Scalia Thomas and Kennedy JJ (more contentiously) indicated their view that the First Amendment forbids any limits on donations or spending), while three others including Roberts CJ, Breyer and Alito JJ apparently endorsed the differential treatment of spending and donations, but found the donation limits here too low). In dissent, Stevens Souter and Ginsburg JJ would have upheld the legislation.

<sup>42</sup> The majority proposed a two-step test to determine validity of an electoral finance law: (1) whether there were danger signs that the limits imposed may harm the electoral process by preventing challengers from mounting effective campaigns against incumbents, threatening accountability; and then (2) an assessment of relevant factors including what the limit was, whether the limit on party contributions to candidates was the same as the limit on individual contributions to candidates, whether exceptions existed for volunteer expenses, whether the ceiling was adjusted for inflation, and whether there was any special justification for the donation limits (2495-99).

<sup>43</sup> 2500.

<sup>44</sup> (2007) 127 S Ct 2652.

<sup>45</sup> *McConnell v FEC* (2003) 540 US 93.

*Wisconsin II* found that they were not express advocacy, so the law could not regulate them consistently with the First Amendment.<sup>46</sup>

Chief Justice Roberts adopted a narrow view of what was ‘express advocacy’: that the ad must be susceptible of no other reasonable interpretation other than as an appeal to vote for or against a specific candidate. These ads did not meet the test, so could not be regulated as ‘express advocacy’.<sup>47</sup>

(c) *Canadian Jurisprudence*

There have been many attempts to regulate electoral financing over the years, some being held contrary to the *Charter*.<sup>48</sup> For those not familiar with the *Charter*, s2(b) guarantees freedom of expression and s2(d) guarantees freedom of association. Section 1 of the *Charter* clarifies that the rights in the *Charter* are not absolute, and must be balanced against ‘reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’. In other words, a balancing exercise is called for in assessing the constitutional validity of laws which impinge on *Charter* freedoms, a class which certainly includes electoral financing laws. One relevant factor is whether the laws are the ‘least drastic means’ test; in other words, whether the laws introduced, although invasive of *Charter* freedoms, were the least intrusive means possible to achieve legitimate objectives.<sup>49</sup>

More recent reforms have included the *Elections Act* 2003, which introduced a limit on contributions by individuals to each political party, its candidates and associations of \$5000 total. Corporate and union contributions to national political party organisations were prohibited, although such bodies could contribute up to \$1000 to individual candidates. Disclosure obligations in relation to donations were increased.<sup>50</sup> The *Accountability Act* 2006 went further, reducing the maximum individual contribution from \$5000 to \$1000, and totally banning corporate and union contributions.

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<sup>46</sup> Roberts CJ, Scalia Thomas Kennedy and Alito JJ, Souter Stevens Ginsburg and Breyer JJ dissenting (2673).

<sup>47</sup> The decision has had a generally hostile reception among writers: see for example Richard Briffault ‘WRTL and Randall: The Roberts Court and the Unsettling of Campaign Finance Law’ (2007) 68 *Ohio State Law Journal* 807; ‘WRTL II: The Sharpest Turn in Campaign Finance’s Long and Winding Road’ (2008) 1 *Albany Governmental Law Review* 101; Daniel Ortiz ‘The Difference Two Justices Make: FEC v Wisconsin Right to Life Inc II and the Destabilisation of Campaign Finance Regulation’ (2008) 1 *Albany Governmental Law Review* 141; Kurt Hohenstein ‘Clio, Meet Buckley – Buckley, Clio: Reintroducing History to Unravel the Tangle of Campaign Finance Reform’ (2008) 1 *Albany Governmental Law Review* 63; and Deborah Goldberg and Brenda Wright ‘Defending Campaign Contribution Limits After Randall v Sorrell’ (2008) 63 *New York University Annual Survey of American Law* 661.

<sup>48</sup> Examples include *National Citizens’ Coalition AG Canada* (1984) 11 D.L.R. (4<sup>th</sup>) 481 (Alta QB)(amendments prohibiting anyone who was not a candidate for election and who was not acting on behalf of a registered party or candidate for election from incurring election expenses during an election period struck down as an unjustified breach of the guarantee of freedom of expression); and *Somerville v Canada* (1996) 136 D.L.R. (4<sup>th</sup>) 205, where a limit on third party expenditure of \$1000 was struck down on the same basis. The Supreme Court of Canada validated a ceiling on third party election expenditures of \$150 000, and a maximum of \$3000 in each electorate (known as a ‘riding’ in Canada) as reasonable regulation.

<sup>49</sup> Applying this test, the Supreme Court of Canada validated a ceiling on third party election expenditure of \$150 000, and a maximum of \$3000 in each electorate: *Harper v Canada* (2004) 1 SCR 827; cf *Libman v Quebec* (1997) 3 SCR 569.

<sup>50</sup> As a partial trade-off, the amount of public funding of Canadian political parties was increased.

While the constitutionality of such provisions is open to doubt and has been questioned,<sup>51</sup> they also run the danger of being seen as self-serving. Using evidence of past political donation activity, Feasby<sup>52</sup> argues the changes introduced by the minority Conservative government in the *Accountability Act* will impact most seriously on the Liberal Party, the main Opposition party in Canada. He uses this example to suggest, as others have,<sup>53</sup> that electoral laws require particular scrutiny by the judges, given the obvious tendency of the government in power to pass laws that advantages itself at the expense of opposition parties, and the inherent conflict of interest that may actually have occurred or be perceived to have occurred. In other words, if judicial deference to choices that the Parliament makes is an important factor in assessing Charter challenges to legislation, it should be less of a factor in this context. As Pildes concludes:

Constitutional law must play a role in constraining partisan or incumbent self-entrenchment that inappropriately manipulates the ground rules of democracy. That functional justification for judicial review will be present in all constitutional democracies.<sup>54</sup>

#### (d) *British Approach*

The United Kingdom's scheme was enacted in the *Political Parties, Elections and Referendums Act 2000* (PPERA).<sup>55</sup> The Act limits campaign expenditure<sup>56</sup> in the year before an election to almost 20 million pounds. The exact amount allowed is calculated by a formula whereby 30 000 pounds is multiplied by the number of seats contested in order to provide a maximum spend.<sup>57</sup> There was recently a proposal to reduce the 20 million pound ceiling to 15 million pounds.<sup>58</sup> These provisions work with other legislation which generally prohibits political advertising.<sup>59</sup> There are criminal penalties for breach of the limits.<sup>60</sup> Extensive disclosure provisions also apply.

The PERA limits third party (including corporations and unions) expenditure in the year before an election to 10 000 pounds in England, and 5000 pounds in each of Scotland, Wales and Northern Ireland. This parties wishing to donate above that limit must register with the Electoral Commission. Once this has occurred, limits increase

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<sup>51</sup> Colin Feasby 'Constitutional Questions About Canada's New Political Finance Regime' (2007) 45 *Osgoode Hall Law Journal* 513.

<sup>52</sup> Colin Feasby 'Constitutional Questions About Canada's New Political Finance Regime' (2007) 45 *Osgoode Hall Law Journal* 513, 542-543.

<sup>53</sup> Eg John Hart Ely *Democracy and Distrust: A Theory of Judicial Review* (1980); Samuel Issacharoff and Richard Pildes 'Politics as Markets: Partisan Lockups of the Democratic Process' (1998) 50 *Stanford Law Review* 643; Richard Pildes 'The Theory of Political Communication' (1999) 85 *Virginia Law Review* 1605.

<sup>54</sup> 'The Supreme Court 2003 Term – Foreword: Constitutionalization of Democratic Politics' (2004) 118 *Harvard Law Review* 29, 154.

<sup>55</sup> See for detailed discussion Keith Ewing *The Cost of Democracy: Party Funding in Modern British Politics* (2007).

<sup>56</sup> Defined to include party political broadcasts, advertising, unsolicited material sent to electors, any document setting out the party's policies, market research conducted on the electorate, press conference or other media expenses, transport of party leaders and officials, and rallies and public meetings

<sup>57</sup> Schedule 9 Part II s3.

<sup>58</sup> *United Kingdom Ministry of Justice Party Finance and Expenditure in the United Kingdom: The Government's Proposals* (2008) p40 ('White Paper').

<sup>59</sup> *Communication Act 2003* (UK) s321, Chapter 21.

<sup>60</sup> See also the *Political Parties and Elections Bill 2008* (UK).

to 793 500 in England, 108 000 pounds in Scotland, 60 000 pounds in Wales and 27 000 pounds in Northern Ireland.<sup>61</sup> The United Kingdom Parliament did not act on a recommendation from a 2007 commissioned report which recommended capping individual donations at 50 000 pounds.<sup>62</sup> The limits on donations have been criticised for their lack of enforceability.<sup>63</sup>

The United Kingdom has adopted the *European Convention on Human Rights*,<sup>64</sup> Article 10 of which protects the right to receive and impart information and ideas without interference by a public authority. It acknowledges that this right must be balanced against other considerations, most relevantly here conditions/restrictions considered necessary in a democratic society. It is similar in this respect to Article 19 of the *International Covenant on Civil and Political Rights*, although that article more strictly protects the right by allowing derogations from the right only where necessary to protect the reputation of others, to protect public order, public health or morals.<sup>65</sup>

The European Court of Human Rights found that a 1983 British Act limiting political speech amounted to a violation of Article 10.<sup>66</sup> Section 75(1) of the *Representation Act* 1983 (UK) prohibited any expenditure greater than 5 pounds by a third party to promote a candidate for political office. Bowman was charged with an offence against s75 after she circulated a large number of leaflets pointing out the views of particular candidates in relation to abortion law, together with some material presenting a pro-life position. This occurred just prior to a general election.

The government sought to justify the provisions on several bases, including that (a) it stopped wealthy third parties from campaigning for or against a particular candidate or issuing material; (b) ensured candidates remained independent of the influence of powerful interest groups; and (c) it prevented the political debate from being overly focussed on one issue (which lobby groups would tend to target) rather than a range of issues.

In declaring the law to be inconsistent with Article 10, the Court found it was disproportionate to any legitimate end. Free elections and freedom of expression formed the bedrock of any democratic system, with the latter necessary to make sure the choice of voters at an election was free.<sup>67</sup> There was no evidence Bowman's advocacy would harm any specific candidate, because readers might use the material

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<sup>61</sup> Schedule 10 Part II s3.

<sup>62</sup> Sir Hayden Phillips *The Review of the Funding of Political Parties Strengthening Democracy: Fair and Sustainable Funding of Political Parties* (2007) p10. A previous major review in the United Kingdom recommended against a cap on private funding: *The Committee on Standards in Public Life: the Funding of Parties in the United Kingdom* (1998)(Neill Committee) p80.

<sup>63</sup> Ewing cites three loopholes with such limits, as demonstrated by conduct since the introduction of the United Kingdom restrictions – money can be disaggregated so as not to breach limits, money can be spread around and money can be given to unregulated recipients: *The Cost of Democracy* (2007) p229-230. He concludes of the new regime that 'extensive and detailed controls have been found to be very porous, allowing ample opportunity for financial support for parties to be concealed in various perfectly lawful ways' (87).

<sup>64</sup> *Human Rights Act* 1998 (UK).

<sup>65</sup> Article 25 provides for a right of all citizens to take part in the conduct of public affairs on a non-discriminatory basis without unreasonable restrictions.

<sup>66</sup> *Bowman v United Kingdom* [1998] ECHR 4 (24839/94); see also *Linens v Austria* (8/7/86) Series A No 103, p26 ss41-42 and *Mathieu-Mohan and Clerfayt Belgium* (2/3/87) Series A No.113, p22 s47.

<sup>67</sup> Para 42.

to form a range of views about candidates. The government could not show that the limit of 5 pounds here was necessary to achieve the legitimate end of securing equality among candidates given there were no restrictions on the press in supporting or opposing a particular candidate, or upon parties or candidates advertising, provided it was not intended to promote or prejudice the electoral prospects of any particular candidate in a particular constituency.<sup>68</sup> I am not aware that the validity of the PPERA has been tested in terms of the *European Convention on Human Rights*.

#### *Summary of Jurisprudence on Electoral Finance Laws*

In summary then it can be seen that whether or not a country has a bill of rights, courts in various jurisdictions have closely scrutinised legislation that limits participation in democratic processes. They recognise some legitimate government interest in regulating electoral financing, but in many cases have found that the end did not justify the means in terms of restrictions on funding contributions, spending etc.

#### *Part B: Arguments in Favour of Limits on Donations/Campaign Spending*

I explore here the arguments in favour of and against restrictions, before concluding with an opinion of which types of restrictions the Australian Government might be able to introduce that would avoid constitutional difficulty, given the international experience.

I begin this consideration from a starting point that, as has been recognised substantially in many jurisdictions, freedom of thought, speech and communication is an essential aspect of a democracy. It is a fundamental right that must be accorded due respect. It is not a desirable extra in a system of representative government where the sovereignty of the people is accepted. While no right is absolute, and courts will allow intrusions into fundamental human rights, the clearest and most cogent justification must be given, and shown. I also bear in mind the work of public choice theorists who argue that governments will attempt to maximise their position and power, and must be checked by independent, outside interests.<sup>69</sup> This accords of course with the theory underlying the doctrine of judicial review and the separation of powers. Thus, arguments as to the need for such regulation must be very closely scrutinized by the courts. Finally, I bear in mind the faith we place in the people to be able to digest communications they receive, to judge whether they are being told the truth, whether policies are in the best interests of the country and/or themselves etc. In this way, I am sceptical of the need for the government to step in to regulate speech to 'protect' the public from too much, incomplete, or incorrect information.

#### *(1) Corruption*

It might be argued that it is necessary to introduce a limit on the amount by which an individual can donate to a candidate or political party in order to reduce the likelihood of, or the perception that, the donor is somehow buying political candidate or party. Similarly, it might be argued that it is necessary to limit a candidate's spending in order to reduce their dependence on donations, which would then reduce the likelihood they have been 'bought off' by a particular donor. It can readily be acknowledged that it would not be good in terms of faith in our political institutions if

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<sup>68</sup> Para 47.

<sup>69</sup> Randall Holcombe *Public Policy and the Quality of Life* (1995) p5-6; Dwight Lee and Richard McKenzie *Regulating Government* (1987) p10-13.

it were perceived (whether or not it was actually the case) that politicians or political parties had been ‘bought off’ by a particular donor, or were doing the bidding of their most generous donors. Both the High Court of Australia and the Supreme Court of the United States have recognised this as a legitimate government interest in the context of regulation of political funding.<sup>70</sup> This rationale is also referred to in several places in the Federal Government’s Green Paper on Electoral Reform in support of the case for change.<sup>71</sup>

I would find this argument convincing if I had seen evidence of a link between political donations and voting behaviour from politicians. However, of the many studies that have sought to establish whether such a link exists, most have found little evidence that a politician’s voting behaviour is in fact affected by donations that might have been made.<sup>72</sup> As Hall and Wayman write:

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.<sup>73</sup>

The United Kingdom Ministry of Justice in its White Paper is also not convinced of the corruption argument.<sup>74</sup>

## (2) Equality

Some argue that it is necessary to limit the quantum of donations to candidates or parties, or limit the amount that a candidate can spend, in order to make elections as

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<sup>70</sup> *ACTV v Cth* (1992) 177 CLR 106 and *Buckley v Valeo* (1976) 424 US 1.

<sup>71</sup> Para 7.37 ‘eliminating or reducing private funding with bans or caps would address concerns about undue influence’; para 7.35 ‘In the Australian federal electoral system, no restrictions on donations currently exist. It has been argued that this could result in a situation where influence and access can be purchased’, and para 8.28 ‘By imposing an upper limit on election spending, the need for and advantages in attracting large donations and other financial support would be removed, and the incentive for any political party to chase dollars and potentially trade benefits or access for funding would be minimised’.

<sup>72</sup> Henry Chappell ‘Campaign Contributions and Congressional Voting: A Simultaneous Probit-Tobit Model’ (1982) 62 *Review of Economics and Statistics* p77-83; Janet Grenzke ‘Shopping in the Congressional Supermarket: The Currency is Complex’ (1989) 33 *American Journal of Political Science* 1; William Welch ‘Campaign Contributions and Legislative Voting: Milk Money and Dairy Price Supports’ (1982) 35 *Western Political Quarterly* 478; John Wright ‘PACs, Contributions and Roll Calls: An Organisational Perspective’ (1985) 79 *American Political Science Review* 400; John Lott ‘Empirical Evidence in the Debate on Campaign Finance Reform’ (2001) 24 *Harvard Journal of Law and Public Policy* 9; Sorauf, F *Money in American Elections* (1983) p285-290; S Moussalli *Campaign Finance Reform: The Case for Deregulation* 4 (1990); Bradley Smith ‘Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform’ (1996) 105 *Yale Law Journal* 1049; Bradley Smith ‘Money Talks: Speech, Corruption, Equality and Campaign Finance’ (1998) 86 *Georgetown Law Journal* 45; and Frank Souraff ‘Politics, Experience and the First Amendment: The Case of American Campaign Finance’ (1994) 94 *Columbia Law Review* 1348.

<sup>73</sup> ‘Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees’ (1990) 84(3) *American Political Science Review* 797, 798, Kathleen Sullivan ‘Political Money and Freedom of Speech’ (1997) 30 *University of California Davis Law Review* 663, 679. For a contrary view, see Richard Briffault ‘The Political Parties and Campaign Finance Reform’ (2000) 100 *Columbia Law Review* 620, and J Skelly Wright ‘Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?’ (1982) 82 *Columbia Law Review* 609.

<sup>74</sup> ‘There is no evidence to suggest that the overwhelming majority of people who give to political parties do so with the intention of securing improper influence’ (p53).

‘equal’ as possible among candidates.<sup>75</sup> These arguments draw support from the principle of voting equality inherent in our system of democracy, and argue that voting equality implies participation equality.<sup>76</sup> Adherents to the equality argument question the libertarian conception of free speech as ignoring existing inequalities in private ownership of wealth and property which impact on participation in the political process.<sup>77</sup>

Again, in my view evidence of such existing inequality is necessary before accepting such a view. If there were evidence that either of the major political parties enjoyed a significant financial advantage over the other, evidenced by the quantum of private donations, or their ability to fund election campaigns, it would at least be arguable that such a disparity could affect the legitimacy of the choice that electors would be making each time they were asked to vote. However, in my view there are several difficulties with such an argument.<sup>78</sup>

Firstly, there is little evidence of great funding disparities in Australia, at least as between the major political parties. The most recent evidence available to us (which is up to 1996, before disclosure rules changed) suggests that the Australian Labor Party spent almost \$40 million between 1984-1996. The Liberal Party during that same time period spent almost \$35 million.<sup>79</sup> The Green Paper notes that after the rules changed, and parties were required to disclose only total expenses rather than total election expenses, the estimate of electoral expenses in 2004 for the Australian Labor Party was \$19.4 million and the Liberal Party \$22 million. These figures don’t indicate that either of the major political parties is at a real disadvantage, in terms of their ability to fund electoral campaigns.

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<sup>75</sup> ‘It is argued that both bans and caps go towards ensuring that all citizens have equal opportunity to participate in the political process’ (p61) *Green Paper*; J Skelly Wright ‘Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?’ (1982) 82 *Columbia Law Review* 609.

<sup>76</sup> Ronald Dworkin ‘The Curse of American Politics’ (1996) *New York Review Books* p19,23; Kathleen Sullivan ‘Political Money and Freedom of Speech’ (1997) 30 *University of California Davis Law Review* 663, 674.

<sup>77</sup> Jeffrey Blum neatly summarises this divide: ‘The libertarian conception of free speech is best seen as integral to the libertarian strategy of seeking a minimal state in which paternalistic and regulatory functions are severely limited ... By promoting speech entitlements that are coextensive with the private ownership of wealth and property, the libertarian approach facilitates an upward redistribution of political power and initiative that tends to strengthen the political base for reducing the regulatory and welfare programs despised by libertarian theorists. By contrast, the equal liberty and collective right conception is integral to a strategy designed to achieve ends that are in many respects the opposite of those that libertarians favor. By using absolutist protection to guarantee sufficient social space for movements to form and enter the established political system, the Supreme Court has enhanced the political initiative, and thus the political power, of groups that lack control over significant wealth and property. This limited redistribution of political power has helped to create a political base for the paternalistic, regulatory welfare state’: ‘The Divisible First Amendment: A Critical Functionalist Approach to Freedom of Speech and Electoral Campaign Spending’ (1983) 58 *New York University Law Review* 1273, 1349.

<sup>78</sup> Ewing dismisses the argument as a ‘fiction’: ‘(another) objective of a party funding regime is based on the principle of political equality which lies at the heart of liberal democracy. In practice, this principle is little more than a fiction, undermined by the great disparities of wealth .. that exist between individuals in a liberal version of democracy’: *The Cost of Democracy* (2007) p27.

<sup>79</sup> *Australian Electoral Commission*, figures reproduced in the *Green Paper* p10.

Considering private donations to the major political parties,<sup>80</sup> according to the Australian Electoral Commission the Australian Labor Party received approximately \$120 million in private funding in the years between 2002-2003 and 2004-2005, compared with the Liberal Party which received approximately \$104 million. In the years between 1999-2000 and 2001-2002, the Australian Labor Party received about \$98 million in private donations, and the Liberal Party approximately \$81 million.<sup>81</sup>

Another argument against the so-called need for equality is that the mere fact that a candidate, or a party, may be able to collect large levels of donations may in fact reflect the popularity of the platform or the candidate. One of the impressive things about the political campaign of United States President Barack Obama in 2008 was his ability to raise very large levels of donations to his campaign, both to be the Democratic nominee, and then to run for President. These massive donation levels showed the extremely large support base from which this candidate drew, reflecting the voice of the American people. It is hard to see in this context how limiting the amount that a person could donate to a candidate would have assisted in making the campaign or the result more democratic. So far from impeding democracy, the freedom that an individual has to support a particular candidate or party, and to express that support by financially donating to that candidate or party, reflects democracy at work.

The American Courts have generally not been impressed with the argument that in order to protect one person's freedom of speech, it is necessary to limit another's freedom of speech.<sup>82</sup> Fried claims that if it were the position that a government could silence certain speakers in order to ensure 'others' are heard, 'it is but a short step to suppression pure and simple'.<sup>83</sup> Others claim that far from creating equality, campaign finance restrictions actually promote inequality by making it tougher for challengers to incumbents to raise the funding they need, and favour those who know how the system works, as opposed to fledgeling, grassroots campaigners who may not be aware of the rules or how to (legally) circumvent them.<sup>84</sup> There is also the view that the mere fact someone spends a lot of money on their candidacy is no guarantee of electoral success – though it might purchase more advertising, voters may not like the message. Researchers of some recent elections have found that many incumbents won re-election while spending much less than their opponents.<sup>85</sup> In any event,

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<sup>80</sup> The amount of public funding available to political parties, based as it is on the party's support at the previous federal election, is excluded as irrelevant for the purposes of the present discussion.

<sup>81</sup> *Green Paper* p12, see also Joo-Cheong Tham and David Grove 'Public Funding and Expenditure Regulation of Australian Political Parties: Some Reflections' (2004) 32 *Federal Law Review* 397, 401-405.

<sup>82</sup> *Buckley v Valeo* (1976) 424 US 1; Stephen Gottlieb 'The Dilemma of Electoral Finance Campaign Finance Reform' (1989) 18 *Hofstra Law Review* 213, 289.

<sup>83</sup> Charles Fried 'The New First Amendment Jurisprudence: A Threat to Liberty' in Stone, G et al ed *The Bill of Rights in a Modern State* 225, 226-227.

<sup>84</sup> Bradley Smith 'Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform' (1995) 105 *Yale Law Journal* 1049, 1072-1084; 'Money Talks: Speech, Corruption, Equality and Campaign Finance' (1997) 86 *Georgetown Law Journal* 45, 88; Joel Gora 'Campaign Finance Reform: Still Searching Today for a Better Way' (1998) 6 *Journal of Law and Policy* 137, 145-146, Clarisa Long 'Shouting Down the Voice of the People: Political Parties, Powerful PACs and Concerns About Corruption' (1993) 46 *Stanford Law Review* 1161, 1181-1183.

<sup>85</sup> Smith, n71, p1065; *Late Money in Key House Races* (1995) Political Financing and Lobbying Report 3, 5-6 (January 11).

experienced participants in this process will often be able to find legal loopholes to avoid limits.<sup>86</sup>

*Part C: Other Issues Relevant to the Constitutionality of Political Funding Reform*  
Several other issues are raised by the overseas authorities, particularly the United States cases, in the context of campaign finance reform, which I now consider.

*(1) The Less Drastic Means Doctrine*

In several American cases considering First Amendment rights, the Court has considered as one relevant factor in assessing the constitutionality of the law, whether there were less drastic means (in other words, means less intrusive of human rights) that were available to the government to pursue what may be a legitimate objective. So, for example, in assessing whether spending limits on candidates are justified to prevent corruption, the Court might find that they are not justified because they are intrusive, and the government interest in preventing corruption could less invasively be met by introducing a disclosure regime.<sup>87</sup>

There is some support for this doctrine in the Australian case law. A unanimous court in *Lange v Australian Broadcasting Corporation* seemed to accept the validity of such an approach, in the current context:

In *ACTV* for example, a majority of this Court held that a law seriously impeding discussion during the course of a federal election was invalid because there were other less drastic means by which the objectives of the law could be achieved.<sup>88</sup>

However, Brennan CJ expressly disavowed this approach in *Levy*:

Under our Constitution, the courts do not assume the power to determine that some more limited restriction than that imposed by an impugned law could suffice to achieve a legitimate purpose. The courts acknowledge that the law-maker's power to determine the sufficiency of the means of achieving the legitimate purpose, reserving only a jurisdiction to determine whether the means adopted could reasonably be considered to be appropriate and adapted to the fulfilment of the purpose.<sup>89</sup>

I wonder with respect whether such a precise delineation can be made between what is 'reasonably appropriate and adapted' and whether less drastic means are available. In other words, perhaps the fact that less drastic means are available to achieve legitimate ends might suggest that the law is not reasonably appropriate and adapted to achieving a legitimate end. It is worth remembering also that the phrase 'reasonably appropriate and adapted' is itself derived from a United States decision.<sup>90</sup>

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<sup>86</sup> Ewing points out many of the loopholes that have been exploited in campaign finance regulation, including making donations over extended periods rather than in lump sums, channelling money to assist candidates indirectly rather than directly, considering the precise timing of a donation carefully to avoid difficulties, providing benefits to candidates and parties through loans rather than donations, providing benefits to candidates and parties through in-kind support rather than a donation, testing the limits of what 'election expenses' are: *The Cost of Democracy* (2007)

<sup>87</sup> See for example *Buckley v Valeo* (1976) 424 US 1, 55-56; *City of Cincinnati v Discovery Network Inc* (1993) 113 S Ct 1505.

<sup>88</sup> (1997) 189 CLR 520, 568.

<sup>89</sup> *Levy v Victoria* (1997) 189 CLR 579, 598; as did Gleeson CJ in *Coleman v Power* (2004) 220 CLR 1, 31.

<sup>90</sup> *McCullough v Maryland* (1819) 4 Wheat 316, 421: 'let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, what are not prohibited, but consist with the letter and spirit of the Constitution are constitutional'

Apart from the comments in *Lange* cited above, the High Court of Australia clearly has used something akin to (at the very least) the ‘less drastic means’ test in considering the constitutionality of legislation, though in different contexts to the one now being considered.

For example, in the *Castlemaine Tooheys Ltd v South Australia*<sup>91</sup> decision regarding s92 of the Constitution, the High Court did consider the possibility of other regulatory options:

Where a law on its face is apt to secure a legitimate object but its effect is to impose a discriminatory burden upon interstate trade as against intrastate trade, the existence of reasonable non-discriminatory alternative means of securing that legitimate object suggests that the (law is invalid as involving prohibited discrimination).

In another context considering laws providing for bicentennial celebrations in Australia,<sup>92</sup> the High Court refused to accept provisions giving the Bicentennial Authority monopoly use over certain words, given that those words could be used in other contexts for legitimate commercial reasons. The court concluded that protection of the integrity of the bicentennial celebrations did not require such prohibition; that the law was disproportionate to the need to protect the commemoration powers of the authority.<sup>93</sup> Though the court did not phrase its reasoning by saying something like ‘although the authority has legitimate purposes, there are less drastic powers it could be given in order to effect its purposes that would be less invasive of established commercial freedoms, so the law is unconstitutional’, I would submit that the above comments are very similar in effect. As a result, I believe there is some Australian support in the constitutional context for such a test.

Proceeding on the basis that this is a relevant doctrine, we should apply this to the question of limits on campaign funding. It is difficult of course because no specific limits on political donations or expenditure by candidates or parties have been suggested in the *Green Paper*. However, I would be very sceptical of the need for such laws, and it is submitted a relevant factor in assessing the constitutional validity of such laws, given their interference with the freedom of communication, would be whether other measures are available to achieve the kinds of purposes said to be achieved by such measures.

The alternatives include a register of political donations and full disclosure of donations at a very low threshold, enforcement of criminal provisions dealing with corruptions and bribes, and a system by which some public funding is provided to political parties (which already occurs). To the extent that corruption and equality arguments remain a concern (and I have given my reasons for thinking they are not justifications for further electoral funding reform), clearly measures already exist to deal with them, and it is not clear whether measures more invasive of the freedom of political communication are in fact necessary. I don’t believe that we should defer to

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(Marshall CJ); expressly adopted and applied by the High Court of Australia in *Grannall v Murrumbidgee Margarine Pty Ltd* (1955) 93 CLR 55, 76; expressly approved of recently by Gummow and Crennan JJ in *Thomas v Mowbray* [2007] HCA 33, [102].

<sup>91</sup> (1990) 169 CLR 436, 471-472 (Mason CJ Brennan Deane Dawson and Toohey JJ).

<sup>92</sup> *Davis v Commonwealth* (1988) 166 CLR 79.

<sup>93</sup> 99-100.

Parliament's judgment about the necessity or otherwise of laws, particularly in this context where the subject matter being considered is very 'close to the bone' as it were, and where politicians and political parties can be expected to act in ways that they think will advantage themselves, rather than build or maintain a robust democracy.

*(2) The Individual/Organisation Distinction*

As indicated above, some American cases have drawn a distinction based on whether the donor is an individual or an organisation.<sup>94</sup> It is argued that, because freedom of communication/freedom of speech is fundamental to the right of an individual to participate in the electoral process, that restrictions on the ability of an organisation to make donations to political candidates or individuals should be more acceptable. As indicated, the recent Canadian reforms completely ban donations by organisations, while allowing some donations by individuals.

The Federal Government's discussion paper canvasses this issue separately from the general question of caps. In considering the question of differential treatment of bans or caps on donations from organisations, the Green Paper considers:

An argument in favour of this approach is that the Government is elected by individuals and is there to represent the will of its citizens, rather than organisational interests. In that case, individuals should be encouraged to contribute to those running for office by allowing them to give donations to their party of choice, whereas organisations should not be allowed to influence candidates or parties running for office. Banning donations from organisations is argued to have the added advantage of preventing wealthy individuals from donating to political parties and candidates through a range of different corporations or organisations, thereby undermining any caps on donations which may be in place.

An argument against banning donations from organisations is that different types of organisations play a variety of important roles in modern society – corporations have legitimate interests in government decisions; trade unions exist to represent the interests of their membership base; while community groups can be formed around important social or environmental issues.<sup>95</sup>

Given the terms in which the freedom of political communication has been framed in Australia, it is submitted there is a respectable argument that the freedom is limited to individuals rather than organisations.<sup>96</sup> The freedom exists because the Constitution is based on the principle of representative democracy. Citizens need to be able to engage in political discussion in order to give effect to this system. On one view, then, the freedom is limited to individuals and thus a law banning political donations by organisations<sup>97</sup> would not offend the freedom since such organisations are not necessarily democratic, are not citizens and do not vote at elections. The Parliament does not represent that organisation. It may be argued also that an organisation, particularly a well-resourced one, might be more easily perceived as able to influence

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<sup>94</sup> Eg *Austin v Michigan Chamber of Commerce* (1990) 494 US 652; see Linda Berger 'Of Metaphor, Metonymy, and Corporate Money: Rhetorical Choices in Supreme Court Decisions on Campaign Finance Regulation' (2007) 58 *Mercer Law Review* 949; and C Edwin Baker 'Campaign Expenditures and Free Speech' (1998) 33 *Harvard Civil Rights-Civil Liberties Law Review* 1, 32-33, Adam Winkler 'Beyond Bellotti' (1999) 32 *Loyola Los Angeles Law Review* 133.

<sup>95</sup> P59 *Green Paper*.

<sup>96</sup> This issue did not arise in *ACTV v Commonwealth* since the Act applied only to governments and persons; it did not refer to non-government organisations.

<sup>97</sup> More detailed discussion of this issue from a company perspective appears in Ian Ramsay, Geof Stapledon and Joel Vernon 'Political Donations by Australian Companies' (2001) 29 *Federal Law Review* 179.

government decision making, in other words the strength in numbers argument. This would justify the Commonwealth being able to regulate donations from such organisations.<sup>98</sup>

However, while it may be accepted that an organisation may not directly have freedom of communication, we need to remember that communication is two-way – it is a right to be heard but also a right to hear. It might be argued that, in order for citizens to be able to participate effectively in a democracy, they must have access to a range of views on political matters, and some of these views might be expressed by organisations. As Mason CJ said in *ACTV v Commonwealth*

Individual judgment ... on so many issues turns upon free public discussion in the media of the views of *all interested persons, groups and bodies* and on public participation in, and access to, that discussion.<sup>99</sup>

McHugh J agreed that voters had a constitutional right to convey *and receive* opinions.<sup>100</sup> Deane and Toohey JJ in *Nationwide News v Willis* said that freedom of political discussion necessarily involved the freedom to maintain *and consider* claims and opinions about political matters.<sup>101</sup> And the Court was unanimous in *Lange* that ‘common convenience and welfare of Australian society are advanced by discussion – the giving *and receiving* of information – about government and political matters’.<sup>102</sup>

I have concluded that no distinction should be made, in terms of the constitutional freedom of communication, between donors according to whether they are individuals or organisations. While it is true that the freedom is cast in terms of democracy and representative government, and an organisation does not have a right to vote nor could it expect Parliament to represent its view, I believe that individual citizens have a right to receive the views of the organisation, in order to best exercise their democratic rights. These views might be expressed directly through payment for political advertising, or indirectly by funding candidates who express (broadly or narrowly) the views of the organisation.

### (3) *The Donations/Expenditure Distinction*

At the heart of the American jurisprudence in this area is the notion that differential treatment should be applied to donations to candidates and parties on the one hand,

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<sup>98</sup> If this were the position taken, another relevant issue might be how ‘democratic’ the organisation was. For example, if its office bearers were voted in by members, the organisation might be argued to be democratic and hence be entitled to freedom of communication, as genuinely representing the views of its members, whereas if the organisation was not perceived to be democratic in nature, its claim to be able to speak out about political matters might on one view be diminished. However, due to the conclusion I reach on the suggested distinction, I need not explore this peripheral issue here.

<sup>99</sup> 139.

<sup>100</sup> 232 (emphasis added).

<sup>101</sup> (1992) 177 CLR 1, 75.

<sup>102</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 571. Subsequent to my development of this argument, I learned that the United States Supreme Court in *First National Bank v Bellotti* (1978) 435 US 765 dismissed arguments that the worth of speech depended on whether an individual or corporation was doing the talking, on the basis that both could equally inform the public. The *McConnell v Federal Election Commission* case (2003) 540 US 93 upheld limits on corporate spending, but the continuing acceptance of this decision is a matter of doubt after *Sorrell*: Richard Briffault ‘WRTL II: The Sharpest Turn in Campaign Finance’s Long and Winding Road’ (2008) 1 *Albany Governmental Law Review* 101.

and actual campaign expenditure on the other.<sup>103</sup> The *Green Paper* treats them as separate policy options.<sup>104</sup> As the result in *Buckley* demonstrates, the Supreme Court in that decision was prepared to validate the former, but not the latter, under First Amendment principles.<sup>105</sup> This distinction has apparently been retained, at least by name, although some commentators see in the very recent cases an actual (if not formal) departure from the *Buckley* dichotomy:

Randall re-affirmed the Court's continued adherence to the contribution-expenditure distinction, which has long been at the heart of our campaign finance jurisprudence, while demonstrating that a majority of the Court rejects the distinction.<sup>106</sup>

Perhaps the key passage in terms of the explanation of the *Buckley* court's distinction between the two kinds of limits is this one:

By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support ... A limitation on the amount of money a person may give to a candidate or campaign organisation thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.<sup>107</sup>

I must agree with Burger CJ who dissented from this view in *Buckley*, in invalidating both the donation limit and expenditure limit. Too much should not be made of the distinction. The donations are intended to be expended, and are expended, by the candidate in communicating a political view. This communicated view is presumably broadly similar to the political view with which the donor agrees. On one view, we should see the candidate as the medium through which the political views of his/her donors are communicated. In my view, whether the donor speaks directly to the people, or indirectly through candidates he/she supports, both are political speech and should be entitled to the same protection.<sup>108</sup>

One also wonders about the constitutional purpose behind the distinction – the effect of it is to allow limits on donations but not to limit total spend. It is submitted that

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<sup>103</sup> *Buckley v Valeo* (1976) 424 US 1.

<sup>104</sup> Chapter 7 is about Bans or Caps on Funding, Chapter 8 about Caps on Expenditure.

<sup>105</sup> *Buckley v Valeo* (1976) 424 US 1.

<sup>106</sup> Richard Briffault 'WRTL and Randall: The Roberts Court and the Unsettling of Campaign Finance Law' (2007) 68 *Ohio State Law Journal* 807, 825; 'The Return of Spending Limits: Campaign Finance After Landell v Sorrell' (2005) 32 *Fordham Urban Law Journal* 399; 'WRTL II: The Sharpest Turn in Campaign Finance's Long and Winding Road' (2008) 1 *Albany Government Law Review* 101; Daniel Ortiz 'The Difference Two Justices Make: *FEC v Wisconsin Right to Life, Inc II* and the Destabilisation of Campaign Finance Regulation' (2008) 1 *Albany Government Law Review* 141; Kurt Hohenstein 'Clio, Meet Buckley – Buckley, Clio: Re-Introducing History to Unravel the Tangle of Campaign Finance Reform' (2008) 1 *Albany Government Law Review* 63.

<sup>107</sup> 20-21.

<sup>108</sup> As Burger CJ put it, 'we do little but engage in word games unless we recognise that people – candidates and contributors – spend money on political activity because they wish to communicate ideas, and their constitutional interest in doing so is precisely the same whether they or someone else utters the words' (242).

effects/consequences are relevant considerations in considering the constitutionality of provisions and the acceptability of suggested distinctions. This distinction is flawed because the effect of allowing limits on donations will, all other things being equal, end up limiting campaign expenditure. This was exactly the thing the Supreme Court said was unacceptable. It is true that limiting donations might cause candidates to cast the net further afield in terms of donations, but this is an option open to candidates whether or not limits exist, so I dismiss it as a 'red herring' in terms of justification of donation limits.<sup>109</sup> I submit that, given the High Court's acceptance that communication can be non-verbal, the political communication inherent in donating to a candidate or political party is just as valuable in terms of representative government as the ability of a candidate to spend money to communicate the political ideas and views of themselves, their party and those whom they represent.

#### *(4) Express Advocacy vs Issues-Based Discussion*

As discussed above, some of the American cases have drawn a distinction between these two kinds of speech, finding restrictions on the former more likely to be compatible with First Amendment rights than restrictions on the latter. The Green Paper does not expressly refer to this distinction.<sup>110</sup>

I am not convinced that such a sharp distinction can or should be made between the two types of speech. As some of the American cases have shown on their facts, it can be a very difficult line to draw. Is an ad that advocates a particular view on a contentious topic, and then tells viewers to 'contact candidates' about it, or tells viewers what particular candidates think about the issue, in effect advocacy in favour of a particular candidate? Or is it merely issue-based discussion? What is the difference, in terms of freedoms, between expressly advocating for a candidate whose views one supports, and taking out an ad taking a position about an issue, and telling viewers/readers that a particular candidate also takes that position? I would argue that the effect is virtually the same, and that we are resorting to unjustified distinctions to argue otherwise.

If the distinction served some other purpose which was compatible with freedom of speech/freedom of political communication, the fact it sometimes required fine lines to be drawn might not be fatal. But I am not convinced that express advocacy of a candidate is any less necessary to the kind of representative democracy we have, and wish to maintain, than issue-based advocacy.

#### *Conclusion*

I conclude that the introduction of electoral funding legislation would be a challenge for the Australian Government given the constitutional freedom of political communication that has been recognised by the High Court of Australia. Although I cannot of course comment on any specific proposal as no bill has yet been drafted, the Court should start, when considering such a law, and the draftsman should start,

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<sup>109</sup> If it be thought that relatively low donation limits might make a candidacy more 'democratic', others disagree. Smith, for example, claims many previous presidential elections in the United States have shown that candidates often able to best raise campaign dollars in small contributions often turned out to be disastrous candidates, citing Barry Goldwater and George McGovern as examples: Bradley Smith 'Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform' (1995) 105 *Yale Law Journal* 1049, 1063.

<sup>110</sup> As a result, I explore this argument in less detail than otherwise might be appropriate.

when drafting such a law, with the general principle that it is fundamental in a democracy that people must have a right to debate issues, and that includes speech as well as hearing messages from others. Of course, there must be a very strong and clear case for an interference with such a right. It cannot be supported based on mere assertion or platitudes. Some of the arguments given to support such regulation must be tested in terms of specific evidence. There is evidence that the introduction of campaign finance regimes, such as in the United Kingdom, have not in fact achieved the purposes for which they were introduced. Courts must be mindful of the fact that political parties may seek to change the funding rules to secure what they consider to be an electoral advantage to them. A strong independent umpire must consider any such changes very carefully.

The bill would need to explain cogently how the regulations it introduced represented the least drastic means to achieve a legitimate objective. I have concluded that there is no justification for differential treatment of political donations on the one hand, and spending on the other. Nor is the distinction between individual donors on the one hand and group donors on the other justified. Nor is the distinction sometimes made between express advocacy and issues-based advocacy one that the bill should embrace. The Australian Government must tread very carefully if it wishes to proceed on this path.