The reform of political donations, expenditure and funding

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EXECUTIVE SUMMARY

The reform of Australia's system of political party financing is not a simple matter. There are a number of jurisdictional, constitutional, policy and practical issues that must be considered in assessing any proposal.

1. Jurisdictional issues

Funds raised by State branches of political parties are often used to fund candidates for federal elections as well as State and local elections. Fund-raising for federal election campaigns often takes place within New South Wales. The consequence is that a State law that imposes limits on political donations made in New South Wales, or given to the NSW branch of a party, might be regarded as unconstitutional because it interferes with Commonwealth elections. Equally, Commonwealth laws limiting political donations might also be unconstitutional because of interference with State elections. Laws that are narrowly focused to avoid unconstitutionality are likely to be ineffective due to a significant potential for evasion. A co-operative Commonwealth/State approach to the financing of political parties is therefore preferable.

2. Constitutional constraints

Laws that ban or impose limits upon political donations or election campaign expenditure are likely to be regarded as burdening the constitutionally implied freedom of political communication. This is because they have the effect of limiting the quantity and breadth of communication about political matters. Such laws will only be held valid by the courts if they are reasonably and appropriately adapted to serving a legitimate end in a manner which is compatible with the system of representative and responsible government prescribed by the Commonwealth Constitution (the *Lange* test). Accordingly, reform proposals concerning party financing must be measured against this test, and special attention must be given to the types of issues that have concerned the High Court in the past, such as laws that unduly favour incumbents or unreasonably limit political communication by third parties.

3. The principal aims of reform

Proposals will also need to be tested against the principal aims of reform. The primary aim, which has been accepted as a 'legitimate end' by the High Court, is to avoid the risk and perception of corruption and undue influence. Other aims might include the reduction of the advantage of wealth in campaigning, creating a more level playing field and improving the diversity and depth of information to which voters have access so they can be genuinely informed in exercising their choice.

4. Banning or capping political donations

An outright ban on political donations is likely to be struck down as constitutionally invalid on the ground that it is not 'reasonably appropriate and adapted' to serving the

legitimate end of reducing the risk of corruption and undue influence. Banning small donations from individuals, for example, would not assist in achieving that end. Caps upon political donations are more likely to be constitutionally acceptable, but this would depend upon the level of the cap and its effect upon the capacity of parties and candidates to communicate with electors. There are a number of practical issues to be confronted about the sources and types of donations to be capped, the level at which caps should be set, and how to substitute for lost revenue to parties. The most difficult problem is how to prevent evasion of the caps through campaigning by third parties that are not limited in the sources of their funds and which may support political parties or particular policies.

5. Expenditure limits for political parties, candidates and third parties

Expenditure limits applied to political parties and candidates have a direct effect on their capacity to communicate with the electorate. Accordingly, any such law must be very carefully balanced in order to be held constitutionally valid. The most contentious area is the imposition of expenditure limits on third parties. If no such limits are imposed on third parties, the effectiveness of limits imposed on political parties or candidates will be undermined by third party electoral campaigning. If limits are imposed on third parties, there is a high risk of constitutional invalidity. Practical issues must also be considered, such as the periods for which expenditure limits apply, the types of expenditure to which they apply and the level at which they ought to be set. Expenditure limits may also need to be considered as part of an entire scheme, involving limits on donations and funding.

6. Public funding of political parties and candidates

Public funding itself does not burden freedom of political communication, but rather enhances opportunities for political communication. However, if it forms part of a scheme which involves limits on political donations or expenditure and therefore potentially burdens political communication, the whole scheme will need to be reasonably appropriate and adapted to serve a legitimate end, as required by the *Lange* test. Accordingly, great care would have to be taken with setting thresholds for receiving public funding and with setting the level of funding in a manner that does not unduly favour incumbents or discriminate against minor parties or new parties. Consideration could be given to using matching funding as one means of accommodating support for new parties.

7. Principle of equality

The High Court has not recognised any constitutional implication requiring political equality, and is unlikely to do so. However, where there is a burden on freedom of political communication and the High Court is considering the *Lange* test, laws that unduly discriminate against minor and new parties or favour incumbents will be vulnerable.

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Introduction

The reform of political funding in Australia is no simple matter.[2] First, there are jurisdictional problems to contend with, which make it difficult for a State or the Commonwealth to act unilaterally in imposing bans or caps on political donations. Next, there are constitutional difficulties arising from the implied freedom of political communication and the constitutional requirements of representative government. These constitutional constraints mean that any law imposing bans or caps on donations or expenditure will have to be very carefully balanced to ensure that it survives challenge. There are also policy matters to consider, such as who should fund political parties, what financial burden on taxpayers is acceptable and how to establish a system that is fair but not wasteful. Finally, there are the practical problems of preventing the avoidance of any restrictions while at the same time maintaining a workable system that is not overly burdensome at an administrative level.

This paper raises and discusses these issues and considers how they have been dealt with by comparable countries and their constitutional courts.

1. Jurisdictional issues – State or national reform?

Political funding in Australia is complicated by the federal system not only at the governmental level but also at the political party level. In general, major political parties tend to have a federal structure, with both a national office or secretariat and branches in each of the States. It is the State branch of a party which is usually registered as a political party within the State.

Political parties registered within New South Wales often receive donations that are used to fund candidates in Commonwealth, State and local government elections. Further, because there are many potential corporate donors in New South Wales, candidates from other States often hold fund-raisers within New South Wales, raising donations that are used to fund electoral campaigns at the Commonwealth level and in other States. If the New South Wales Parliament were to enact a law that banned or capped (a) the donation of funds to political parties registered in New South Wales and (b) donations that take place in New South Wales, then three inter-related jurisdictional issues would arise.

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[2] See the range of parliamentary reports dealing with the subject, the most recent being: NSW, Select Committee on Electoral and Political Party Funding, *Electoral and Political Party Funding in New South Wales* (NSW Parliament, June 2008).

Extra-territoriality

First, such a law would have an extra-territorial effect because it would apply to individuals, corporations or other bodies outside New South Wales that make donations to any party registered within New South Wales. The States, however, have a power to make laws with extra-territorial effect, as long as there is a sufficient nexus with the State[3] and subject to any other implication derived from the Commonwealth Constitution and the federal system it implements.[4] A law concerning the donation of funds to political parties registered in the State or donations made within the State would appear to have a sufficient nexus with the State. However, as discussed below, federal implications might affect such a law.

Inconsistency of laws

Secondly, there is the possibility of inconsistency of laws. This arises at two levels. A law of New South Wales concerning political donations might affect actions that take place in another State and conflict with the law of that other State. The Constitution does not contain a provision for resolving conflicts between State laws. In such a case, the High Court might derive an implication from the principles of federalism imposed by the Commonwealth Constitution and use it to limit the State's power to make laws which have an extra-territorial effect that leads to a conflict between State laws.[5] A New South Wales law might also conflict with Commonwealth laws concerning political parties and political donations. At the moment there is no conflict because both Commonwealth and State laws require disclosures that can be made without there being any conflict. If, however, a State law banned donations that a Commonwealth law expressly permitted or if the Commonwealth legislated to 'cover the field' and the State law intervened in that field, s 109 of the Constitution provides that the Commonwealth law prevails to the extent of the inconsistency. Accordingly, any proposal for a State law must take into account whether it might give rise to an inconsistency with other Commonwealth laws (or the laws of other States) and the potential for future inconsistency in the absence of a co-operative arrangement.

Implications arising from federalism and representative government

The third issue concerns the constitutional powers of the Commonwealth and the States within the federal system. The Commonwealth Constitution is predicated upon the continuing existence of the Commonwealth and the States as polities with governments and Parliaments. The High Court has drawn an implication from the Constitution that the Commonwealth may not legislate to destroy or curtail the continued existence of the States, or restrict or burden them in the exercise of their constitutional powers.[6] The

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[3] *Pearce v Florenca* (1976) 135 CLR 507, 517.
[4] *Australia Acts* 1986, s 2(1); and *Union Steamship Co of Australia v King* (1988) 166 CLR 1, 14.
[5] See, for example, *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, [138] (Kirby J).
[6] *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31; *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 163 (Brennan J); *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188; and *Austin v Commonwealth* (2003) 215 CLR 185.

Commonwealth, therefore, is limited in its power to interfere in the 'constitutional and electoral processes of the States'.[7] 'Representative government in the states is a characteristic of their respective Constitutions, and the legislative power of the Commonwealth cannot be exercised substantially to impair' that representative government.[8]

On the basis of this reasoning, unilateral Commonwealth legislation banning or regulating the receipt or expenditure of funds by political parties in a manner that impacts on the funding of State elections, might well be vulnerable to constitutional challenge. Equally, any State law that interfered with Commonwealth elections, by banning or regulating the receipt or expenditure of funds by a State-registered political party that would have been used to support candidates in Commonwealth elections, would be vulnerable to constitutional challenge.

Comparable problems in the United States

The same federalism issues arise in the United States. Attempts to confine federal laws concerning the regulation of political finances to donations and expenditure in relation to federal elections have resulted in massive avoidance and the use of 'soft money' (i.e. unregulated money) through State party structures. It has been argued that this has exacerbated problems concerning undue influence and potential corruption, rather than alleviating them.

Persily has explained:

> The campaign finance debate is as much about federalism as it is the First Amendment. If the United States did not have its overlapping system of elections at multiple levels of government, the campaign finance beast might be easier to tame. Federalism creates both an avenue of evasion for federally imposed limits and the risk that federal law might intrude excessively on state elections and the associations involved in them. Therefore, regulation of state and local parties is essential to federal campaign finance reform, but also the most constitutionally problematic component of it.[9]

An attempt was made to extend federal regulation to some activities by State parties, through the enactment of the *Bipartisan Campaign Reform Act* 2002 (USA). Its validity was challenged, but upheld by the United States Supreme Court in *McConnell v Federal Election Commission*.[10] The Supreme Court accepted that preventing corruption from shifting to state parties was an important governmental interest. It noted that the federal law only regulated the conduct of private parties. It imposed no requirements on States

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[7] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 242 (McHugh J).
[8] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 163 (Brennan J). Note that while Dawson J also appeared to accept this argument at 202, he did not think that the limitations on political advertising in that case actually did impair the functioning of the States, largely because he regarded political advertising on the electronic media as uninformative and trivializing.
[9] Nathaniel Persily, 'Soft Money and Slippery Slopes' (2002) 1(3) *Election Law Journal* 401, 406.
[10] 540 US 93 (2003).

or State officials and left States free to impose their own restrictions on the funding of State elections. While the law incidentally affected some State fund-raising, this was considered necessary to plug loopholes in the federal law.

These federalism issues do not arise in Canada because political parties at the national level are completely separate from those that operate at provincial level. As there is no mixing of funding or party operations concerning the two levels of government, the constitutional problems that arise in the United States and Australia do not arise in Canada.

A co-operative solution

As long as there are national parties in Australia which through State registered branches fund candidates in both Commonwealth and State elections, then there is a significant risk that any State attempt to go it alone to regulate party funding will be either constitutionally invalid, or legally ineffective (due to an inconsistency with other Commonwealth or State laws) or simply ineffective on a practical level (due to loopholes that would be necessary to avoid unconstitutionality). A Commonwealth attempt to go it alone would also risk being held invalid if it interfered with State elections.

Accordingly, it would be preferable for any substantial reforms to be undertaken nationally on a co-operative Commonwealth and State basis.

2. Constitutional constraints upon action

Apart from the jurisdictional issues discussed above, the main constitutional constraint is the implied freedom of political communication and any other implications that might be drawn from the system of representative and responsible government mandated by the Constitution.

There remains a degree of uncertainty about the extent to which such constitutional implications would affect New South Wales laws. A distinction must first be drawn between implications derived from the Commonwealth Constitution and those drawn from the State Constitution.

Implications drawn from the State Constitution

Most provisions in the *Constitution Act* 1902 (NSW) are not entrenched. This means that they can be repealed or amended by ordinary legislation and cannot support an implication that limits the exercise of that ordinary legislative power. Any implication derived from an unentrenched provision of the NSW *Constitution Act* would simply be overridden by subsequent laws that are enacted in the ordinary way.[11] In contrast, specially entrenched constitutional provisions can only be expressly or impliedly repealed or amended if a specified procedure is followed, such as approval by a referendum.

[11] *McGinty v Western Australia* (1996) 186 CLR 140, 212 (Toohey J); and *ICAC v Cornwall* (1993) 38 NSWLR 207, 253 (Abadee J).

Ordinary legislation that conflicts with these entrenched provisions will be of no force or effect if the special procedures for its enactment are not followed. The question then is whether the entrenched provisions in the NSW *Constitution Act* collectively impose a system of representative and responsible government from which implications, such as freedom of political communication, could be drawn.

The High Court has held that the Western Australian *Constitution Act* does contain an implication of freedom of political communication, because it contains an entrenched provision requiring that Members of Parliament be 'chosen directly by the people'.[12] In *Muldowney v South Australia,* the Court did not need to consider the issue as the South Australian Solicitor-General conceded that the South Australian *Constitution Act* also contained such an implication.[13]

The position is less clear in New South Wales, given the different nature of the entrenched provisions in its *Constitution Act,* including the absence of an entrenched requirement that Members of Parliament be directly chosen by the people.[14] While a case could be made that the entrenched provisions of the NSW *Constitution Act* impose a system of representative government,[15] it may or may not succeed. Given this doubt, it would be sensible to seek to ensure that any State law concerning political donations and expenditure would be consistent with the implications that might be derived from an entrenched constitutional system of representative government at the State level.

Implications drawn from the Commonwealth Constitution

Unlike State Constitutions, the provisions of the Commonwealth Constitution are all entrenched, as none can be amended or repealed without the approval of the people overall, and in a majority of the States, by way of a referendum.[16] This means that implications drawn from the Commonwealth Constitution cannot be overridden by ordinary legislation.

Does the Commonwealth Constitution contain an implication that the States must exercise a form of representative government? The Commonwealth Constitution is not prescriptive about the operation of government in the States but does refer to State institutions, such as State Parliaments, Governors and courts, and appears to assume their continuing existence. It is possible that the High Court might draw an implication of representative government from references to State 'Parliaments' in the Commonwealth

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[12] *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211, 233-4 (Mason CJ, Toohey and Gaudron JJ) and 236 (Brennan J).
[13] (1996) 186 CLR 352, 367 (Brennan J); 373-4 (Toohey J); 377-8 (Gaudron J); and 387-8 (Gummow J). See also *Cameron v Becker* (1995) 64 SASR 238.
[14] Spigelman CJ has noted that the principle of responsible government forms part of the Constitution of New South Wales: *Egan v Chadwick* (1999) 46 NSWLR 564, [45]. However, his Honour had no need to address the further question of whether the principle rested on entrenched or unentrenched provisions of the *Constitution Act* 1902 (NSW).
[15] See A Twomey, *The Constitution of New South Wales* (Federation Press, 2004), p 206.
[16] Commonwealth Constitution, s 128.

Constitution[17] or the role that the States play in the federal system. Justice Gaudron, for example, considered that the Commonwealth Constitution 'operates to require that the States, as constituent bodies of the federation, be and remain essentially democratic'.[18] Justices Deane and Toohey regarded the 'Constitution's doctrine of representative government' as 'structured upon an assumption of representative government within the States'[19] and Justice Kirby considered that the Commonwealth Constitution contemplates that State Parliaments will be 'representative of the people of the State and democratically elected.'[20] Such general statements, however, have not, so far, been translated into constraints upon State Constitutions or State legislative power, as the High Court has rejected arguments that the Commonwealth Constitution requires that State Parliaments be bicameral[21] or be elected upon the principle of 'one vote, one value'.[22]

The High Court's approach to the development of implications in the Commonwealth Constitution that bind the States is illustrated by its refinement of the implied freedom of political communication. The High Court drew this implication from provisions in the Commonwealth Constitution that establish the system of representative and responsible government at the Commonwealth level. These include ss 7 and 24 of the Constitution, which require that Members of the Commonwealth Parliament be directly chosen by the people, and s 128 which gives electors a role in amending the Constitution. From these provisions it drew an implied right to freedom of political communication, to ensure that voters can make a genuine choice when directly choosing their representatives,[23] and an implication concerning a universal franchise.[24] A freedom to associate and participate in political affairs may also be drawn from these provisions, but it has been regarded by the High Court as subsidiary to, or a corollary of, the implied freedom of political communication.[25]

Constitutional implications do not confer personal rights but rather, 'preclude the curtailment of the protected freedom by the exercise of legislative or executive power'.[26] They therefore limit Commonwealth legislative power. They also affect State legislative

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[17] See sections 9, 15, 25, 29, 41, 51(xxxvii)-(xxxviii), 107, 108, 111, 123 and 124 of the Commonwealth Constitution. For a more detailed discussion of implications that might be drawn from references to the States in the Commonwealth Constitution, see: A Twomey, *The Constitution of New South Wales,* (Federation Press, Sydney, 2004) pp 182-202.

[18] *McGinty v Western Australia* (1996) 186 CLR 140, 216 (Gaudron J). See also *Muldowney v South Australia* (1996) 186 CLR 352, 376 (Gaudron J).

[19] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 75 (Deane and Toohey JJ).

[20] *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [197] (Kirby J).

[21] *Clayton v Heffron* (1960) 105 CLR 214, 248-9 (Dixon CJ, McTiernan, Taylor and Windeyer JJ).

[22] *McGinty v Western Australia* (1996) 186 CLR 140, 175-6 (Brennan CJ); 189 (Dawson J); 210 (Toohey J); 216 (Gaudron J) 250-1 (McHugh J); 293 (Gummow J).

[23] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; and *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

[24] *Roach v Commonwealth* (2007) 239 ALR 1.

[25] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 212 (Gaudron J); and 232 (McHugh J); *Kruger v Commonwealth* (1997) 190 CLR 1, 91 (Toohey J); 116 (Gaudron J); McHugh J (142); and *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 225-6 (McHugh J); 234 (Gummow and Hayne JJ); and 277-8 (Kirby J).

[26] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 558.

power,[27] at least to the extent that the State laws, such as laws concerning defamation, limit political communication about Commonwealth matters. If the law in question affects State matters only, however, the Commonwealth implication will not apply.

This was made clear by Brennan CJ in *Muldowney v South Australia*.[28] That case concerned a State law which prohibited a person from advocating a method of voting in State elections other than that prescribed. Brennan CJ stated that the 'freedom of political discussion implied in the Commonwealth Constitution is implied to protect the working of the system of government of the Commonwealth prescribed by the Constitution but not to protect the working of the system of government prescribed by the Constitution of a State.'[29] He therefore concluded that a State law concerning State elections was not affected by any of the provisions in the Commonwealth Constitution that give rise to the implication of freedom of political communication and that such a law did not affect the government of the Commonwealth.[30] In *Lange v Australian Broadcasting Corporation,* the High Court also stressed that the implied freedom was 'limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the [Commonwealth] Constitution'.[31]

This distinction, however, becomes harder to maintain when the types of communications limited or regulated by a law might affect political understanding and choice at both the Commonwealth and the State level. Some communications about State political matters might affect public opinion about a political party at the national level, or about the performance of the Commonwealth Government in providing funding to the States. To this extent it has been argued that political communication may be indivisible.[32] As the implied freedom is a restriction on the power to enact laws, the focus should, however, be on the nature of the law rather than the particular communication in question. If a law, such as a defamation law, applies in such a manner that it affects political communications about Commonwealth and State matters, then it may well breach the implication derived from the Commonwealth Constitution regardless of the particular nature of a communication made.

Laws concerning the funding of political parties potentially give rise to the same problem. Such laws are likely to affect the manner in which State-registered political parties fund candidates for Commonwealth elections and support Commonwealth election campaigns. Hence the implication of freedom of political communication and any other implications derived from the system of representative government established by the Commonwealth Constitution are likely to apply to such a State law.

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[27] *Coleman v Power* (2004) 220 CLR 1, 49 (McHugh J).
[28] (1996) 186 CLR 352.
[29] (1996) 186 CLR 352, 365-6. See also Dawson J at 370 and Toohey J at 374; and similar arguments in *McGinty v Western Australia* (1996) 186 CLR 140, 175-6 (Brennan CJ); 189 (Dawson J); 210 (Toohey J); and 250-1 (McHugh J).
[30] (1996) 186 CLR 352, 365-6.
[31] (1997) 189 CLR 520, 561.
[32] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 142 (Mason CJ); 169-9 (Deane and Toohey JJ); 215-7 (Gaudron J); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 75-6 (Deane and Toohey JJ); and *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 571-2.

Further, if a national co-operative scheme is established, such implications derived from the Commonwealth Constitution will also apply, as will State based constitutional implications in States such as Western Australia. Accordingly, any proposal must take into account the operation of such constitutional implications and the way the High Court is likely to apply them to the proposal.

The nature of the implication and the test that is applied

The High Court, in an unanimous judgment in *Lange v Australian Broadcasting Corporation*, set down the following test for ascertaining whether there has been a breach of the implied freedom of political communication:

> When a law of a State or federal Parliament or a Territory legislature is alleged to infringe the requirement of freedom of communication imposed by ss 7, 24, 64 or 128 of the Constitution, two questions must be answered before the validity of the law can be determined. First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people (hereafter collectively "the system of government prescribed by the Constitution"). If the first question is answered "yes" and the second is answered "no", the law is invalid.[33]

That test was later slightly altered by a majority of the High Court in *Coleman v Powers* so that one must consider whether the law is 'reasonably appropriate and adapted to serve a legitimate end *in a manner* which is compatible with' the system of government prescribed by the Constitution.[34]

The elements of the test are therefore:

1. whether the law burdens freedom of political communication;
2. whether the law serves a 'legitimate end';
3. whether the law is reasonably appropriate and adapted to serving that legitimate end; and
4. whether the manner in which the law serves that legitimate end is compatible with the system of government prescribed by the Commonwealth Constitution.

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[33] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567-8.

[34] (2004) 220 CLR 1, [92]–[96] (McHugh J), [196] (Gummow and Hayne JJ), [211] (Kirby J). Note also the variation of the terminology used in *Roach v Electoral Commissioner* where Gummow, Kirby and Crennan JJ required that the law be 'reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government' (2007) 239 ALR 1, [85].

Similar tests are applied in other countries, such as the United States and Canada, so their jurisprudence is illustrative (although in no way determinative) of the type of issues that may arise in applying such a test and the manner in which a court might deal with them.

Applying the *Lange* test to the issue of the regulation of political party funding, the first question is whether a law that bans or limits the making of donations to political parties or limits their expenditure 'burdens political communication', either in its terms, operation or effect. In other countries where the same issue has arisen, courts have held that it may do so. For example, in the United States, the Supreme Court in *Buckley v Valeo* held that campaign contributions and expenditure either constitute 'speech' or are so intrinsically related to speech that any regulation of them is governed by the First Amendment.[35] However, it distinguished between the type of limitations imposed. The Supreme Court took the view that expenditure limits have a greater effect on political communications. Limiting spending on political advertising has the effect of limiting 'the number of issues that can be discussed, the depth of their exploration, and the size of the audience reached'.[36] In contrast, the Court considered that limitations on campaign contributions did not have as direct and serious an effect upon the political communication that forms the 'core' of the First Amendment.

The second question is whether laws regulating political party funding and expenditure serve a 'legitimate end'. In *Australian Capital Television Pty Ltd v Commonwealth* (the *ACTV* case), the purpose of enacting the restrictions on political advertising was described in the 2nd reading speech as including the avoidance of potential corruption and undue influence, the termination of the privileged status of the wealthy in dominating public debate and the end of the trivialisation of political debate through brief political advertisements.[37] The High Court accepted that these amounted to legitimate ends.[38]

In the United States, the Supreme Court has also held that there is a legitimate governmental interest in preventing corruption and undue influence or the appearance of corruption and undue influence.[39] It has further concluded that there is a legitimate interest in the enactment of laws designed to prevent the evasion of anti-corruption measures.[40] The Canadian Supreme Court has held that there is a legitimate government interest in (a) promoting equality in political discourse by preventing the rich from dominating the electoral debate; (b) fostering informed citizenship; and (c) ensuring that voters retain confidence in the electoral process.[41]

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[35] *Buckley v Valeo* 424 US 1 (1976), 14-21. See also *Harper v Canada* [2004] 1 SCR 827, where the Canadian Supreme Court considered that expenditure limits burden freedom of expression, but were still justified.
[36] *Buckley v Valeo* 424 US 1 (1976), 19.
[37] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 130-1 (Mason CJ).
[38] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 144-5 (Mason CJ); 156 (Brennan J); 175 (Deane and Toohey JJ); and 238-9 (McHugh J).
[39] *Buckley v Valeo* 424 US 1 (1976); *Nixon v Shrink Missouri Government PAC* 528 US 377 (2000); *McConnell v Federal Election Commission* 540 US 93 (2003); and *Davis v Federal Election Commission* 554 US ___ (2008), (unreported, 26 June 2008), p 12 (Alito J for the majority).
[40] *McConnell v Federal Election Commission* 540 US 93 (2003).
[41] *Harper v Canada* [2004] 1 SCR 827, [23].

The third question is whether such laws are reasonably appropriate and adapted to serving that legitimate end. This takes into account whether the law is narrowly tailored to achieve the legitimate end identified or whether it goes further than is necessary in impinging upon the freedom. The courts give some deference to Parliament with respect to the method that it chooses to achieve the legitimate end.[42] However, if the law is too drastic in its burden on freedom of political expression[43] and there are other means to achieve the legitimate end that do not burden the freedom or do so only incidentally, then the law is likely to be found to be invalid.

For example, if one is trying to stamp out the reality or appearance of corruption or undue influence, is it necessary to ban all donations or is it enough to limit large donations? The United States Supreme Court has held that a Vermont law limiting campaign funding to such an extent that candidates could not raise the funds necessary to run a competitive election was invalid because it was not sufficiently carefully tailored and its effects were disproportionately severe.[44]

The Court may also consider whether there is any factual relationship between laws banning or limiting party donations or expenditure and the prospects of corruption and undue influence. The United States Supreme Court has noted that more than half of the top 50 donors of 'soft-money' in the United States contributed to both major national parties, leading to the conclusion that they were seeking influence or avoiding retaliation rather than supporting a particular political ideology.[45] The Court has concluded that there is little reason to doubt that sometimes large contributions will result in the corruption of the political system and no reason to question the existence of suspicion amongst voters that large donations lead to undue influence.[46]

The fourth question asks whether the manner in which the law serves the legitimate end is itself compatible with the maintenance of the system of representative government imposed by the Constitution. If, for example, a law was skewed in favour of a particular party, or limited the capacity of voters to become genuinely informed, to such an extent that elections could no longer be regarded as resulting in representatives directly chosen by the people, then the law would be likely to be struck down as constitutionally invalid.

Accordingly, any proposal for the reform of political financing in Australia must take into account the above elements of the *Lange* test. They are considered in the more detailed discussion of particular proposals below.

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[42] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 160 (Brennan J); *Coleman v Power* (2004) 220 CLR 1, 52-3 (McHugh J).
[43] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 238-9 (McHugh J).
[44] *Randall v Sorrell* 548 US 230 (2006).
[45] *McConnell v Federal Election Commission* 540 US 93 (2003), 148.
[46] *Nixon v Shrink Missouri Government PAC* 528 US 377 (2000).

3. The principal aims of reform

One of the primary aims of political funding regulation is to reduce or eliminate the risk and perception of corruption and undue influence. The intention is to preserve the integrity of the electoral system and enhance public confidence in it. Such an intention has been recognised by courts in Australia, Canada, the United States and Europe as a legitimate governmental interest.[47]

When large donations are made to political parties by companies or other organisations, suspicions arise that the donations are made for reasons other than generosity. When a donor makes donations to parties on both sides of politics, it may be a gesture of philanthropic support of the system of party politics or it may be that the donor seeks to attain benefits regardless of which major party wins an election.[48] It may be the case that donors hope for favourable treatment by way of laws or government contracts. It may be that they seek access to decision-makers and a sympathetic hearing of their concerns. It may be that they simply seek to avoid retaliation or to be placed in no worse a position than their competitors that have made donations.[49] While it is almost always impossible to prove that the receipt of donations affects government policy or contracts,[50] the perception that this is the case is itself dangerous as it undermines public confidence in the system of government. This, in turn, reduces public participation in political affairs and may also reduce the quality of candidates for election.

Political funding reform might also entail other aims, such as reducing the advantages of the wealthy in dominating political debate and creating a more level playing field for candidates seeking election.[51] The intention is to ensure that voters have a fair opportunity to be fully informed of the policies of political parties and candidates for election, which may not be possible if those with financial resources drown out the voices of others.

Reform may also be focused upon improving transparency and the information given to electors so that they may make a genuinely informed vote. This may involve supporting communication by a wide variety of groups with different views on the one hand, while on the other it might involve trying to prevent wealthy single issue groups from hijacking the political agenda.

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[47] See, for example: *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Harper v Canada* [2004] 1 SCR 827; *Buckley v Valeo* 424 US 1 (1976); and *Bowman v United Kingdom* (1998) 26 EHRR 1.

[48] Note the 1995-8 study which showed that of the top 10 donors, all but one donated to both the Coalition and the ALP: I Ramsay, G Stapledon and J Vernon, 'Political Donations by Australian Companies', (2001) 29 *Federal Law Review* 179, 203-4.

[49] See: I Ramsay, G Stapledon and J Vernon, 'Political Donations by Australian Companies', (2001) 29 *Federal Law Review* 179, 181; J Fisher, 'Why Do Companies Make Donations to Political Parties?' (1994) 42 *Political Studies* 690; and G Gallop, 'From Government in Business to Business in Government' (1997) 83 *Canberra Bulletin of Public Affairs* 81.

[50] D Cass and S Burrows, 'Commonwealth Regulation of Campaign Finance – Public Funding, Disclosure and Expenditure Limits' (2000) 22 *Sydney Law Review* 477, 480-1.

[51] The Canadian approach focuses more on these interests than corruption concerns: *Figueroa v Canada* [2003] 1 SCR 912; and *Harper v Canada* [2004] 1 SCR 827.

4. Banning or capping donations to political parties and candidates

Background to banning or capping donations in Australia

Australia does not have a tradition of banning or capping donations to political parties or candidates. Instead, Australian jurisdictions have relied upon a system of public disclosure of donations to parties and candidates. Transparency of donations is intended to reduce the risk of corruption by making it publicly known who has been giving donations to parties and candidates. This paper does not discuss the disclosure regime, but it is the subject of substantive discussion elsewhere.[52]

The only caps currently placed on political donations apply in Victoria, where donations from gaming and casino licensees are prohibited above $50,000.[53] Anonymous donations above specified amounts are also prohibited under Commonwealth, New South Wales, Queensland, Western Australia, Australian Capital Territory and Northern Territory electoral laws. A ban on donations from foreign sources has also been proposed by the Commonwealth.[54] While New South Wales has not gone so far as to ban donations from foreign sources it does make it unlawful to accept donations of a reportable size from any source other than an individual unless the donor has an Australian Business Number.[55] This means that foreign entities, other than individuals, must at least have some presence in Australia and can more easily be identified. New South Wales has recently also banned the making of indirect campaign contributions that exceed $1000 in value, such as the provision of office accommodation, vehicles and computers.[56]

The Australian Electoral Commission has previously recommended against placing limits on donations due to the difficulties involved with definition and enforcement.[57]

Banning or capping donations in other comparable countries

Donations to political parties in the United Kingdom are not currently banned or capped, but serious consideration is currently being given to imposing caps on donations. Public opinion polls in the United Kingdom have strongly supported the imposition of caps on donations.[58] In 2004 the UK Electoral Commission recommended against a cap on

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[52] See, for example, D Cass and S Burrows, 'Commonwealth Regulation of Campaign Finance – Public Funding, Disclosure and Expenditure Limits' (2000) 22 *Sydney Law Review* 477; Graeme Orr, 'The Currency of Democracy: Campaign Finance Law in Australia' (2003) 26 UNSWLJ 1; and Graeme Orr, 'Political Finance Law in Australia' in K D Ewing and S Issacharoff (eds) *Party Funding and Campaign financing in International Perspective* (Hart Publishing, Oxford, 2006), 99.
[53] *Electoral Act* 2002 (Vic), s 216.
[54] Senator the Hon John Faulkner, Media Release, 28 March 2008; and *Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill* 2008.
[55] *Election Funding and Disclosures Act* 1981 (NSW), s 96D.
[56] *Election Funding and Disclosures Act* 1981 (NSW), s 96E.
[57] Graeme Orr, 'The Currency of Democracy: Campaign Finance Law in Australia' (2003) 26 UNSWLJ 1, 22, referring to AEC Submission to the Joint Standing Committee on Electoral Matters Inquiry into Funding and Disclosure, Submission No 7, 17 October 2000.
[58] UK, House of Commons, Constitutional Affairs Committee, *Party Funding*, (HC 163-1, 2006), p 36.

private donations, but suggested that if there were to be one, it should be set at a relatively low level, such as £10,000.[59] The Phillips Review of the Funding of Political Parties, however, considered that there was an emerging consensus in the United Kingdom in favour of caps on donations, and that a ceiling of £50,000 was attainable.[60] Reform proposals concerning caps on donations have since stalled since one political party withdrew from talks in October 2007. The British Government has indicated, however, that it regards a cap of £50,000 as too high and that a lower limit would be needed 'to help reconnect people with the political process'.[61] It has given consideration to a significantly lower cap of £1000, but noted that a lower cap would increase the amount of public funds required. It stressed the need to ensure that parties remain financially sustainable and that changes not give any unfair advantage to any party at the expense of others.[62]

In Canada, donations from non-individuals, such as corporations, unions and associations were previously limited to annual amounts of $1000[63] and could only be given to candidates or electoral district associations. These entities could not donate to political parties or in relation to leadership contests. In December 2006 even these modest donations were prohibited. Now, only individuals may make donations to parties or candidates and they may only donate up to $1000 annually.[64]

In the United States, corporations and unions may only make donations to candidates or parties indirectly through political action committees ('PACs'). There are limits on the amounts individuals may donate to each candidate and overall to candidates per election cycle. There are higher limits for donations to national party committees, state party committees and political committees per election cycle.[65] For example, individuals may contribute up to $2,300 to a Presidential candidate from a major party who has not accepted public funding, or to a candidate from a minor or new party regardless of whether he or she accepts public funding. Individuals may also contribute up to $28,500 a year to a national party committee and up to $5000 to a State or local party committee.

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[59] UK, Electoral Commission, *The funding of political parties*, (December 2004), p 86; and House of Commons, Constitutional Affairs Committee, *Party Funding*, (HC 163-1, 2006), p 36.
[60] UK, The Review of Funding of Political Parties, *Strengthening Democracy: Fair and Sustainable Funding of Political Parties*, March 2007, pp 10-12.
[61] UK, 'Party finance and expenditure in the United Kingdom – The Government's proposals', White Paper, June 2008, Cm 7329, p 8.
[62] UK, 'Party finance and expenditure in the United Kingdom – The Government's proposals', White Paper, June 2008, Cm 7329, p 54.
[63] All references to amounts of money in this paper are references to the currency of the nation concerned. In this case the reference is to Canadian dollars.
[64] *Canada Elections Act* 2000, ss 404-5. See also: Gareth Griffith and Talina Drabsch, *Election Finance Law: Recent Developments and Proposals for Reform* (NSW Parliamentary Library Research Service, June 2007), p 20-1.
[65] See information provided by the Federal Election Commission: www.fec.gov. See also: Gareth Griffith and Talina Drabsch, *Election Finance Law: Recent Developments and Proposals for Reform* (NSW Parliamentary Library Research Service, June 2007), p 41.

The constitutional validity of bans or caps on political donations

The constitutional validity of a complete ban on political donations to candidates or parties in Australia would be doubtful on two grounds. First, such a ban, if not compensated for by adequate public funding, would have the effect of depriving political parties of the capacity to communicate their policies and advocate the election of their candidates to office. Secondly, the act of making a donation to a political party may also be regarded as a political communication as it expresses support for a candidate or party. Accordingly, a law banning all donations would be likely to be regarded by the High Court as burdening freedom of political communication either in its terms, operation or effect. The Court would then need to consider whether the law was reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the system of government prescribed by the Constitution.

While the High Court would be likely to find that the reduction of the risk of corruption and undue influence is a legitimate end, it is likely also to find that a complete ban on donations to political parties and candidates is not reasonably appropriate and adapted to serving this end. Allowing individuals to make small donations to political parties is unlikely to give rise to risks of corruption or undue influence. Caps that prevent individuals or corporations from giving large donations to political parties are more likely to be regarded as reasonably appropriate and adapted to serve the end of avoiding corruption and undue influence.

These issues have all been considered in constitutional litigation in the United States. The United States Supreme Court has upheld the validity of caps imposed upon donations.[66] The Court took the view that a contribution to a candidate 'serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support.'[67] The Court therefore concluded that placing limits on the level of the contribution, rather than a complete ban, imposes little restraint upon the donor's political communication 'for it permits the symbolic expression of support evidenced by a contribution but does not infringe the contributor's freedom to discuss candidates and issues'.[68] The Court also accepted the argument that limits on donations could potentially affect political communication by preventing candidates and parties from 'amassing the resources necessary for effective advocacy', but found no evidence that the limits imposed in this case had any such 'dramatic adverse effect' on the funding of campaigns.[69] The only effect of the limit of $1000 on donations by individuals was to require the political parties and candidates to raise funds from a wider field of people. They could still raise large amounts if they had sufficiently broad public support.[70]

The US Supreme Court accepted that Congress had a legitimate interest in seeking to avoid the risk of corruption and undue influence, and considered that the imposition of a

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[66] *Buckley v Valeo* 424 US 1 (1976).
[67] *Buckley v Valeo* 424 US 1 (1976), 21.
[68] *Buckley v Valeo* 424 US 1 (1976), 21.
[69] *Buckley v Valeo* 424 US 1 (1976), 21.
[70] *Buckley v Valeo* 424 US 1 (1976), 22.

$1000 limit upon contributions by individuals 'focuses precisely on the problem of large campaign contributions' while leaving persons free to assist and support candidates and parties with financial resources.[71] The Court rejected the argument that the imposition of such limits on donations to all parties discriminates against minor parties. It noted that it gave minor parties an advantage, because candidates from major parties are the ones who would most likely have received the large donations which were now prohibited.[72] It also noted that as candidates from minor parties may win office or influence the outcome of an election, it was appropriate that they also be subject to the same limits on donations to avoid the risk of corruption and undue influence.[73]

In Australia, while the constitutional validity of a complete ban on political donations is doubtful (unless perhaps there were adequate public funding to all parties and candidates in elections so that the capacity to communicate policies and advocate the election of candidates was not unduly restricted),[74] it is more likely that some form of cap on donations would be upheld as valid. This would depend very much on the level of the cap and its application, including its relationship with public funding and any expenditure limits.

Practical issues concerning caps on donations

Definitional issues and the extent of the operation of donation caps

Parties and candidates receive money from a wide range of private sources. These include donations from corporations, unions, partnerships,[75] unincorporated associations, trusts, other lobby and issue groups and individuals, as well as membership subscriptions and union affiliation fees. They may receive money in other forms, such as sponsorships for conferences or publications, loans (including those given at less than market rate or those later forgiven without repayment), income from investments (including dividends from shares and rent from property) and from commercial transactions (such as selling advertisements in party publications at or above commercial rates). Parties may benefit by having their debts to others paid directly by third parties, rather than as a donation to the party itself.[76] Parties also receive benefits such as the provision of services (eg legal or financial advice), the use of property (such as offices and equipment) and the provision of labour (such as volunteers or the secondment of experts from large firms to parties) at no cost or a substantially reduced cost.[77]

One of the challenges in devising and applying bans or caps is to decide the extent to which such limits should apply. Should they extend to donations by individuals? Should

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[71] *Buckley v Valeo* 424 US 1 (1976), 28.
[72] *Buckley v Valeo* 424 US 1 (1976), 33.
[73] *Buckley v Valeo* 424 US 1 (1976), 35.
[74] See the discussion on public funding below.
[75] Donors in this category are largely law and accounting firms.
[76] This is now prohibited in New South Wales with respect to electoral expenditure: *Election Funding and Disclosures Act* 1981 (NSW), s 96E.
[77] See further s 96E of the *Election funding and Disclosures Act* 1981 (NSW) regarding the prohibition of some of these forms of indirect campaign contributions. It does not, however, apply to volunteer labour.

they cover membership fees? If not, do union affiliation fees fall within the category of donations or membership fees?[78] To what extent should donation caps apply to gifts in kind or commercial transactions above or below the normal market rate?

Defining donations clearly has proved difficult. To what extent is payment for attending a dinner a donation or simply covering the cost of the dinner? To what extent is paying to attend a budget function or a conference a fee for attendance or a political donation?[79] These problems already arise under the existing disclosure regime, but would become more vexed if bans or caps were to apply to donations.

How far should limitations extend beyond the traditional concept of a donation? On the one hand, not regulating matters such as loans and the provision of services might simply result in a shift from the use of donations to these other means of acquiring influence and access by donors. This would not remove the risk of corruption and undue influence and could potentially make it worse by making transactions less transparent and increasing the intimacy of the relationship between donors and parties. For example, if a major corporation pays for staff who are seconded to work free of charge for a party, that corporation may have far more influence upon a party than if it merely donated funds. Equally, if party officers are given free office accommodation and facilities within a corporation's building, access to party officers by the corporation is significantly greater than would be the case if the corporation simply provided a cheque.

On the other hand, regulating all such aspects of political parties may result in governments being too closely involved in the running of parties[80] and parties being bound by impossible levels of red tape and administration.[81] Any proposed caps or bans would have to balance very carefully the need to reduce the exploitation of loopholes against the need for a simple, effective and efficient system for administering the scheme. Given that much political funding already comes from taxpayers, with potentially far greater amounts being footed by taxpayers if private donations to political parties are to

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[78] This point has been contentious in the United Kingdom. Under s 50(2)(c) of the *Political Parties, Elections and Referendums Act* 2000 (UK), union affiliation fees are treated as donations for disclosure purposes, but this has proved a serious sticking point in reaching agreement on further reforms such as donation caps: O Gay, I White and R Kelly, *The Funding of Political Parties*, (House of Commons Research Paper 07/34, 2007) pp 24-25; and J Fisher, 'Party Funding: Back to Square One (and a Half) or Every Cloud Has a Silver Lining?' (2008) 79(1) *The Political Quarterly* 119, 122. Sir Hayden Phillips proposed detailed rules for permitting affiliation fees, which are listed in: UK, 'Party finance and expenditure in the United Kingdom – The Government's proposals', White Paper, June 2008, Cm 7329, Annex 2, p 65.

[79] See further: Graeme Orr, 'The Currency of Democracy: Campaign Finance Law in Australia' (2003) 26 UNSWLJ 1, 18.

[80] UK, House of Commons, Constitutional Affairs Committee, *Party Funding*, (HC 163-1, 2006), p 48.

[81] Note the concern expressed by the Joint Standing Committee on Electoral Matters ('JSCEM') about the excessive bureaucratic requirements of the reporting system: JSCEM, *Financial Reporting by Political Parties*, (AGPS, Canberra, 1994). See also: Graeme Orr, 'The Currency of Democracy: Campaign Finance Law in Australia' (2003) 26 UNSWLJ 1, 16.

be capped, there is a duty to ensure that significant amounts of taxpayers' money are not wasted in administration and compliance costs.[82]

Consideration would also have to be given to whether entities are deemed to be separate or part of the one body for the purposes of capping donations. For example, to what extent may subsidiaries of corporations each make donations up to the level of the cap? What about related corporations? What about different State branches of trade unions and the national office? What about transfers from one branch or office of a political party to another branch or office? For example, the NSW Election Funding Authority's record of electoral expenditure by donors with respect to the NSW election of March 2007 records that the Liberal Party of Australia Federal Secretariat donated $448,150, presumably to the State branch of the Liberal Party. Would such a donation be capped?

Jurisdictional issues

As noted in section 1 of this paper, jurisdictional and practical issues are also likely to arise if donation limits are imposed by one jurisdiction (State or Commonwealth) but for constitutional reasons do not apply with respect to other jurisdictions. Similar problems have arisen in the United States. Federal limits on donations were initially applied only to donations that were to be used for advocacy for the election or rejection of candidates in federal elections. This approach proved to be impractical. It resulted in large amounts of unregulated 'soft money' being raised in the States to influence federal elections and to run 'issue advocacy' advertisements in the media.[83] While the federal-state difficulties with soft money were eventually addressed in the *Bipartisan Campaign Reform Act* 2002 (USA), the validity of which was upheld by the Supreme Court,[84] they highlight the problems that might arise if the States and the Commonwealth took different courses with respect to limits on campaign funding.

Banning donations of particular kinds

A number of jurisdictions place bans on particular types of donations or those emanating from particular sources. Examples include:

- Donations from foreign sources over a particular amount, except nationals who are currently living overseas and corporations predominantly owned by nationals (Germany, New Zealand, United Kingdom and United States);
- Anonymous donations over a particular amount (Australia (Cth, NSW, Qld, WA, ACT and NT) Canada, New Zealand and United Kingdom);

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[82] Note that compliance costs in the United States are so great that Presidential nominees who accept public funding and are consequently denied access to private donations, may still solicit donations for a compliance fund that is used solely for the purposes of meeting the costs of complying with financial regulations.

[83] Alan Grant, 'Election Campaign Funding Reform and Judicial Review in the United States' [2004] *Public Law* 501, 503.

[84] *McConnell v Federal Election Commission* 540 US 93 (2003).

- Donations from non-individuals who do not have an Australian Business Number (New South Wales);
- Indirect donations, such as the provision of particular types of goods and services, the payment of a party's or candidate's debts and the waiver of debts (New South Wales);
- Donations in cash over a particular amount (Germany);
- Donations from fully or partly state-owned enterprises (Germany);
- Donations from persons or corporations with contracts with the government (United States);
- Donations made in the expectation of political or economic advantage (Germany);
- Donations from corporations, unions and associations (Canada); and
- Donations above $50,000 from gaming and casino licensees (Victoria).[85]

Donations from certain types of donors may be the source of greater concern at one level of government than another, depending upon the division of powers and responsibilities in the federal system. For example, where local government has control over planning and development matters, donations by developers and those seeking land use zoning changes tend to be greater and more likely to lead to suggestions of corruption.[86] This is not just the case in Australia, but in other federations, such as Germany.[87] While this might suggest that donation bans from different sectors should apply at different levels of government, there are a number of difficulties with such a proposal. The first difficulty is adequately defining the category of donors who are banned from donating. The second is that political parties work across all three levels of government, so that donations at any level may wash through the party funding system. The third problem is that if one is to have a national system of consistent laws, such distinctions would be difficult to manage and enforce.

The banning of donations from bodies that have contracts with the government may prevent existing contractors using donations as a form of *quid pro quo* for receiving contracts, but does not prevent prospective contractors from donating to political parties in the hope of being awarded a contract. From a practical point of view, identifying all corporations or individuals that have contracts with any part of the public service, from the provision of sandwiches or paperclips to major infrastructure, at any one point of time would be exceedingly difficult. If such a ban were to apply only during the course of a contract, timing issues would also arise as to when a donation was made and when contracts commenced and terminated.

The most common distinction in imposing caps or bans on political donations is between donations made by individuals and those made by other bodies such as corporations, unions and associations. The justification for the distinction is that only individuals may

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[85] *Electoral Act* 2002 (Vic), s 216.
[86] Graeme Orr, 'The Currency of Democracy: Campaign Finance Law in Australia' (2003) 26 UNSWLJ 1, 26.
[87] Karl-Heinz Nassmacher, 'Political Finance in West Central Europe' in K Nassmacher (ed), *Foundations for Democracy – Approaches to Comparative Political Finance,* (Nomos Verlagsgesellschaft, Baden-Baden, 2001), p 99.

vote and that only they should therefore participate in the electoral process by way of donations. If such a justification were called upon, donations would have to be confined to enrolled voters, excluding minors, non-citizen residents and donations from foreign individuals.

A blind fund for corporate donations

Many of the largest corporate donors make donations to both major parties, suggesting that they donate for reasons other than the support of a particular political ideology. It is sometimes suggested by corporations that they donate to political parties as part of their philanthropic responsibilities to the community. If this were the case, and corporate donations were to be banned or capped, a blind fund could be established by the Electoral Commission to receive corporate donations of a philanthropic nature above the cap or outside the ban, which could be distributed to parties and candidates on the same basis as public funding. This would mean that corporations could still support the political party system, but without the perception that they were seeking undue influence over political parties. If they did not donate to the blind fund, because their only interest in donating was to buy influence, then the banning or capping of their donations would be to the benefit of the political system.

Setting caps at the right level

If caps were placed on donations, it is difficult to predict the likely effect on parties by reference to current figures. This is because parties are likely to seek smaller donations (under the level of the cap) from a much wider number of donors. The behaviour of donors is also likely to differ. For example, large donations previously given by interest groups (eg environmental groups, shooters' associations and ethnic associations) might instead be broken up and donated directly by individuals who participate in those groups. Donations by wealthy people might be broken up and donated by a number of different family members. Donations by partnerships might be instead made by a number of partners.

Detailed studies on subjects such as corporate donations to political parties are now relatively out of date.[88] The best one can do is look at recent disclosures of donations by political parties to attempt to ascertain how the imposition of donation limits, particularly upon corporations, might affect major parties, minor parties and micro parties.

[88] They still, however, contain useful insights. See: I Ramsay, G Stapledon and J Vernon, 'Political Donations by Australian Companies', (2001) 29 *Federal Law Review* 179, 201.

Table – 2007 NSW General Election – Contributions Received by Parties [89]

Party Name	Donations $1500 or less	Donations more than $1500	Annual Subscriptions	Subscriptions & donations below $1500
Australian Democrats (NSW Division)	71,541 45%	34,048 22%	52662 33%	78%
Australian Labor Party (NSW Branch)	2,857,354 10%	21,592,256 78%	3,197,778 12%	22%
Australians Against Further Immigration	5,536 60%	0 0%	3765 40%	100%
Christian Democratic Party (Fred Nile Group)	1,104,664 78%	123,406 9%	186,280 13%	91%
Horse Riders Party	61 100%	0 0%	0 0%	100%
Liberal Party of Australia NSW Division	5,298,785 18%	22,326,909 75%	2,271,397 7%	25%
National Party of Australia - NSW	1,414,435 32%	1,045,596 24%	1,918,966 44%	76%
Outdoor Recreation Party	7,533 45%	5,000 30%	4,320 25%	70%
Restore the Workers Rights Party	0 0%	0 0%	20,613 100%	100%
Save Our Suburbs	9,610 66%	5,000 34%	0 0%	66%
The Fishing Party	754 26%	0 0%	2,200 74%	100%
The Greens	946,143 45%	679,467 33%	468,109 22%	67%
The Shooters Party	110,622 13%	556,748 67%	166,405 20%	33%
Unity Party	206,436 41%	292,939 58%	6,155 1%	42%

The last column in the above table shows that in New South Wales the small parties obtain most of their private funding from annual subscriptions and donations of $1500 or less.[90] This suggests that a cap on donations at a higher level would not substantially disadvantage small or micro parties. It would, however, have a significant effect upon

[89] This information was obtained from: NSW Election Funding Authority, 'Summary of Political Contributions Received and Electoral Expenditure Incurred by Parties', 9 April 2008.

[90] The exceptions were the Shooters Party, the Unity Party, and to some extent, the Greens. Most of the large amounts given to the Shooters Party were from hunting or sporting associations, which could have been made as smaller individual contributions by members. Most of the large donations to the Greens and the Unity Party came from individuals, rather than corporations: NSW Election Funding Authority, 'Details of Donations Made and Political Contributions Received by Donors', 22 April 2008.

the major parties and some form of public funding would be required to ensure that they have adequate funds to mount election campaigns.

Setting caps at too high a level can also be problematic. Professor K D Ewing has criticised the proposal for a £50,000 cap on donations in the United Kingdom because it would not have the equalising tendency that might otherwise be expected from donation caps. He noted:

> Given income levels, only a small number of people could contemplate donating at this level, thereby undermining the idea of equality between citizens. Given the nature of the support for the political parties, there is also a danger that such a cap would give the Conservative Party a significant benefit, thereby undermining the idea of equality between parties.[91]

As noted above, the British Government has also regarded a cap of £50,000 as too high.[92] Great care would therefore need to be taken to set caps at a level that is not too low and not too high.

Excluding the application of donation caps to small and new parties

In the United Kingdom it has been proposed that caps on donations apply only to those parties that have at least two or more representatives in Parliament, devolved legislatures or the European Parliament. The intention behind this exclusion is to give new and smaller parties an opportunity to receive unlimited early funding until they achieve legislative representation.[93] Such an arrangement could be related to public funding. An argument could be made that parties that do not qualify for public funding should not be subject to a cap on the donations they receive.

Third parties and the avoidance of bans and caps

If corporations or unions or other bodies are prevented from donating to political parties, or their donations are capped, the likely consequence is that they will use the funds they would otherwise have donated either to undertake political campaigning themselves, or to allow third parties to do so. They might donate funds to a lobby group or association to which they belong (eg the Business Council of Australia) or an association which is directly or indirectly related to a political party, so that it may use the funds to campaign for a particular party or in relation to a particular issue.

The first question is whether such action would defeat the purpose of imposing bans or caps. If the purpose is to prevent the risk of corruption and the buying of influence, it

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[91] K D Ewing, *The Cost of Democracy – Party Funding in Modern British Politics* (Hart Publishing, Oxford, 2007), p 228.
[92] UK, 'Party finance and expenditure in the United Kingdom – The Government's proposals', White Paper, June 2008, Cm 7329, p 8.
[93] UK, 'Party finance and expenditure in the United Kingdom – The Government's proposals', White Paper, June 2008, Cm 7329, p 59.

may be partly fulfilled if the money does not flow directly to parties. However, influence is still likely to be obtained if parties are limited in their funds and rely on third parties to campaign on their behalf. It is arguable that parties could be made even more beholden to third party lobby groups, if the lobby groups controlled extensive advertising budgets and dictated the nature of the political advertisements. One possibility, depending upon the amount of public funding given to political parties, is that the voices of political parties would be swamped by advertising from better resourced third parties. This gives rise to the risk of travelling down the United States path where political advertising is dominated by single issue campaigns that distract from the bigger issues and tend to trivialise political debate.

One way of avoiding such an outcome would be to place expenditure limits on third parties, but as discussed below, this is fraught with constitutional and practical difficulties. While limits could be placed upon 'associated entities', which are really just fronts for parties, it would be difficult to constrain the political activities of genuine bodies such as businesses, unions and lobby groups.

Matters for consideration:

- Whether caps or bans should apply to all donations, or by reference to the nature of the donor (eg different caps for individuals than for corporations).
- What type of donations are to be banned or capped? Should some be banned (eg overseas donations), some capped (eg donations in money and some donations in kind) and some left unregulated (eg volunteer labour)?
- Whether intra-party transfers of funds should be affected by any caps and whether branches of unions or parties, or subsidiaries of companies should all be treated as separate entities for the purpose of applying caps.
- Whether a blind fund should be established to receive donations that would otherwise be banned or capped.
- The period during which the cap applies – eg a financial year, the term of a Parliament or a period prior to an election.
- How to deal with membership subscriptions for parties and union affiliation fees.
- Whether a global cap should apply to all donations by each individual or entity during a defined period, or whether separate caps should apply for donations by an individual or entity to different parties, or even to different candidates during that period. (In the United States there are global caps on donations by individuals per election cycle, but there are also sub-limits concerning donations to candidates, parties and PACs).
- Whether caps should apply to the candidate, limiting what he or she can donate to his or her election campaign from his or her own financial resources.
- Whether caps should apply to donations to political parties that have no parliamentary representation.
- The level at which caps are to be set and how substitute funding is to be provided to those parties and candidates affected.
- How to deal with avoidance of bans or caps through expenditure by third parties.

5. Expenditure limits for political parties, candidates and third parties

Background to expenditure limits in Australia

Expenditure limits applied to candidates at Commonwealth elections from 1902[94] to 1980 when they were repealed.[95] Expenditure limits did not extend to third parties, but third parties were required to disclose their expenditure on behalf of, or in the interests of, any candidate or party.[96] There were a number of practical problems with the expenditure

[94] *Commonwealth Electoral Act* 1902 (Cth), Part XIV. The limits were initially £100 for candidates for the House of Representatives and £250 for candidates for the Senate.
[95] *Commonwealth Electoral Amendment Act* 1980 (Cth).
[96] For further detail see: D Cass and S Burrows, 'Commonwealth Regulation of Campaign Finance – Public Funding, Disclosure and Expenditure Limits' (2000) 22 *Sydney Law Review* 477, 484-5.

limits scheme. First, the limits were focused on expenditure by candidates in their electorates and did not deal with expenditure by political parties generally. Secondly, the limits remained too low and were only raised once in 1946. Thirdly, the fact that the limits did not relate to the reality of political expenditure and were not enforced, meant that they were largely ignored.[97] Expenditure limits were repealed in 1980, partly because they were regarded as 'unworkable' and were mostly honoured in the breach, but primarily because of concern that breaches would give rise to challenges to the election of candidates after such a challenge was successful with respect to a Tasmanian State election.[98]

Expenditure limits were abolished by Western Australia in 1979 and Victoria in 2002. The only State in which expenditure limits continue to apply is Tasmania, with respect to elections for the Legislative Council. Only a candidate or his or her agent may incur expenditure with a view to promoting the election of the candidate to the Legislative Council.[99] A political party may not incur expenditure to promote the election of candidates to the Legislative Council, nor may third parties.[100] The expenditure limit for candidates was set at $10,000 in 2005, to which an additional $500 is added every subsequent year.[101] Breach of the expenditure limit is an offence punishable by a fine, and if it is breached by more than $1000 and the candidate was elected to the Legislative Council, the court must declare the candidate's election void, unless satisfied that there are special circumstances that make it undesirable or inappropriate to make such a declaration.[102]

Expenditure limits in comparable countries

In the United Kingdom expenditure on election campaigns by political parties is limited, but with a relatively high ceiling. The limit for spending by parties in the year prior to the holding of a general election is £30,000 per electorate contested[103] (which amounts to approximately £19 million for major parties).[104] There is a floor to the expenditure limit.

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[97] Graeme Orr, 'The Currency of Democracy: Campaign Finance Law in Australia' (2003) 26 UNSWLJ 1, 6.

[98] *Re Electoral Act 1907* [1979] Tas R 282; Graeme Orr, 'The Currency of Democracy: Campaign Finance Law in Australia' (2003) 26 UNSWLJ 1, 6; D Cass and S Burrows, 'Commonwealth Regulation of Campaign Finance – Public Funding, Disclosure and Expenditure Limits' (2000) 22 *Sydney Law Review* 477, 491; and Commonwealth, Joint Select Committee on Electoral Reform, *First Report*, (Canberra, 1983) 28.

[99] *Electoral Act* 2004 (Tas), s 159.

[100] *Attorney-General v Liberal Party of Australia, Tasmanian Division* [1982] Tas R 60. Cf the pre-2002 position in Victoria, where expenditure limits only applied to expenditure by candidates, not by parties or others. See also the same position in the United Kingdom prior to 2000: *R v Tronoh Mines Ltd* [1952] 1 All ER 697.

[101] *Electoral Act* 2004 (Tas), s 160.

[102] *Electoral Act* 2004 (Tas), s 199(5).

[103] *Political Parties, Elections and Referendums Act* 2000 (UK), s 79 and Schedule 9.

[104] This is because major parties usually do not contest the 18 seats in Northern Ireland. The consequence is that in 2005 the expenditure limit for the major parties was approximately £18.84 million. Four more seats have been created in England since the 2005 election, so the expenditure limit will be higher at the next UK general election: UK, 'Party finance and expenditure in the United Kingdom – The Government's proposals', White Paper, June 2008, Cm 7329, pp 33 and 40.

If a party contests fewer than 27 seats in England, be it 1 or 26 seats, it is still subject to an expenditure limit of £810,000, which is the figure for contesting 27 seats. The expenditure limit floor in Scotland is set at four seats and in Wales it is 2 seats.[105]

In each constituency in the United Kingdom a separate limit of around £10,000 applies to candidates, depending on the size and the number of voters in the constituency. This limit only applies during the period from the dissolution of the House of Commons to the polling date. The constituency limit is not counted as part of the national limit of a political party.[106] There have been concerns in the United Kingdom that the shortness of the period during which the limit applies renders it ineffective. The UK Government has expressed its preference for returning to the system where the expenditure limit was triggered when a person commenced promoting himself or herself as a candidate for election, regardless of whether the person had yet been officially adopted or nominated as a candidate or Parliament dissolved.[107]

In New Zealand, the spending of candidates is capped at $20,000, and the spending of parties is capped at $1 million, plus $20,000 for each electorate in which the party stands a candidate.[108] There are currently 70 electorates in New Zealand.

In Canada, expenditure limits only apply during the election campaign. Outside of that period, there is no limit on political expenditure. Limits for parties during election campaigns are calculated by $0.70 multiplied by the number of electors in the electorates in which the party is running candidates multiplied by an inflation adjustment factor.[109] Expenditure limits for candidates are even more complicated with a scale of amounts applied per the number of electors[110] multiplied by an inflation adjustment factor, as well as special adjustments for matters such as low population density.[111]

In the United States expenditure limits apply to Presidential candidates only if they accept public funding. They are therefore optional in nature. Candidates for the 2008 US Presidential election who accepted public funding in the primaries were limited to overall campaign expenditure of $42.05m, with sub-limits in each of the States (eg $2,357,500 for Alabama, $841,000 for Alaska and $9,559,100 for Florida). The expenditure limit for the general election campaign for a major party Presidential nominee[112] who accepts

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[105] UK, 'Party finance and expenditure in the United Kingdom – The Government's proposals', White Paper, June 2008, Cm 7329, p 33.
[106] UK, House of Commons, Constitutional Affairs Committee, *Party Funding*, (HC 163-1, 2006), p 25.
[107] UK, 'Party finance and expenditure in the United Kingdom – The Government's proposals', White Paper, June 2008, Cm 7329, pp 41-5.
[108] *Electoral Finance Act* 2007 (NZ), ss 76 and 98. Note that in 2005 all major parties and some minor parties breached the expenditure limit and legislation was passed to validate retrospectively the excess expenditure: Gareth Griffith and Talina Drabsch, *Election Finance Law: Recent Developments and Proposals for Reform* (NSW Parliamentary Library Research Service, June 2007), pp 22-4.
[109] *Canada Elections Act* 2000 (Canada), s 422.
[110] $2.07 each for the first 15,000 electors; $1.04 each for the next 10,000 electors and $0.52 each for the rest of the electors.
[111] *Canada Elections Act* 2000 (Canada), ss 440-1.
[112] Note that in contrast, minor candidates receive a smaller proportion of public funding but are entitled to collect private contributions, up to a particular level.

public funding is $84.1 million (which is the amount of the public funding grant).[113] Some previous candidates, such as George W Bush, Howard Dean and John Kerry, rejected public funding in favour of raising their own funding from donations and having no limits on their expenditure during the primaries.[114] Barack Obama has announced that he will forego public funding of $84.1 million in the Presidential election campaign and instead raise his own funds, which could potentially be triple the expenditure limit that would otherwise have applied to him.[115]

The constitutional validity of expenditure limits for candidates and parties

Expenditure limits have not been challenged yet in Australia, but their constitutional validity, at least if introduced at the Commonwealth level, could well be challenged on the ground that they breach the implied freedom of political communication. This is because, as the United States Supreme Court accepted in *Buckley v Valeo,* expenditure limits, while neutral as to the substance of political communication, limit the quantity and diversity of that communication and the capacity of candidates and parties to convey their policies during an election campaign in the most effective manner.[116] Queensland's Electoral and Administrative Review Commission has also noted that as the 'bulk of monies expended by both parties and candidates is directed toward advertising', any expenditure limit 'becomes essentially a case of imposing limits on political advertising.'[117]

Cass and Burrows have argued with respect to Australia, however, that:

> the [prior] existence of limits on expenditure indicates that, at the very least, there is historical precedent for their existence. Moreover these limits existed for some 80 years of this century as a central plank of the first system of campaign finance regulation introduced in Australia and survived (albeit in outdated form) for almost the entire century until they were repealed in 1980. They existed in the context of a system that was fairly described as a representative democracy. Their persistence for some 80 years suggests that although their practical workability may have been questioned, this did not lead to a desire for their repeal. They were not perceived of as inconsistent with constitutional democracy, or incompatible with the aims of the campaign finance system. The reinstatement of expenditure limits would not so much involve the introduction of an entirely new principle of campaign finance, as the mere restoration of an historical precedent, compatible with Australian notions of representative democracy.[118]

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[113] Federal Election Commission web-site: www.fec.gov.
[114] Gareth Griffith and Talina Drabsch, *Election Finance Law: Recent Developments and Proposals for Reform* (NSW Parliamentary Library Research Service, June 2007), p 37; and Alan Grant, 'Election Campaign Funding Reform and Judicial Review in the United States' [2004] *Public Law* 501, 505.
[115] 'Obama knocks back $88m public campaign cash' *The Australian* 20 June 2008, p 8.
[116] *Buckley v Valeo* 424 US 1 (1976) 19 and 39.
[117] Qld, Electoral and Administrative Review Commission, *Report on Investigation of Public Registration of Political Donations, Public Funding of Election Campaigns and Related Issues* (June 1992), p 93.
[118] D Cass and S Burrows, 'Commonwealth Regulation of Campaign Finance – Public Funding, Disclosure and Expenditure Limits' (2000) 22 *Sydney Law Review* 477, 486-7.

While this is a legitimate argument, it should also be noted that a majority of the High Court in *Roach v Electoral Commissioner* used notions of evolutionary interpretation to derive an implication of a universal franchise from the Constitution, despite the long historical absence of a universal franchise in Australia.[119] Further, Commonwealth expenditure limits were abolished well before the implied freedom of political communication was first identified by the High Court in 1992. While expenditure of money may not itself necessarily amount to political communication,[120] laws that limit expenditure by candidates have the *effect* of limiting political communication because most expenditure by candidates and parties during an election campaign is for the communication of messages, such as advertising in the media, hand bills, direct mail, meetings, posters and billboards. The first part of the test set out by the High Court in the *Lange* case was 'does the law effectively burden freedom of communication about government or political matters either in its terms, operation or *effect*?'[121] Accordingly, expenditure limits are likely to be regarded as burdening freedom of political communication.

The next question is whether there is a legitimate end that the law seeks to serve. The High Court is likely to accept that matters such as avoiding the risk of corruption and undue influence are legitimate ends for government to pursue, as it indicated in the *ACTV* case.[122] In Canada, the courts have also accepted as legitimate a number of reasons for limiting the expenditure of candidates, parties and third parties during election campaigns including:

1. reducing the costs of elections to ensure that those of modest means can still genuinely participate in the electoral process;
2. enhancing public confidence in the electoral process by minimizing the factors that lead to perceptions that politicians are beholden to their contributors;
3. preventing wealthy candidates, parties and supporters from monopolizing the sources of communication and exercising undue influence on the political debate; and
4. avoiding the possibility of corruption arising from candidates and parties being dependent upon private funding.[123]

The question then becomes whether a law imposing expenditure limits is reasonably appropriate and adapted to serving a legitimate end in a manner that is compatible with the maintenance of the constitutional system of representative and responsible

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[119] *Roach v Commonwealth* (2007) 239 ALR 1, [6]-[7] (Gleeson CJ); [45] (Gummow, Kirby and Crennan JJ).

[120] It is arguable that in some cases the expenditure of money might be seen as a form of political communication (i.e. putting one's money where one's mouth is). Non verbal communication may amount to political communication: *Levy v Victoria* (1997) 189 CLR 579.

[121] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567 [my emphasis].

[122] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 144-5 (Mason CJ); 156 (Brennan J); 175 (Deane and Toohey JJ); and 238-9 (McHugh J).

[123] *Somerville v Canada* (1996) 136 DLR (4th) 205, 212 (Conrad JA).

government. This will depend upon the nature of the limits and how they are imposed.[124] At least one Justice in the *ACTV* case took the view that a more direct way of minimizing the risk of corruption than banning political advertising would have been to limit political expenditure,[125] as was done in Australia up until 1980. Crucial factors that would influence the High Court include the extent to which expenditure limits apply to third parties and the level of those limits. If they were so low that candidates, political parties or third parties[126] could not adequately communicate to voters about policies and who should be elected, then the burden on freedom of political communication would be likely to be regarded as disproportionate to the legitimate end. Further, if expenditure limits had the effect of favouring incumbents in some manner, this might also lead to the law being struck down as disproportionate.[127]

Cass and Burrows have concluded that 'it would be difficult to argue definitively that an expenditure limit necessarily breaches the Australian implied freedom of political speech'.[128] While this is true, the risk that expenditure limits might do so remains significant, but would depend upon the nature of the law.

In the United States, expenditure limits were introduced in response to the Watergate scandal. However, in *Buckley v Valeo,*[129] the United States Supreme Court struck down expenditure limits as unconstitutional on the ground that they breached the First Amendment. It noted that campaign expenditure limits affect the ability of candidates to communicate their policies and that the legitimate object of alleviating the risk of corruption is addressed by limits on contributions and disclosure requirements, rather than expenditure limits.[130] Moreover, the justification of equalising the financial resources of candidates was regarded as unconvincing. The Court noted that limits on political contributions meant that the financial resources available to candidates will depend upon the 'size and intensity of the candidate's support', such as the number of volunteers and contributors.[131]

The Supreme Court also struck down expenditure limits upon advertising by third parties that advocates the election or defeat of candidates. The Court pointed out that under the laws in question it would be a criminal offence for a person to place a single one-quarter page advertisement in a major metropolitan newspaper advocating the election or defeat of a candidate, as this would cost more than the $1000 limit.[132] Yet, any person could

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[124] Joo-Cheong Tham and David Grove, 'Public Funding and Expenditure Regulation of Australian Political Parties: Some Reflections (2004) 32 *Federal Law Review* 397, 421-2.
[125] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 155-6 (Brennan J).
[126] See the discussion below.
[127] For example, if government advertising was unaffected by expenditure limits and was of such a nature as to be regarded by the courts as supporting incumbent candidates in their political campaigns, this could lead to the law imposing the expenditure limits being struck down as invalid.
[128] D Cass and S Burrows, 'Commonwealth Regulation of Campaign Finance – Public Funding, Disclosure and Expenditure Limits' (2000) 22 *Sydney Law Review* 477, 489. See also: Graeme Orr, 'The Currency of Democracy: Campaign Finance Law in Australia' (2003) 26 UNSWLJ 1, 23-4.
[129] 424 US 1 (1976).
[130] *Buckley v Valeo* 424 US 1 (1976) 55.
[131] *Buckley v Valeo* 424 US 1 (1976) 56.
[132] *Buckley v Valeo* 424 US 1 (1976), 39-40.

advertise generally on political issues, spending however much they wanted, as long as the advertisement did not advocate the election or defeat of a clearly identified candidate. The Court noted the problem that by keeping open unlimited expenditure on 'issues' advertising, in order to satisfy First Amendment requirements, the anti-corruption and undue influence rationale was undermined, as candidates could still become beholden to third parties for their massive expenditure on issues advertising.[133] In effect, the inability to close the third party loophole meant that all expenditure limits were ineffective and therefore not justified.

The Supreme Court also rejected an argument that the governmental interest in providing an equal playing field was enough to justify the infringement on free speech.[134] It held that free speech should not be restricted in order to enhance the relative voices of others. In particular, the Court rejected the imposition of expenditure limits on the use of a candidate's own personal funds. It noted that the use of personal funds reduces the risk of undue influence arising from outside contributions, so that limits upon a candidate's use of his or her own funds could not be justified as an anti-corruption measure.[135] The consequence of this finding, however, was that rich candidates could massively outspend candidates who relied on capped political donations to fund their campaigns.

This problem was addressed, to an extent, by the 'millionaire's amendment' to the *Bipartisan Campaign Reform Act* 2002 (USA). It raised the caps on political donations to candidates who faced opponents who contributed large amounts of their own money to their campaign.[136] A majority of the Supreme Court struck down the validity of this provision in 2008. It noted that if the amendment had simply raised the donation limits for all candidates, it would have been valid.[137] However, by raising the limits for one candidate but not the self-funded candidate, it imposed 'an unprecedented penalty on any candidate who robustly exercises [his or her] First Amendment right' by using personal funds to finance his or her campaign.[138] The majority saw this as imposing a 'drag on First Amendment rights'.[139] The majority again stressed that reliance on personal funds reduces the threat of corruption and concluded that the millionaire's amendment, 'by discouraging the use of personal funds, disserves the anticorruption interest'.[140] It again

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[133] *Buckley v Valeo* 424 US 1 (1976) 45.
[134] *Buckley v Valeo* 424 US 1 (1976), 48-9.
[135] *Buckley v Valeo* 424 US 1 (1976) 53.
[136] The provision was very complex, but in summary it allowed the amount an individual could contribute to a candidate to be trebled (from $2,300 to $6,900), even if the individual had already reached his or her overall limit for political donations of $42,700. The candidate could also receive unlimited contributions from his or her political party, whereas normally a limit of $40,900 applied. This applied if the candidate's opponent gave notice, as required, that he or she intended to spend more than $350,000 of personal funds on his or her election campaign.
[137] *Davis v Federal Election Commission* 554 US ___ (2008), (unreported, 26 June 2008), p 10 (Alito J for the majority).
[138] *Davis v Federal Election Commission* 554 US ___ (2008), (unreported, 26 June 2008), p 12 (Alito J for the majority).
[139] *Davis v Federal Election Commission* 554 US ___ (2008), (unreported, 26 June 2008), p 13 (Alito J for the majority).
[140] *Davis v Federal Election Commission* 554 US ___ (2008), (unreported, 26 June 2008), p 14 (Alito J for the majority).

rejected the notion that Congress could legitimately limit free speech in order to level the playing field and saw 'ominous implications' in such interference in elections.[141]

The United States Supreme Court has recognised, however, the validity of expenditure limits when voluntarily accepted as the price for receiving public funding in Presidential elections.[142] The Supreme Court recently noted that 'a candidate, by forgoing public financing, could retain the unfettered right to make unlimited personal expenditures'. In contrast, a law that abridged that right without an option to avoid that abridgement was invalid.[143]

Unlike the United States Supreme Court, the Canadian courts have taken a more relaxed view on expenditure limits for candidates, noting that such limits place no limitation 'upon what a candidate may say, how it may be said or when or where it may be said.'[144]

The constitutionality of third party expenditure limits

If expenditure limits apply to candidates and parties, then it is usually considered necessary to apply limits to third party expenditure, or at the least a category of associated entities.[145] Otherwise, expenditure limits are easily circumvented by the establishment of outside bodies to make unregulated expenditure. The difficulty of banning or limiting the expenditure of third parties on political advertising during election campaigns is that it potentially prevents third parties from raising legitimate political issues and concerns during an election campaign. There is therefore a conflict between the interests in the limitation of expenditure and the interests in maintaining freedom of political communication.

This was a major concern of the High Court in the *ACTV* case.[146] Third parties spend substantial amounts in electoral campaigns in Australia on matters of legitimate concern to them. Brennan J noted in the *ACTV* case that in the 1990 federal election, $1.7m was spent on political broadcasting by 3rd parties, including $1.1m by the logging industry and $25,000 by the Australian Conservation Foundation.[147] In the 2007 federal election

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[141] *Davis v Federal Election Commission* 554 US ___ (2008), (unreported, 26 June 2008), p 16 (Alito J for the majority).
[142] *Republican National Committee v Federal Election Commission* 445 US 955 (1980).
[143] *Davis v Federal Election Commission* 554 US ___ (2008), (unreported, 26 June 2008), p 13 (Alito J for the majority).
[144] *R v Blake* 42 CCC (3d) 217 (1988), [46].
[145] At the Commonwealth level, an 'associated entity' is one that is controlled by one or more registered political parties or operates at least to a significant extent for the benefit of one or more parties, or is a financial member of, or has voting rights in, a party: *Commonwealth Electoral Act* 1918, s 287. There have been difficulties in the past with defining 'associated entity' and ensuring that the Electoral Commission has the necessary powers to identify associated entities: D Cass and S Burrows, 'Commonwealth Regulation of Campaign Finance – Public Funding, Disclosure and Expenditure Limits' (2000) 22 *Sydney Law Review* 477, 510-7.
[146] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 145 (Mason CJ); 173 (Deane and Toohey JJ); 220 (Gaudron J); Cf Brennan J at 162 who noted that third parties could still use other forms of advertising, and who saw the limitations on third parties as being proportionate.
[147] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 149 (Brennan J).

campaign, significant amounts were spent by unions and business groups on advertising concerning industrial relations. It would be hard to regard these bodies as no more than 'fronts' for political parties, as the issues upon which they advertised went to the core of their purposes for existence. It would also be difficult to argue that they should be silenced during election campaigns as their views form a legitimate part of the public debate. On the other hand, as Dawson J noted in the *ACTV* case, third parties can subvert the object of any restrictions imposed on political parties and candidates.[148]

In New Zealand, third parties may choose to be 'listed' by the Electoral Commission in order to obtain the benefit of higher expenditure limits. The expenditure of listed third parties is capped at $120,000 overall, and $4000 for election advertisements that seek to persuade people to vote for, or not to vote for, particular candidates.[149] Persons who are not listed as third parties may still publish election advertisements promoting the election or rejection of candidates or parties, but only up to a maximum cost of $12,000 overall and $1000 with respect to any candidate.[150] Neither a listed nor unlisted third party may publish an advertisement that promotes the election of a candidate or party without the authority of the candidate or party concerned.[151] 'Issues advertising', however, remains largely unregulated.[152] Geddis has criticised this approach, arguing that the laws regulating political advertising by third parties during election periods are both too loose, because they can be avoided by making advertisements directed at issues rather than candidates or parties, and too rigid, because they give candidates and parties too much control over advertisements by third parties that promote them.[153]

Expenditure limits also apply to third parties in the United Kingdom, and have done so since 1918.[154] Third parties were permitted to spend only a measly 50p, later increased to £5, on advertising the views of candidates or disparaging other candidates in an election. This constraint was challenged in the European Court of Human Rights in *Bowman v United Kingdom*.[155] Mrs Bowman had issued 1.5 million leaflets during the general election campaign of 1992 detailing the views of candidates on abortion and human embryo experimentation. She was prosecuted, but not convicted, of a breach of s 75 of

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[148] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 190-2 (Dawson J).
[149] *Electoral Finance Act* 2007 (NZ), s 118. In 2005, members of the Exclusive Brethren exploited a loophole in electoral funding laws. The law imposed restrictions on third party expenditure that advocated voting for parties or candidates at an election. Instead the Exclusive Brethren spent large amounts on distributing pamphlets criticising certain parties, so they were not subject to an expenditure cap. The law was subsequently changed to close this loophole.
[150] *Electoral Finance Act* 2007 (NZ), s 63.
[151] *Electoral Finance Act* 2007 (NZ), s 65.
[152] Andrew Geddis, 'The Regulation of Campaign Funding in New Zealand: Practices, Problems and Prospects for Change' in K D Ewing and Samuel Issacharoff, *Party Funding and Campaign Financing in International Perspective* (Hart Publishing, Oxford, 2006) p 22.
[153] Andrew Geddis, 'The Regulation of Campaign Funding in New Zealand: Practices, Problems and Prospects for Change' in K D Ewing and Samuel Issacharoff, *Party Funding and Campaign Financing in International Perspective* (Hart Publishing, Oxford, 2006) p 23. Note that Geddis' comments were addressed to earlier, slightly different, provisions.
[154] *Representation of the People 1918* (UK); and *Representation of the People Act 1983* (UK), s 75.
[155] (1998) 26 EHRR 1.

the *Representation of the People Act* 1983 (UK).[156] The European Court of Human Rights found that the law breached her right to freedom of expression.

Mrs Bowman argued that the major parties had no policies on matters such as abortion and embryo experimentation, as such matters were left to conscience votes. Accordingly, in order for the people to make an informed choice in an election, third parties, such as herself, needed to inform them of the record of candidates on such issues. The information she provided could have persuaded voters to vote either way, depending on the voter's own views. She expressed concern that the law allowed the major political parties to set the political agenda and prevented others from putting on the political agenda issues of importance, such as republicanism, a Bill of Rights, environmental protection or Sunday trading. She argued that the £5 limit was used to silence other groups such as the Campaign for Nuclear Disarmament, Charter 88, environmentalists and those for or against fox-hunting.

The British Government argued that the provision protected the rights of others in three ways:

> First, it promoted fairness between competing candidates for election by preventing wealthy third parties from campaigning for or against a particular candidate or issuing material which necessitated the devotion of part of a candidate's election budget, which was limited by law, to a response. Secondly, the restriction on third-party expenditure helped to ensure that candidates remained independent of the influence of powerful interest groups. Thirdly, it prevented the political debate at election times from being distorted by having the discussion shifted away from matters of general concern to centre on single issues.[157]

Mrs Bowman responded that if the real issue was the avoidance of corruption, then the law should be directed at preventing secret donations by private persons and bodies to political parties.[158]

While the Court accepted that the securing of equality between candidates and the protection of the rights of others was a legitimate aim,[159] the legislation was regarded as disproportionate in its limitation on third parties. The £5 limit for third party expenditure was simply set too low. The alternatives for Mrs Bowman, such as publicising her views through letters to newspapers or standing for election herself, were not practical. In effect there was 'a total barrier to Mrs Bowman's publishing information with a view to influencing the voters'.[160] The British Government responded by increasing the amount

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[156] She had been convicted of the same offence on two previous occasions, but this time the case was dismissed because the prosecution was brought out of time.
[157] *Bowman v United Kingdom* (1998) 26 EHRR 1, 16-17.
[158] *Bowman v United Kingdom* (1998) 26 EHRR 1, 10.
[159] *Bowman v United Kingdom* (1998) 26 EHRR 1, 17.
[160] *Bowman v United Kingdom* (1998) 26 EHRR 1, 19.

to £500 for expenditure in constituency campaigns.[161] Any campaigning by a third party on behalf of a candidate or with the candidate's authority, counts under the candidate's expenditure limit.[162]

In relation to national political campaigns, third parties can now spend £10,000 in England and £5,000 in each of Scotland, Wales and Northern Ireland. If a third party wants to spend more, it must be registered as a 'recognised third party' by the Electoral Commission. The expenditure of a registered third party during the period of 12 months before a general election must be disclosed and is subject to limits, but the limits are substantially higher.[163] Concern has still been expressed in the United Kingdom that such expenditure limits may be contrary to the *Human Rights Act* 1998 (UK).[164]

Canada also has third party expenditure limits at the national level. In 1983 it banned third parties who were not acting on behalf of a registered party or candidate from incurring 'election expenses' during the election campaign period. This ban was struck down by the Alberta Court of Queen's Bench on the ground that it breached the guarantee of freedom of expression and was not otherwise justified.[165] The next two elections were held without any constraints on third party expenditure. In 1993 a limit of $1000 was placed on third-party expenditure for promoting or attacking candidates or parties during an election campaign. The Alberta Court of Appeal struck it down in 1996 on the same grounds.[166]

In 2000, the Canadian Parliament made a third attempt at imposing limits on third-party election expenditure, raising the limit to $150,000, but with a condition that no more than $3000 could be spent in any electorate. Third parties had to register if they incurred electoral advertising expenses of more than $500. Again the limits were challenged, but this time the matter was decided by the Canadian Supreme Court.

The Supreme Court, in *Harper v Canada*, upheld the validity of the limits on third party electoral expenditure. The majority considered that s 3 of the Canadian Charter of Rights and Freedoms gave voters a right to vote in an informed manner. In order to be informed, the majority considered that voters must be 'able to hear all points of view' and that to achieve this there must be limitations or otherwise the voices of the affluent will

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[161] *Political Parties, Elections and Referendums Act 2000* (UK), s 131. Note debate as to whether this is high enough to satisfy the European Court of Human Rights: K D Ewing, 'Promoting Political Equality: Spending Limits in British Electoral Law' (2003) 2 *Election L J* 499, 506.

[162] UK, 'Party finance and expenditure in the United Kingdom – The Government's proposals', White Paper, June 2008, Cm 7329, p 47.

[163] *Political Parties, Elections and Referendums Act 2000* (UK), s 85 and Sch 10. The cap is £793,500 with respect to England, £108,000 for Scotland, £60,000 for Wales and £27,000 for Northern Ireland. Expenditure caps in relation to elections to devolved legislatures or the European Parliament are lower. By 2005, 26 third parties were registered, contributing £1.7 million: UK, House of Commons, Constitutional Affairs Committee, *Party Funding*, (HC 163-1, 2006), p 32.

[164] K D Ewing, 'Promoting Political Equality: Spending Limits in British Electoral Law' (2003) 2 *Election L J* 499, 519-20; and Jane Marriott, 'Alarmist or Relaxed? Election Expenditure Limits and Free Speech' [2005] *Public Law* 764.

[165] *National Citizens' Coalition v Canada* (1984) 11 DLR (4th) 481.

[166] *Somerville v Canada* (1996) 136 DLR (4th) 205.

drown out other voices.[167] The majority concluded that 'unequal dissemination of points of view undermines the voter's ability to be adequately informed of all views' and that accordingly s 3 of the Charter 'does not guarantee a right to unlimited information or to unlimited participation'.[168] Their Honours considered that unlimited spending by third parties can (a) lead to the dominance of political discourse by the wealthy; (b) allow candidates and political parties to circumvent their own spending limits; (c) have an unfair effect on the outcome of an election; and (d) erode the confidence of the Canadian people in the fairness of the electoral system.[169]

The majority stressed that spending limits have to be 'carefully tailored to ensure that candidates, political parties and third parties are able to convey their information to voters.'[170] Overly restrictive limits would undermine the ability for voters to be informed, and would therefore be unconstitutional. In this case, it was found that the limits allowed third parties to engage in 'modest, national, informational campaigns' and 'reasonable district informational campaigns', which was enough.[171]

The Supreme Court in *Harper v Canada* also stressed that not all third party advertising was as deserving of constitutional protection, such as advertising that manipulates political discourse or simply smears candidates. The majority noted that 'the danger that political advertising may manipulate or oppress the voter means that some deference to the means chosen by Parliament is warranted.'[172]

The minority in *Harper v Canada* was concerned that the limits were too low, so that third parties could not effectively communicate their views on election issues to fellow citizens.[173] The majority responded that 'third party advertising is not restricted prior to the commencement of the election period' and even during an election campaign, expenditure limits only apply to advertising that is associated with a candidate or party and do not apply to speeches, letters, news, commentary or the internet.[174] While the expenditure limits were set at a level lower than the limits that apply to candidates and parties, this was justified on the grounds that: candidates must have sufficient resources to respond to attacks from third parties; third parties have fewer expenses to meet than candidates; and third party expenditure is usually lower because it tends to focus on single issues.[175]

In contrast, the Canadian Supreme Court held in a case concerning limits on third party expenditures in relation to a referendum in Quebec, that the limits were too drastic

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[167] *Harper v Canada* [2004] 1 SCR 827, [72] (Iacobucci, Bastarache, Arbour, LeBel, Deschamps and Fish JJ).
[168] *Harper v Canada* [2004] 1 SCR 827, [72].
[169] *Harper v Canada* [2004] 1 SCR 827, [79].
[170] *Harper v Canada* [2004] 1 SCR 827, [73].
[171] *Harper v Canada* [2004] 1 SCR 827, [74].
[172] *Harper v Canada* [2004] 1 SCR 827, [85].
[173] *Harper v Canada* [2004] 1 SCR 827, [9] (McLachlin CJ and Major J).
[174] *Harper v Canada* [2004] 1 SCR 827, [112] - [115].
[175] *Harper v Canada* [2004] 1 SCR 827, at [116].

because only the 'Yes' and 'No' committees were permitted to expend money, excluding those with other views, such as those who supported abstention.[176]

Practical issues concerning the application of expenditure limits

Types of expenditure caught

An important matter to consider is the type of expenditure to which caps apply. Is it campaign expenditure only, or does it extend to other expenditure by political parties involving administration and their continued operation? Should expenditure caps include the market price for services otherwise provided free of charge or at a discount to parties, or should they be regarded as donations, or both? Should expenditure caps cover capital expenditure or the wages and expenses paid to the staff of political parties and should they also cover the market costs of seconded employees and/or voluntary staff?[177]

The distinction between campaigning and other party costs is frequently difficult to identify and enforce. The UK Phillips Review of the Funding of Political Parties gave consideration to extending expenditure caps to all expenditure of political parties, because campaigning is at the core of all their activities. Sir Hayden Phillips noted that this would be simpler to administer and more effectively enforced, but that it was objected to by some on the ground that parties are private associations that should not be financially controlled by governments.[178] Instead of identifying what should fall within the expenditure cap, he proposed that all party expenditure be included unless it fell within express exclusions, covering matters such as superannuation contributions for employees, interest on debt, legal expenses, costs of compliance with electoral law, expenditure on trading activities and income generation and intra-party transfers.[179]

Timing of the application of expenditure caps

Expenditure caps must either apply on an ongoing basis or for a particular period. In some jurisdictions, such as Canada, they apply only for the formal period of the election campaign. In New Zealand, expenditure caps apply during the three months prior to an election, and in the United Kingdom they apply to the period four months before elections to the European Parliament, the Scottish Parliament, the Northern Ireland Assembly and the National Assembly for Wales. This permits political parties and third parties to exercise greater freedom in spending outside this period, but has the effect of encouraging large amounts of spending, particularly in marginal electorates, well in advance of the announcement of an election, effectively prolonging campaigns. It simply moves the timing of expenditure, rather than reducing it.

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[176] *Libman v Quebec* [1997] 3 SCR 569; 151 DLR (4th) 385.
[177] See the discussion on this in a UK context in: K D Ewing, 'Promoting Political Equality: Spending Limits in British Electoral Law' (2003) 2 *Election L J* 499, 502-3.
[178] UK, The Review of Funding of Political Parties, *Strengthening Democracy: Fair and Sustainable Funding of Political Parties*, March 2007, p 14.
[179] UK, 'Party finance and expenditure in the United Kingdom – The Government's proposals', White Paper, June 2008, Cm 7329, p 36.

The period during which expenditure limits apply with respect to political parties in national campaigns at general elections in the United Kingdom is much longer. The period runs for 365 days prior to polling day. As the Westminster Parliament does not have a fixed term, political parties cannot be sure when the 365 day period commences to run until almost the end of it, leading to significant budgeting uncertainty and the risk of inadvertent breaches. Such a system also gives a significant advantage to the governing party, which can determine when the election is to be held and plan accordingly.[180] It would work better, however, in States such as New South Wales with fixed term Parliaments and known election dates.

Limits on the expenditure of candidates in the United Kingdom (as opposed to party expenditure in the national campaign) only apply for the period from the dissolution of Parliament to the election. This means that candidates can spend large amounts in campaigns in marginal electorates without expenditure limits until Parliament is dissolved prior to an election. It also leads to uncertainty as to when a political party is involved in national campaign expenditure or campaign expenditure in a constituency. The UK Phillips Review of the Funding of Political Parties gave serious consideration to limiting expenditure 'on a continuous basis' because campaigning is now a 'continuous activity'. It noted, however, that some argued that such regulations would be too onerous and heavy-handed.[181] This could particularly be the case in constituencies where party officers are volunteers. It would be difficult to find volunteers who were prepared to be legally responsible for administering expenditure limits in constituencies for years rather than the short period of an election campaign.[182] Ewing has also pointed out further difficulties with respect to continuous limits, such as whether they apply to parties at a flat rate or take into account the number of members of the party, whether the limit should be the same for every year or different for election years and whether it should apply to such matters as property maintenance, where a party owns its own premises, or commercial activities.[183]

Sir Hayden Phillips recommended the setting of an expenditure limit of £130 million for the term of a Parliament (i.e. five years), which would be proportionally reduced if the Parliament ran for less than its full term. An additional £20 million premium would be included for the election. This proposal was criticised in a UK Government White Paper where it was noted:

> If the only limit set was one for the whole of a parliament, with parties having complete discretion about when exactly to spend during the course of the parliament, there is a serious risk that this would have an unintended result: the effective limit on parties' spending in the final 12 months could in practice be

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[180] K D Ewing, 'Promoting Political Equality: Spending Limits in British Electoral Law' (2003) 2 *Election L J* 499, 510.
[181] UK, The Review of Funding of Political Parties, *Strengthening Democracy: Fair and Sustainable Funding of Political Parties*, March 2007, pp 13-14.
[182] UK, The Review of Funding of Political Parties, *Strengthening Democracy: Fair and Sustainable Funding of Political Parties*, March 2007, p 15.
[183] K D Ewing, *The Cost of Democracy – Party Funding in Modern British Politics* (Hart Publishing, Oxford, 2007), p 236.

> much higher than now, with parties 'saving up' until the final year of the parliament. There would appear to be a strong incentive for a party to do this, and it is therefore hard to see how a single limit for a parliament would restrain spending at elections. A potential refinement of Sir Hayden Phillips' proposals might therefore be to complement the parliamentary cycle limits with annual limits…[184]

Another problem with moving to continuous or annual expenditure limits for political parties is how to deal with limits on third party expenditure. The British Government has taken the view that it would be excessive to extend continuous expenditure limits to third parties.[185]

The capacity of candidates to respond to media attacks

Another problem with having expenditure limits for political parties and candidates is ensuring that they have the capacity to respond to attacks that are made upon them by third parties or through talk-back or media commentary. As the Canadian Supreme Court has pointed out, expenditure limits must be lower for third parties than for candidates and political parties 'to ensure that a particular candidate who is targeted by a third party has sufficient resources to respond'.[186] A serious difficulty arises, however, if a candidate is attacked through news, current affairs or talkback, where there is no limit placed upon media organisations expending money on such broadcasts. If candidates and parties are limited in the funds that they may use, they may not be in a position to refute attacks in the media, leaving people to believe that what has been stated is true and uncontested.[187]

This was a matter of concern for Mason CJ in the *ACTV* case in the slightly different context of the banning of political advertising.[188] He noted that if political advertising were banned, this would elevate 'news, current affairs and talkback radio programs to a position of very considerable importance during an election campaign period.' If there were adverse comment about a candidate or party on such programs, the right of reply would be only 'at the invitation of the powerful interests which control and conduct the electronic media'. It would be very difficult for a candidate or party to refute such adverse comments effectively if they were banned from advertising or expending further money on advertising.[189]

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[184] UK, 'Party finance and expenditure in the United Kingdom – The Government's proposals', White Paper, June 2008, Cm 7329, p 39.
[185] UK, 'Party finance and expenditure in the United Kingdom – The Government's proposals', White Paper, June 2008, Cm 7329, p 48.
[186] *Harper v Canada* [2004] 1 SCR 827, [116].
[187] *Bowman v United Kingdom* (1998) 26 EHRR 1, 12.
[188] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 129 and 146 (Mason CJ).
[189] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 129 and 146 (Mason CJ).

McHugh J was also concerned that too much power could be placed in the hands of broadcasters. He pointed out that if political advertising were banned, but the freedom to broadcast news, current affairs and talkback programs were preserved, then this would permit discrimination between those banned from advertising. While some would 'be able to get their ideas, policies, arguments and comments before radio and television audiences, it does not follow that those wishing to put the opposite point of view will necessarily be able to do so.' This 'will depend entirely upon the decisions of the licensees and those who control the content of the relevant programs'.[190]

The level of expenditure caps and the cost of campaigning

Where expenditure caps apply to candidates, issues will arise as to whether the different cost of campaigning in urban and rural areas are adequately accommodated by those caps. For example, the cost of advertising in newspapers and on radio may be higher in urban areas than rural areas, but the costs of petrol for transport in rural areas will be greater and the larger size of electorates in rural areas may mean that advertising has to take place through a greater number of media outlets to cover the electorate, increasing overall costs. Expenditure caps for candidates may therefore need to take into account the nature of the electorate and the relative costs of waging a reasonable campaign in different electorates.

Matters for consideration:

- The level at which expenditure caps should be set, so that parties and candidates may still communicate effectively with voters.
- The period during which a cap applies, eg continually, for a year before the election or for the care-taker period prior to an election.
- The type of expenditure to which it applies, eg election campaigning, party operations and administration.
- Whether expenditure caps should cover other forms of support such as volunteer labour.
- Whether the same expenditure cap should apply in relation to all electorates regardless of size and population, and how expenditure limits should apply to parties that only stand candidates in some electorates.
- Whether there should be separate or combined expenditure caps for parties and candidates who are endorsed by parties.
- Whether expenditure caps apply to third parties and how they are to be applied in a manner that is likely to be regarded as constitutionally valid.
- Whether expenditure caps should apply as a condition of public funding.
- How expenditure caps fit in as part of a scheme involving other proposals such as limits on political donations and public funding for parties and candidates.

[190] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 237 (McHugh J).

6. Public funding of political parties and candidates

Background to public funding in Australia

Public funding of political parties and election campaigns occurs through a variety of means. The most obvious is the direct funding of political parties and candidates. New South Wales was the first Australian jurisdiction to introduce public funding for political parties at the State level in 1981. The *Election Funding and Disclosures Act* 1981 (NSW) establishes a Central Fund (which holds two-thirds of the appropriated amount) and a Constituency Fund (comprising the other third). The Central Fund is primarily directed at parties participating in Legislative Council elections, but may also apply to groups and independent candidates for the Legislative Council. The Constituency Fund is directed at candidates for Legislative Assembly elections. To qualify for a payment, a candidate, group member or party member must either be elected or achieve at least 4% of first preference votes. Due to the low quota in the Legislative Council, a number of elected candidates do not receive 4% of first preference votes, but are still funded because they are elected.

The Act also establishes a Political Education Fund, from which payments are made annually to registered parties that have qualified for funding from the Central Fund.[191] This money may only be spent for political education purposes, including posting written material and information to electors concerning the history or structure of the party, its policies and achievements.[192] It may not be used for campaigning or party conventions.[193] There is currently no public funding for local government elections in New South Wales.[194]

In the Commonwealth, formal public funding of parties and candidates commenced in 1984. Funding is given to candidates and groups that receive 4% of first preference votes. The amount of funding is calculated by reference to the number of such votes they received, with an indexed amount being provided per eligible vote. At the 2004 Commonwealth election, $1.94 was paid per eligible vote, resulting in a total payout of $41.93 million.[195] Around half of candidates in Commonwealth elections receive sufficient support to obtain some public funding.[196] Public funding schemes were also established in the Australian Capital Territory in 1992, Queensland in 1994, Victoria in 2002 and Western Australia in 2006.

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[191] The amount is calculated, however, by reference to votes received in the Legislative Assembly election, leaving parties that only stand candidates in the Legislative Council without funding.
[192] *Election Funding and Disclosures Act* 1981 (NSW), Part 6A.
[193] Graeme Orr, 'The Currency of Democracy: Campaign Finance Law in Australia' (2003) 26 UNSWLJ 1, 9.
[194] Gareth Griffith and Talina Drabsch, *Election Finance Law: Recent Developments and Proposals for Reform* (NSW Parliamentary Library Research Service, June 2007), p 9.
[195] Australian Electoral Commission, *Funding and Disclosure Report Election 2004*, (Cth Government, 2005), p 5.
[196] Australian Electoral Commission, *Funding and Disclosure Report Election 2004*, (Cth Government, 2005), p 10.

In addition, a degree of public funding also occurs indirectly through tax deductions for political donations and candidate expenses and through the allowances and facilities given to Members of Parliament and their staff.[197] Compulsory voting is sometimes regarded as a form of indirect funding because it saves political parties the need to expend large amounts on 'getting out the vote'. The provision of electoral rolls to parties also reduces campaigning costs.[198]

The Committee that recommended the introduction of public funding at the Commonwealth level in 1983 considered that it would mean that parties and candidates would not be reliant upon the donations of the wealthy and special interest groups and that the taint of corruption and undue influence could therefore be avoided.[199] Given, however, the escalating costs of election campaigns and the incentive to spend more than one's competitors, the introduction of public funding does not appear to have reduced party reliance on private funding. Indeed, public funding has been criticised for potentially inflating campaign expenditure, failing to reduce reliance on private funding and exacerbating political inequality.[200]

Public funding in comparable countries

The United Kingdom does not yet have a general system of public funding for political parties. It does, however, provide 'policy development grants' to political parties for developing policies to be included in their election manifesto. These grants only apply to parties represented in the Parliament by at least two Members in the House of Commons. The total value of grants each year is £2 million. There are complicated rules for dividing up this amount, but in essence the Labour Party, the Conservatives and the Liberal Democrats receive an equal amount, with smaller amounts going to the minor parties, including equal amounts for parties from Northern Ireland.[201]

In the United Kingdom, there are also grants given to support the Opposition parties. 'Short money' is used to fund the office of the Leader of the Opposition, as well as assisting in the costs of Opposition parties in the House of Commons carrying out parliamentary business and travel. This is calculated by reference to the number of seats won and the number of votes cast for the party at the previous general election. In 2007-8, the Conservative Party received £4.5 million in Short Money and the Liberal Democrats received £1.67 million. The equivalent for the House of Lords is known as

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[197] Joo-Cheong Tham and David Grove, 'Public Funding and Expenditure Regulation of Australian Political Parties: Some Reflections (2004) 32 *Federal Law Review* 397, 406-8.
[198] D Cass and S Burrows, 'Commonwealth Regulation of Campaign Finance – Public Funding, Disclosure and Expenditure Limits' (2000) 22 *Sydney Law Review* 477, 492, and Commonwealth, Joint Select Committee on Electoral Reform, *First Report,* (Canberra, 1983) 145.
[199] Joint Select Committee on Electoral Reform, *First Report,* (Canberra, 1983) 153-4; and D Cass and S Burrows, 'Commonwealth Regulation of Campaign Finance – Public Funding, Disclosure and Expenditure Limits' (2000) 22 *Sydney Law Review* 477, 493.
[200] Joo-Cheong Tham and David Grove, 'Public Funding and Expenditure Regulation of Australian Political Parties: Some Reflections (2004) 32 *Federal Law Review* 397, 411-14.
[201] See the details in: O Gay, I White and R Kelly, *The Funding of Political Parties,* (House of Commons Research Paper 07/34, 2007) p 9.

'Cranbourne money'. In 2007-8, the Conservative Party was allocated £457,540, the Liberal Democrats £228,445 and the Convenor of the Crossbench Peers £41,003.[202]

In the United States, public funding is given to those Presidential candidates who agree to accept limitations on their expenditure and meet other requirements concerning disclosure. At the primaries stage, funding is provided by way of 'matching funding' (see below). At the general election, funding for Presidential candidates from major parties is a set amount which is increased each election by a cost of living adjustment. In 2008 it is $84.1 million. Candidates from minor parties receive a smaller percentage, and independents or candidates representing new parties only receive public funding after the election if they receive at least 5% of the vote.

In Canada eligible parties and candidates are reimbursed for 50% of their audited election expenses. Eligible parties also receive quarterly allowances that are calculated by reference to the proportion of votes the party received at the last general election.[203]

The constitutional validity of public funding

The High Court of Australia has stressed that that the implied freedom of political communication is a freedom *from* legislative or executive burdens placed upon political communication. It is not a freedom *to* communicate, or a positive right of any kind.[204] There is therefore no constitutional right for any party or candidate to receive public funding to facilitate his or her political communication with the public.

If the Parliament chooses to grant public funding to parties or candidates, this in itself does not amount to a burden on freedom of political communication. As United States and Canadian courts have pointed out, public funding of political parties and candidates does not abridge or burden freedom of political communication, but rather enhances it by giving parties and candidates a greater capacity to communicate on political matters with the public.[205] The same point was made by Gleeson CJ in *Mulholland v Australian Election Commission*, where he accepted that '[p]ublic funding of political parties for election campaigns, and the adoption of the list system for Senate elections, were also measures in aid of political communication and the political process.'[206]

In the *ACTV* case, McHugh J considered that public funding of political parties was a legitimate means of addressing concerns about corruption and undue influence arising from donations. He observed that '[t]he creation of special offences, disclosure of contributions by donors as well as political parties, *public funding*, and limitations on

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[202] UK, 'Party finance and expenditure in the United Kingdom – The Government's proposals', White Paper, June 2008, Cm 7329, p 51.
[203] *Canada Election Act* 2000 (Canada), s 435.01.
[204] See, for example: *Levy v Victoria* (1997) 189 CLR 579, 622 (McHugh J); *McClure v Australian Electoral Commission* (1999) 73 ALJR 1086, 1090 (Hayne J); and *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 223 (McHugh J); 245 (Gummow and Hayne JJ).
[205] *Buckley v Valeo* 424 US 1 (1976), 92-3; *MacKay v Manitoba* [1989] 2 SCR 357; 61 DLR (4th) 385, 392 (Cory J).
[206] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 201.

contributions are but some of the remedies available to overcome the evil which arises not from the giving of information to the electorate or its content but from the conduct of contributors and political officials.'[207]

The main constitutional issue that arises with respect to public funding concerns how it relates to other measures, such as bans or caps on donations. Where such schemes burden political communication, the question arises as to whether a law is reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the system of government prescribed by the Constitution. Two factors, in particular, might influence the Court to find that the law, overall, is not reasonably and appropriately adapted to such an end. They are whether the law unduly favours incumbents and unreasonably discriminates against minor parties and independents.

Judges are naturally wary of 'laws that permit temporary majorities to entrench themselves against effective democratic accountability'.[208] If a law is slanted too far towards preserving the *status quo* and in particular, the benefits of incumbency, it may not be regarded as sufficiently appropriate and adapted to serve the legitimate end. There may also be difficulties with establishing that it is compatible with the constitutionally prescribed system of representative government, if it undermines the capacity of voters to make a free choice.

For example, in the *ACTV* case, a number of judges were concerned that the mechanism for granting free political advertising overly favoured incumbents.[209] Justice Dawson, however, pointed out that in reality small parties and independents do not have the financial resources to use electronic advertising, so the impugned laws, by giving them some access to free political advertising, actually improved the position of small parties and independents.[210] Both Justices Brennan and Dawson noted that small parties and independents still had access to the same forms of non-electronic advertising that they used before.[211]

Despite judicial concern about laws unduly favouring incumbents, the High Court in *Mulholland* was prepared to accept that there are legitimate reasons for requiring that political parties have a minimum level of support before being given privileges, such as public funding.[212] Apart from the risk that voters will be confused or misled by 'shell

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[207] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 239 (McHugh J) [my emphasis].
[208] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 238 (Gummow and Hayne JJ); and 257 (Kirby J) referring to L Tribe, *American Constitutional Law*, (2nd ed, 1988), paras 13-18.
[209] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 131-2 (Mason CJ); 172 (Deane and Toohey JJ); and 239 (McHugh J).
[210] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 190 (Dawson J, dissenting).
[211] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 162 (Brennan J); 189 (Dawson J).
[212] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 239 (Gummow and Hayne JJ); 271 (Kirby J); and 306 (Heydon J).

parties' and 'front parties' that are established to manipulate preference systems or profit from public funding schemes, there is also the significant risk that such actions will result in public disillusionment and the undermining of trust in the system of representative government.[213]

Justices Gummow and Hayne considered that there was no conflict with the requirement of 'direct choice' in s 24 of the Constitution 'where the receipt by an officer of a political party of public moneys as electoral funding of endorsed candidates is conditioned upon continuing party registration and subjection to investigative powers of the [Electoral] Commission.'[214] Their Honours observed that:

> One of the apparent benefits from public funding under Part XX of the Act to representative government may be the minimisation of reliance by parties on campaign contributions. It may encourage candidates from new parties and groups. But, on the other hand, that benefit will not be secured by the funding of "front" or "shell" parties with no substantial membership to which officers of the party are accountable. It is entirely consistent with the objectives of a system of representative government that the Act requires a significant or substantial body of members, and without "overlapping" with the membership of other parties, before there is an entitlement to receive public funding by a non-Parliamentary party.[215]

Justice Heydon also commented that:

> The impugned legislation provides a system of funding to groups of politicians attracting sufficient community support to be capable of description and registration as "parties". The scheme of the legislation – to define "party" as a group having an elected legislator or 500 members; to prevent the misleading of voters by the channelling of preferences attaching to voters for "single issue" parties to other parties; and to prevent voters from being otherwise misled – is a reasonable technique for achieving its goals.[216]

It has been argued that the requirement that parties or candidates receive at least 4% of first preference votes to receive public funding is unfair because it 'plainly discriminates against small and "start-up" parties' and that it should be removed or lowered.[217] *Dicta* from the High Court, however, suggest that a degree of discrimination based upon levels of public support is acceptable, although the extent of that degree remains debateable.

At the moment this is not a matter of great constitutional concern because the public funding laws merely enhance the capacity of parties and candidates to communicate with

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[213] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 272 (Kirby J).
[214] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 239 (Gummow and Hayne JJ).
[215] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 239 (Gummow and Hayne JJ).
[216] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 306 (Heydon J).
[217] Graeme Orr, 'The Currency of Democracy: Campaign Finance Law in Australia' (2003) 26 UNSWLJ 1, 25.

electors, rather than burdening freedom of political communication. If, however, they formed part of a package that included bans or caps on donations which did have the effect of burdening freedom of political communication, greater attention would have to be given to means of limiting any discrimination in favour of incumbents or against minor parties and independents, particularly with respect to thresholds for funding.[218]

The constitutional validity of thresholds for public funding in comparable countries

In the United States, public funding of Presidential candidates was challenged on the ground that it invidiously discriminated against minor candidates, in breach of the Fifth Amendment. As discussed above, the acceptance of public funding is voluntary and based upon the acceptance of expenditure limits. Those who do not receive public funding are not subject to spending limits. The US Supreme Court rejected the challenge to public funding, noting that the absence of public funding does not prevent candidates from getting on the ballot. The inability of minor-party candidates to run effective campaigns would reflect their failure to raise private contributions, rather than the absence of public funding.[219] The Court noted the interest of Congress in not funding 'hopeless candidacies' with large sums of public money and that it was justified to withhold public assistance from candidates that did not have a significant modicum of support. It observed that there was also a public interest in not providing artificial incentives for splintered parties and factionalism.[220]

Hence, the Supreme Court upheld a provision that set the threshold for achieving public funding at 5% of the vote. It deferred to Congress on setting the actual figure. It also noted that there was no evidence that minor parties had lost political ground after the introduction of public financing. It accepted that the use of popular vote totals from the previous election was appropriate for ascertaining whether to give public funding to candidates for a party.[221]

It was also argued before the Supreme Court that new entries were discriminated against because they only received post-election funding, if they achieved 5% of the vote. It was contended that they could not raise enough in loans to expend sufficient on their campaigns to get over the 5% line in order to get reimbursement. The Supreme Court was unsympathetic to this argument, noting that if the new entrant had reasonable prospects of exceeding the 5% figure, the party or candidate would become an acceptable loan risk. The real issue was the level of public support.[222]

In Canada, the Supreme Court dismissed a challenge to provisions which provided for the reimbursement of a portion of campaign expenses of candidates who received more than 10% of votes cast in an electorate.[223] It was argued that the use of a taxpayers' money to

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[218] Such measures are discussed below.
[219] *Buckley v Valeo* 424 US 1 (1976), 94.
[220] *Buckley v Valeo* 424 US 1 (1976), 96.
[221] *Buckley v Valeo* 424 US 1 (1976), 99-100.
[222] *Buckley v Valeo* 424 US 1 (1976), 102-4.
[223] *MacKay v Manitoba* [1989] 2 SCR 357.

support extremist groups was a breach of the freedom of expression of a taxpayer who holds diametrically opposed views. It was also argued, in what the court described as a contradictory submission, that the 10% threshold benefited the three established parties so that splinter groups or new parties had no access to public funding. The Canadian Supreme Court dismissed the action on the ground that there was no evidence to support the factual basis of the claims. The Court also concluded:

> The Act does not prohibit a taxpayer or anyone else from holding or expressing any position or their belief in any position. Rather, the Act seems to foster and encourage the dissemination and expression of a wide range of views and positions. In this way it enhances public knowledge of diverse views and facilitates public discussion of those views.[224]

While the threshold for reimbursement of a proportion of expenses of a candidate remains at 10%, the threshold for the reimbursement of a proportion of campaign expenditure by political parties and the threshold for parties to receive quarterly allowances is 2% of the national vote or 5% of the total vote in the constituencies in which the party runs candidates.[225]

Germany has the lowest public funding threshold in the world,[226] at 0.5% of the national vote or 1% of votes in a Landtag (State Parliament) election.[227] This is because an earlier threshold of 2.5% was struck down by the Federal Constitutional Court as violating the equal protection clause. A majority of the Court considered that any party securing 0.5% of the vote 'manifests its seriousness as an election campaign competitor'.[228] The Court accepted that there was no requirement to fund all parties that participated in a campaign, as there was a public interest in discouraging the formation of splinter parties, but the threshold must be low.[229] In practice, despite this exceptionally low threshold for funding, the six parties represented in the German Parliament still receive more than 95% of public funding.[230]

In the United Kingdom, thresholds for existing public funding (such as 'policy development grants' and 'Short money') are based upon representation by at least two members in the relevant House, or alternatively, in the case of 'Short money', one Member who was elected by at least 150,000 votes. Sir Hayden Phillips, in considering a more comprehensive public funding scheme for the United Kingdom, argued that

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[224] *MacKay v Manitoba* [1989] 2 SCR 357; 61 DLR (4th) 385, 392 (Cory J)
[225] *Canada Elections Act* 2000 (Canada), ss 435, 435.01, and 464.
[226] Reginald Austin and Maja Tjernström (eds), *Funding of Political Parties and Election Campaigns,* (International Institute for Democracy and Electoral Assistance, Stockholm, 2003) p 123.
[227] *Political Parties Act* 1994 (Germany), art 18(4).
[228] *Party Finance Case IV* (1968) 24 BVerfGE 300, quoted in: Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press, 2nd ed, 1997) p 211.
[229] *Party Finance Case III* (1966) 20 BVerfGE 56, quoted in: Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press, 2nd ed, 1997) p 208.
[230] Karl-Heinz Nassmacher, 'Political Finance in West Central Europe' in K Nassmacher (ed), *Foundations for Democracy – Approaches to Comparative Political Finance,* (Nomos Verlagsgesellschaft, Baden-Baden, 2001), p 102.

representation by at least two seats at Westminster, Edinburgh, Cardiff or the European Parliament should be the qualification for public funding. He also recommended that 'so as not to raise a barrier against new parties, it would be fair to stipulate that parties not eligible for public funding are not subject to the limits on donations.'[231]

Thresholds for public funding

Australia – Cth	4% of first preference votes
Australia – NSW	4% of first preference votes or election of 1 Member
Australia - ACT	4% of first preference votes (*Electoral Act* 1992, s 208)
Australia – Qld	4% of first preference votes (*Electoral Act* 1992, Schedule s 297)
Australia – Vic	4% of first preference votes (*Electoral Act* 2002, s 211)
Australia – WA	4% of first preference votes (*Electoral Act* 1907, s 175LF)
Canada	Parties – 2% of national vote or 5% of votes in electoral districts contested. Candidates – 10% of votes in electorate.
Germany	0.5% of national vote for party list or 1% in last Landtag election (but 10% if party list not approved in a Land)
Spain	Representation by at least one Member in a multi-member constituency
United Kingdom	Party represented by at least 2 Members in House of Commons (policy development grants) and either 2 members or 1 member who received at least 150,000 votes (Short money).
United States	Presidential candidates who raise more than $5000 in each of 20 States and agree to spending limits, receive matching funding in the primaries. In the general election campaign, the Presidential nominees of major parties receive a fixed grant if they agree to limit expenditure and not receive private donations. The nominees of minor or new parties can qualify for funding, either by reference to the proportion of votes achieved by the party's nominee at the previous Presidential election, or after the election if the nominee of a new party receives at least 5% of the vote.

Matching funding

In Germany, public funding is calculated by reference to an amount per vote received by a party (€0.85 for each of its first 4 million votes, followed by €0.70 for any additional votes) in elections plus an amount of €0.38 per each €1 the party receives in membership fees, contributions by elected representatives and donations of up to €3,300 from natural persons in the previous year.[232] In practice, this results in about 40% of public funding being distributed according to votes received and about 60% being distributed by

[231] UK, The Review of Funding of Political Parties, *Strengthening Democracy: Fair and Sustainable Funding of Political Parties*, March 2007, p 19.

[232] *Political Parties Act* 1994 (Germany) art 18(3). See also: UK, House of Commons, Constitutional Affairs Committee, *Party Funding*, (HC 163-1, 2006), p 46. This funding formula is also subject to an overall cap.

reference to funds raised by parties from individuals.[233] This balances the assessment of public support for a party by using both votes recorded and public support through membership and individual donations, but cuts out the distorting effects of donations by corporations, unions and other organisations, and large donations by rich individuals. It encourages parties to widen their base and seek to increase participation by individuals in the political process. This has occurred in Germany, with membership fees amounting to about one third of party income and most private political donations being raised from individuals rather than corporations or other bodies.[234]

In the United States, the use of public 'matching funding' for private donations was challenged on the ground that it favoured wealthy voters and candidates. The Supreme Court found, on the contrary, that the intention of the legislation was to 'reduce financial barriers and to enhance the importance of smaller contributions'. It upheld the validity of the matching funds scheme.[235] For example, New York City has a voluntary scheme under which candidates agree to expenditure caps and receive in return public funding of $6 for every $1 donated up to $1050 per donor. Candidates receive a maximum payment of $88,550, but receive bonus payments if facing a well financed non-participant in the scheme.[236] Donations from corporations that are 'doing business' with the City are limited and not subject to matching.[237] Similarly, in US Presidential elections, eligible candidates who agree to expenditure caps receive matching payments for the first $250 of each individual contribution raised during primary campaigns, up to an overall cap of half the expenditure limit.

In the United Kingdom, the House of Commons Constitutional Affairs Committee recommended the introduction of a 'combined matched funding and tax relief scheme' to encourage small donations.[238] The UK Electoral Commission preferred the use of tax relief schemes to matching funding, because it regarded matching funding as more administratively complex.[239] The Phillips Review of the Funding of Political Parties recommended a matching funding scheme as follows:

> Eligible parties would be invited to establish a registered subscriber scheme, primarily using the internet, through which any voter could subscribe a minimum of £5 to support the party. Each subscription would be matched with £5 of public funding.

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[233] Karl-Heinz Nassmacher, 'Political Finance in West Central Europe' in K Nassmacher (ed), *Foundations for Democracy – Approaches to Comparative Political Finance,* (Nomos Verlagsgesellschaft, Baden-Baden, 2001), pp 101-2.

[234] Karl-Heinz Nassmacher, 'Political Finance in West Central Europe' in K Nassmacher (ed), *Foundations for Democracy – Approaches to Comparative Political Finance,* (Nomos Verlagsgesellschaft, Baden-Baden, 2001), pp 96-8.

[235] *Buckley v Valeo* 424 US 1 (1976), 107.

[236] The validity of this aspect of the scheme might be queried in the light of *Davis v Federal Election Commission* 554 US ___ (2008), (unreported, 26 June 2008).

[237] See the web-site of the New York City Campaign Finance Board: www.nycfb.info. See also: UK Electoral Commission, *The funding of political parties,* (December 2004), p 99.

[238] UK, House of Commons, Constitutional Affairs Committee, *Party Funding,* (HC 163-1, 2006), p 55.

[239] Electoral Commission, *The funding of political parties,* (December 2004), p 99; and O Gay, I White and R Kelly, *The Funding of Political Parties,* (House of Commons Research Paper 07/34, 2007) p 36.

> The level of funding available to eligible parties through this scheme would therefore be directly related to their ability to attract paying supporters, and the energy they put into doing so. The scheme would not discriminate between those able and willing to pay a lot and those only wishing to subscribe a small amount. Once parties had established a supporter scheme, they would have the opportunity and the means through which to communicate with a wider group of voters.[240]

The British Government has pointed out that the advantage of such a scheme is that it might encourage more people to participate in party politics. The disadvantages, however, include the absence of certainty for parties about how much they are likely to raise, the expense of administering such a system and the fact that it is 'more vulnerable to fraud'.[241]

Practical issues concerning public funding

The use of public funding

An initial issue to consider is the use to which public funding may be put. Public funding is most commonly provided to reimburse parties for campaign expenses. It may, however, be paid into party coffers without being related to past campaign expenditure or tagged for any particular future use. In some jurisdictions, such as New South Wales and the United Kingdom, separate funds are established for separate purposes, such as political education, policy development or funding Opposition parties in conducting their parliamentary business.

In Germany, in contrast, the Federal Constitutional Court held in 1966 that it was unconstitutional for public funding to extend beyond electoral expenses to everything a party does. This conclusion was in part based upon the notion that political parties must be free from state interference, including public funding. Elections, however, provided a special case for which it was justified to reimburse party expenditure. This meant that public funding could only apply to those parties that ran candidates in an electoral campaign.[242] In 1992, however, the Federal Constitutional Court abandoned its attempt to distinguish between electoral and party expenses. Instead, it opted for a rule that public funding may not exceed the amount otherwise raised by political parties.[243] Hence it cannot form more than one half of a party's income.

As the German Federal Constitutional Court found, practical difficulties arise in attempting to distinguish between the purposes for which public funding may be used.

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[240] UK, The Review of Funding of Political Parties, *Strengthening Democracy: Fair and Sustainable Funding of Political Parties*, March 2007, p 19.
[241] UK, 'Party finance and expenditure in the United Kingdom – The Government's proposals', White Paper, June 2008, Cm 7329, p 60.
[242] *Party Finance Case III* (1966) 20 BVerfGE 56, discussed in: Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press, 2nd ed, 1997) p 204-8.
[243] *Party Finance VII* case (1992) 85 BVerfGE 264, quoted in: Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press, 2nd ed, 1997) pp 214-5.

Methods of calculating thresholds and amounts of public funding

Constitutional courts, as noted above, have generally accepted that there are very good reasons for not giving public funding to all candidates or parties in elections. There is a public interest in discouraging the splintering of parties and protecting the public purse from funding hopeless candidacies and unaccountable 'shell' or 'front' parties.[244] Ewing has noted that one should 'have regard to the French experience where very lax eligibility rules have seen "a large number of people" create "their own parties just to get public subsidies".'[245] If every candidate and party running for Parliament were publicly funded, it is likely that the number of candidates and groups participating in elections would be so great that the 'table-cloth ballot paper' of 1999[246] would seem modest in comparison. There would be a significant risk that voters would not only be confused by the vast array of candidates and parties, but become more cynical and disengaged if elections were treated as an opportunity for every opinionated person or interest group to publicise their views at the taxpayer's expense, despite having no public support and no chance of election.

The difficulty, however, lies in finding a reliable and fair means of determining the threshold at which public funding applies and the amount that should be given to parties and candidates by way of funding. This is necessary to diminish the risk that such laws will be held constitutionally invalid by a court for not being reasonably appropriate and adapted to serving a legitimate end in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

The criterion usually regarded as acceptable is the level of community support for a party or candidate. The most reliable means of measuring this support is the result of elections (either by reference to the number of Members elected or the number of first preference votes received).[247] However, relying on past electoral results tends to favour incumbents. This is particularly the case where a major party has performed particularly badly at one election. The significant loss of public funding prior to the next election could make it extremely difficult to rebuild the party's support, leaving the incumbents with a massive financial advantage. This could fatally weaken the Opposition, to the detriment of the health of the democracy.

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[244] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 239 (Gummow and Hayne JJ); 271 (Kirby J); and 306 (Heydon J); *Buckley v Valeo* 424 US 1 (1976), 96; *Party Finance Case III* (1966) 20 BVerfGE 56.

[245] K D Ewing, *The Cost of Democracy – Party Funding in Modern British Politics* (Hart Publishing, Oxford, 2007), p 243.

[246] There were 80 participating parties or groups in the 1999 NSW Legislative Council election, including the 'Three Day Weekend Party', the 'Make Billionaires Pay More Tax! Party' and the 'What's Doing? Party'. There were 274,594 informal votes.

[247] In some cases both measures are used. For example, in the United Kingdom, 'Short money' is calculated by a flat sum for each elected Member belonging to the party and a further figure for the votes cast in the election for each such Member: O Gay, I White and R Kelly, *The Funding of Political Parties,* (House of Commons Research Paper 07/34, 2007) pp 11-12.

There are also significant timing issues. If funding for an election campaign is calculated by reference to the previous election some three or four years ago, it may well not reflect current community support for a party. If funding for an election campaign is calculated and paid after the election by reference to the results of the election, parties are left uncertain in the lead up to an election as to the extent (if any) to which they will be reimbursed, and therefore how much they should spend during an election campaign. A party may incur significant expenditure in the expectation of receiving a level of electoral support that does not materialise at the election,[248] leaving it with large debts.

A point that ought to be made is that there is a difference between funding which is based upon first preference votes and funding which is based upon seats in the legislature. It is not always the case that the party that wins the greatest number of first preference votes wins a majority of seats in the legislature. Hence a public funding system based upon first preference votes does not always favour incumbents. A system based upon first preference votes also permits public funding for small parties and independents who do not achieve representation in Parliament.[249] On the other hand, where the quota for election to a House of a legislature is particularly low, as in the case of the NSW Legislative Council, it is possible for candidates of parties to be elected without having received 4% of first preference votes.[250] Hence in New South Wales, funding is granted either on the basis of first preference votes, or upon a party's candidate being elected to the legislature.

One way of avoiding parties being financially wiped out by one bad performance and incumbents gaining too great an advantage, would be to calculate public funding by reference to first preference voting results averaged over the last three elections.[251] This option could only apply to those parties that have a track record of participating in elections. Other means would need to be considered for dealing fairly with new parties and independents.

In New Zealand, the Electoral Commission allocates broadcasting time during election periods to parties by reference to their community support. In doing so it is required to

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[248] The Australian Electoral Commission referred to the position of the Australian Democrats at the 2004 Commonwealth election as an example of this problem: Australian Electoral Commission, *Funding and Disclosure Report Election 2004*, (Cth Government, 2005), p 9.

[249] For example, in the 2007 NSW election, funding was given to candidates from the Unity Party, the Christian Democratic Party, Australians Against Further Immigration and the Greens, as well as numerous independents who achieved more than 4% of first preference votes but were not elected. Commonwealth public funding after the 2004 election was given to 10 political parties, including the 'No Goods and Services Tax Party', as well as 15 independent candidates: Australian Electoral Commission, *Funding and Disclosure Report Election 2004*, (Cth Government, 2005), p 4.

[250] For example, in the 2007 NSW election, the Shooters Party received only 2.79% of primary votes, but still received $244,696 in public funding from the Central Fund because one of its candidates was elected. In the 1999 NSW election, the Christian Democratic Party (3.8%), the Greens (3.49%), Reform the Legal System (1.21%), Unity (1.17%) and the Outdoor Recreation Party (0.25%) all received public funding from the Central Fund despite receiving less than 4% of first preference votes: NSW Election Funding Authority, www.efa.nsw.gov.au.

[251] This is done in Germany: K D Ewing, *The Cost of Democracy – Party Funding in Modern British Politics* (Hart Publishing, Oxford, 2007), p 270.

have regard to a number of criteria, including votes received by the party at the previous election, votes received at any by-election held since the last general election, the number of Members of Parliament belonging to the party and other indications of public support such as opinion polls and the number of members of a political party.[252] These broader indicators of support, such as opinion polls, are not necessarily reliable and are taken as factors in what becomes a relatively subjective and disputed allocation.[253] Their appropriateness for assessing eligibility for public funding is therefore doubtful.

A different approach that reflects current political support in the measure of public funding is to provide mixed funding, calculated in part upon a party's prior electoral performance and in part by reference to a party's current support, which takes into account the number of current members of a party that financially contribute to that party. This could be done by matching funding, as discussed above. Thresholds could be determined, as in New York City, by reference to the number of registered contributors and the amount donated by them.[254] This would ensure that new parties with no electoral track record, but with significant current support, could receive public funding that reflects that measure of support. It would also encourage major parties to seek to expand their membership bases and increase participatory democracy.

An alternative is for voters to be given an additional choice at elections as to the party to which the voter wishes to allocate his or her share of public funding for political parties. It may be the case that a voter will vote for one party for a particular reason (eg that it is a main competitor for the formation of a government) while preferring that his or her share of public funding be allocated to another political party. Such a system has been proposed, but not accepted, in Germany.[255] The main difficulty with this proposal is the extra administration involved in counting these financial votes (although that problem might be reduced in the future if a form of electronic voting were implemented). A similar approach is used in Italy,[256] and the United States.[257] In these two countries tax-payers may check a box on their income tax return which authorises either a certain percentage or a fixed allocation from their income tax to be paid into a general fund from which public funding is provided to political parties. It does not, however, permit tax-payers to determine to which party their tax contribution is to be paid.[258] The money is distributed according to existing public funding formulas.

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[252] *Broadcasting Act* 1989 (NZ), s 75.

[253] Andrew Geddis, 'The Regulation of Campaign Funding in New Zealand: Practices, Problems and Prospects for Change' in K D Ewing and Samuel Issacharoff, *Party Funding and Campaign Financing in International Perspective* (Hart Publishing, Oxford, 2006) p 24.

[254] In New York City, candidates for district council elections that have a minimum of 75 contributors raising at least $5000, may receive matching funding: www.nyccfb.info.

[255] Christine Landried, 'Political Finance in West Germany' Herbert Alexander and Rei Shiratori (eds) *Comparative Political Finance Among the Democracies* (Westview Press, Boulder, 1994) pp 142-3.

[256] Reginald Austin and Maja Tjernström (eds), *Funding of Political Parties and Election Campaigns,* (International Institute for Democracy and Electoral Assistance, Stockholm, 2003) p 123.

[257] See the details on the US Federal Election Commission web-site: www.fec.gov.

[258] In the United States, however, some States have tax check-off systems that allow tax-payers to chose the campaign or political party fund to which their tax contribution is directed: Ruth S Jones, 'US State-Level Campaign Finance Reform' in Herbert E Alexander and Rei Shiratori, *Comparative Political Finance Among the Democracies* (Westview Press, Boulder, 1994) p 67.

A further alternative is to devise an opt-in/opt-out system. Under such a system, a political party can opt for public funding and donation caps or instead choose to have no caps on donations but no public funding. Such a system has been used with respect to presidential elections in the United States. It has been criticised, however, for allowing parties that have access to wealthy donors to exploit such access, reviving the concerns about potential corruption and influence that the public funding scheme was intended to eliminate or reduce.[259] It also leaves the publicly funded candidates with one hand tied behind their backs when facing well-financed opponents, as they are not permitted to raise additional funds. In New York City, bonus funding is available for candidates facing well-financed non-participants in the public funding scheme.[260] Where, however, candidates do not qualify for public funding, it may be appropriate that they not be affected by expenditure limits or donation limits.

If expenditure limits apply to parties and candidates, public funding can instead be calculated by reference to a proportion of campaign expenditure. This occurs in Canada, where 50% of an eligible party's expenditure is reimbursed.[261] This places a burden on parties to fund for themselves the other half of their campaign costs, ensuring that they are not excessive and that parties cannot profit from public funding.

Public funding, donation caps and the reduction of expenditure

One further factor of relevance in assessing how much public funding is needed to substitute for any bans or caps placed on private funding is the issue of expenditure. If expenditure is limited, or the need for expenditure is reduced by the provision, for example, of free broadcasting of political advertising, then the need for public funding is reduced. For example, in Germany, New Zealand and the United Kingdom, the need for political funding is not as great because of the provision of free (or at cost) political advertising by broadcasters.[262]

Political advertising amounts to a major portion of campaign costs. Returns by media organisations in relation to the 2001 and 2004 Commonwealth elections show that $27.7 million was spent on advertising in 2001 and $41.8 million in 2004, of which $37.4 million was spent by political parties and $4.4 million by third parties such as companies, unions and associations.[263] Although free political advertising provisions were struck down by the High Court of Australia in the *ACTV* case, this was in the context of advertising bans and provisions that overly favoured incumbents. Consideration could

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[259] UK, House of Commons, Constitutional Affairs Committee, *Party Funding*, (HC 163-1, 2006), p 47.
[260] See the New York City Campaign Finance Board web-site: www.nyccfb.info.
[261] *Canada Elections Act* 2000 (Canada), s 435.
[262] Karl-Heinz Nassmacher, 'Political Finance in West Central Europe' in K Nassmacher (ed), *Foundations for Democracy – Approaches to Comparative Political Finance*, (Nomos Verlagsgesellschaft, Baden-Baden, 2001), p 96; *Electoral Finance Act* 2007 (NZ), ss 63-70; *Broadcasting Act* 1989 (NZ), Prt 6; O Gay, I White and R Kelly, *The Funding of Political Parties*, (House of Commons Research Paper 07/34, 2007) pp 15-16; and *Communications Act* 2003 (UK), s 333.
[263] Australian Electoral Commission, *Funding and Disclosure Report Election 2004*, (Cth Government, 2005), pp 9 and 28.

still be given to reducing campaign expenditure by requiring broadcasters to provide free or 'at cost' advertising to political parties during election campaigns. Care would need to be taken to avoid breaches of s 51(xxxi) of the Constitution.[264] Further, such a proposal could be implemented without banning paid political advertising altogether. One option could be for parties to make a choice – either to pay for their own political advertising broadcasts, without any limits, or to accept free political advertising time on the condition that they do not pay for additional electronic political advertising. Even if there is a burden on freedom of political communication, a law will still be constitutionally valid if it is reasonably appropriate and adapted to serving a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative government.[265] This is an area which could be further considered.

Capping public funding

An issue also arises as to whether public funding should be capped. It could be capped at a fixed level and then shared amongst parties and candidates by reference to the relevant formula.[266] This gives budgeting certainty and limits the financial exposure of taxpayers. Another possibility is the capping of public funding by reference to a proportion of a party or candidate's electoral expenditure or fund-raising efforts. For example, in Canada public funding applies by way of the reimbursement of a proportion (initially 60%, then reduced to 50%) of a candidate's or party's electoral expenditure. In Queensland, New South Wales, Victoria and Western Australia, funding is capped by reference to receipts for expenditure.[267] During the period in which Commonwealth public funding has not been capped by expenditure, concerns have been raised that some candidates and groups have profited from public funding, as their receipts of public funding far exceeded their campaign expenses.[268] The Commonwealth proposes to reimpose a cap on funding by reference to campaign expenditure.[269]

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[264] In the *ACTV* case, broadcasters argued that legislation requiring them to broadcast political advertisements for free was an acquisition of their property, which could only be made on 'just terms' because of the application of s 51(xxxi) of the Constitution. Only three judges needed to consider the argument, but all three rejected it on the ground that there was no 'acquisition': *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 165-6 (Brennan J); 197-9 (Dawson J); and 245 (McHugh J).

[265] For contrasting views on the validity of political advertising bans, see: *R v Radio Authority, ex parte Bull* [1995] 4 All ER 481; and *VgT Verein Gegen Tierfabriken v Switzerland* (2001) 12(5-6) *Human Rights Case Digest* 401-5 (European Court of Human Rights, June 2001), and the discussion in K D Ewing, 'Promoting Political Equality: Spending Limits in British Electoral Law' (2003) 2 *Election L J* 499, 521-2.

[266] In Germany there is an overall cap of €133 million. Entitlements normally exceed this amount, so they are reduced proportionately to meet the overall cap.

[267] *Electoral Act* 1992 (Qld), Schedule; *Election Funding and Disclosures Act* 1981 (NSW), s 74; *Electoral Act* 2002 (Vic), s 212; *Electoral Act* 1907 (WA), s 175LG.

[268] See the details in: Australian Electoral Commission, *Funding and Disclosure Report Election 2004,* (Cth Government, 2005), p 11. While the list of expenditure does not include items such as travel and office expenses, the excess of funding over expenditure in some cases would appear to be far greater than any conceivable travel and office administration expenses.

[269] *Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill* 2008.

In Germany, as a result of a finding by the Federal Constitutional Court, public funding may not exceed a party's annual income from other sources.[270] Accordingly, public funding to parties is capped so that it cannot amount to more than half a party's annual income.[271] This is known as the 'relative limit'. In addition, there is an 'absolute limit' of €133 million, which is the total annual amount that may be given to political parties collectively. In New South Wales, a party's entitlement to funding from the Central Fund and the Constituency Fund is capped to the extent that a single party or candidate may not receive more than half of either fund.[272]

Advance payments

The New South Wales electoral funding system permits the making of payments in advance of elections. A party may claim for each complete year after the return of the writs for the previous general election, an amount equal to 10% of the total to which it was entitled with respect to the previous general election. If the advance payments amount to an overpayment, the party must repay it to the Election Funding Authority after the general election.[273]

In Germany, advance quarterly instalments of public funding are permitted. They are based upon the sum received in the previous year, and each instalment may not exceed 25% of that sum. If there are signs that a party may have to reimburse that sum, a security deposit may be required. Any funds to which a party is not entitled must be repaid, or may be deducted from future public funding.[274]

In the United States, public funding for Presidential candidates in general elections is paid prior to the election, except in the case of independents or candidates for new parties, who must wait until after the election for it to be ascertained if they received more than 5% of the vote.

Payment of public funding

A further question arises as to whom public funding should be paid. Should it be paid to the party that endorses and supports a candidate or should it be paid directly to each candidate? In New South Wales the system is split, with payments with respect to the Central Fund for Legislative Council elections being made to parties, groups and independents, while payments from the Constituency Fund with respect to Legislative Assembly elections are made to candidates. However, s 76A of the *Election Funding and Disclosures Act* 1981 (NSW) provides that a candidate may direct that his or her entitlement under the Act be paid to the party that endorsed him or her at the relevant

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[270] *Party Finance Case V* (1979) 52 BVerfGE 63, discussed in: Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press, 2nd ed, 1997) p 213.
[271] UK, House of Commons, Constitutional Affairs Committee, *Party Funding*, (HC 163-1, 2006), p 46.
[272] *Election Funding and Disclosures Act* 1981 (NSW), ss 63 and 68.
[273] *Election Funding and Disclosures Act* 1981 (NSW), ss 69-71A.
[274] *Political Parties Act* 1994 (Germany), art 20.

election. This is now standard practice, so most payments are directed to parties rather than candidates.

The issue takes on added importance, however, if a cooperative legislative framework were to be put in place that encompassed both State and Commonwealth elections. Should payments be made to the national branch of a political party or to the relevant State branch? In Germany, public funding is calculated in part by reference to the performance of parties in European, national and Land (State) elections. Land party associations receive €0.50 for each vote cast for the party at the last Landtag (State parliamentary) election, with the rest going to the national association of the party.[275]

Matters for consideration:

- What should be the threshold for receiving public funding?
- How should public funding be calculated? Should it take into account first preference votes, parliamentary representation and/or party membership subscriptions and individual donations? Should it be paid to match portions of individual donations?
- Should receipt of public funding be based on the condition that candidates and parties accept, voluntarily, other constraints, such as limits on funding which do not apply to those who do not receive public funding?
- Should there be overall caps on public funding, or caps placed upon the funding of each individual party or candidate that relate to expenditure (eg public funding no greater than x% of campaign expenditure) or fundraising (eg public funding no greater than a party's other income within the defined period)?
- To whom should public funding be paid? Should it be paid directly to candidates or to political parties, and if the latter, to which branch of the party?
- Should there be a mechanism for paying part of public funding in advance of an election? Should public funding be paid in a lump sum with respect to each election, or should it be paid as a monthly or quarterly allowance?
- For what purposes may public funding be used? Is it intended for electoral campaign funding only or should it be able to be used for policy development or political education or party administration and maintenance? Is it practical to limit the use of funds in this manner?
- How does public funding fit in with other elements of the scheme including any limits on donations or expenditure?

[275] German Parliament, 'State funding of political parties in Germany', 26 January 2007, www.bundestag.de/htdocs_e/documents/party.html

7. Principle of equality

As noted above, the notion of 'political equality' often arises in addressing political party funding and expenditure, either as a matter of principle or a constraint arising from a Constitution or Bill of Rights. Attempts to establish 'equality' are fraught with difficulty, as in politics one is inevitably dealing with unequals, and treating them 'equally' has the tendency to magnify inequality. Moreover, money is not a fair indicator of equality, making attempts to apply a principle of 'political equality' to party funding laws very difficult indeed.[276] As the United States Supreme Court has noted:

> Different candidates have different strengths. Some are wealthy; others have wealthy supporters who are willing to make large contributions. Some are celebrities; some have the benefit of a well-known family name. Levelling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election. The Constitution, however, confers upon voters, not Congress, the power to choose the Members of the House of Representatives… and it is a dangerous business for Congress to use the election laws to influence the voters' choices.[277]

In Australia, attempts to imply a principle of equality from the provisions in the Constitution dealing with elections have failed.[278] The Commonwealth Constitution, on its face, permits an inequality in the value of votes, as a consequence of the federal system. Gleeson CJ has noted that '[w]here the Constitution contains an express provision for one form of inequality in the value of votes, it dictates at least some caution in formulating a general implication of equality on that subject.'[279]

The High Court has previously upheld the validity of laws that discriminated based upon a level of popular support for a party or candidate, such as: provisions for deposits which are not refunded to candidates whose vote is below 4% of first preference votes;[280] 'above the line voting' which discriminates against independents and unregistered parties;[281] and provisions requiring a certain number of supporters before a party may be registered as a political party.[282] In *Mulholland v Australian Electoral Commission,* the Court rejected the argument that the Constitution requires that political parties be treated equally or that there be a 'level playing field' with respect to the treatment of political

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[276] See the analysis of political equality, including its application to expenditure caps, in: Ronald Dworkin, 'What is Equality? Part 4: Political Equality' (1987) 22 *University of San Francisco Law Review* 1, 16.
[277] *Davis v Federal Election Commission* 554 US ___ (2008), (unreported, 26 June 2008), p 16 (Alito J for the majority).
[278] *Attorney-General (Commonwealth); Ex Rel McKinlay v Commonwealth* (1975) 135 CLR 1; and *McGinty v Western Australia* (1996) 186 CLR 140.
[279] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 190.
[280] *McClure v Australian Electoral Commission* (1999) 73 ALJR 1086. See also: *Fabre v Ley* (1972) 127 CLR 665.
[281] *McKenzie v Commonwealth* (1983) 59 ALJR 190; *Abbotto v Australian Electoral Commission* (1997) 71 ALJR 675; and *McClure v Australian Electoral Commission* (1999) 73 ALJR 1086.
[282] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181.

parties.[283] Their Honours noted that the Constitution gives Parliament a wide range of discretion to make electoral laws, as long as they fall within the requirements of the system of 'representative government' imposed by the Constitution.[284] Requirements that a party give evidence of a minimum level of electoral support before receiving privileges, such as its name on the ballot paper or public funding, were regarded as consistent with the requirements of representative government imposed by the Constitution.[285] Such laws protected the electoral process by preventing voters from being misled about the nature of a party and the level of its support.[286]

In *Mulholland*, both Callinan and Heydon JJ stressed that even if some kind of constitutional implication did arise that prohibited unreasonable discrimination against political parties in the electoral system, it would still not have been breached in that case. Discrimination lies in the unequal treatment of equals and in the equal treatment of unequals. Their Honours noted that parties with significant public support are not equal with those that do not have such support, so it may be legitimate to treat them differently, as long as that different treatment is reasonably capable of being seen as appropriate and adapted to a relevant difference.[287]

In the United States, the right to equality under the due process clause of the Fifth Amendment has given rise to challenges to limits on campaign donations, expenditure and public funding, on the ground that such laws invidiously discriminate in favour of incumbents and against challengers. Such an argument was rejected by the United States Supreme Court in *Buckley v Valeo*. The Court noted that the limitations on campaign funding applied equally to all major parties and that there was no evidence that campaign limitations in themselves discriminated against challenges to incumbents from major parties.[288] While the Court was more concerned about potential discrimination against minor parties and independent candidates, it noted that such candidates may win elective office or have a substantial impact on the outcome of elections and therefore may also be the subject of attempts to gain undue influence or corruption.[289] Excluding them from campaign contribution limits was therefore not necessarily appropriate. In relation to limits on expenditure, the Supreme Court rejected the argument that the political speech of some people could be limited in order to enhance the voices of others to achieve equality in the ability to influence the outcome of elections. The Court considered that the First Amendment was intended to achieve the unfettered exchange of ideas about

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[283] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 215 (McHugh J); 296 (Callinan J); and 302 (Heydon J).
[284] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 194-5 (Gleeson CJ); 217 (McHugh J); 296 (Callinan J); and 305 (Heydon J).
[285] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 195 (Gleeson CJ); 230 (Gummow and Hayne JJ); 271-3 (Kirby J); and 302 (Heydon J).
[286] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 201 (Gleeson CJ); 210 (McHugh J); 239 (Gummow and Hayne JJ); 271-2 (Kirby J); and 303 (Heydon J).
[287] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 296-7 (Callinan J); and 302-3 (Heydon J).
[288] *Buckley v Valeo* 424 US 1 (1976), 31.
[289] *Buckley v Valeo* 424 US 1 (1976), 35.

political matters and could not be abridged to achieve notions of equality.[290] In 2008 the Supreme Court again upheld this position.[291]

When it came to public funding of campaigns, the US Supreme Court also rejected the argument that there had to be a level of 'equality' in funding parties. The Court noted that 'the Constitution does not require Congress to treat all declared candidates the same for public funding purposes.'[292] It noted the 'obvious differences in kind between the needs and potentials' of different political parties and observed that sometimes 'the grossest discrimination can lie in treating things that are different as though they were exactly alike'.[293] It held that Congress was justified in giving major parties full funding and others only a percentage of public funding.[294] The Supreme Court accepted that Congress has a legitimate interest in policies 'against fostering frivolous candidacies, creating a system of splintered parties, and encouraging unrestrained factionalism.'[295]

In contrast, in Germany the Federal Constitutional Court has placed importance on political parties having an equal opportunity to participate in public debate. While there is no constitutional requirement that parties be publicly funded, if the legislature passes any law regulating party financing, it must not violate the right of parties to equal opportunity.[296] Public funding of parties may reflect the popular strength of each party, but must not accentuate existing inequalities.[297]

In Canada, the Supreme Court has accepted that it is a legitimate end for a law to promote the equal opportunity of individuals to participate in the electoral process, which may involve promoting 'an electoral process that requires the wealthy to be prevented from controlling the electoral process to the detriment of others with less economic power'.[298] This amounts to a justification for limiting freedom of expression, but such a limitation must still be narrowly tailored to achieve that end and not amount to a disproportionately drastic limitation on freedom of expression.

This notion of equality is not positively mandated by the guarantee of freedom of expression. Instead, it may be used as a justification for derogating from the guarantee of freedom of expression in particular cases. The case of *Hogan v Newfoundland* illustrates the distinction. A referendum was held in Newfoundland about removing from

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[290] *Buckley v Valeo* 424 US 1 (1976), 48-9.
[291] *Davis v Federal Election Commission* 554 US ___ (2008), (unreported, 26 June 2008), pp 15-6 (Alito J for the majority).
[292] *Buckley v Valeo* 424 US 1 (1976), 97.
[293] *Buckley v Valeo* 424 US 1 (1976), 97-8.
[294] *Buckley v Valeo* 424 US 1 (1976), 98.
[295] *Buckley v Valeo* 424 US 1 (1976), 106.
[296] *Party Finance Case II* (1958) 8 BVerfGE 51, discussed in: Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press, 2nd ed, 1997) p 201.
[297] *Party Finance Case II* (1958) 8 BVerfGE 51, discussed in: Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press, 2nd ed, 1997) p 203.
[298] *Harper v Canada* [2004] 1 SCR 827, [62]; and C Feasby, 'The Supreme Court of Canada's Political Theory and the Constitutionality of the Political Finance Regime' in K D Ewing and S Issacharoff (eds) *Party Funding and Campaign Financing in International Perspective* (Hart Publishing, Oxford, 2006), p 249.

denominational schools their constitutional right to public funding. The referendum was successful and the constitutional amendment made. No limits were placed upon spending on either side of the question. Catholic school supporters sought compensation from the Government on the ground that the Government had spent public money supporting the Yes case. It was argued that the Government was constitutionally obliged to equalise the expenditure on both sides. This argument was rejected by the Newfoundland Court of Appeal. It noted that while equality and fairness could be regarded as legitimate reasons for limiting freedom of expression, the constitutional guarantee of freedom of expression did not demand spending limits or require the Government to ensure equal spending on the cases for both sides of a referendum. It could not be argued that unequal expenditure on the Yes and No cases breached the freedom of expression of those supporting the No case.[299]

The Canadian Charter of Rights and Freedoms also contains in s 3 an express right to vote and to be a candidate for the Canadian Parliament. Whether this provides some kind of right to equal treatment of political parties, above and beyond any protection provided by the guarantee of freedom of expression has been the subject of debate. The Quebec Court of Appeal, in *Barrette v Canada,* upheld the scheme for the reimbursement of a proportion of electoral expenses for candidates, despite the fact that it only applied to candidates who received 15% of first preference voters. It noted that the purpose of the 15% threshold was 'to discourage the proliferation of parties and candidates unable to attract an important following' and parties and candidates that are 'ephemeral, marginal, frivolous or insignificant'.[300] It was argued that while there was no obligation on government to supply candidates with the means necessary to make known their views, if such means were provided it had to be done without discrimination. McCarthy JA rejected this argument, noting that the only express provisions in the Charter on discrimination, concern discrimination against discrete and insular minorities or disadvantaged groups in Canadian society. He was not prepared to imply additional anti-discrimination requirements into s 3 of the Charter with respect to unsuccessful candidates.[301] Mailhot JA also took into account the government's limited resources and concluded that the threshold of 15% was justified especially when considered in the context of other measures. Mailhot JA noted that in Quebec the equivalent threshold was 20% for provincial elections.[302]

The correctness of this decision has since been queried[303] in light of the Canadian Supreme Court's later decision of *Figueroa v Canada*.[304] In this case the Canadian Supreme Court held invalid a provision requiring a political party to field at least 50 candidates in an election in order to be registered as a political party and receive benefits,

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[299] *Hogan v Newfoundland* (2000) 183 DLR (4th) 225; and P Hogg, *Constitutional Law of Canada*, (Thomson, 5th ed Supplemented, 2007) Vol 2, 43.18.
[300] *Barrette v Canada* (1994) 113 DLR (4th) 623, 625.
[301] *Barrette v Canada* (1994) 113 DLR (4th) 623, 628-9.
[302] *Barrette v Canada* (1994) 113 DLR (4th) 623, 632.
[303] C Feasby, 'The Supreme Court of Canada's Political Theory and the Constitutionality of the Political Finance Regime' in K D Ewing and S Issacharoff (eds) *Party Funding and Campaign financing in International Perspective* (Hart Publishing, Oxford, 2006), pp 256-8.
[304] *Figueroa v Canada* [2003] 1 SCR 912.

such as the right to issue tax receipts for donations made outside the election period. The majority stressed that there was no obligation to provide funding to political parties, but if Parliament bestows funding on some political parties but not others, scrutiny will be required.[305]

The majority focused on the political rights in s 3 of the Canadian Charter and concluded that they would be breached by any provision that interfered with the capacity of the members and supporters of small political parties to play a meaningful role in the electoral process. This was because there is 'only so much space for political discourse; if one person "yells" or occupies a disproportionate amount of space in the marketplace for ideas, it becomes increasingly difficult for other persons to participate in that discourse'.[306] Small parties already find it hard to be heard, so legislation that increases the funds of affluent parties 'increases the likelihood that the already marginalized voices of political parties with a limited geographical base of support will be drowned out by mainstream parties', diminishing the capacity of members of small parties to play a 'meaningful role in the electoral process'.[307] The majority, however, noted that this case should not be taken to mean that any differential treatment of political parties would constitute a violation of s 3, or that such treatment could never be justified.[308]

The *Figueroa* case was used in argument in *Mulholland v Australian Electoral Commission*, to support the contention that ss 7 and 24 of the Commonwealth Constitution give rise to an implication that requires equal treatment of political parties. This argument was rejected by the High Court. Their Honours took the view that *Figueroa* was not applicable because it arose out of a different context, being based upon an express right that is not contained in the Commonwealth Constitution and goes beyond what is required by ss 7 and 24 of the Constitution.[309]

Accordingly, it is unlikely that the High Court would imply a right to 'political equality' from the Constitution. However, as noted above, if a law burdens the implied freedom of political communication, so that the Court moves on to the 'reasonably appropriate and adapted' part of the *Lange* test, then laws that unduly favour incumbents or discriminate against minor or new parties might well be held unconstitutional on the ground that they are not reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. This is the context, therefore, in which discrimination should be considered.

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[305] *Figueroa v Canada* [2003] 1 SCR 912, [48].
[306] *Figueroa v Canada* [2003] 1 SCR 912, [49].
[307] *Figueroa v Canada* [2003] 1 SCR 912, [52]-[53].
[308] *Figueroa v Canada* [2003] 1 SCR 912, [91].
[309] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 194 (Gleeson CJ); 213 (McHugh J); 242 (Gummow and Hayne JJ); 295 (Callinan J); and 300-1 (Heydon J).

Conclusion

The reform of political party financing to achieve the aim of reducing the risk, or perception, of corruption and undue influence is an important matter. It would be preferable for a comprehensive scheme to be achieved co-operatively at the Commonwealth, State and local government level, both for constitutional reasons and to minimise loopholes and avoidance. Any proposal would have to be scrutinised with great care to avoid constitutional invalidity and the many potential practical problems which might cause it to fail to fulfil the original aim.

No country has achieved a perfect system of political financing, and each country works under different constitutional constraints arising from Bills of Rights or different constitutional provisions. Experience from comparable countries is a useful reference point for ideas and to predict the types of challenges that might be run in the courts. However, for any system to work well in Australia, it will need to be carefully tailored to meet Australian circumstances and Australian constitutional requirements.