Working Paper 5 – Reconsidering the Reform of Political Donations, Expenditure and Funding in New South Wales

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Reconsidering the reform of political donations, expenditure and funding in New South Wales

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EXECUTIVE SUMMARY

This paper is a complete revision of a paper written in 2008 to advise the NSW Government on the constitutional and practical issues that were likely to affect any reform of campaign financing laws in the State. It draws upon comparative experience in other jurisdictions in Australia and in similar countries (primarily the United States, Canada, the United Kingdom and New Zealand) with a particular emphasis on what has happened since 2008. It analyses various proposals, such as the full public financing of elections, in the light of recent constitutional cases, such as Unions NSW v New South Wales, and points to both practical and constitutional issues that must be dealt with.

Chapter 1 – Background and Current Position

This chapter undertakes a chronological review of the numerous reforms to campaign finance laws that have occurred in NSW from 2008. It notes the reasons given for making these different changes and the attempts made to accommodate constitutional issues. It ends with a summary of the current position in NSW.

Chapter 2 – Jurisdictional issues

This chapter considers the jurisdictional issues that affect campaign finance laws. Political parties at the State level also fund candidates for Commonwealth elections. If a State law interferes with Commonwealth elections, it will be invalid. If a State law is inconsistent with the Commonwealth Electoral Act, the State law will be ineffective to the extent of the inconsistency. The consequence is that State laws cannot ban all fundraising by State political parties. They must still be able to raise money to support Commonwealth elections. Hence, no State law on campaign finance can be comprehensive. Unless there is a co-operative Commonwealth-State scheme concerning political donations and expenditure, there will always be scope for evasion of the State law due to these jurisdictional problems.

Chapter 3 – Constitutional constraints

This chapter considers the constitutional constraints upon the reform of campaign finance laws. 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 serve 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). In Unions NSW, the High Court struck down bans on donations by corporations, unions, entities and persons other than those on the electoral roll, on the ground that they were not enacted for the purpose of achieving a ‘legitimate end’. Any reforms to campaign finance laws in NSW must take account of the High Court’s reasoning to ensure that the laws are valid.
Chapter 4 – Banning or capping political donations

This chapter addresses the constitutional validity of banning or capping political donations, as well as the practical issues that arise. It addresses whether full public funding and a complete ban on political donations would be valid, concluding that it would be difficult for a government to persuade the High Court that a complete ban would serve a legitimate end and be a proportionate response to instances of corruption. It also considers the validity of bans upon particular types of donations or donors.

Chapter 5 – Expenditure limits

This chapter considers the constitutional validity of expenditure limits imposed upon parties, candidates and third-party campaigners. Expenditure limits clearly burden the implied freedom of political communication, so any such laws must be carefully calibrated to ensure that they serve a legitimate end in a proportionate manner. Care must also be taken to prevent avoidance of the limits by the creation of front parties and the use of third-party campaigners, but the Unions NSW case has shown that aggregation laws must be very cautiously framed if they are to withstand High Court scrutiny.

Chapter 6 – Public funding of political parties and candidates

This chapter considers methods of publicly funding parties and candidates. While public funding itself does not burden freedom of political communication, if public funding is to substitute for private donations (e.g. if there is a complete ban upon donations) then the amount and method of public funding will be critical to the constitutional validity of the scheme. The chapter therefore explores different methods of public funding that may reflect public support for particular parties and candidates, as well as the constitutional validity of imposing thresholds for receiving public funding and how this might work in the context of a complete ban upon political donations.

Chapter 7 – Enforcement and Anti-Avoidance Measures

Recent revelations in the Independent Commission Against Corruption have shown systematic attempts to avoid the application of the existing laws and given rise to concerns about both the effectiveness of enforcement measures and the adequacy of penalties. This chapter provides some comparative examples of anti-avoidance measures from other countries and the types of penalties that they apply.
INTRODUCTION

The reform of political funding in Australia is no simple matter. First, there are jurisdictional problems to contend with, which make it difficult for a State or the Commonwealth to act unilaterally in imposing effective bans or caps on political donations. This is because bans upon funding political parties in a State can be evaded by simply funding that party for the purposes of supporting its campaign in Commonwealth elections.

Next, there are constitutional limitations 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 has to be enacted for a legitimate purpose (such as the reduction of the risk or appearance of corruption) and must be very carefully framed to achieve that end while imposing minimal possible limits on free political communications.

There are also policy matters to consider, such as who should fund political parties, what financial burden on taxpayers is acceptable, how to ensure that political parties engage with the public at the grass-roots level and how to establish a system that is fair but not wasteful.

Finally, there are the practical problems of making sure that the system is effective and fair by 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.
CHAPTER 1 – BACKGROUND AND CURRENT POSITION

Historically, there have been few constraints on political funding in Australia. The system has largely worked on the principle that disclosure is the best way to avoid the risk of corruption. Hence, most jurisdictions in Australia have disclosure regimes where donations above a specified level must be publicly disclosed by parties, identifying the source of the funding.

Apart from some largely ineffectual and unenforced expenditure limits for candidates, there had been little effort to impose significant constraints upon fund-raising or expenditure by political parties until the 21st century. While the Commonwealth did try to impose an indirect limit on campaign expenditure by a scheme that would have banned political advertising on the electronic media during the campaign period and required instead the allocation of free time to political parties and candidates, this scheme was held invalid by the High Court in 1992.

The beginnings of reform – 2008

In New South Wales, the impetus for reform arose from a number of scandals concerning political funding and a rising public concern that donations were being made to candidates and political parties in order to seek to obtain access to Ministers and influence over their decisions. In 2008 the NSW Department of Premier and Cabinet commissioned a paper to address the legal and constitutional issues involved in the reform of political funding as well as the practical issues that arise, in order to inform the Government’s consideration of reform options. In publishing that report, the then Premier, Nathan Rees, said that it was clear that ‘in order to give reforms the best chance of success, they need to be progressed in a co-ordinated manner with the Commonwealth, and other States and Territories’. The NSW Government would therefore make a submission to the Commonwealth’s Green Paper process in an effort to achieve coordinated reform. The Premier noted the following issues of concern:

On the one hand, there are good arguments for eliminating political donations from our election campaigns – not only to ensure that our system is corruption resistant, but that it is also seen to be corruption resistant.

If political donations are completely banned, the full cost of elections will have to be funded from the State Budget. The cost of this to taxpayers will be significant.

1 See Chapter 5 on expenditure limits below.
2 Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106.
On the other hand, Australians have a legitimate right to support parties and candidates of their choosing.

Australia has a healthy democracy. We need to preserve the right of every one of us to have our say and to stand for elected office. We don’t want a system in which running for elected office is the preserve of the wealthy.\(^4\)

The Commonwealth Government, however, did not proceed with political donations reform, preventing the taking of a uniform approach.

**The ban on donations by property developers – 2009**

In 2009, the *Election Funding and Disclosures Amendment (Property Developers Prohibition) Bill 2009* (NSW) was introduced by the Rees Government.\(^5\) It introduced a new Division 4A into Part 6 of the *Election Funding and Disclosures Act 1981* (NSW), including s 96GA which made it unlawful for:

- a property developer to make a political donation;
- a person to make a political donation on behalf of a property developer;
- a person to accept a political donation that was made by a property developer or a person on behalf of a property developer;
- a property developer to solicit another person to make a political donation; and
- a person to solicit another person on behalf of a property developer to make a political donation.

A property developer was defined in s 96GB as including a corporation engaged in a business that regularly involves the making of planning applications or a close associate of that person, including directors and officers of the corporation and their spouses, related bodies corporate, shareholders with at least 20% voting power in the corporation and their spouses and the beneficiaries of any trust that is a property developer. Where there was uncertainty as to whether a person or corporations was or was not a ‘property developer’ for the purposes of the Act, an application could be made to the Election Funding Authority for a determination under s 96GE. Existing penalties, being fines of $20,000 for parties and $11,000 for individuals, were extended to apply to breaches of this new Division 4A.

Premier Rees, in his second reading speech on the Bill, again supported the need for national reform as the most practical way of minimizing loopholes arising from the federal system and the national structure of political parties.\(^6\) He also evinced a consciousness of the constitutional constraints on the banning of political donations.

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\(^5\) The Bill was introduced by the Rees Government but was not finally passed until after the Keneally Government came to power. The Bill received royal assent in February 2010.

noted that the definitions of those prohibited from donating were drawn narrowly, so as to cover spouses of directors and major shareholders of property developers, but not other family members and not employees. The definitions were ‘carefully crafted so as not to encroach on an individual’s right to freedom of political communication, but still ensure that the ban is meaningful and reasonably adapted to address the public’s concern about corporate donations from property developers.’ The Premier announced that this was a first step towards a broader reform of capped donations and greater public funding. He noted that:

Legal advice indicates that any wholesale ban or significant cap on donations may impact upon the right to freedom of political communication. This in turn gives rise to constitutional issues, which could render any ban or cap invalid.\(^7\) Hence there was a need to proceed cautiously with a system that did not unduly impede the freedom of political communication, but reduced the risk and perception of corruption.

As to why this ban was imposed in relation to property developers, rather than other groups, Nathan Rees later explained the distinction as follows:

It is worth putting on record that I do not have a view that property developers per se or the industry group is corrupt or approaching being corrupt. I do say, however, that for corruption to occur there needs to be both motive and opportunity. Unlike big pharmaceuticals or any other organisation we deal with as policymakers and lawmakers, hundreds of decisions are made about the development industry at local, State and Federal government levels each week across Australia that can confer or otherwise very significant profits on the people making the proposals. There is a profit motive for those who are so inclined. There is also adequate opportunity across three levels of government hundreds of times a week in Australia. That is why a ban on developer donations was considered important at the time.\(^9\)

**Caps on Donations and Expenditure and Increased Public Funding – 2010**

In 2010, the Keneally Government caused to be enacted a more comprehensive reform in the *Election Funding and Disclosures Amendment Act* 2010 (NSW). The Act came into force on 1 January 2011. There were five aspects to the reforms.

1. *Caps upon political donations*

First, political donations were capped at a maximum of $5000 for parties and $2000 for candidates and third party campaigners. Aggregate limits were also applied, such as a

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ban on donating to more than three registered third party campaigners in a financial year, where those donations were for the purposes of electoral expenditure. The intention was to discourage avoidance by the creation of third party entities for harvesting donations and avoiding expenditure caps. Supranode Caps were also applied to related corporations as if they were a single corporation, to ‘ensure that a single corporate group cannot avoid the caps by donating through different companies or by setting up new shelf companies for that purpose’. Party membership fees and affiliation fees were excluded from caps on political donations, but prohibited from use in relation to electoral expenditure. Transfers of funds from a federal branch of a party or an inter-state branch were made subject to the donation cap.

2. Caps upon expenditure

Caps were also placed upon electoral communications expenditure in the 6 months prior to an election. This expenditure included advertising, printing, telecommunications and internet costs, production costs, office rent and staff wages, but not travel, accommodation, research or volunteer labour. The caps for Legislative Assembly candidates were $100,000 for each candidate endorsed by a party and $150,000 for each independent. By-election candidates had a higher cap of $200,000, with any party spending in a by-election coming under the candidate’s cap. The caps for parties were approximately $100,000 per electorate in which the party ran endorsed candidates (around $9.3 million if a party endorsed candidates in all Legislative Assembly seats) and a maximum of $1,050,000 for any party endorsing candidates in the Legislative Council, but with 10 or fewer endorsed candidates in the Legislative Assembly. Parties also could not spend more than $50,000 in an electorate, to prevent ‘sand-bagging’ marginal electorates.

Third-party campaigners that spent more than $2000 on electoral expenditure had to be registered and were then subject to a spending cap of $1,050,000 (or $525,000 for those registering after 1 January in an election year), with a limit of $20,000 in any one electorate. The intention was to permit third-party campaigners to spend a reasonable amount to fund a campaign and get its message across, but not to swamp political parties.

3. Increase in public funding

Public funding was significantly increased. Instead of applying by reference to the number of votes received in the previous election, it was changed to cover approximately three-quarters of the actual expenditure of political parties (within the relevant expenditure cap) on electoral communications. This reimbursement occurs regardless of the number of votes received.

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10 NSW, Parliamentary Debates, Legislative Assembly, 28 October 2010, p 27169 (Kristina Keneally).
11 NSW, Parliamentary Debates, Legislative Assembly, 28 October 2010, p 27169 (Kristina Keneally).
12 The formula applies on a diminishing sliding scale. A registered party may claim with respect to Legislative Assembly elections, 100% of expenditure made under the first 10% of its expenditure cap, then 75% of expenditure for the next 80% of its expenditure cap, and then 50% of its expenditure on the last 10% of its expenditure cap. The sliding scale is different for the Legislative Council, applying to each third of the spending cap. The intention was to provide a ‘disincentive to spend to the cap’ and to ‘reduce the
of the political support for political parties, as long as they meet a threshold of four per cent of first preference votes or have a party member elected to Parliament. Candidates may also be reimbursed a proportion of their electoral communications expenditure, if they achieved at least four per cent of first preference votes or were elected. Parties and candidates could not claim for the same items of expenditure.

Additional funding was also provided for party administration through an Administration Fund, calculated at $80,000 per member of the Legislative Assembly and the Legislative Council, up to a ceiling of $2 million for a party. Again, the payments would only be made for the reimbursement of actual expenditure within this limit. Funding was also provided through a Policy Development Fund to support new parties that were not eligible for funding from the Administration Fund.

4. The ban on donations from tobacco, liquor and gambling entities

Despite the uniform cap imposed upon political donations, the absolute ban upon donations by property developers was retained and expanded to include donations by tobacco, liquor and gambling entities. These changes were proposed by the Greens (primarily in relation to tobacco) and the Christian Democrats (in relation to liquor and gambling) and were incorporated in an amendment moved by John Kaye for the Greens. His explanation for this amendment was that the next government would face a number of important decisions with respect to a smoke free environment, tobacco vending machines, liquor licensing, alcohol consumption and gaming machine licences. Kaye considered it important that those decisions should not be ‘perverted by the rivers of cash that come from those industries’. He stressed that the amendments were designed to catch only for-profit businesses and industry representative organizations, rather than small clubs.13

Fred Nile for the Christian Democrats sought to move a further amendment, banning political donations from the sex industry.14 This amendment was rejected. In the debate upon it, a distinction was brought between the sex industry and other banned donors by David Shoebridge in the following terms:

There is one other fundamental reason not to support Reverend the Hon. Fred Nile’s amendment: it does not address a known problem in relation to political donations here in New South Wales. We know the scope of the problem in relation to the alcohol, gambling, property development and tobacco industries. In the past 10 years we have seen hundreds of thousands of donations from the alcohol industry, millions from the hotel industry, many millions from the development industry, hundreds of thousands from the tobacco industry, and more than a million from the gaming industry, but donations from what is defined as the sex industry—assuming there is some sort of rational scope to the nature of overall costs for taxpayers of the new public funding model’: NSW, Parliamentary Debates, Legislative Assembly, 28 October 2010, p 27170 (Kristina Keneally).

14 NSW, Parliamentary Debates, Legislative Council, 10 November 2010, p 27502 (Fred Nile).
the business covered by the definition—simply do not feature. It is not one of the industries that is corrupting the public processes here in New South Wales in the same way that the alcohol, property development and tobacco industries are. It does not address an identified problem and therefore it is not a rational stand-alone sector to target, as proposed by the honourable member.15

5. Jurisdictional issues

Finally, in order to deal with jurisdictional problems, significant administrative burdens were imposed. Political parties and third party campaigners were required to create separate accounts for State campaigns. Parties could only spend on electoral campaign expenditure out of their State campaign account. Separate accounts had to be held by parties to fund Commonwealth election campaigns and administrative costs. The reason was to avoid interference with donations and expenditure in relation to Commonwealth election campaigns.16

The rationale for these reforms

The reasons that the Premier, Kristina Keneally, gave for the introduction of this package of reforms included providing ‘certainty and confidence in the electorate of the impartiality of government decision-making and of the transparency of process in government’; the reduction of ‘the advantages of money in dominating political debate’, and the provision of a ‘more level playing field for candidates seeking election, as well as for third parties who wish to participate in political debate’.17 She noted in particular that the reforms would put an end to the ‘political arms race, under which those with the most money have the loudest voices’ and would help ‘give voters a better opportunity to be fully and fairly informed of the policies of all political parties, candidates and interested third parties’.18

Like her predecessor, the Premier noted the constitutional and jurisdictional constraints upon the NSW legislation and the need for coordinated reform at the national level. She said:

In drafting this bill the Government has been acutely aware that any New South Wales law that interferes with Commonwealth elections or burdens the implied freedom of communication about Commonwealth political matters may be subject to constitutional challenge. Any New South Wales reforms must take into account the elements of the test set down by the High Court in the Lange case—that is, the reforms must be reasonably and appropriately adapted to serving a legitimate end in a manner which is compatible with the system of representative and responsible government. The Government is satisfied that the right balance has been struck in this bill. However, for comprehensive and effective regulation of this area the

16 NSW, Parliamentary Debates, Legislative Assembly, 28 October 2010, p 27170 (Kristina Keneally).
17 NSW, Parliamentary Debates, Legislative Assembly, 28 October 2010, p 27168 (Kristina Keneally).
18 NSW, Parliamentary Debates, Legislative Assembly, 28 October 2010, p 27168 (Kristina Keneally).
Commonwealth must introduce similar laws to regulate Federal donations and campaign expenditure. Without Commonwealth action in this area our laws may fall prey to unscrupulous people who use the lack of Commonwealth regulation to attempt to circumvent the spirit of the law. Now is the time for the Commonwealth to follow the New South Wales lead in the interests of achieving a more transparent democratic system of government in this country.19

**Criticism of the reforms**

The Leader of the Opposition objected to these reforms, instead proposing that donations by anyone who is not an elector should be banned, and donations from electors should be capped at $1000-$1500, with the amount being set by an independent body. He also advocated lower expenditure limits, to be set by an independent body.20 He gave the following reasons for this approach:

> I would argue that if you are not going to have a fully public-funded electoral system—and I do not support 100 per cent public funding—the only way that you can ensure that the public is going to have confidence about our electoral system is to limit it to the individuals who are on the electoral roll. It must be limited to those Australian citizens who are enrolled, not overseas citizens and non-residents, because of course those people do not get the vote. They do not have a stake in the system and they should not be able to influence the system—and nor should unions, third-party interest groups and corporations that, under this legislation, would be given a particular ability to do so.21

**Bans on donations by non-voters and the aggregation of expenditure by affiliates - 2012**

The *Election Funding, Expenditure and Disclosures Amendment Act 2012 (NSW)* came into force on 9 March 2012. It was enacted after the Coalition came to power, for the purpose of implementing two of Premier O’Farrell’s previous commitments, regarding a ban on donations by anyone other than voters and the aggregation of expenditure by political parties and their affiliates. Existing caps on donations by voters were retained, as were expenditure caps and the bans upon donations by property developers and tobacco, liquor and gambling entities.

The Premier, in his second reading speech, noted the constitutional issues involved, observing:

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20 Note also the complaint in the Legislative Council by Don Harwin that the expenditure limits were higher than the actual expenditure of parties in the previous election, increasing the ‘arms race’, rather than ending it: NSW, *Parliamentary Debates*, Legislative Council, 10 November 2010, p 27463 (Don Harwin). See also John Kaye from the Greens who raised the same concern at p 27483.
It is inevitable that these laws and, I expect, this bill will trigger discussion and debate about constitutional principles. It has always been a great excuse to do nothing and a way to justify the status quo. I believe that a ban on donations other than those by individuals does not place unreasonable restrictions on the implied freedom of political communication mandated by the Commonwealth Constitution. The measures in this bill are designed to rid this State of the risk, reality and perception of corruption and undue influence. To this end, they are consistent with the principles endorsed by the High Court in the Lange case.22

The Premier also noted the enforcement problems with such a law in a federation and said that he would ‘continue to urge the Commonwealth Government to extend these reforms in the Federal electoral context so that the same fundamental principles of accountability and transparency apply at every level of government in Australia.’23

Bans on donations

The Act inserted s 96D into the Election Funding, Expenditure and Disclosures Act 1981, banning political donations by anyone other than enrolled voters. This excluded political donations from corporations, unions, partnerships, peak bodies, religious institutions, charities, community organisations, unincorporated associations, most permanent residents,24 citizens under the age of 18 and others who could not vote in Australia. The Premier stated that this measure ‘will invest the power to donate solely in those who have the power to vote, those with the greatest stake in the system.’25

Aggregation of expenditure by affiliates

The Act also inserted a new s 95G(6) which aggregated the expenditure of political parties and affiliated organisations that were involved in the governance of the party by appointing delegates to its governing body or participating in pre-selection of candidates for the party. The Premier stated that this amendment would ‘link the electoral communication expenditure of political parties with that of their affiliates to ensure that the effectiveness and fairness of campaign finance rules are not undermined’.26 It was aimed at preventing the avoidance of the effectiveness of expenditure caps through the use of additional expenditure by affiliated bodies.

The Selection Committee on the Bill, however, raised concerns that this would ‘unfairly restrict the political voice of affiliated organisations during election campaigns’. It therefore recommended that ‘section 95G be amended to provide for the aggregation of the electoral communication expenditure of a party and its affiliated organisations into the cap of the party only where the expenditure incurred by the affiliated organisation has

22 NSW, Parliamentary Debates, Legislative Assembly, 12 September 2011, p 5433 (Barry O’Farrell).
23 NSW, Parliamentary Debates, Legislative Assembly, 12 September 2011, p 5433 (Barry O’Farrell).
24 Some permanent residents who are not Australian citizens remain entitled to vote if they were on the electoral law before 26 January 1984 because of grandfathering provisions.
25 NSW, Parliamentary Debates, Legislative Assembly, 12 September 2011, p 5432 (Barry O’Farrell).
26 NSW, Parliamentary Debates, Legislative Assembly, 12 September 2011, p 5432 (Barry O’Farrell).
the effect of directly advocating a vote for, or is incurred at the request of or in co-operation with, the party to which it is affiliated. 27 The Select Committee concluded that this ‘would allow affiliated organisations to exercise their independent political voice through the conduct of issues-based campaigns, whilst simultaneously reducing the risk of parties and their affiliates engaging in co-ordinated electoral campaigns that directly advocate for the party’. 28

‘Issues’ campaigns by third party campaigners

The prohibition upon receiving donations from corporations and other entities also extended to donations received by third party campaigners. Hence, peak bodies (such as the Council of Social Services, church bodies, environmental groups, Unions NSW, the Australian Hotels Association and the Sporting Shooters’ Association) that previously ran campaigns funded by their constituent bodies, would in future be unable to do so unless they could raise sufficient donations from individuals on the electoral roll. This would effectively silence most third party campaigning, except for campaigns run by corporations or bodies that finance their campaigns through business activities, rather than donations from constituent bodies.

In the Committee hearings on the Bill, significant concerns were raised about the effect of the Bill on third party campaigners and their ability to run ‘issues’ campaigns. 29 The Select Committee recommended that the restrictions on donations to third party campaigners should only apply to for-profit entities or where the third-party campaign promotes the interests of a particular political party, candidate or group of candidates. It also raised the prospect of a potential constitutional challenge if such changes were not made. 30

The Bill was amended at the initiative of the Government so that the definition of ‘electoral expenditure’ excluded expenditure on ‘issues’ campaigns. 31 Section 87(4) provided:

(4) Electoral expenditure (and electoral communication expenditure) does not include expenditure incurred by an entity or other person (not being a registered party, elected member, group or candidate) if the expenditure is not incurred for

the dominant purpose of promoting or opposing a party or the election of a candidate or candidates or influencing the voting at an election.

Increases to public funding for party administration – 2013

In 2013 the *Election Funding Expenditure and Disclosures (Administrative Funding) Act 2013* (NSW) made changes to the Administration Fund. These changes arose out of an inquiry into the effect upon small parties of all the compliance costs arising from the rule changes from 2010 onwards regarding expenditure, donations and disclosures. These compliance costs were said to have a greater impact upon small parties that did not have the party administrative structure to be able to implement them. Instead of relying on volunteers, small parties had to employ professional staff to ensure compliance with the law.

Annual payments from the Administrative Fund, which are paid to reimburse actual administrative expenditure up to a cap, were therefore adjusted so that the cap increased and applied on a sliding scale of $200,000 for the first elected member of a party, an additional $150,000 for its second elected member, $100,000 for its third elected member and $83,000 for subsequent members, up to a cap of 25 members (or $2.3 million per party with 25 or more members). An independent member who was not an endorsed candidate at the time of his or her most recent election to Parliament and was not a member of a party at the time to which the payment related, was entitled to be reimbursed administrative expenditure up to a cap of $200,000.

The High Court strikes down the 2012 amendment – 2013

On 18 December 2013, the High Court in *Unions NSW v New South Wales* struck down the 2012 amendments as unconstitutional. These were the ban in s 96D upon donations from persons and entities that were not enrolled voters and the requirement in s 95G(6) that the expenditure of a political party and affiliated organisations be aggregated. The Court could not find any ‘legitimate end’ for these provisions, as they did not reduce the risk or appearance of corruption, given the existing caps on donations. The reasoning in the case is addressed in Chapter 3 below.

Expression of the objects of the political donations regime – 2014

The *Electoral and Lobbying Legislation Amendment (Electoral Commission) Act 2014* (NSW) inserted a new objects clause into the *Election Funding, Expenditure and Disclosures Act 1981*. Section 4A of that Act now provides:

The objects of this Act are as follows:

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33 At the time of writing, this Act had not yet come into force.
(a) to establish a fair and transparent election funding, expenditure and disclosure scheme,
(b) to facilitate public awareness of political donations,
(c) to help prevent corruption and undue influence in the government of the State,
(d) to provide for the effective administration of public funding of elections, recognising the importance of the appropriate use of public revenue for that purpose,
(e) to promote compliance by parties, elected members, candidates, groups, agents, third-party campaigners and donors with the requirements of the election funding, expenditure and disclosure scheme.

The objects set out in this provision, especially the object of helping to ‘prevent corruption and undue influence in the government of the State’, may be drawn upon by the courts in their assessment of the intended ‘legitimate end’ of provisions in the Act. This will aid in the clarification of the purposes of provisions of the Act, which is essential to the assessment of their constitutional validity.

In addition, the *Election Funding, Expenditure and Disclosures Consequential Amendment Act 2014* (NSW) reinserted provisions in the principal Act concerning the disclosure of donations made by corporations and other entities, as a consequence of the High Court having found invalid the 2012 provisions banning such donations. It also restored the former s 96D, which confines political donations to those on the electoral roll or entities that have an Australian Business Number or other identifying number allocated by ASIC. The purpose is to exclude donations from overseas persons or bodies that have no presence in Australia.

**Challenge to the validity of the ban on donations by property developers – 2014**

The ban on donations by property developers, which was introduced in 2009, has remained unaffected by subsequent legislative changes and was not challenged in the *Unions NSW* case. However, on 28 July 2014, the then Lord Mayor of Newcastle, Mr Jeff McCloy, commenced a High Court challenge against the constitutional validity of the provisions banning donations from property developers and other prohibited donors.

According to the writ, Mr McCloy is a ‘close associate’ of a ‘property developer’ under the *Election Funding, Expenditure and Disclosures Act 1981*, because he is a director of a corporation, North Lakes Pty Ltd, which is engaged in the business of the residential or commercial development of land. He is therefore a ‘prohibited donor’ under s 96GAA of the Act. On 21 March, another corporation of which Mr McCloy was a director, the

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McCloy Group Pty Ltd, made a gift of $9975 ‘for the benefit of persons including a candidate in connection with the March 2011 New South Wales State election.’

The challenge is being made on two grounds. First, it is argued that s 96GA of the Act, by banning donations from property developers and other prohibited donors, ‘effects a restriction upon the funds available to political parties and candidates to meet the costs of political communication by restricting the source of those funds’. This is based upon the reasoning in *Union NSW v New South Wales.*

Secondly, in a convoluted chain of reasoning, it is contended that s 96GA burdens the direct choice by the people of NSW of their Senators and Members of the House of Representatives by prohibiting the association of prohibited donors and State or local government members, candidates and parties by means of the making of political donations and by disadvantaging in NSW elections any State or local government elected members, candidates or parties to the extent that they are associated with prohibited donors, or promote, condone or tolerate the interests of prohibited donors, thereby having a ‘corresponding effect upon persons who are senators or members of the House of Representatives, or who are seeking election as such, who are associated with’ those State or local government members, candidates or parties that are associated with the prohibited donors.

The writ notes that s 9 of the *Independent Commission Against Corruption Act 1988* (NSW) provides that conduct that would otherwise be corrupt does not amount to corrupt conduct under the Act unless it amounts to a criminal offence under a State law. If successful in arguing that s 96GA is constitutionally invalid, Mr McCloy contends that his conduct in relation to the making of the donation ‘was incapable of being unlawful’ or amounting to a criminal offence.

**Current position**

**Political donations**

Under the current law, assuming it to be constitutionally valid, there is a cap on political donations in the 2014-15 financial year of $5700 for registered political parties and groups and $2400 for candidates, unregistered political parties and third party campaigners. Donations that exceed the cap during the financial year are unlawful unless they are paid into an account kept exclusively for the purposes of federal or local government election campaigns (s 95B). There are aggregation provisions for donations.

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39 Writ of summons, No S211 of 2014, *McCloy v NSW and ICAC*, 28 July 2014, para [60]. Query, however, whether the making of the donations might also have been an offence under s 96HA(2) of the Act.
40 *Election Funding, Expenditure and Disclosures Act 1981* (NSW), s 95A, as adjusted for inflation.
to the same party or candidates by the one donor, and to different candidates, members or
groups from the same party (s 95A(2) and (3)). Contributions by a candidate to his or her
own campaign do not count as political donations and are not included within the cap on
political donations to a candidate (s 95A(4)).

Political donations are banned from:

- individuals not on an Australian electoral roll (s 96D);
- entities that do not have an ABN or other Australian identifying number (s 96D);
- property developers and their close associates (s 96GA);
- tobacco industry business entities and their close associates (s 96GA);
- liquor or gambling industry business entities and their close associates (s 96GA); and
- anonymous donors where the donation is of $1000 or more (s 96F).

Certain indirect political donations (eg the provision of accommodation, vehicles or
computers for no payment or inadequate payment) are also banned where their value in a
financial year exceeds $1000 (s 96E). It is also unlawful for a donor to donate to more
than three third-party campaigners in a financial year (s 95C). Political donations must
be deposited in particular accounts kept for that purpose by the party and must only be
used for party purposes – not the private purposes of any individual.

Candidates may only accept reportable political donations (i.e. those of $1000 or more) if
the candidate has an official agent and the donation is made to that official agent who
deposits it into the candidate’s campaign account, gives an official receipt to the donor
and records the transaction. If a candidate is an endorsed member of a registered political
party, then the party’s agent also fulfils the role as the candidate’s agent. Candidates
must also keep records of the amounts of small political donations (under $1000) and
disclose their total value.

Electoral expenditure

In terms of expenditure, the capped expenditure period runs from 1 October in the year
before the election to the end of the fixed polling day the following March (s 95H). Again, the expenditure limits are subject to adjustment for inflation. For the 2015
election, parties that endorse candidates in the Legislative Assembly will be subject to an
expenditure limit of $111,200 multiplied by the number of seats in which they run an
endorsed candidate (s 95F(2)). However, small registered parties that run fewer than 10
candidates in the Legislative Assembly but which endorse candidates in the Legislative
Council, have an expenditure limit of $1,116,600 (s 95F(4)).

Each Legislative Assembly candidate also has the same expenditure limit of $111,200 (s
95F(6)) except for independent candidates, which have a higher expenditure limit (s
95F(7)), as do non-grouped candidates in the Legislative Council (s 95F(8)) because they
do not have additional party support. In addition, there is a cap of $55,600 in relation to
expenditure in any electorate (s 95F(12)). Expenditure limits for registered third party campaigners are $1,166,600 if they are registered before the capped expenditure period starts, and $583,300 for those registered later (s 95F(10)).

Administration

From an administrative point of view, there are strict laws concerning the disclosure of donations above $1000 and laws about the accounts into which donations may be placed and from which expenditure may be made in relation to State election campaigns. Sections 96 and 96A prescribe what may be paid into and out of State campaign accounts, what the money may be used for, who may receive donations and who may access the account. Third-party campaigners must also have a separate campaign account and an official agent (s 96AA).

Public Funding

There remain three forms of public funding of political parties. The first and primary form is the reimbursement of a significant proportion of campaign expenses. This applies to a registered party if at least one of its candidates is elected or it received 4% of first preference votes in a Legislative Council election or an average of at least 4% of first preference votes in those Legislative Assembly electorates where it runs candidates (s 57). If parties meet this threshold, then they are entitled to be reimbursed proportions of their actual expenditure during the capped expenditure period.

Where a party runs endorsed candidates in a Legislative Council election but either runs no endorsed candidates, or not more than 10 endorsed candidates in a Legislative Assembly election, then it is entitled to be reimbursed 100% of the first third of the amount spent under its expenditure cap, 75% of the second third and 50% of the final third under its expenditure cap. In the case of all other parties (i.e. those that run candidates in the Legislative Assembly but don’t run candidates in the Legislative Council or run more than 10 candidates in the Legislative Assembly) they may be reimbursed 100% of the first 10% of their actual expenditure under the expenditure cap, 75% of the next 80% of expenditure, and 50% of the last 10% of expenditure under the expenditure cap (s 58). Candidates are also eligible for reimbursement if they meet the applicable threshold (s 60), but the same item of expenditure cannot be claimed by both a candidate and the party (s 61). Payments that are due to a candidate may be directed by the candidate to be paid to the party that endorsed the candidate (s 67). Payments are conditional upon parties and candidates having lodged their disclosure declarations. If the Election Funding Authority is entitled to recover an unlawful donation from a party, it can do so by deducting the amount from public funding provided under this Part (s 70).

In addition, registered parties may receive funding for administrative expenditure from the Administration Fund if they have at least one elected member of Parliament. As discussed above, there is a sliding scale for caps up to which actual administrative expenses can be reimbursed. The annual cap starts at $200,000 for the first elected member decreasing to $150,000 for the second, $100,000 for the third, and $83,000 for
each elected member thereafter, up to a cap of 25 members in total (s 97E). There is also
provision for the reimbursement of the administrative expenses of Independent members,
up to a cap of $200,000 (s 97F). Payments may be made quarterly (s 97GA).

In the case of new or small parties that do not qualify for funding from the Administrative
Fund, they may be supported by the Policy Development Fund. This applies to parties
that have been registered for at least 12 months and the cap for reimbursement is
calculated by reference to the number of first preference votes received by any candidate
endorsed by the party at the previous State election. However, there is a floor of a
minimum payment of $5000 for any registered party during the first 8 years from its
registration (s 97I).

Overall, a political party with at least 25 elected members would receive approximately
$2.27 million per year in reimbursement of administration costs, amounting to $9.1
million over a four year cycle. It would also be reimbursed for approximately $6.97
million in election campaign costs, assuming that it actually spent up to its limit of $9.3
million. It would therefore only need to raise $2.32 million over four years through
political donations to fund the rest of its campaign up to its expenditure limit. This
amounts to approximately 465 donations up to the maximum of $5000.
CHAPTER 2 - JURISDICTIONAL ISSUES

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) all donation of funds to political parties registered in New South Wales or (b) all donations that take place in New South Wales, then three inter-related jurisdictional issues would arise.

Extra-territoriality

First, such a law would (unless read-down by a court) 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 the power to make laws with extra-territorial effect, as long as there is a sufficient nexus with the State\(^\text{41}\) and subject to any other implication derived from the Commonwealth Constitution and the federal system it implements.\(^\text{42}\) 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 leading to a conflict between State laws.\(^\text{43}\)

\(^{41}\) Pearce v Florenca (1976) 135 CLR 507, 517.

\(^{42}\) Australia Acts 1986, s 2(1); and Union Steamship Co of Australia v King (1988) 166 CLR 1, 14.

\(^{43}\) See, for example, Mobil Oil Australia Pty Ltd v Victoria (2002) 211 CLR 1, [138] (Kirby J).
A New South Wales law might also conflict with Commonwealth laws concerning political parties and political donations. If a State law banned donations that a Commonwealth law expressly permitted or if the Commonwealth legislated to ‘cover the field’ with respect to donations to political parties 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.

In the Unions NSW case, it was argued that the State’s laws banning political donations by corporations, unions and others conflicted with Part XX of the Commonwealth Electoral Act, which permits corporations, unions and others to make donations to State branches of political parties, and in particular with s 327 of the Commonwealth Electoral Act, which states that a person shall not interfere with the free exercise or performance by any other person of any political right or duty relevant to a Commonwealth election and that a person must not discriminate against another person on the ground of the other person making a political donation to a State branch of a political party or a candidate. It was argued that s 96D of the State Act coerced the plaintiffs into refraining from making political donations and subjected them to detriment by declaring such acts unlawful. This was argued, even though Part 6 of the Election Funding, Expenditure and Disclosures Act 1981 (NSW) is confined in its application to State and local government elections (not Commonwealth elections) and s 95B and cl 34A of the Election Funding, Expenditure and Disclosures Regulation 2009 (NSW) exclude from the limitations in the Act any donations made for the purposes of Commonwealth elections.  

The High Court, however, resolved the case on other grounds and did not address the alleged inconsistency. Nonetheless, any change to State laws must take into account whether it might give rise to an inconsistency with any Commonwealth law (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. The Commonwealth, therefore, is limited in its power to interfere in the ‘constitutional and

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45 Unions NSW v New South Wales (2013) 88 ALJR 227, [16] and [66] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); and [71] and [170] (Keane J).
electoral processes of the States’. 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. 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.

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*. The Supreme Court accepted that preventing corruption from shifting to state parties was an important governmental interest. It noted that the federal

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48 *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.


law only regulated the conduct of private parties. It imposed no requirements on States 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 are separately organized and operate independently at the federal and 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 State laws that 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). For example, property developers that are banned from donating in NSW may simply donate to a party to fund its campaign in federal elections and use this donation as a means of seeking to influence State members of the same party.

Accordingly, it would be preferable for there to be a co-operative State and Commonwealth scheme that removes, or at least lessens, the problem of avoidance and also prevents arguments about the inconsistency of laws or their constitutional invalidity arising from one jurisdiction interfering in election campaigns for another jurisdiction.
CHAPTER 3 – CONSTITUTIONAL CONSTRAINTS UPON ACTION

Apart from the jurisdictional issues discussed in Chapter 2, 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. It was this constitutional implication that resulted in the NSW 2012 amendments to the political funding scheme being struck down by the High Court in the Unions NSW case.

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.\(^{51}\) 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. 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’.\(^{52}\) 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.\(^{53}\)

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

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\(^{51}\) McGinty v Western Australia (1996) 186 CLR 140, 212 (Toohey J); and ICAC v Cornwall (1993) 38 NSWLR 207, 253 (Abadee J).

\(^{52}\) Stephens v West Australian Newspapers Ltd (1994) 182 CLR 211, 233-4 (Mason CJ, Toohey and Gaudron JJ) and 236 (Brennan J).

\(^{53}\) (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.
requirement that Members of Parliament be directly chosen by the people. While a case could be made that the entrenched provisions of the NSW Constitution Act impose a system of representative government, it may or may not succeed. The point was argued in the Unions NSW case, but the Court decided not to address it as it could decide the case on other grounds.

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. 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 Constitution 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’. Justices Deane and Toohey regarded the ‘Constitution’s doctrine of representative government’ as ‘structured upon an assumption of representative government within the States’ and Justice Kirby considered that the Commonwealth Constitution contemplates that State Parliaments will be ‘representative of the people of the State and

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54 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).


56 *Unions NSW v New South Wales* (2013) 88 ALJR 227, [16] and [66] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); [71] and [170] (Keane J).

57 Commonwealth Constitution, s 128.


60 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 75 (Deane and Toohey JJ).
democratically elected. 61 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 62 or be elected upon the principle of ‘one vote, one value’. 63

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 both an implied freedom of political communication, to ensure that voters can make a genuine choice when directly choosing their representatives, 64 and an implication concerning a universal franchise. 65 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. 66

Constitutional implications do not confer personal rights but rather, ‘preclude the curtailment of the protected freedom by the exercise of legislative or executive power’. 67 They therefore limit Commonwealth legislative power. They also affect State legislative power, 68 at least to the extent that the State laws, such as laws concerning defamation, limit political communication that may be relevant to how a voter forms his or her decision about how to vote in Commonwealth elections and referenda. 69

There is great difficulty, however, in determining whether communications relevant to State political matters may affect the formation of a voter’s views in relation to Commonwealth elections and potential referenda. 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

61 ABC v Lenah Game Meats Pty Ltd (2001) 208 CLR 199, [197] (Kirby J).
63 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).
66 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).
69 Muldowney v South Australia (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).
States. It has therefore been argued that political communication may be indivisible. As the implied freedom is a restriction on the power to enact laws, rather than an individual right, the focus should 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. However, if the law is one that only has relevance to a State election (such as prohibiting persons from advising electors to number their ballots in a particular way so that a valid vote can be cast at the State election without full preferences being given) then it will have no effect upon how electors form voting intentions at Commonwealth elections and would therefore not attract the application of the Commonwealth implied freedom of political communication.

If laws concerning the funding of political parties affect the manner in which State-registered political parties fund candidates for Commonwealth elections and support Commonwealth election campaigns, then they will clearly be subject to the Commonwealth Constitution’s implied freedom of political communication and any other implications derived from the system of representative government established by the Commonwealth Constitution. Sections 83 and 95AA(2) of the Election Funding, Expenditure and Disclosures Act 1981 (NSW) were intended to quarantine the State laws so that they only applied to State and local government campaigns and therefore prevented this kind of interference with Commonwealth elections.

This left the more difficult question of whether limitations upon the potential sources for the funding of political communication in State election campaigns burdened political communication about matters that may affect how electors form voting intentions in relation to Commonwealth elections. This would depend upon (1) whether the making of a political donation amounted to a form of political communication, and if so, the nature of that communication and whether it might affect how electors vote in Commonwealth elections; and (2) whether a reduction in the number of potential sources for the funding of State election campaigns was regarded simply as a State issue concerning the sourcing of donations (under which banned corporate and union donations could be replaced by donations from individuals) or whether it was regarded as actually diminishing the flow of political communication in relation to the State election, which in turn affected the formation of voter intentions in relation to Commonwealth elections.

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70 **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.

71 **Unions NSW v New South Wales** (2013) 88 ALJR 227, [71] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); [109] (Keane J).

72 **Muldowney v South Australia** (1996) 186 CLR 352, 365-6 (Brennan CJ); 373-4 (Toohey J); 370 (Dawson J).

73 For a detailed development of this argument and the authorities upon which it relies, see: Anne Twomey, ‘The Application of the Implied Freedom of Political Communication to State Electoral Funding Laws’ (2012) 35(3) UNSWLJ 625, 630-5.
In *Unions NSW*, the High Court conflated these issues. It focused upon whether political communications in a State election campaign can be separated from issues that arise in relation to Commonwealth elections. The mere fact that a State or local government election campaign *might* give rise to political communications concerning issues relevant to Commonwealth elections or referenda was enough for Keane J to hold that the application of the Commonwealth implied freedom of political communication was triggered.\(^{74}\) The Court concluded that the quarantining provisions could not effectively prevent the burden on the Commonwealth implied freedom, given the ‘many contexts in and levels at which political communication occurs’ in Australia.\(^{75}\) Their Honours noted the close interaction between levels of government through s 96 grants of Commonwealth funding to State programs, the use of co-operative executive and legislative arrangements and the operation of national political parties across the federal divide at Commonwealth, State and local government levels.\(^{76}\) Their Honours concluded that ‘generally speaking, political communication cannot be compartmentalised to either that respecting State or that respecting federal issues’.\(^ {77}\) The qualification of ‘generally speaking’, suggests that there may still be cases in which such distinctions can arise, but they will be difficult to establish. In any case, the Court did not regard laws concerning the sources of political donations in relation to State elections as falling within any exception.

The consequence is that regardless of whether there is a State implied freedom of political communication, any State laws regarding political funding will need to be carefully drafted so as not to breach the Commonwealth implied freedom of political communication. This will also be necessary if there is a national co-operative scheme developed to deal with political donations and campaign funding.

### The nature of the implication and the test that is applied

#### The Lange test

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

\(^{74}\) *Unions NSW v New South Wales* (2013) 88 ALJR 227, [158]-[159] (Keane J).

\(^{75}\) *Unions NSW v New South Wales* (2013) 88 ALJR 227, [42] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); [155] (Keane J).

\(^{76}\) *Unions NSW v New South Wales* (2013) 88 ALJR 227, [21]-[25] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). See also Keane J at [151].

\(^{77}\) *Unions NSW v New South Wales* (2013) 88 ALJR 227, [27] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
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.\(^{78}\)

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.\(^{79}\)

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.

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.

**1. Whether the law burdens the implied freedom of political communication**

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.\(^{80}\) However, it distinguished between the types 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


\(^{79}\) (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) 233 CLR 162, [85].

\(^{80}\) *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.
the audience reached’. In contrast, the Court considered that caps on political donations did not have as direct and serious an effect upon the political communication that forms the ‘core’ of the First Amendment.

In *Unions NSW v New South Wales*, the High Court noted the argument that donations are a form of political expression, but raised a concern that approaching the question from this direction might blur the distinction that the High Court has long maintained between the implied freedom as a limit on legislative power as opposed to a personal right. As Keane J pointed out in his separate concurring judgment, what is constitutionally protected in Australia is the interest of the people of the Commonwealth in the free flow of political communication that aids them in performing their duties as voters. Australia is therefore different from the United States where the First Amendment protects the right of an individual to make a form of political communication by way of a political donation.

The High Court concluded that it did not need to decide whether political donations amount to political communications, and did not do so. Instead it focused upon the effect of the law upon political communication, finding that the ban on political donations by some categories of potential donors (i.e. corporations, unions, other entities and anyone not on the electoral roll) had the effect of restricting ‘the funds available to political parties and candidates to meet the costs of political communication by restricting the sources of those funds.’ Keane J added that banning some kinds of donations is ‘apt to distort the flow of political communication within the federation by disfavouring some sources of political communication and thus necessarily favouring others.’

A good case could be made for the argument that restricting the sources of funding for political communication did not necessarily affect actual expenditure on political communication or reduce its quantity or quality, because political parties have expenditure caps and are publicly funded for 75% or more of their expenditure within those caps. Parties therefore only have to raise 25% of their campaign expenditure on political communications and have four years to do so between elections. They also have a field of 15 million Australian voters from which they can receive $5000 donations. For example, if a major party received 460 donations of $5000 each over a period of four years, this would be sufficient to satisfy the difference between public funding and the expenditure cap. It is difficult to see, therefore, why banning corporations and others from making donations would necessarily have resulted in less political communication. As the US Supreme Court said in *Buckley v Valeo*, political parties and candidates would simply have to raise funds from a wider field of people and could still raise large amounts if they had sufficiently broad support.

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81 *Buckley v Valeo* 424 US 1 (1976), 19.
82 *Unions NSW v New South Wales* (2013) 88 ALJR 227, [37] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); [109] (Keane J).
84 *Unions NSW v New South Wales* (2013) 88 ALJR 227, [38] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); and [120] (Keane J).
It is also notable that there are other laws, such as tax laws, that more directly reduce the amount of money available for funding political advertising during election campaigns, yet it would be most surprising if such laws were regarded as burdening the implied freedom of political communication.

Nonetheless, as a clear majority of the High Court has accepted that laws that limit the potential sources of political donations amount to a burden upon the implied freedom of political communication, then all future laws concerning campaign financing must be framed in a manner that takes this into account to ensure that the test in *Lange* is not breached. Such laws must therefore be 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.

2. *Whether the law serves a ‘legitimate end’*

The second question is whether laws regulating political party funding and expenditure serve a ‘legitimate end’.

In the United States, the Supreme Court has also held that there is a legitimate governmental interest in preventing the actuality and appearance of corruption and undue influence, and preventing the evasion of anti-corruption measures. However, in more recent times the Supreme Court has taken a very narrow view of the type of corruption that may legitimately be prevented, confining it to *quid pro quo* corruption. The influence that may be derived from the making of significant donations is not in itself regarded as amounting to corruption. Chief Justice Roberts made this point in *McCutcheon v Federal Election Commission*, observing:

> Many people… would be delighted to see fewer television commercials touting a candidate’s accomplishments or disparaging an opponent’s character. Money in politics may at times seem repugnant to some, but so too does much of what the First Amendment vigorously protects…

In a series of cases over the past 40 years, we have spelled out how to draw the constitutional line between the permissible goal of avoiding corruption in the political process and the impermissible desire simply to limit political speech. We have said that government regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford. “Ingratiation and access… are not corruption.”

They embody a central feature of democracy – that constituents support

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candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns.

Any regulation must instead target what we have called “quid pro quo” corruption or its appearance…. That Latin phrase captures the notion of a direct exchange of an official act for money.\textsuperscript{90}

The US Supreme Court has not accepted the argument that freedom of speech may be limited to serve the end of achieving greater political equality through creating a more level playing field. It has concluded that politics is an inherently unequipped field and that attempting to impose equality in relation to one aspect of that inequality (i.e., in relation to money), involves an inappropriate interference with the political system. The majority in \textit{Davis v Federal Election Commission} said:

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. Leveling 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.\textsuperscript{91}

The Canadian Supreme Court has been more liberal in its view of the legitimate interests that may be pursued in a manner that limits free speech. It 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.\textsuperscript{92} This broader range of legitimate interests is a consequence of the Canadian \textit{Charter of Rights and Freedoms}, which protects equality rights as well as freedom of speech and political rights. In \textit{Figueroa v Canada}\textsuperscript{93} the Supreme Court noted that while there was no obligation to provide funding to political parties, if Parliament bestows funding on some political parties but not others, scrutiny will be required.\textsuperscript{94} Their Honours noted that 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’.\textsuperscript{95} As small parties already find it hard to be heard, 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

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\textsuperscript{91} Davis \textit{v} Federal Election Commission 554 US 724 (2008), 742 (Alito J for the majority).
\textsuperscript{92} Harper \textit{v} Canada [2004] 1 SCR 827, [23].
\textsuperscript{93} Figueroa \textit{v} Canada [2003] 1 SCR 912.
\textsuperscript{94} Figueroa \textit{v} Canada [2003] 1 SCR 912, [48].
\textsuperscript{95} Figueroa \textit{v} Canada [2003] 1 SCR 912, [49].
\end{footnotesize}
process’. The majority, however, noted that this case should not be taken to mean that differential treatment could never be justified.

In Australia, the jurisprudence on this subject is not as greatly developed. 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 being primarily the avoidance of potential corruption and undue influence, but also as including 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. The case largely focused upon the legitimate end concerning corrupt conduct.

There was limited discussion about whether a level playing field amounts to a legitimate end to justify limits on political communication. This was in part because a number of Justices expressed doubt that the laws in question in the *ACTV* case were really directed at creating a level playing field. Mason CJ and McHugh J noted that such a claim could not be maintained as the laws did not give equal access to all to the electronic media and favoured incumbents and those previously elected to Parliament. Deane and Toohey JJ accepted that the creation of a level playing field might support some degree of control on spending on, or the use of, political communication, but not the exclusion of third-party campaigners from use of the electronic media for political advertising. Brennan J, however, appeared to accept that a legitimate end may include reducing the untoward advantage of wealth, which would appear to incorporate some of the aspects of a level playing field.

Looking at the case in retrospect, a majority of the High Court in *Unions NSW*, made the observation that the legitimate end of the relevant law in the *ACTV* case ‘may have been to effect a level playing field’, but the judgments in *ACTV* expressed greater scepticism as to whether this was actually the case.

The High Court, in *Mulholland v Australian Electoral Commission*, rejected the application of *Figueroa v Canada* and Canadian authorities generally, due to their different context derived from the Canadian Charter. It also rejected the argument that the Constitution requires that political parties be treated equally or that there be a ‘level

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96 *Figueroa v Canada* [2003] 1 SCR 912, [52]-[53].
97 *Figueroa v Canada* [2003] 1 SCR 912, [91].
99 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 130 and 144 (Mason CJ); 155-6 (Brennan J); 189 (Dawson J); 238 (McHugh J).
100 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 131-2 and 146 (Mason CJ); 239 (McHugh J).
104 *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).
playing field’ with respect to the treatment of political parties. 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. 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. Such laws protected the electoral process by preventing voters from being misled about the nature of a party and the level of its support.

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.

While the High Court in Mulholland did not decide about whether making a more level playing field could be a legitimate end for the purposes of limiting the implied freedom of political communication, it did give rise to doubt as to whether this would be accepted as a legitimate end, given the recognition by some judges that not all political parties are equal and that there are legitimate reasons to treat them differently.

In Unions NSW, the plaintiffs conceded that the general objects of the Electoral Funding, Expenditure and Disclosures Act 1981 (NSW) were to reduce the possibility of undue or corrupt influence from being asserted and that this was a legitimate end. The Court accepted that the ‘anti-corruption purposes of the … Act are not doubted.’ The plaintiffs argued, however, that the 2012 amendments that instituted a ban on donations by non-voters and aggregated the expenditure of parties and their affiliates were not enacted to serve this legitimate end.

106 Mulholland v Australian Electoral Commission (2004) 220 CLR 181, 194-5 (Gleeson CJ); 217 (McHugh J); 296 (Callinan J); and 305 (Heydon J).
107 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).
108 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).
The majority noted in *Unions NSW* that the identification of the ‘true purpose of a statutory provision which restricts a constitutionally guaranteed freedom is not often a matter of difficulty’. It considered that the purpose is usually evident. However, the battle is usually between the ostensible purpose and the unspoken, illegitimate purpose. The very point of the proportionality test concerning whether a law is reasonably appropriate and adapted to achieve the legitimate end, is to reveal that the ostensible purpose was not the true purpose, because the ostensible purpose could have been achieved by other means that imposed less of a burden on the implied freedom. The High Court noted in relation to s 92 of the Constitution that the purpose of the legislative measures in *Castlemaine Tooheys Ltd v South Australia* were ‘found to be the conservation of energy resources and the amelioration of litter problems’, yet this was merely its ostensible purpose. Those involved with the case were well aware, as had been noted in *Hansard*, that the ‘true purpose’ was protection of the local Cooper’s Brewery from competition from interstate Bond brewing. The lack of proportionality of the law revealed that it was not truly one to achieve legitimate environmental ends, but in fact one that was intended to discriminate against inter-state trade for protectionist reasons. The Court therefore struck down the law, but maintained the fig-leaf that the purpose of the provision was environmental in nature.

The *Castlemaine Tooheys* case illustrates the game as traditionally played in the High Court. It usually involves the jurisdiction that has enacted the law setting out its ostensible purpose, which is a legitimate end, and the Court then testing it by way of the proportionality test. This test is applied to reveal whether there was really another purpose – an illegitimate purpose – which caused the law to be framed in the way that it was. According to the polite formalities, the Court then strikes down the law on the ground that it has failed the proportionality test, but does not accuse the jurisdiction of bad faith in attempting to deceive the Court about its real purpose. Both the Court and the jurisdiction continue to pretend that the ostensible purpose was the purpose of the law, albeit inadequately and unconstitutionally pursued.

This traditional way of treating these cases went awry in *Unions NSW*. Instead of accepting the State’s ostensible purpose of avoiding corruption and preventing evasion of existing caps, the Court stated that it could not identify the purpose of the law, or indeed any legitimate end for it, at all. Their Honours noted that the ban on corporations and others from making political donations was ‘selective in its prohibition’, but concluded that the basis for that selection ‘was not identified and is not apparent’. Their Honours observed:

> It is large-scale donations which are most likely to effect influence, or be used to bring pressure to bear, upon a recipient. These provisions, together with the requirements of public scrutiny, are obviously directed to the mischief of possible

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corruption. The same cannot be said of s 96D, in its wide-ranging prohibition on the sources of donations.\textsuperscript{114}

The argument that corporations are ‘more likely to represent a threat to integrity’ than other donors was given short shrift by the Court. Their Honours noted that even if this was accepted, questions would still arise as to ‘whether a complete prohibition respecting donations of any amount from any corporation was justified’.\textsuperscript{115} However, the provision was not solely directed at corporations, as it picked up other entities and individuals as well, with no justification as to why their donations under the cap were any more likely to lead to corruption than the donation of voters on the electoral roll.

The argument that only voters should be able to make political donations because they are the only ones who have an interest in the election of a government was also rejected by the Court. Their Honours noted that many of those banned from donating will have ‘a legitimate interest in political matters’.\textsuperscript{116} While it is the formation of voting intentions by persons on the electoral roll that is protected by the implied freedom, this is achieved by protecting free political communication which goes beyond communication between voters and their representatives or candidates in elections.\textsuperscript{117} Voters are influenced by political communication which is facilitated by corporations (eg the media) and in which corporations, non-citizens, unions and other interest groups participate.\textsuperscript{118} To cut every person or entity out of public debate, other than enrolled voters, would significantly diminish political communication. Moreover, the Court considered that non-voters have a legitimate interest in being able to influence that debate and the election of Members of Parliament, even by making political donations. Their Honours said:

> There are many in the community who are not electors but who are governed and are affected by decisions of government. Whilst not suggesting that the freedom of political communication is a personal right or freedom, which it is not, it may be acknowledged that such persons and entities have a legitimate interest in governmental action and the direction of policy. The point to be made is that they, as well as electors, may seek to influence the ultimate choice of the people as to who should govern. They may do so directly or indirectly through the support of a party or a candidate who they consider best represents or expresses their viewpoint. In turn, political parties and candidates may seek to influence

\textsuperscript{114} Unions NSW v New South Wales (2013) 88 ALJR 227, [53] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

\textsuperscript{115} Unions NSW v New South Wales (2013) 88 ALJR 227, [55] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

\textsuperscript{116} Unions NSW v New South Wales (2013) 88 ALJR 227, [56] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); [144] (Keane J).

\textsuperscript{117} Unions NSW v New South Wales (2013) 88 ALJR 227, [30] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); [144] (Keane J).

such persons or entities because it is understood that they will in turn contribute to
the discourse about matters of politics and government.\textsuperscript{119}

The Court asked itself why it was considered necessary to ban donations from the
particular sources nominated and how it furthered the anti-corruption purposes of the
Act.\textsuperscript{120} The Court compared the general ban on donations from corporations and others
against the specific ban on donations by property developers and tobacco, liquor and
gambling industry business entities. Their Honours noted that the general ban did not
identify the affected entities or persons 'as having interests of a kind which requires them
to be the subject of an express prohibition'.\textsuperscript{121} They noted that the State had not sought to
'liken the interests of industrial organisations, such as the plaintiffs, to those of the
prohibited donors'.\textsuperscript{122} Their Honours concluded with respect to s 96D that 'the purpose
of its wide, but incomplete, prohibition is inexplicable'.\textsuperscript{123}

Keane J appeared to regard the general caps upon donations and expenditure as satisfying
two legitimate ends – limiting the influence of donations on candidates and parties and
enhancing the prospects of a level playing field.\textsuperscript{124} He accepted that 'the protection of the
integrity of the electoral process from secret or undue influence is a legitimate end the
pursuit of which is compatible with the freedom of political communication.'\textsuperscript{125}

Keane J considered caps on donations and expenditure, while limiting the amount that
can be spent upon political communication, are 'appropriate and adapted to ensure that
wealthy donors are not permitted to distort the flow of political communication to and
from the people of the Commonwealth'.\textsuperscript{126} He saw the selectivity of the bans in s 96D as
distorting the flow of political communication and therefore invalid.\textsuperscript{127} The bans on
donations by corporations, unions and other were not 'calibrated' to give effect to the
purported rationale for their enactment or adapted to target the vices said to be attached to
them as a source of political donations.\textsuperscript{128}

As for the aggregation provision, the State had argued that it was intended to prevent
circumvention of the caps on expenditure. Their Honours noted, however, that implicit in
this argument was the notion that the provision dealt with expenditure derived from a
single source and the assumption that the objectives of all expenditure made by a party

\textsuperscript{119} Unions NSW v New South Wales (2013) 88 ALJR 227, [30] (French CJ, Hayne, Crennan, Kiefel and
Bell JJ). See also Keane J at [144].
\textsuperscript{120} Unions NSW v New South Wales (2013) 88 ALJR 227, [56] (French CJ, Hayne, Crennan, Kiefel and
Bell JJ).  
\textsuperscript{121} Unions NSW v New South Wales (2013) 88 ALJR 227, [57] (French CJ, Hayne, Crennan, Kiefel and
Bell JJ). 
\textsuperscript{122} Unions NSW v New South Wales (2013) 88 ALJR 227, [58] (French CJ, Hayne, Crennan, Kiefel and
Bell JJ).  
\textsuperscript{123} Unions NSW v New South Wales (2013) 88 ALJR 227, [59] (French CJ, Hayne, Crennan, Kiefel and
Bell JJ).  
\textsuperscript{124} Unions NSW v New South Wales (2013) 88 ALJR 227, [136] (Keane J).  
\textsuperscript{125} Unions NSW v New South Wales (2013) 88 ALJR 227, [138] (Keane J). 
\textsuperscript{126} Unions NSW v New South Wales (2013) 88 ALJR 227, [136] (Keane J).  
\textsuperscript{127} Unions NSW v New South Wales (2013) 88 ALJR 227, [137] (Keane J).  
\textsuperscript{128} Unions NSW v New South Wales (2013) 88 ALJR 227, [141] (Keane J).
and its affiliated organisations would be the same. The Court appeared to reject these assumptions. It could not identify the reasons why or how a party and its affiliated unions are to be ‘treated as the same organisation for the purpose of expenditure on electoral communications.’ Their Honours had previously noted that unions and other bodies have a legitimate interest in being involved in political debate. Further, the Court could not deduce from the aggregation provision how it furthered the anti-corruption purposes of the Act. Their Honours concluded that in the absence of a legislative purpose that was conformable with the legitimate ends of the Act, the aggregation provision was invalid, without the need to consider the application of a proportionality test. Interestingly, their Honours did not appear to identify a separate legitimate end of a ‘level playing field’ that might arguably have supported the aggregation provision (at least, if it had applied more widely to pick up other bodies that run campaigns at the behest of or in concert with a political party, as had been initially recommended by the Select Committee on the Bill).

3. Whether the law is reasonably appropriate and adapted to serve that legitimate end

The third question is whether such laws are reasonably appropriate and adapted to serve 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. Are there ‘alternative, reasonably practicable and less restrictive means’ of achieving the legitimate end? The courts give some deference to Parliament with respect to the method that it chooses to achieve the legitimate end. However, if the law is too drastic in its burden on freedom of political expression 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. In Unions NSW it was contended that a ‘margin of choice’ should be given to the Commonwealth Parliament concerning how the legitimate end may be achieved. This argument was rejected by the majority, which noted that it had never received the support of a majority of the Court. It remains a matter for a court to decide whether or not laws are reasonably appropriate and adapted to serve a legitimate end.

In the ACTV case, McHugh J noted that if one really wants to deal with corruption, then there are more direct means of doing so than banning advertising on electronic media. He observed:

130 Unions NSW v New South Wales (2013) 88 ALJR 227, [64]-[65] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
134 Unions NSW v New South Wales (2013) 88 ALJR 227, [45] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). Compare Keane J’s concern at [129] that if a law is struck down ‘because a different, less burdensome, measure might have been available, it would seem to countenance a form of decision-making having more in common with legislative than judicial power.’
The creation of special offences, disclosure of contributions by donors as well as political parties, public funding, and limitations on 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.\footnote{135 Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106, 239 (McHugh J).}

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.\footnote{136 Randall v Sorrell 548 US 230 (2006).}

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.\footnote{137 McConnell v Federal Election Commission 540 US 93 (2003), 148.} The Supreme Court has also previously 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.\footnote{138 Nixon v Shrink Missouri Government PAC 528 US 377 (2000).}

In more recent times, however, the US Supreme Court has taken a narrower view of the type of corruption, the avoidance of which would justify limits on First Amendment speech,\footnote{139 McCutcheon v Federal Election Commission 572 US ___ (2014), 2 (Roberts CJ).} and has placed less significance on a factual history of corruption.\footnote{140 American Tradition Partnership Inc v Bullock 567 US ___ (2012).} In New South Wales, the findings of the Independent Commission Against Corruption might assist in establishing a factual basis for corruption risks in relation to particular types of donors so that restrictions upon donations from those groups might be regarded as reasonably appropriate and adapted to serve a legitimate anti-corruption end.

4. \textit{Whether the manner in which the law serves that legitimate end is compatible with the system of government prescribed by the Commonwealth Constitution}

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. Keane J stressed in \textit{Unions NSW} that while a law may validly regulate political communications by enhancing or protecting them, ‘the Court...
must also ensure that the regulation is compatible with the maintenance of the federation’s system of representative and responsible government.\textsuperscript{141}

In \textit{Langer v Commonwealth}, for example, a majority of the High Court held that a law that prohibited voters being told of a way of validly voting that would result in their preferences being exhausted was compatible with the maintenance of the system of representative and responsible government, because it supported the preferential system of government and all voters participating equally in the voting system.\textsuperscript{142}

A law, however, that was skewed in favour of a particular party or whichever party was in government,\textsuperscript{143} or that 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, would be likely to be struck down as constitutionally invalid, even if it was reasonably appropriate and adapted to achieve a legitimate end. This would be because it was not done in a manner that is compatible with the constitutionally prescribed system of representative and responsible government.

Accordingly, any proposal for the reform of political financing in Australia must be carefully framed so that it is not seen to distort the political system by favouring particular political parties or incumbents or by undermining the direct choice by the people of their representatives.

\textsuperscript{141} \textit{Unions NSW v New South Wales} (2013) 88 ALJR 227, [158] (Keane J).

\textsuperscript{142} \textit{Langer v Commonwealth} (1996) 186 CLR 302, 317 (Brennan CJ); 334 (Toohey and Gaudron JJ); 336 (McHugh J); and 351 (Gummow J).

\textsuperscript{143} See, eg, \textit{Australian Capital Television Pty Ltd v Commonwealth} (1992) 177 CLR 106, 132 and 146 (Mason CJ); 172 (Deane and Toohey JJ); 237 and 239 (McHugh J). Cf Dawson J at 190-1.
CHAPTER 4 - BANNING OR CAPPING POLITICAL DONATIONS

Background to banning or capping donations in Australia

Australia does not have a tradition of banning or capping donations to political parties or candidates. Until recently, most 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.144

New South Wales

The history of bans and caps on political donations from 2008-2014 is complex, as a series of different changes were made during this period. First, the Election Funding (Political Donations and Expenditure) Act 2008 (NSW)145 imposed the following limits on political donations:

- s 96D prohibited the acceptance of reportable political donations (i.e. those over $1000) except from individuals or entities with an Australian Business Number;
- s 96E prohibited the making of certain indirect donations over $1000 in value;
- s 96F prohibited the acceptance of anonymous donations of a reportable amount; and
- s 96G prohibited the receipt of loans (that if made as gifts, would have been reportable donations), other than from a financial institution, unless the details are recorded.

Next, the Election Funding and Disclosures Amendment (Property Developers Prohibition) Act 2009 (NSW)146 inserted Division 4A into the Act, including s 96GA which made it:

- unlawful for a property developer to make a political donation;
- unlawful for a person to make a political donation on a property developer’s behalf;
- unlawful for a person to accept a political donation made by a property developer or by a person on the property developer’s behalf;

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145 This Act came into force on 10 July 2008.
146 This Act came into force on 14 December 2009.
• unlawful for a property developer to solicit another person to make a political donation; and
• unlawful for a person to solicit another person on behalf of a property developer to make a political donation.

Property developers were defined to include their close associates, which encompassed directors or officers of any property developer corporation, their spouses, any related body corporate, a person with more than 20% voting power in the property developer corporation, stapled entities and where a property developer is a trustee, persons who hold more than 20% of the units in a unit trust or the beneficiaries of a discretionary trust.

In addition, the 2009 Act:

• provided that loans from property developers are to be regarded as political donations, unless from a financial institution, if the loan would have been a political donation if it were a gift (s 96GC);
• excluded from this Division the payment of annual party membership or affiliation fees from property developers and their close associates, if under the $1000 reportable donation mark (s 96GD); and
• permitted the Election Funding Authority to make determinations about whether an applicant was not a property developer for the purposes of the Divisions (s 96E).

Thirdly, the *Election Funding and Disclosures Amendment Act 2010* (NSW)\(^{147}\) made the following major changes in relation to political donations:

• Division 2A was inserted in Part 6, which imposed caps on political donations in relation to State elections of $5000 for registered parties or groups and $2000 for candidates, elected members, unregistered parties and third-party campaigners;
• Political donations were to be aggregated so that donations to the same party, member, group, candidate or third-party campaigner could not exceed the cap in any financial year, and donations to different candidates, members or groups of the same political party could not exceed the cap in any financial year (s 95A(2) and (3));
• A candidate could make contributions to finance his or her own election campaign without those contributions being regarded as political donations or falling within any cap on donations to the candidate (s 95A(4));
• The caps were to be indexed in accordance with inflation (s 95A(5));
• S 95B made it unlawful for a person to accept a political donation that exceeds the cap unless the part of the donation that exceeds the cap is paid into an account kept exclusively for the purposes of federal or local government election campaigns or if received by a third-party campaigner, the amount is paid into any account other than its State campaign account;

\(^{147}\) This Act came into force on 1 January 2011.
It was made unlawful for an individual to make a political donation on behalf of a corporation that is related to another corporation that had made donations to the same party, member, group, candidates or third-party campaigner in the same financial year unless this is disclosed to the person accepting the donation (s 95B(6));

S 95C prohibited a person from making or accepting political donations to more than three third-party campaigners in the same financial year where the donation was to be paid into the third-party campaigner’s State campaign account (unless the person making or receiving the donation did not know about the other donations);

Annual party subscriptions of $2000 or less or levies paid to a party by its elected members were excluded from political donations caps (s 95D);

s 96D was amended so that donations could now only be received by individuals on a State, Commonwealth or local government electoral roll or entities with either an Australian Business Number or any other number recognised by ASIC for the purposes of identifying the entity;

s 96EA prohibited the making and receipt of donations by a political party to a candidate or group of candidates not endorsed by that or any other party; and

s 96GAA was expanded to extend the ban on the making or receipt of donations by property developers, to donations by tobacco industry business entities and liquor or gambling industry business entities.

The Election Funding, Expenditure and Disclosures Amendment Act 2012 (NSW) then amended the Act further by:

- inserting s 95G(6) which aggregated the expenditure of political parties with affiliated organisations;
- amending s 96D so that it was unlawful for a political donation to be accepted unless the donor was an individual enrolled on a State, federal or local government electoral roll;
- amending s 96D so that it was unlawful for an individual to make a political donation on behalf of a corporation or other entity and for a corporation or other entity to make a gift to an individual for the purpose of the individual making a political donation;
- amending s 96D by prohibiting affiliation fees by unions, but permitting the transfer of property been branches of parties or associated parties;
- amending s 87 by excluding expenditure by third parties on issues campaigns where the dominant purpose of the expenditure is not to promote or oppose a party or candidate at an election or influence the voting at an election.

On 18 December 2013, in Unions NSW v New South Wales, the High Court struck down the validity of s 95G(6) and s 96D, leaving only the amendment to s 87 standing from this 2012 Act.

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148 This Act came into force on 9 March 2012.
Finally, the *Election Funding, Expenditure and Disclosures Consequential Amendment Act 2014 (NSW)*\(^{150}\) reinstated the position before the 2012 amendments were made with respect to donations by corporations and other entities. This included the restoration of provisions concerning the disclosure of donations, such as those by or on behalf of related corporations, and the restoration of the previous s 96D which now prohibits the acceptance of political donations unless the donor is an individual on a State, Commonwealth or local government electoral roll or an entity that has a relevant business number.

**Queensland**

In 2011 the Queensland Government followed New South Wales by targeting political donations and expenditure. It imposed indexed caps upon political donations, starting at $5000 for donations to registered parties and $2000 for donations to candidates and third-party campaigners (*Electoral Act 1992* (Qld), s 252), where these donations were intended for use for campaign purposes during the capped expenditure period.\(^{151}\) However, donations of unlimited size could still be given to parties and candidates for other purposes, such as administrative purposes or for campaigning outside the capped expenditure period. The Queensland Government noted in a discussion paper on subsequent reforms to this system, that Queensland had a weaker system of capping donations than in New South Wales. It said:

> There is an argument that by targeting only those donations intended to be used for campaign purposes during the capped expenditure period, the cap in Queensland is not effective in meeting its policy objective. Political parties and candidates may accept donations in excess of the cap, provided they are not used for campaign purposes during the capped expenditure period. The extent to which the caps limit the potential for undue influence is, therefore, somewhat reduced.\(^{152}\)

Like NSW, parties in Queensland had to have separate campaign accounts into which these donations were paid. Gifts of foreign property were also banned (s 270), as were anonymous donations above $200 (s 271) and loans of more than $1000, other than from a financial institution, unless the details were recorded (s 272).

In 2013 the Queensland Government decided to repeal the caps on political donations and expenditure. Its cited reason was that they ‘impinge on the implied freedom of political communication and unnecessarily restrict participation in the political process.’\(^{153}\) This

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\(^{150}\) This Act came into effect on 24 June 2014.

\(^{151}\) The capped expenditure period commenced 2 years after the polling day in the last election, or upon the issue of the writs, whichever occurred first – *Electoral Act 1992* (Qld), s 197.


was achieved by the *Electoral Reform Amendment Act 2014* (Qld),\(^{154}\) which repealed the Divisions concerning State campaign accounts and political donations. It also raised the level at which political donations have to be disclosed from $1000 to $12,400. This had a flow-on effect to provisions concerning anonymous donations and undocumented loans, which can now be received if below $12,400.

*The Australian Capital Territory*

The ACT also followed the leads of New South Wales and Queensland in introducing caps upon political donations and expenditure in 2012. The ACT’s Select Committee on Amendments to the Electoral Act 1992 described the limits on political donations, described as ‘gifts’, as follows:

> 2.19 Gifts are limited in several ways. There is a cap of $10,000 on the total amount of gifts that may be received in a financial year from the same person and deposited into an ACT election account (s 205I(2)). A ‘person’ includes an unincorporated association (s 198) and a corporation.\(^{155}\) Gifts from anyone other than an individual on the ACT electoral roll must be paid into a federal election account, except if the recipient is a third party campaigner (s 205I(4)). Since the ACT election account is the only financial account from which electoral expenditure may be incurred (s 205C), this means that gifts from companies and organisations cannot be used on an ACT election, except by third party campaigners. If the cap is exceeded, the penalty is twice the amount by which the cap is breached, payable as a debt to the Territory (s 205I(5)).
>
> 2.20 There are also restrictions on anonymous gifts. Political entities in the ACT, other than third party campaigners, must not accept anonymous gifts of $1,000 or more (s 222). If such a donation is received, it is payable to the Territory, and if it is not paid, it may be recovered as a debt. Small anonymous gifts of less than $250 must not be accepted where the total of such gifts received would be more than $25,000 for the financial year or, for candidates in an election, more than $25,000 for the disclosure period (s 222(3), (4)).\(^{156}\)

In the light of the High Court’s judgment in *Unions NSW*, the Committee recommended the repeal of s 205I(4) which had banned anyone other than voters on the ACT electoral roll from making gifts to parties and independent candidates for the purposes of ACT election campaigns.\(^{157}\) The cap of $10,000 on donations would remain. It also recommended that the provisions concerning anonymous donations be made more

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\(^{154}\) This Act commenced with retrospective effect back to the day it was introduced as a bill into the Queensland Parliament, which was 21 November 2013.

\(^{155}\) By virtue of the *Legislation Act 2001* (ACT), s 160.


consistent, so that anonymous gifts up to $1000 each may be received, but totalling no more than $25,000 in a financial year.  

**Other Australian jurisdictions**

The only other caps currently placed on political donations apply in Victoria, where donations from gaming and casino licensees are prohibited above $50,000.Anonymous donations above specified amounts are also prohibited under Commonwealth, Western Australian and Northern Territory electoral laws. South Australia enacted electoral funding laws in 2013 which do not come into effect until 2015. They do not cap political donations generally, but they do prohibit anonymous donations over $200 and place a maximum $500 cap on entry to fund-raising events where access to Ministers or their staff is provided.

**Banning or capping donations in other comparable countries**

**The United Kingdom**

Donations to political parties in the United Kingdom are not currently banned or capped, but serious consideration has been given to imposing caps on donations. Public opinion polls in the United Kingdom have strongly supported the imposition of caps on donations. In 2004 the UK Electoral Commission recommended against a cap on private donations, but suggested that if there were to be one, it should be set at a relatively low level, such as £10,000. 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. Reform proposals concerning caps on donations stalled when one political party withdrew from talks in October 2007. The Brown Labour Government indicated, however, that it regarded a cap of £50,000 as too high and that a lower limit would be needed "to help reconnect people with the political process". It gave consideration to a significantly lower cap of £1000, but noted that a lower cap would increase the amount of [158]

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[159] *Electoral Act* 2002 (Vic), s 216.
[160] Commonwealth *Electoral Act* 1918, s 306 – ban on anonymous donations of more than $12,800.
[161] Commonwealth *Electoral Act* 1907 (WA), s 175R – ban on anonymous donations of $2,100 or more.
[162] Commonwealth *Electoral Act* (NT), s 197 – ban on anonymous donations of $1000 or more to parties and $200 or more to candidates.
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.\textsuperscript{168}

In November 2011 the Committee on Standards in Public Life published its report on ‘Political Party Finance: Ending the Big Donor Culture’.\textsuperscript{169} It recommended the imposition of a cap of £10,000 upon political donations, including donations from unions, corporations and individuals. The Committee rejected a higher cap of £50,000 on the basis that as this would be around twice average earnings, it would be well beyond the reach of most voters and ‘fail to convince majority opinion that the issue had been addressed’.\textsuperscript{170}

The Committee also noted that as its proposals would significantly affect the capacity of parties to fund their campaign activities, it would be necessary to increase public funding by an extra £23 million to political parties.

The Cameron Conservative Government responded by accepting the principle that donations should be capped, but rejecting the payment of additional public funding for parties. In the absence of that extra public funding, it noted that the level of any cap would have to be reconsidered. It stated that it would seek consensus through cross-party discussions.\textsuperscript{171} Seven meetings were held between the Conservative Party, the Labour Party and the Liberal Democrats, but they failed to reach a consensus and were abandoned in June 2013. It was reported that the main sticking point for Labour was union donations and the main sticking point for the Conservatives was the reduction in the size of donations.\textsuperscript{172} On 10 July the Labor Leader of the Opposition, Ed Miliband, proposed to Prime Minister Cameron in Question Time that a cap of £5000 be imposed upon donations from trade unions, businesses and individuals. The Prime Minister rejected this proposal on the basis that taxpayers should not be obliged to pay for the loss of private donations.

In 2013 (a non-election year) the main UK parties received the following amounts in political donations and public funding:\textsuperscript{173}

\begin{itemize}
  \item \textsuperscript{170} UK, Committee on Standards in Public Life, ‘Political Party Finance: Ending the Big Donor Culture’, (13th report, CM 8209, November 2011), pp 4-5.
\end{itemize}
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<tr>
<th>Party</th>
<th>Donations</th>
<th>Public Funding</th>
<th>Total</th>
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<tr>
<td>Conservatives</td>
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<td>£454,276</td>
<td>£16,317,383</td>
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<td>Liberal Democrats</td>
<td>3,801,264</td>
<td>492,125</td>
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<td>Scottish Green Party</td>
<td>16,929</td>
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</tr>
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**Canada**

In 1993, political donations from foreign sources were banned in Canada. In 2003, major changes were made to campaign finance in Canada, including the imposition of caps on donations and expenditure as well as the introduction of significant public finance of political parties. Donations by individuals were capped at $5000 per year. Donations from non-individuals, such as corporations, unions and unincorporated associations, were limited to annual amounts of $1000 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 (either citizens or permanent residents) may make donations to parties or candidates and they may only donate up to $1200 annually.\(^\text{174}\) Cash contributions to registered parties over $20 are also prohibited\(^\text{175}\).

**United States**

In the United States, caps may be imposed upon donations. Individuals may make donations up to $2,600 per election to a candidate for federal office (with primaries and general elections counted separately) and $32,400 per year to a national political party or committee.\(^\text{176}\) Individuals may also contribute up to $10,000 to a State, District or local party committee per year (combined limit) and $5000 for any other political committee per year. Until earlier this year, there were also aggregate limits on the amount that an individual could donate to all candidates or committees. These aggregate limits permitted individuals to contribute $48,600 amongst all federal candidates and a total of $74,600 to other political committees in the 2013-2014 electoral cycle.\(^\text{177}\)

\(^{174}\) *Canada Elections Act, s 405* (as amended by *Fair Elections Act* 2014). Note that corporations were first barred from making political donations in 1908 in Canada, but the law’s enforcement was ineffective and it tended to be more honoured in the breach.

\(^{175}\) *Canada Elections Act, s 405.31.*

\(^{176}\) 2 USC §441(a)(1)(B).

together, this represented a total contribution of $123,200 in a two-year election cycle. The Supreme Court struck down these aggregate limits in 2014 in McCutcheon v Federal Election Commission.179

Corporations and unions may only make donations to candidates or parties indirectly through political action committees (‘PACs’). PACs are subject to the same donation caps as individuals, except for multi-candidate PACs, which may contribute more to candidates but less to parties.180 Donations by federal government contractors are prohibited, unless made by corporations or unions through PACs. Contributions from foreign nationals who are not permanent residents are also prohibited. Cash contributions over $100 (in aggregate) from one person are prohibited. Anonymous cash contributions over $50 cannot be used in relation to a federal election.

The constitutional validity of bans or caps on political donations

United States

In 1976 in Buckley v Valeo, the United States Supreme Court upheld the validity of caps imposed upon donations.181 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.’182 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’.183 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.184 The only effect of the limit of $1000 on donations by individuals was to require 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.185

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 $1000 limit upon contributions by individuals ‘focuses precisely on the problem of large

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185 Buckley v Valeo 424 US 1 (1976), 22.
campaign contributions’ while leaving persons free to assist and support candidates and parties with financial resources. 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. 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.

Since Buckley, the US Supreme Court has taken a progressively narrower approach to the permissible regulation of campaign donations. This culminated in McCutcheon v Federal Election Commission where the Supreme Court struck down the validity of aggregation limits that had the effect of preventing a donor from making donations under the relevant caps to a large number of candidates and committees. A majority of the Supreme Court took the view that this denied the donor the capacity to be associated with additional candidates and political action committees by making donations to them. It was effectively, therefore, a ban rather than a cap on donations. As each of the donations still had to be under the cap (which by then had risen to $2600) the risk of any one donation causing the recipient to act corruptly was extremely low. Hence the anti-corruption justification for the law was not applicable, unless one took the view that the influence upon a party of cumulative donations to its candidates could give rise to corrupt influence.

The majority in McCutcheon rejected the previous view of the Supreme Court in Buckley that an aggregate limit was a ‘modest restraint’. Chief Justice Roberts said:

An aggregate limit on how many candidates and committees an individual may support through contributions is not a “modest restraint” at all. The Government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse.

While the majority continued to accept that it was legitimate for legislatures to enact anti-corruption measures, it interpreted corruption narrowly as quid pro quo corruption.

In another controversial case, Citizens United v Federal Election Commission, the Supreme Court supported the rights of corporations, unions and other associations as third-party campaigners to spend money on direct campaigning, rather than acting through PACs. It struck down a provision which banned corporations and unions from making electioneering communications within 30 days of a primary and 60 days of a general election. The case did not affect the ban on corporations and unions directly

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188 Buckley v Valeo 424 US 1 (1976), 35.
contributing to parties and candidates by way of political donations, although it opened up the way for such a challenge.

The majority rejected the notion that a distinction should be drawn between the political communications of corporations and natural persons:

"Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster" (quoting Bellotti, 435 US at 783). The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not "natural persons." 192

The majority also rejected the notion that it should interfere to prevent corporations obtaining an unfair advantage in the political marketplace by using their significant financial resources. It concluded that the 'First Amendment’s protections do not depend on the speaker’s “financial ability to engage in public discussion”.' It considered it a ‘dangerous business’ for the law to seek to level electoral opportunities, as this involves the Congress in making ‘judgments about which strengths should be permitted to contribute to the outcome of an election’, when that is a matter for voters. 193

As for the argument that corporations should not be able to take advantage of the use of corporate funds achieved through economic activity involving those that may not support the corporation’s political views, the Court rejected it noting:

All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker’s ideas. 194

In dissent, Justice Stevens argued that corporations unfairly influence the marketplace of political ideas through their vast wealth and ability to dominate sources of communication by outspending others and acquiring prime broadcasting spots. He contended that this marginalizes the political speech of others and drowns out alternative points of view.

Since Citizens United, courts in the United States have struck down other limits on third-party campaigners. For example, in SpeechNow.Org v Federal Election Commission, the Court of Appeals struck down the validity of provisions that capped to $5000 the donations that an individual may make to a federal political committee, where that committee makes only independent third-party expenditure and does not contribute to candidates or political parties. This was because ‘contributions to groups that make only independent expenditures cannot corrupt or create the appearance of corruption’. Hence

the legitimate end of anti-corruption was not applicable and could not support the caps on donations to such bodies. Again, this finding did not affect the law regarding caps and bans on the making of political donations to candidates. It was limited to donations to third-party campaigners that make independent expenditure only. The Court upheld the disclosure requirements for political committees.

The effects of Citizens United have also spread to State election laws. In Montana in the early 20th century, a number of ‘copper barons’ exercised considerable influence over the political system, engaging in widespread quid pro quo corruption. In 1912, in a citizens’ initiated referendum, the people voted to restrict corporate influence on elections by, among other things, banning direct expenditure by corporations that supports or opposes a political candidate or party in State elections. When this law was challenged post-Citizens United, the Montana Supreme Court upheld its validity. It referred to the history of corporate corruption of the political system in Montana and cited evidence showing the direct connection between independent third-party expenditure and political corruption. The Court held that the State had a compelling reason to maintain these restrictions. However, on appeal, the United States Supreme Court struck down this law in American Tradition Partnership Inc v Bullock, holding that a State cannot ban direct third-party expenditure by corporations or unions in relation to state elections.

As a result, third-party campaigning has increased significantly at elections in the United States, swamping campaigning by candidates and parties. It has led to the creation of ‘Super PACs’ which are bodies that make no political donations themselves to candidates and parties, but rather campaign directly on political issues. They can therefore accept unlimited donations from individuals, corporations and unions. During the 2012 election cycle, third-party campaign spending tripled from what had been spent in 2008, reaching $1 billion for the first time. In at least 36 House and Senate races in 2012, more money was spent during the general election by third-parties than by the candidates themselves.

There has been a significant back-lash against these developments. Proposals have been floated in the United States to amend the Constitution to overturn the effect of Citizens United. Sixteen States have so far called for such an amendment, and similar resolutions are pending in a number of other States.

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196 Western Tradition Partnership v Attorney General of Montana 271 P 3d 1, 36-7 (2011).
199 For copies of the State resolutions calling for a constitutional amendment, see: http://freespeechforpeople.org/node/342.
Canada

In Canada, while there have been constitutional challenges to limits on expenditure – particularly third-party spending – and limits on party registration and public funding, there does not appear to have been a challenge to the constitutional validity of banning political donations by corporations, unions and unincorporated associations. The reason for this may be general public acceptance of these bans as well as the likelihood that the Supreme Court would hold them valid given its approach to other issues concerning campaign funding.

This is because the factors to be taken into account by the Canadian Supreme Court are different to those in Australia and the United States, due to the Canadian Charter of Rights and Freedoms which came into force in 1982. The Charter includes an explicit right in s 3 for citizens to vote and run for election, as well as a right to freedom of thought, expression and association in s 2 and equality rights in s 15. Hence, instead of giving primacy to First Amendment rights, as in the United States, or an implied freedom of political communication, as in Australia, the Canadian Supreme Court balances freedom of speech against equal participation in the electoral system.

The Canadian Supreme Court has therefore 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’. 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.

The other relevant case is Figueroa v Canada, where the Supreme Court held invalid laws that required a party to field at least 50 candidates in an election before it could receive public funding benefits. 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’. 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’.

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203 Figueroa v Canada [2003] 1 SCR 912, [52]-[53].
Australia – a complete ban on political donations and full public funding

The constitutional validity of a complete ban on political donations to candidates or parties in Australia would be doubtful. In undertaking this analysis, one must look at each of the two stages of the Lange test. The first stage asks whether the implied freedom of political communication is effectively burdened in its terms, operation or effect.

It is likely that a Court would find that a law completely banning political donations, even if off-set by public funding, would still amount to an effective burden on the implied freedom of political communication. First, such a ban would limit the resources that parties can draw upon to support their political communications. It would prevent parties from raising additional funds to spend upon political communications. In Unions NSW the High Court held that a general ban on certain types of political donations reduced the sources from which political communications could be funded, imposing a burden on the implied freedom of political communication.204

It would be arguable, however, that if expenditure on all political communication (not just electoral communications expenditure)205 was validly capped and public funding was provided to all parties and candidates right up to that cap, then there would be no consequential reduction in the amounts available to support political communication and therefore the implied freedom would not be burdened.206 The problem with this argument is that the imposition of the expenditure caps themselves would amount to a burden on the implied freedom of political communication. Hence, any challenge to a ban upon all donations would simply incorporate a challenge to the caps upon expenditure in order to overcome the first stage of the Lange test by establishing that there was a burden on the implied freedom of political communication.

There would also be an additional argument that the act of making a donation to a political party is itself to be regarded as a political communication on the basis that it expresses support for a candidate or party. As noted above, the US Supreme Court has taken this view but it has not yet been decided in Australia.

If a law banning all political donations and imposing spending caps was regarded as burdening the implied freedom of political communication, then the High Court would address the second stage of the Lange test. Is the law reasonably appropriate and adapted

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204 Unions NSW v New South Wales (2013) 88 ALJR 227, [38] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
205 Current expenditure caps in NSW only apply to ‘electoral communication expenditure’ and only apply in the 6 months before an election. They do not address other political communications that a party may seek to make to inform voters of its policy and plans at other times. Hence, even with public funding being provided up to the existing cap, a ban on donations would prevent parties from participating in other political communications about their policies, unless the expenditure cap and public funding were expanded to take this into account.
206 Note Keane J’s discussion of the argument that public funding might offset any reduction in the sources of donations, but did not do so in this case: Unions NSW v New South Wales (2013) 88 ALJR 227, [117].
to serve a legitimate end in a manner which is compatible with the maintenance of the system of government prescribed by the Constitution? This would raise the question of what legitimate end was being served in making such a law. How would a law that banned all political donations be any more likely to reduce the risk of corruption than existing laws that impose caps on those donations? If one focuses on legally valid actions, it would be extremely difficult to argue that a maximum donation of $5000 to a party is any more likely to give rise to corruption or undue influence than a complete ban on donations. On this basis, a law banning all donations would be likely to be regarded as invalid on the ground that it does not serve a legitimate end.

One might instead, however, argue that one must look also towards the potential effect upon illegal conduct. On the one hand, those who seek to corrupt or gain undue influence, and who currently do so with no regard to the law (eg prohibited donors who still donate, legal donors who breach the caps or donors who seek to launder donations through other organisations), will presumably have no qualms about breaching a new law that bans donations completely. They would either continue to make illegal donations in cash or shift to acts for the personal benefit of decision-makers (eg gifts, holidays and jobs for children), rather than the party. This could make corruption worse, as it would be more difficult to track and expose than donations. Again, it would not appear to serve a legitimate end of preventing the risk or perception of corruption. On the other hand it is arguable that political parties and candidates might be less inclined to accept donations in breach of the law if they received sufficient public funding and therefore no longer perceived a need to seek or receive corrupt or illegal payments. This might be regarded as serving a legitimate end, although whether or not it is proportional would be a matter for the courts to decide. One could well argue that there are other ways that are better directed at discouraging parties from engaging in corrupt or illegal conduct, such as more rigorous investigation and enforcement of the existing law, stiffer penalties and longer periods in which prosecutions can be initiated.

Finally, the proportionality test would have to be applied to whatever scheme of public funding applied to ascertain whether the law was reasonably appropriate and adapted to serve the legitimate end in a manner compatible with the constitutionally prescribed system of responsible and representative government. This would turn upon the details of the scheme, such as how independents, small parties and new parties are funded and the impact upon the free flow of political communication. No such assessment can be made in the absence of the details of the scheme.

Further, the question of the funding of third-party campaigners would have to be addressed in any such scheme. Banning political donations to third-party campaigners would most likely be constitutionally invalid, especially given that it is unlikely that they would receive public funding to off-set the effect of such a ban upon their ability to contribute to political debate by making political communications. If donations to political parties, candidates, groups and elected members were to be banned, the likely result would be that the money formerly spent by corporations, unions and others on political donations would be re-directed to third-party campaigners. While expenditure caps would presumably still apply to third-party campaigners, it is likely that there would
be a proliferation of new third-party campaigners engaging in direct campaign expenditure, with many likely to be in collusion in running campaigns in support of particular parties and candidates. Australia would end up in a similar position to the United States where PACs now out-spend political parties and dominate election campaigns. Whether this outcome is conducive to an anti-corruption end is doubtful.

The issue of a complete ban on donations was briefly addressed by the High Court in *Unions NSW v New South Wales*. Their Honours observed:

Section 96D stops just short of a complete prohibition upon political donations. A complete prohibition might be understood to further, and therefore to share, the anti-corruption purposes of the EFED Act. On the other hand, if challenged, it would be necessary for the defendant to defend a prohibition of all donations as a proportionate response to the fact that there have been or may be some instances of corruption, regardless of source.  

The High Court is therefore open to considering the argument, but for the reasons given above, it would be difficult for the Government to persuade the Court that a complete ban on political donations would serve a legitimate end and be a proportionate response to instances of corruption.

*Australia – Bans on particular types of donations or donors*

Bans on foreign donations and anonymous donations apply in the United States, Canada, New Zealand and the United Kingdom. According to the Institute for Democracy and Electoral Assistance (‘IDEA’), 50% of countries around the world ban anonymous political donations, 12.2% impose a limit on the amount of an anonymous donation that may be accepted and only 28.9% of countries permit anonymous donations. IDEA also records that 63.3% of countries ban political donations from foreign interests, while 30.6% of countries allow such donations.

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207 *Unions NSW v New South Wales* (2013) 88 ALJR 227, [59] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). See also Keane J at [127] re the irrelevancy of s 96D being a ‘step towards the comprehensive prohibition on all political donations’.

208 In the United States donations from foreign nationals (except for permanent residents) are banned and anonymous cash contributions over $50 cannot be used in relation to a federal election.

209 *Canada Elections Act*, ss 331, 357(3), 358, 404 and 404.4.

210 In New Zealand candidates and parties are prohibited from keeping donations greater than $1500 from an overseas person or an anonymous source.

211 *Political Parties, elections and Referendums Act* 2000 (UK), s 54.

212 IDEA, ‘Is there a ban on anonymous donations to political parties?’: [http://www.idea.int/political-finance/question.cfm?id=259](http://www.idea.int/political-finance/question.cfm?id=259).

213 IDEA, ‘Is there a ban on donations from foreign interests to political parties?’: [http://www.idea.int/political-finance/question.cfm?field=246&region=-1](http://www.idea.int/political-finance/question.cfm?field=246&region=-1).
Anonymous donations clearly give rise to the risk of corruption and undermine the transparency otherwise achieved by the disclosure of donations. Hence, there is a clear legitimate interest in banning anonymous donations above a particular amount.214

The rationale for banning foreign donations is less obvious. It is usually claimed that foreigners have no legitimate interest in the composition of the government of a nation and that Australian elections should not be made vulnerable to manipulation by foreign governments or the businesses and citizens of other countries. While this argument may be accepted, it is more difficult to argue that permanent residents in Australia have no legitimate interest in the composition of the government, especially when they are subject to the laws passed by the Parliament and affected by them. The High Court noted in *Unions NSW* that there ‘are many in the community who are not electors but who are governed and are affected by decisions of government’. Their Honours observed that such people have ‘a legitimate interest in governmental action and the direction of policy’ and ‘may seek to influence the ultimate choice of the people as to who should govern’.215

It is also notable that Canada, New Zealand and the United States permit political donations from permanent residents as well as citizens. In the United Kingdom, permissible donors are confined to those on the electoral roll, however, many permanent residents and persons from Commonwealth countries resident in the United Kingdom may enrol to vote and make political donations as a consequence. The NSW provision that denies permanent residents the capacity to make political donations is therefore vulnerable to constitutional challenge.

Bans on corporations, unions and other entities from donating, while they continue to stand in Canada, were struck down by the High Court in *Unions NSW v New South Wales*. It is therefore clear that a general ban of that kind is not permissible in New South Wales.

Bans on particular categories of persons and corporations, such as property developers, tobacco, liquor and gambling industry business entities, may be more justifiable. The High Court noted in *Unions NSW v New South Wales* that these particular persons and entities may have ‘interests of a kind which requires them to be the subject of an express prohibition’.216 It also observed that the ‘history which may explain or support the targeting of the “prohibited donors” in Div 4A was not addressed in detail in argument’, as it was not necessary to do so.217 Both these statements recognise a possibility that such a history could be relied upon to justify these bans. If compelling evidence could be shown that donations made by persons or entities falling within these particular categories are more likely to give rise to corruption or the perception of corruption and

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214 In NSW, reportable political donations (i.e. those of $1000 or more) may not be accepted unless the name and address of the person making the donation are known: s 96F.
undue influence, and that the caps on donations do not remove that risk, then such provisions might survive if regarded as reasonably appropriate and adapted to serve that legitimate end.

It should also be noted that bans of particular types of donations may be appropriate at different levels of government due to the fact that one level of government has the power to make decisions that give a significant financial advantage to a particular type of donor, but another does not. In the absence of a national scheme, it is therefore appropriate to tailor bans in their application to the sectors of the community that can gain the most from decisions at the relevant level of government. Hence, a ban on donations by property developers at the local government or the State level would be much more justifiable than at the Commonwealth level.\textsuperscript{218} This is not just the case in Australia, but in other federations, such as Germany.\textsuperscript{219}

One complicating factor is that the ban on donations by property developers was enacted in 2009 at a time when there were no caps on donations. If the High Court were to base its assessment of constitutional validity of the provision at the time it was enacted, then the question of whether or not it was reasonably appropriate and adapted to achieve a legitimate end would be assessed in a context of there being no other limits upon the amount of donations such persons and entities could make. If, however, as in \textit{Unions NSW}, the provisions were assessed within the context of existing caps upon donations, then the more difficult question arises as to how the bans achieve any greater anti-corruption end than the existing caps. This gives rise to the controversial question of whether a law that might have been constitutionally valid at the time that it was enacted can lose its constitutional validity as a consequence of the enactment of other legislation which has the effect of altering the first law’s status as ‘reasonably appropriate and adapted to achieve a legitimate end’. The High Court has not yet explicitly addressed this issue,\textsuperscript{220} although it may be relevant to Mr McCloy’s challenge to the validity of the prohibited donor provisions.

Finally, it should be noted that in other countries, selective bans also apply to particular categories of donors. In Germany, for example, donations from fully or partly state-owned enterprises are forbidden, as are donations made in the expectation of political or economic advantage. In the United States donations from government contractors are also banned.

\begin{itemize}
\item \textsuperscript{220} Compare Keane J’s comments on the different temporal argument that s 96D was ‘justified as a step towards a comprehensive prohibition on all political donations’ which he rejected on the ground that one ‘must deal with the law as it is, not as it might be’: \textit{Unions NSW v New South Wales} (2013) 88 ALJR 227, [127].
\end{itemize}
Practical issues concerning caps on donations

Definitional issues and the extent of the operation of donation caps

The first challenge in banning or capping political donations is to define what is a political donation. On the one hand it is important to cast the definition widely to prevent avoidance. If only formal transfers of money were banned or capped, they would quickly be replaced by indirect donations, such as the provision of goods and services to the party at no cost or for less than value or the provision of loans that are later written off. Such avoidance actions not only undermine confidence in the integrity of the system, but the use of indirect donations may also increase the risk of corruption 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 or candidate, 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 and parties being bound by impossible levels of red tape and administration. Hence campaign funding laws must 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, there is also a duty to ensure that significant amounts of taxpayers’ money are not wasted in administration and compliance costs.

Another matter for consideration is what types of donations are more likely to give rise to risks of corruption and the sources of those donations. A bequest, for example, is less likely to give rise to corruption, as the donor is dead by the time the money is paid to the party. However, does the mere fact that a donor has promised a bequest in his or her will give the donor an opportunity to impose influence on the party while still alive?

A candidate’s contribution to his or her own campaign is most unlikely to give rise to corruption issues, as a candidate is not in a position to bribe himself or herself. However, allowing a candidate to make unlimited donations to his or her campaign from personal resources potentially gives rich candidates significant advantages over those of limited

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223 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.
financial means, raising the question of whether a more ‘level playing field’ can be regarded as a legitimate end. In the United States, where a ‘level playing field’ is not seen as a legitimate end, rich candidates cannot be banned from contributing to their own campaigns leading to inequitable levels of campaign funding, given that expenditure caps have also been held to be constitutionally invalid. However, in New South Wales the advantages of being a rich candidate who can self-fund his or her campaign are reduced by the imposition of an expenditure cap upon all candidates.

Other issues arise concerning party membership fees and affiliation fees. Should party membership fees be the subject of caps or bans, or should they be diverted to fund other party activity, rather than electoral communications? Should union affiliation fees fall within the category of donations or membership fees?\(^{224}\)

In addition, there are definitional difficulties in disentangling donations from payments for the provision of goods or services. For example, to what extent is payment for attending a fund-raising 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? To what extent is the price paid for party publications payment for the receipt of goods, or a donation to the party?\(^{225}\)

The provisions in the Election Funding, Expenditure and Disclosures Act 1981 (NSW) deal with the above issues as follows:

**Definition of ‘gift’:** Currently, s 85 of the Act defines political donations primarily by reference to ‘gifts’. A gift is defined in s 84(1) as meaning any ‘disposition of property made by a person to another person, otherwise than by will, being a disposition made without consideration in money or money’s worth or with inadequate consideration and includes the provision of a service (other than volunteer labour) for no consideration or for inadequate consideration.’ It therefore excludes bequests and volunteer labour, but picks up the payment of money or the provision of goods and services that are not paid for in full by the recipient. For example, the payment of the salary of a person who provides services to a party or candidate would appear to be a gift that amounts to a political donation.\(^{226}\) Where monetary amounts are not involved, it is the value of the gift that counts, and this may be assessed by a valuer appointed by the Election Funding Authority for that purpose (s 84(4)).

**Other things that may be ‘gifts’ amounting to political donations:** For the purposes of the definition of ‘political donations’ in s 85, a gift also includes:

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\(^{224}\) This point has been contentious in the United Kingdom. See: Committee on Standards in Public Life, Political Party Finance – Ending the Big Donor Culture, (November 2011, CM 8208), pp 51-4.


\(^{226}\) See also s 96E which deals with certain indirect campaign contributions.
• a contribution, entry fee or other payment to entitle a person to participate in or obtain a benefit from a fund-raising venture or function, being an amount that forms part of the proceeds of the venture or function;
• annual or other subscriptions paid by a party member or by a person or entity (including a union) for affiliation with the party;
• transfers of money or property to the NSW branch of a party from its federal branch or another State or Territory branch of the party, or from an associated party (eg one in a coalition arrangement); and
• uncharged commercial interest on loans.227

Transfers between party branches: Political parties therefore cannot avoid the donations cap by ensuring donors instead donate to the federal branch or a branch in another State, which then transfers it to the NSW branch. All transfers to the NSW branch are subject to the same cap, except for amounts transferred to the NSW branch that are deposited in an account that is only used for expenditure on federal election campaigns or local government election campaigns (s 95B(2)). Donations to the NSW Branch for the purposes of federal election campaigns are excluded for jurisdictional reasons (to prevent the State law from invalidly interfering with Commonwealth elections), even though it is possible that prohibited donors may still seek to influence State members by donations to the branch of their State party for the purposes of federal elections.

Meaning of ‘political donation’: A political donation is defined in s 85 as any gift made to or for the benefit of a party, elected member, candidate or group of candidates. Importantly, it also includes a gift ‘made to or for the benefit of an entity or other person (not being a party, elected member, group or candidate), the whole or part of which was used or is intended to be used by the entity or person to enable it to make, directly or indirectly, a political donation or to incur electoral expenditure or to reimburse the entity or person for making, directly or indirectly, a political donation or incurring electoral expenditure’. Hence, a prohibited donor cannot avoid the application of the law by instead donating money to a third party which is then intended to be passed on to a political party or candidate or used for electoral expenditure by the third-party. This form of ‘laundering’ donations is prohibited. Equally, donors who have reached the cap for political donations cannot avoid it by giving money to a third party for it to be used in this way.

Personal gifts: Personal gifts to individuals that are made in a private capacity and which are not used and not intended to be used in relation to an election or an elected member’s duties, are excluded from the definition of political donation.

Donations by candidates to own campaign: Donations by a candidate to his or her own campaign are not political donations for the purposes of the Act and are not included in the cap on donations (s 95A(4)).

227 Note that in NSW the receipt of certain loans are prohibited unless a record is made of the terms and conditions of the loan: s 96G. See also s 96GC regarding loans by prohibited donors.
**Donations by parties to independents:** Section 96EA makes it unlawful for a party, or a party’s members or candidates, to make a political donation to independent candidates or independent groups. It is also unlawful to accept such a donation. The intention is presumably to discourage parties from running and supporting candidates under false claims of independence.

**Party subscriptions and party levies:** While subscription fees to parties and affiliation fees may be counted as ‘gifts’ for the purposes of political donations, s 95D excludes them from the application of Div 2A, except to the extent that they exceed $2000. Hence, the first $2000 of a subscription fee is not to be counted as a political donation for the purposes of the imposition of caps, but any amount above that is to be so counted. As a consequence, prohibited developers can still be members of political parties and pay annual subscription fees, as long as they amount to no more than $2000. Where a party affiliation fee is not calculated by reference to the number of members of the affiliated organisation, the maximum amount is $2000 (after which it becomes a political donation). However, where the affiliation fee is calculated by reference to the number of members of the affiliate (eg the number of members of a union), the maximum is $2000 multiplied by the number of members of the affiliate.

Section 95D also excludes from the Division any party levy paid by elected members of the party. Again, this is because there is little apparent risk of corruption involved in Members of Parliament donating from their own private resources to their own political party.

**Indirect donations:** Section 96E prohibits certain indirect campaign contributions including the provision of office accommodation, vehicles, computers and equipment for election campaign purposes where there is less than full payment for them, the payment of a party’s or candidate’s costs for political advertising, the waiving of debts for political advertising and the provision of other goods or services of a kind prohibited by the regulations. However, there is no prohibition of the provision of volunteer labour or of gifts worth more than $1000 (including the provision of goods and services).

While s 96E is relatively narrow in relation to the type of indirect donations expressly banned, it should be noted that other indirect donations, such as the provision of staff or goods or services for inadequate or no consideration, also amount to ‘gifts’ and ‘political donations’ in the definitions sections, and are therefore relevant when prohibited donors are banned from making political donations or where legal donors have caps imposed upon their political donations.

**Aggregation issues re caps on donations**

Where political donations made by individual donors are capped, an issue arises as to how to prevent the cap being avoided by the making of separate donations by related corporations that in aggregate exceed the cap. Sub-section 84(6) provides that for the purposes of Part 6, ‘corporations that are related to each other (as determined in accordance with the Corporations Act 2001 of the Commonwealth) are taken to be a
single corporation’. Hence caps cannot be evaded by a corporation making separate donations through each of its subsidiaries or other related corporations.

Sub-section 95A(2) imposes an aggregate cap for donations made by a donor in a financial year to the same party, elected member, group, candidate or third-party campaigner. Sub-section 95A(3) imposes an aggregate cap upon donations made to elected members, groups or candidates of the same political party within a financial year. However, there is no aggregation of donations made to separately registered parties, even though they may be in coalition.\(^\text{228}\)

There is also an aggregate cap that prohibits a donor from making political donations to more than 3 third-party campaigners in the same financial year (s 95C). The intention is to prevent the caps being avoided by the proliferation of third-party campaigners supporting particular political parties. Donations may still, of course, be made to third-party campaigners for non-campaigning activities, such as charitable donations, where the amounts are not paid into the campaign account of the third-party campaigner.

**Donations made through the Election Commission**

One way of dealing with avoidance, attempts to ‘wash’ donations and disclosure issues is to require that all donations be made through the Electoral Commission and be earmarked as to their intended recipient and purpose. Donors that are entities would have to identify themselves by reference to their ABN or other relevant business number and individuals would have identify themselves by reference to their details on the electoral roll (or if permanent residents were permitted to donate, some other form of relevant identification). The Electoral Commission could then immediately disclose donations on an electronic register for all to see, enhancing the speed and accuracy of disclosure. There would no longer be a need to rely on the honesty and diligence of parties, candidates and donors in their disclosures, and the time for publishing disclosures would be significantly reduced. The Electoral Commission would also be in a position to cross-check donations from the same donors to ensure that aggregation limits were not breached and could also ascertain whether related corporations were breaching caps through separate donations.

The Electoral Commission would then pay donations made to State parties and State candidates and groups for State elections, into the relevant campaign account. Donations earmarked by the donor for the purposes of federal elections or party administration could also be paid into the relevant account. Only amounts in the State campaign account could be used to fund electoral expenditure in relation to State elections.

It would then be clear what amounts had been received by a State party and State candidates for the purposes of expenditure in State elections. Such a system would also reduce the administrative burdens on parties to track and declare donations, which would

\(^{228}\) This is clarified by the note to s 95A(4). Note, however, s 86 which provides for donations to associated parties to be aggregated for the purposes of determining a ‘reportable donation’ and s 95G which aggregates the expenditure of associated parties for the purposes of expenditure caps.
significantly help small parties that do not have the administrative structures to deal with heavy compliance burdens. It would require extra funding for the Electoral Commission, but there would be efficiencies in donations being managed and declared centrally.

If desired, there could also be the opportunity for corporations and others to donate to a blind fund to support political parties. Those corporations that claim they donate to political parties on a philanthropic basis as part of their community responsibilities and not to gain any advantage or influence could contribute to this fund. It would be an offence for the donor or others to inform the party or anyone else that the donor had made the donation or intended to make a donation, or to imply that a donation would be made.

This approach is based in part upon ‘protected’ donations in New Zealand which can be made anonymously through the Electoral Commission. In New Zealand such donations are capped at a maximum of $43,350 per donor and no party may receive more than $289,000 by this method in the period between one election and the next. It is an offence for a donor to tell the party or anyone else about making the donation, or an intention to do so, or to imply that it will or has made such a donation.229

Setting caps at the right level

As caps upon donations limit the funds available for the making of donations, they burden the implied freedom of political communication and therefore must be set carefully in order to avoid breaching the second stage of the Lange test. If a cap is too high, it may be regarded as ineffective to achieve the anti-corruption purpose. If it is set too low (depending upon the level of public funding also available) it may impede political parties from making the political communications that inform voters in fulfilling their constitutional roles in elections and referenda.

The NSW indexed caps, which started at $5000 for donations to registered parties and groups and $2000 for political donations to unregistered parties, elected members, candidates and third party campaigners, have not attracted significant criticism230 and would appear to be reasonable in the circumstances.

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229 See Electoral Act 1993 (NZ), ss 208A-208G.
230 No criticism was directed at the level of the caps by the High Court in Unions NSW v New South Wales (2013) 88 ALJR 227.
CHAPTER 5 – EXPENDITURE LIMITS

Background to expenditure limits in Australia and current position

Expenditure limits for Commonwealth elections

Expenditure limits applied to candidates at Commonwealth elections from 1902\textsuperscript{231} to 1980 when they were repealed.\textsuperscript{232} 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.\textsuperscript{233} There were a number of practical problems with the expenditure 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.\textsuperscript{234} Commonwealth 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.\textsuperscript{235}

Expenditure limits for New South Wales elections

Section 95F imposes caps upon electoral communication expenditure for a State election campaign. These caps apply for expenditure during the ‘capped expenditure period’, which runs from 1 October in the year before an election is to be held until the end of polling day, which is in the following March, being a period of just less than six months (s 95H). It is unlawful for a party, group, candidate or third-party campaigner to incur electoral communication expenditure for a State election campaign during the capped expenditure period if it exceeds the applicable cap (s 95I).

The caps set out in s 95F are regularly adjusted for inflation. As noted above, the expenditure caps for the 2015 NSW election for political parties that endorse candidates in the Legislative Assembly are $111,200 multiplied by the number of electoral districts

\textsuperscript{231} 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.

\textsuperscript{232} Commonwealth Electoral Amendment Act 1980 (Cth).


in which the party endorses a candidate. The total cap for a party that runs candidates in all electoral districts is $10,341,600. However, small registered parties that run fewer than 10 candidates in the Legislative Assembly but which endorse candidates in the Legislative Council have an expenditure limit of $1,116,600 (s 95F(4)). The same cap is applied for a group of candidates that runs in the Legislative Council but is not endorsed by a party (s 95F(5)).

Each Legislative Assembly candidate also has an expenditure limit of $111,200 (s 95F(6)) except for independent candidates who have a higher expenditure limit of $166,800 (s 95F(7)), as do non-grouped candidates in the Legislative Council (s 95F(8)) because they do not have additional party support. Candidates in Legislative Assembly by-elections receive a higher expenditure limit of $222,400 regardless of whether or not they are endorsed by a party (s 95F(9)). In addition, there is a cap of $55,600 for parties in relation to expenditure in any one electorate (s 95F(12)).

Expenditure limits for third-party campaigners are $1,167,600 if they are registered before the capped expenditure period starts, and $583,800 for those registered later (s 95F(10)). Third party campaigners can spend $22,240 in Legislative Assembly by-elections (s 95F(11)). Within their general cap, third-party campaigners are also capped to spending no more than $22,240 in any one electorate during a general election (s 95F(12)).

**Expenditure limits for Queensland elections**

In 2011 Queensland implemented caps on electoral expenditure for parties, candidates and third-party campaigners. As Queensland does not have fixed term elections (unlike NSW and the ACT), there was greater difficulty in setting the capped expenditure period. In Queensland it was defined as starting on either the day two years after the polling day for the last election, or the day the writ was issued for the forthcoming election, whichever occurs first, and ending at 6pm on polling day.

The expenditure cap for a registered party was initially set at $80,000 per electorate in which it runs candidates, $50,000 per candidate endorsed by a registered party, $75,000 for an independent candidate or for candidates in a by-election. The expenditure cap for a registered third party was $500,000, but no more than $75,000 in relation to a particular electoral district. Unregistered third parties could spend no more than $10,000 overall and no more than $2000 in a particular electoral district. The amounts were indexed. Electoral expenditure could only be paid out of a State campaign account. The penalty for breaching the cap was either twice the amount by which the cap was exceeded, or 200 penalty units, whichever was the greater.

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236 A third-party campaigner is an entity or person (not a party, member, group or candidate) who incurs electoral communication expenditure during a capped expenditure period that exceeds $2000: *Election, Funding, Expenditure and Disclosures Act 1981* (NSW), s 4(1).

237 Electoral expenditure was defined as including advertising for or against a candidate or party, the production and distribution of other material advocating votes; and the carrying out of opinion polls and other research related to the election.
The expenditure caps were repealed in 2014 (with effect from November 2013) and no longer apply.

**Expenditure limits for Australian Capital Territory elections**

The ACT imposed expenditure limits in 2012. They apply during the ‘capped expenditure period’ which is from 1 January of an election year until the end of polling day (s 198) which is in October. The electoral expenditure that is capped covers advertising and publishing costs and excludes administrative costs. The expenditure caps, which are subject to indexing, were set for party groupings at $60,000 per the number of party candidates contesting an election, up to a maximum of five in a five member electorate and seven in a seven member electorate. Independent candidates and Members also had an expenditure limit of $60,000, as did third party campaigners (ss 205F and 205G). The penalty for breaching the cap is the payment of twice the amount by which the cap is breached to the Territory as a debt. At the 2012 election, two third-party campaigners, the Australian Home Heating Association Inc and the Law Society of the ACT paid penalties for breaching the cap relating to third-party campaigners.238

The ACT also has aggregation provisions concerning expenditure by a party or candidate and an ‘associated entity’. The connection between the associated entity and the relevant party or candidate is much closer than that in the NSW equivalent provisions. In the case of the ACT, that relationship involves control.239 A Select Committee of the ACT Legislative Assembly, after considering these aggregation provisions in the light of the High Court’s judgment in *Unions NSW* which struck down the NSW aggregation provisions, recommended retaining the ACT provisions on the basis that they were sufficiently different and justifiable and were therefore more likely to survive a constitutional challenge.240

**Expenditure limits in other Australian jurisdictions**

Expenditure limits were abolished by Western Australia in 1979 and Victoria in 2002. Tasmania, however, continued its expenditure limits 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.241 A political party may not incur expenditure to promote the election of candidates to the Legislative

239 Note that Queensland also had similar aggregation provisions until they were repealed with the expenditure caps in 2014.
241 Electoral Act 2004 (Tas), s 159.
Council, nor may third parties. The expenditure limit for candidates was set at $10,000 in 2005, to which an additional $500 is added every subsequent year. 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. Candidates who do not file their expenditure returns in time are also subject to a penalty and may have their election declared void.

South Australia enacted electoral funding reform legislation in 2013 which will come into effect in 2015. It took a different approach to expenditure limits, providing for them to be accepted voluntarily in exchange for public funding. If a party or group wishes to receive public funding, then the relevant agent must lodge a certificate 24 months prior to polling day agreeing to expenditure caps. Independent candidates can also opt for public funding if their agent lodges the relevant certificate on the day on which the capped expenditure period commences. The capped expenditure period runs from 1 July before the election (which is held in March) until 30 days after polling day – a period of approximately 9 months.

The South Australian expenditure cap will be $500,000 for a party that only runs candidates in the Legislative Council. For parties running candidates in the Legislative Assembly it will be $75,000 per electoral district contested (part of which must be allocated to the candidate, becoming the candidate’s spending cap) and $100,000 for each candidate it runs in the Legislative Council, up to a maximum of five candidates. The agent is responsible for ensuring that the cap is not breached. If it is breached, public funding is reduced by an amount equal to 20 times the amount by which the cap was exceeded. In addition, there are penalties for agents if the cap is breached. No cap is applied to third-party campaigners, but their expenditure must be disclosed. Candidates and parties are prohibited from entering into an agreement with a third-party campaigner for it to incur political expenditure as a means of circumventing the cap.

**Expenditure limits in comparable countries**

**United Kingdom**

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 (which amounts to

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242 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.
243 Electoral Act 2004 (Tas), s 199(5).
244 Electoral Act 2004 (Tas), s 199(5).
245 Electoral (Funding, Expenditure and Disclosure) Amendment Act 2013 (SA).
246 Political Parties, Elections and Referendums Act 2000 (UK), s 79 and Schedule 9.
approximately £19 million for major parties). There is a floor to the expenditure limit. 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. These expenditure limits are not indexed and have remained the same for some time.

Following is a table showing actual expenditure by those political parties that won at least one seat in the 2010 UK general election:

<table>
<thead>
<tr>
<th>Party</th>
<th>Seats Won</th>
<th>Contested</th>
<th>Total spent</th>
<th>England</th>
<th>Scotland</th>
<th>Wales</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conservative</td>
<td>306</td>
<td>631</td>
<td>£16,682,874</td>
<td>£14,298,166</td>
<td>1,273,110</td>
<td>£1,111,598</td>
</tr>
<tr>
<td>Labour</td>
<td>258</td>
<td>631</td>
<td>8,009,483</td>
<td>6,516,412</td>
<td>967,904</td>
<td>525,116</td>
</tr>
<tr>
<td>Liberal Dem</td>
<td>57</td>
<td>631</td>
<td>4,787,595</td>
<td>3,987,035</td>
<td>470,619</td>
<td>329,941</td>
</tr>
<tr>
<td>SNP</td>
<td>6</td>
<td>59</td>
<td>315,776</td>
<td>315,776</td>
<td></td>
<td>144,933</td>
</tr>
<tr>
<td>Plaid Cymru</td>
<td>3</td>
<td>40</td>
<td>144,933</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Green</td>
<td>1</td>
<td>335</td>
<td>325,425</td>
<td>325,425</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

It is notable that the major parties did not spend up to their expenditure limits. These limits are therefore not being applied as a means of reducing campaign expenditure overall.

In each constituency in the United Kingdom a separate limit applies to candidates, depending on the size and the number of voters in the constituency. The constituency limit is not counted as part of the national limit of a political party. The constituency limit used to apply only to the short period between the dissolution of Parliament and the election. This was criticised upon the ground that it was largely ineffective, as it did not pick up expenditure before Parliament was dissolved. The constituency limits were also criticised for being too low.

On 4 August 2014 new higher expenditure limits for candidates came into effect. They will apply to the UK general election in May 2015. The expenditure limits now deal with two distinct periods. The ‘long campaign’ covers the period from 18 December 2014 to 30 March 2015. During this period the expenditure limit for a candidate is £30,700 plus 6p per registered elector in a borough or burgh constituency or 9p per elector in a county constituency. The ‘short campaign’ is the period from the dissolution of Parliament on 30 March 2015 to polling day on 7 May 2015. The expenditure limit for this period is £8,700 plus 6p per elector in a borough or burgh constituency or 9p per elector in a county constituency. This new arrangement therefore takes into account (1) the size and nature of an electorate; (2) the number of registered voters in an electorate; and (3) spending in the period before the dissolution of Parliament as well as the formal campaign period.

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Expenditure limits also apply to third-party campaigners. Until recently, third-party campaigners that did not register with the Electoral Commission were confined to spending during the regulated campaign period a maximum of £10,000 in England or £5,000 in Scotland, Northern Ireland or Wales. The British Government proposed to reduce these limits to £5000 for England and £2000 for Scotland, Wales and Northern Ireland, but after a significant outcry from charities, the amounts were instead increased to £20,000 for England and £10,000 for Scotland, Northern Ireland and Wales.

Third-party campaigners may spend higher amounts if registered, but the applicable expenditure limits are, since the enactment of the Transparency of Lobbying, Non Party Campaigning and Trade Union Administration Act 2014 (UK), significantly lower than they were. Under the previous regime, the maximum spending cap for registered third-party campaigners was £988,500 in the 12 months before the election. The new Act reduces this to an overall cap of £390,000, or up to £319,800 in England (down from £793,500), £55,400 in Scotland, £30,800 in Northern Ireland and £44,000 in Wales if separate campaigns are run in each jurisdiction. A limit of £9,750 for expenditure in any one constituency was also imposed by the new Act.

There are also special limits for ‘targeted spending’ where the campaign activity upon which the money is spent can ‘reasonably be regarded as intended to influence voters to vote for one particular registered political party or any of its candidates’. If that party authorises the third-party campaigner to undertake the campaign, then the third-party campaigner may spend up to any cap authorised by the political party, subject to the overall caps imposed upon third-party campaigners. If the political party does not give its authorisation, then the third-party campaigner is limited in its ‘targeted spending’ to £31,980 in England, £3,540 in Scotland, £2,400 in Wales and £1,080 in Northern Ireland.

The period during which the expenditure of third-party campaigners is regulated will generally be the 12 months before an election is held. However, due to the enactment of this new legislation and the spending by third-parties in relation to the Scottish independence referendum, the capped expenditure period has been reduced on this occasion to the period from 19 September 2014 to 7 May 2015.

New Zealand

In New Zealand, expenditure limits for parties, candidates and third-party campaigners were changed by the Electoral (Finance Reform and Advance Voting) Act 2010 (NZ)

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249 Political Parties, Elections and Referendums Act 2000 (UK) c 41, s 94(5).
252 Transparency of Lobbying, Non-Party Campaigning and Trade Unions Administration Act 2014 (UK), s 28.
253 Transparency of Lobbying, Non-Party Campaigning and Trade Unions Administration Act 2014 (UK), s 30.
which came into force on 1 January 2011. It increased expenditure limits to $1,032,000 per registered party plus $25,000 for each electoral district in which the party runs a candidate, adjusted annually in line with the CPI.\(^{254}\) Candidates have separate expenditure limits of $26,100 for a general election and $52,100 for a by-election. The provision of free broadcasting of party political advertising on the electronic media also has an impact upon expenditure limits.

Any third-party campaigner that wishes to spend more than $12,000 (now adjusted to $12,300 for the 2014 election) on election advertising during a regulated period must be registered. The maximum expenditure for registered third party campaigners was set in 2011 at $300,000 (now $313,000 for the 2014 election)\(^{255}\) and any expenditure over $100,000 must be the subject of an expense declaration. Persons who reside overseas who are not New Zealand citizens or registered electors, overseas corporations and unincorporated bodies based outside New Zealand may not be registered third-party campaigners in New Zealand.\(^{256}\)

**Canada**

In Canada, expenditure limits only apply during the short election campaign period. 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.\(^{257}\) Expenditure limits for candidates are even more complicated with a scale of amounts applied per the number of electors\(^{258}\) multiplied by an inflation adjustment factor, as well as special adjustments for matters such as low population density.\(^{259}\) The expenditure limits are only set shortly before the campaign period starts, because they depend upon the number of registered voters in each electorate. In 2011, however, the expenditure limit for a party that ran a candidate in each of 308 electorates was just over $21 million. The *Fair Elections Act 2014* (Canada) increased expenditure limits by 5%.

Third-party campaigners that spend more than $500 on election advertising expenses must register. Once registered, they can spend up to $201,900 in total on election advertising expenses, but only $4038 per electoral district.\(^{260}\)

\(^{254}\) For the 2014 election, those figures have been adjusted to $1,108,000 for the election expenses of a registered party plus $26,100 per electoral district contested by a candidate for that party: *Electoral Act 1993* (NZ) s 206C, 206D.

\(^{255}\) *Electoral Act 1993* (NZ) s 206V.

\(^{256}\) *Electoral Act 1993* (NZ) s 204K and 207K.

\(^{257}\) *Canada Elections Act* 2000 (Canada), s 422.

\(^{258}\) $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.

\(^{259}\) *Canada Elections Act* 2000 (Canada), ss 440-1.

\(^{260}\) These figures apply to the period 1 April 2014-3 March 2015.
**United States**

In the United States, expenditure limits for election campaigns have been held to be unconstitutional. As a consequence, they only apply where voluntarily accepted – eg a candidate may accept public funding, but on the condition that he or she is subject to expenditure limits. Hence expenditure limits only apply to Presidential candidates if they accept public funding.

Candidates for the 2012 US Presidential election who accepted public funding in the primaries were limited to overall campaign expenditure of $45.6m, with sub-limits in each of the States. The expenditure limit for the general election campaign for a major party Presidential nominee who accepted public funding was $91.2 million (being the amount of the public funding grant). However, for the first time since public funding was established post-Watergate, both major candidates in the 2012 Presidential election, Obama and Romney, rejected public funding as they could raise more money from private donations.

**The constitutional validity of expenditure limits for candidates and parties**

While the imposition of limits upon electoral campaign expenditure have been held to be constitutionally invalid in the United States, this has not been the case in relation to other jurisdictions, such as the United Kingdom, New Zealand and Canada, where they are generally regarded as valid. More controversy arises, however, with respect to bans and limits on third-party expenditure, which is discussed in a separate section below.

**United States**

In the United States, expenditure limits were introduced in 1974 in response to the Watergate scandal. However two years later, in *Buckley v Valeo*, 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. 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

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261 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.
264 Note that there had been expenditure limits for House and Senate candidates dating back to 1911, but they were easily avoided, not adequately enforced and regarded as ineffective.
266 *Buckley v Valeo* 424 US 1 (1976) 55.
will depend upon the ‘size and intensity of the candidate’s support’, such as the number of volunteers and contributors.\(^ {267} \)

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.\(^ {268} \) Yet, any person could 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.\(^ {269} \) In effect, the inability to close the third party loophole meant that all expenditure limits were ineffective and therefore not justified.

As discussed above, 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.\(^ {270} \) 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.\(^ {271} \) 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.\(^ {272} \) 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.\(^ {273} \) However, by raising the limits for one candidate but not the self-funded candidate, it imposed ‘an unprecedented penalty on any

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\(^ {267} \) Buckley v Valeo 424 US 1 (1976) 56.
\(^ {268} \) Buckley v Valeo 424 US 1 (1976), 39-40.
\(^ {269} \) Buckley v Valeo 424 US 1 (1976) 45.
\(^ {270} \) Buckley v Valeo 424 US 1 (1976), 48-9.
\(^ {271} \) Buckley v Valeo 424 US 1 (1976) 53.
\(^ {272} \) 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.
\(^ {273} \) Davis v Federal Election Commission 554 US 738 (2008), 737 (Alito J for the majority).
candidate who robustly exercises [his or her] First Amendment right’ by using personal funds to finance his or her campaign. The majority saw this as imposing a ‘drag on First Amendment rights’. 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, diserves the anticorruption interest’. It again 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.

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. The Supreme Court has further 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.

Canada

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.’

The Canadian courts have also accepted as legitimate a wider range 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.

Like Australia, the Canadian courts place emphasis upon the need for voters to be able to be informed in the exercise of their constitutional duties. The Canadian Supreme Court has taken the view that expenditure limits on political communication help ensure that

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280 R v Blake 42 CCC (3d) 217 (1988), [46].
voters are capable of being adequately informed. Its reasoning, as explained by the majority in *Harper v Canada*, was as follows:

For voters to be able to hear all points of view, the information disseminated by third parties, candidates and political parties cannot be unlimited. In the absence of spending limits, it is possible for the affluent or a number of persons or groups pooling their resources and acting in concert to dominate the political discourse…. If a few groups are able to flood the electoral discourse with their message, it is possible, indeed likely, that the voices of some will be drowned out…. This unequal dissemination of points of view undermines the voter’s ability to be adequately informed of all views….

Spending limits, however, must be carefully tailored to ensure that candidates, political parties and third parties are able to convey their information to voters. Spending limits which are overly restrictive may undermine the informational component of the right to vote.\(^{282}\)

**Australia**

The constitutional validity of electoral expenditure limits has not yet been challenged in Australia. Nonetheless, any imposition of electoral communications expenditure limits on candidates, political parties and third parties would amount to a burden on the implied freedom of political communication. This was made clear by the High Court in *Unions NSW*. Their Honours stated:

> It must be acknowledged that the general scheme of the … Act also effects burdens on the freedom because it places a ceiling on the amount of political donations which may be made and on the amount which may be expended on electoral communications.\(^{283}\)

Hence, the first stage of the *Lange* test is met and the question then is whether the NSW electoral communications expenditure limits serve a legitimate end in a manner that is compatible with the constitutionally prescribed system of responsible and representative government. There are two possible ‘legitimate ends’ that might be employed to justify expenditure limits. First, it may be argued that expenditure limits are aimed at avoiding the risk or perception of corruption and undue influence. While limiting electoral communications expenditure does not directly achieve this, it is arguable that the *effect of doing so* is to reduce the need for political parties and candidates to raise large amounts of money to fund their campaigns and hence to reduce the temptation to accept donations that are intended to influence or corrupt. In the *ACTV* case, McHugh J 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.\(^{284}\) It would also be necessary to look at


\(^{283}\) *Unions NSW v New South Wales* (2013) 88 ALJR 227, [41] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). See also [61].

\(^{284}\) *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 155-6 (Brennan J).
the aim of expenditure limits in terms of the overall scheme of caps on donations and expenditure and increases in public funding. Together, all three elements combine in the legislation to achieve a legitimate end of the avoidance of the risk or perception of corruption and undue influence.

The other potential legitimate end that might be employed is the ‘level playing field’ or ‘fairness’ end that was used in Canada to justify expenditure limits. The argument there was that for electors to fulfil their responsibilities, they needed to be adequately informed and that limits on electoral expenditure ensure that a range of voices can be heard by voters, rather than the domination of political debate by the well-financed. Such an argument would fit in with the derivation of the Australian implied freedom of political communication from ss 7 and 24 of the Constitution and the constitutional implication that voters must be capable of exercising their constitutional functions in a free and informed manner. However, as discussed above, the High Court may be more influenced by the view of the US Supreme Court that notions of ‘fairness’ and ‘level playing fields’ involve the courts in interfering with the choice by voters in elections and are therefore not legitimate ends.

As for the proportionality test, it would depend very much on the extent of the expenditure limits and how they are imposed. 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 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.

South Australia has sought to avoid these problems by taking the American approach of voluntary expenditure caps that are accepted in exchange for public funding. There does not seem to be any constitutional objection to such an approach, but as has proved the case in the United States it will become ineffective if parties consider that they can raise and spend substantially more money without accepting public money. There is also the risk, as in the United States, that the main spending on election campaigns will be undertaken by third-party campaigners whose expenditure is not capped. This in turn creates a risk that third-parties will take the political and policy initiative away from political parties by advertising particular issues and will manipulate election campaigns to suit their own particular interests.

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286 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.

287 Electoral (Funding, Expenditure and Disclosure) Amendment Act 2013 (SA), which comes into force on 1 July 2015.
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. 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.

United Kingdom

Expenditure limits also apply to third parties in the United Kingdom, and have done so since 1918. 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*. 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 the *Representation of the People Act 1983* (UK). 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.

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288 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.

289 *Representation of the People 1918* (UK); and *Representation of the People Act 1983* (UK), s 75.


291 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.
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.²⁹²

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.²⁹³

While the Court accepted that securing equality between candidates and the protection of the rights of others was a legitimate aim,²⁹⁴ 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’.²⁹⁵ The British Government responded by increasing the amount to £500 for expenditure in constituency campaigns. Any campaigning by a third party on behalf of a candidate or with the candidate’s authority, counts under the candidate’s expenditure limit.

Since then, caps for third party expenditure have increased dramatically in the United Kingdom, but as noted above, they have also recently been reduced somewhat. They still, however, permit significant campaigns to be run by registered third-parties.

**United States**

American courts have been noticeably more inclined to strike down limits on third party expenditure in recent years, especially those that involve bans upon direct expenditure on political advertising by corporations or unions. As discussed in Chapter 4 above, the Supreme Court held in *Citizens United v Federal Election Commission*,²⁹⁶ that a federal law banning corporations and unions from spending on electioneering communications within 30 days of a primary and 60 days of a general election was constitutionally invalid. In addition, in *American Tradition Partnership Inc v Bullock*, the Supreme Court

²⁹² Bowman v United Kingdom (1998) 26 EHRR 1, 16-17.
²⁹³ Bowman v United Kingdom (1998) 26 EHRR 1, 10.
held that a State cannot ban direct third-party expenditure by corporations or unions in relation to state elections.\textsuperscript{297} The consequence, as noted above, has been a significant increase in direct third-party expenditure during elections in the United States.

\textbf{Canada}

Canada also has third party expenditure limits at the national level. In 1983 it banned third parties that 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.\textsuperscript{298} 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.\textsuperscript{299}

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 \textit{Harper v Canada}, upheld the validity of the limits on third party electoral expenditure. The majority considered that s 3 of the \textit{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 drown out other voices.\textsuperscript{300} 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’.\textsuperscript{301} 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.\textsuperscript{302}

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.’\textsuperscript{303} Overly restrictive limits would undermine the ability for voters to be

\begin{itemize}
\item \textsuperscript{297} \textit{American Tradition Partnership Inc v Bullock} 567 US _ (2012).
\item \textsuperscript{298} \textit{National Citizens’ Coalition v Canada} (1984) 11 DLR (4th) 481.
\item \textsuperscript{299} \textit{Somerville v Canada} (1996) 136 DLR (4th) 205.
\item \textsuperscript{300} \textit{Harper v Canada} [2004] 1 SCR 827, [72] (Iacobucci, Bastarache, Arbour, LeBel, Deschamps and Fish JJ).
\item \textsuperscript{301} \textit{Harper v Canada} [2004] 1 SCR 827, [72].
\item \textsuperscript{302} \textit{Harper v Canada} [2004] 1 SCR 827, [79].
\item \textsuperscript{303} \textit{Harper v Canada} [2004] 1 SCR 827, [73].
\end{itemize}
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.\footnote{304}{Harper v Canada [2004] 1 SCR 827, [74].}

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.’\footnote{305}{Harper v Canada [2004] 1 SCR 827, [85].}

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.\footnote{306}{Harper v Canada [2004] 1 SCR 827, [9] (McLachlin CJ and Major J).} 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.\footnote{307}{Harper v Canada [2004] 1 SCR 827, [112] - [115].} 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.\footnote{308}{Harper v Canada [2004] 1 SCR 827, at [116].}

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 because only the ‘Yes’ and ‘No’ committees were permitted to expend money, excluding those with other views, such as those who supported abstention.\footnote{309}{Libman v Quebec [1997] 3 SCR 569; 151 DLR (4th) 385.}

The Quebec Court of Appeal has also upheld a provision that banned electoral expenditure by corporations and unions during the Quebec election campaign period.\footnote{310}{United Steelworkers of America (FTQ) Local 7649 v Quebec (Chief Electoral Officer) [2011] QCCA 1043 [33].} In contrast, attempts to extend such a ban to the pre-campaign period have been struck down twice in British Columbia. In the first case, the legislation was struck down because the ban on third-party political advertising was cast too widely as it would have picked up ‘issues’ campaigns.\footnote{311}{British Columbia Teachers’ Federation v British Columbia (Attorney General) [2011] BCCA 408 [66]-[67].} In the second case, the Court of Appeal considered that while electoral fairness might justify such laws during the campaign period, this was not the case outside of that period, where freedom of political communication must prevail.\footnote{312}{Reference Re Election Act (BC) [2012] BCCA 394 [45].}
Nonetheless, the Supreme Court of British Columbia has upheld a requirement that third-parties be registered before they can sponsor electoral advertising. While accepting that the registration procedures infringed freedom of expression, it upheld them under s 1 of the Charter of Rights and Freedoms on the ground that they were demonstrably justified limits in a free and democratic society. This was because they increased the ‘transparency, openness, and accountability of British Columbia’s electoral process’ and promoted an informed electorate.

**Australia**

The capacity of third-party campaigners to participate in political debate was a major concern of the High Court in the *ACTV* case. Third-party campaigners 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 third parties, including $1.1m by the logging industry and $25,000 by the Australian Conservation Foundation. In the 2007 federal election 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. A majority of the Court found that provisions banning third-parties from advertising their political views on electronic media during an election campaign were invalid.

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, so if there are to be caps or bans upon expenditure by political parties and candidates, there must also be some limitations imposed upon third-parties for such schemes to be effective in achieving their legitimate end.

The issue of third-party expenditure arose again in *Unions NSW v New South Wales* in the context of the amendment that sought to aggregate expenditure by parties and their affiliated organisations (s 95G(6)). A majority of the High Court noted that:

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315 *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.
Section 95G(6) also effects a burden on freedom of political communication in restricting the amount that a political party may incur by way of electoral communication expenditure in a relevant period.\(^{318}\)

The NSW Government argued that the purpose of the aggregation provision was to ‘render efficacious the cap on expenditure’ by preventing its circumvention by the expenditure of bodies closely related to a political party.\(^{319}\) The Court, however, saw assumptions in this argument that the expenditure was being derived from a single source and that the objectives of the party and its affiliates coincided. The Court appeared to doubt the accuracy of both assumptions.\(^{320}\) It also queried how the reduction of the overall expenditure of a party and its affiliates ‘is connected to the wider anti-corruption purposes’ of the Act or furthers them. Their Honours noted that unions are not prohibited donors and there was ‘nothing in the provision to connect it to the general anti-corruption purposes’ of the Act. The Court held that s 95G(6) was invalid.\(^{321}\) Keane J added that to treat affiliated bodies differently from other third-party campaigners, who were not subject to aggregation provisions, is to ‘distort the free flow of political communication’, rendering the law constitutionally invalid.\(^{322}\)

It would therefore appear that banning third-party campaigners from engaging in political communication would be most likely held constitutionally invalid and that while capping such expenditure is likely to be valid, it must be done in an equitable manner and it must allow third-party campaigners to have their voices heard and to participate in the free flow of political debate to a reasonable extent.

**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?\(^{323}\)

\(^{318}\) *Unions NSW v New South Wales* (2013) 88 ALJR 227, [61] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). See also Keane J at [163].


\(^{321}\) *Unions NSW v New South Wales* (2013) 88 ALJR 227, [64]-[65] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

\(^{322}\) *Unions NSW v New South Wales* (2013) 88 ALJR 227, [167]-[168] (Keane J).

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. 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.

Expenditure limits on ‘electoral communication expenditure’ came into effect in New South Wales in 2011. Electoral communications expenditure is defined in s 87 of the Election Funding, Expenditure and Disclosures Act 1981 (NSW) as electoral expenditure on, amongst other things, advertisements, how-to-vote cards, the production and distribution of election material, internet, telecommunications, postage, the employment of staff engaged in election campaigns and office accommodation for such staff or candidates (other than the campaign headquarters of a party or electorate offices of elected members). It does not include expenditure on factual advertising regarding the holding of meetings, travel and travel accommodation, research, fundraising costs, the auditing of campaign accounts or party administration.

Expenditure by third parties is deemed not to be electoral expenditure if it is ‘not incurred for the dominant purpose of promoting or opposing a party or the election of a candidate or candidates or influencing the voting at an election.’ This exception was introduced in an attempt to clarify that third-party campaigners can still run issues campaigns, and receive donations for the purposes of running issues campaigns. However, most issues campaigns are intended to influence the views of people, including how they might vote, so the provision is most likely ineffective to achieve that aim.

**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 and attempts to extend them to the ‘pre-campaign’ period have been found to be unconstitutional. In New Zealand, too, the capped expenditure period is short, applying from the date three months prior to an election or the day after the Prime Minister announces the election date, whichever is the later.

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326 Electoral expenditure is defined as expenditure that promotes or opposes a party or candidates for the purpose of influencing voting at an election – s 87(1).
In the United Kingdom expenditure caps 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.

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 (although it has been shortened slightly for the 2015 UK general election, so that the regulated period does not overlap with that for European elections). Limits on the expenditure of candidates in the United Kingdom (as opposed to party expenditure in the national campaign) used to apply only for the period from the dissolution of Parliament to the election, permitting candidates to spend large amounts in marginal electorates without expenditure limits prior to the dissolution of Parliament. As noted above, separate limits now apply to the ‘short campaign’ after the dissolution of Parliament and the ‘long campaign’ which applies from mid-December to the end of March. The difficulty with applying caps to candidates is that they will not formally be candidates until nominated during the election campaign. This leads to difficulties concerning expenditure prior to that period and attempts to date candidature from when a person declares himself or herself to be a candidate.

In NSW this problem is dealt with by way of some deeming provisions. Section 84(2) provides that an individual who accepts a gift for use solely or substantially in relation to their proposed candidacy at a future election is taken to be a candidate at the time of accepting the gift. Equally, s 84(3) provides that an individual who pays for electoral expenditure for his or her election at a future election, is taken to be a candidate when making the payment for the purposes of the Act.

Other timing problems arise concerning the different times at which spending might have been incurred and the relevant services provided. For example, a candidate or party might book and pay for election advertising in advance, well before the regulated expenditure period starts, for advertising that runs during the regulated period. In NSW, this is dealt with by s 95J which provides that ‘electoral communication expenditure is taken to be incurred when the services for which the expenditure is incurred are actually provided or the goods for which the expenditure is incurred are actually delivered.’ It adds that expenditure on advertising is incurred when the advertising is broadcast or published, expenditure on the production and distribution of election material is incurred when it is distributed and expenditure on staff is incurred during the period of their employment.

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328 The regulated period for the 2015 UK General Election now runs from 27 May 2014 to 7 May 2015.
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’. 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.

This was a matter of concern for Mason CJ in the ACTV case in the slightly different context of the banning of political advertising. 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.

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’.

Expenditure limits and government advertising

One of the great advantages of incumbency is the capacity to use government coffers to advertise government policies or to create favourable impressions of the government. This has led to many disputes about the appropriateness of government spending upon advertising in the lead up to elections where the advertising is intended to support a policy that the government is taking to the election or is being used to praise government

330 Bowman v United Kingdom (1998) 26 EHRR 1, 12.

Once laws cap the expenditure of political parties and candidates upon electoral advertising, it is most important that they also deal with government advertising to ensure that incumbents are not able to circumvent caps by using government funds instead to advertise during election campaigns. This point was made by the NSW Coalition parties in response to the 2010 reforms that imposed expenditure caps on parties in relation to election campaigns. Don Harwin said in the Legislative Council:

\begin{quote}
Missing from this bill, and from the Premier's approach, is the issue of government advertising. The effectiveness of caps on campaign expenditure by political parties and candidates is severely undermined without complementary legislation to stop the misuse of government advertising budgets. Members will see from the Notice Paper that I gave notice of the introduction of such a bill to ensure that, as far as possible, public money was not expended on government publicity for a partisan political purpose by empowering the Auditor-General to scrutinise government publicity and report on its capacity to be used for that purpose. The Leader of the Opposition introduced a similar bill in the other place but regrettably the Government rejected the opportunity to implement such reform and bring transparency and accountability to our system. It remains missing from the Government's flawed reform agenda.\footnote{335 NSW, Parliamentary Debates, Legislative Council, 10 November 2010, p 27463 (Don Harwin). For the pre-2011 position on government advertising in NSW, see: Lenny Roth, ‘Government Advertising’, NSW Parliamentary Library Research Service, May 2011: http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/key/GovernmentAdvertising/$File/e-brief.government+advertising.pdf.}
\end{quote}

After the Coalition Government came into power, it caused to be passed by the Parliament the \textit{Government Advertising Act 2011} (NSW). Section 6 provides that a government advertising campaign ‘must not be designed so as to influence (directly or indirectly) support for a political party’. In particular, campaigns must ‘not contain the name, or give prominence to the voice or any image’ of a Minister, a Member of Parliament or candidate. Nor may such a campaign include the name, logo or slogan of a political party. Section 10 states that a government advertising campaign must not be carried out after 26 January before a scheduled election. There are exceptions for public health and safety matters, service announcements, notices required to be published under a law, job advertisements and tender advertising.

If s 6 is breached, the cost of the campaign is payable by the governing party at the time the campaign commenced and may be recovered in a court as a debt due to the Crown. It
would presumably, then, count as part of the expenditure cap of a political party if the campaign took place during the regulated period.

While these provisions are the strictest in the country with respect to government advertising, there is still a way-out for governments if they so choose. Sub-section 4(5) of the Act provides that the regulations may exempt a government advertising campaign, or a class of government advertising campaigns from the application of this Act or the regulations. Exemptions may be unconditional or the subject of conditions.

**The effectiveness of expenditure limits – preventing avoidance**

One of the main problems with imposing expenditure caps is that they can be thwarted if parties are able to set up ‘front’ organisations that expend money on their behalf. The imposition of caps on third-party election spending partially mitigates the risk, but it leaves open the possibility of a proliferation of front bodies running a campaign in concert. As discussed above, the attempt to aggregate the expenditure of political parties and affiliated organisations was found to be constitutionally invalid. In that case, however, it did not apply to ‘front’ organisations manufactured to circumvent the caps, but rather to long-standing industrial organisations that existed independently of political parties and had their own constituency and political views. The differentiation of these organisations from others and the fact that they had a legitimate interest in participating in public debate, led to the law being struck down by the High Court.

The aggregation provision would have had a better chance of survival if it had been amended as proposed by the Select Committee on the Provisions of the Election Funding, Expenditure and Disclosures Amendment Bill 2011. It recommended that ‘section 95G be amended to provide for the aggregation of the electoral communication expenditure of a party and its affiliated organisations into the cap of the party only where the expenditure incurred by the affiliated organisation has the effect of directly advocating a vote for, or is incurred at the request of or in co-operation with, the party to which it is affiliated.’

Section 4(8) of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) also seeks to deem the acts of bodies closely associated with parties to be the acts of those parties. It provides:

> For the purposes of this Act, where anything is done by, on behalf of or for the benefit of, or any property is held by, or in trust for or for the members of, a body or organisation, incorporated or unincorporated, being a body or organisation that:  
> (a) forms part of a party,  
> (b) is established by or under the constitution of a party, or  
> (c) has functions conferred by or under the constitution of a party,
the thing shall be deemed to be done by, on behalf of or for the benefit of that party or the property shall be deemed to be held by that party, as the case may be.

This provision, however, does not pick up electoral expenditure by bodies, created solely for the purpose of spending money on electoral campaigns, which run campaigns co-ordinated with, or in concert with, those of a political party. Nor does it pick up campaigns run in concert by parties and third-party campaigners. Consideration should be given to whether a carefully calibrated provision can be inserted in the Act to capture such forms of circumvention of expenditure caps.

South Australia, in its election funding reforms that are to come into force on 1 July 2015, has a provision which deals a little more widely with the circumvention of expenditure caps as follows:

**130ZC—Prohibition on arrangements to avoid applicable expenditure cap**

If a person to whom this Division applies enters into an agreement or arrangement with a third party such that the third party will incur political expenditure in relation to an election during the capped expenditure period for the purpose of the person to whom this Division applies avoiding its applicable expenditure cap for the election, the person to whom this Division applies is guilty of an offence.

Maximum penalty: $25 000.

Other conceivable ways of circumventing the expenditure caps are for a party to split into separate parties but to run campaigns in concert and support the same candidates, while having the benefit of two or more full expenditure caps, or for a party to endorse two candidates in an electorate in order to get two full candidate expenditure caps, with the money spent upon advertising the primary endorsed candidate. These methods are addressed by ss 95G(2) and 95G(3) of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) which aggregate the cap for ‘associated parties’ (being those that endorse the same candidates or form a recognised coalition) and where two or more candidates are endorsed by the same party or associated parties in an electoral district.

**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. In some countries, such as the United Kingdom, caps for candidates are calculated by reference to factors such as the size and nature of the electorate and the number of registered voters. In New South Wales, the expenditure caps for candidates...
are the same regardless of the size or population of the electorate.
CHAPTER 6 - PUBLIC FUNDING OF POLITICAL PARTIES AND CANDIDATES

Background to public funding in Australia

The beginnings of public funding

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) established a Central Fund (which held two-thirds of the appropriated amount) and a Constituency Fund (comprising the other third). The Central Fund was primarily directed at parties participating in Legislative Council elections, but could also apply to groups and independent candidates for the Legislative Council. The Constituency Fund was directed at candidates for Legislative Assembly elections. To qualify for a payment, a candidate, group member or party member had either to be elected or receive at least 4% of first preference votes. Due to the low quota needed for election in the NSW Legislative Council, a number of elected candidates did not receive 4% of first preference votes, but were still funded because they were elected.

The Act also established a Political Education Fund, from which payments were made annually to registered parties that had qualified for funding from the Central Fund.337 This money could 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. It could not be used for campaigning or party conventions.338

Commonwealth public funding

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. Since 1995 this funding has been given as an entitlement, regardless of what money, if any, was actually spent on the election. This has led to scandals about candidates and parties profiting from election funding.339

337 The amount was calculated, however, by reference to votes received in the Legislative Assembly election, leaving parties that only ran candidates in the Legislative Council without funding.
The amount of funding is calculated by reference to the number of formal first preference votes they received multiplied by an indexed amount. In the current period of 1 July 2014 to 31 December 2014, the indexed amount is $2.56. In 2013, $58,076,456 was spent in public funding to political parties and candidates in relation to the election. This included $23,884,673 to the Liberal Party, $20,774,691 to the Labor Party, $5,531,871 to the Greens, $3,111,073 to the National Party, $2,312,810 to the Palmer United Party and $1,046,495 to the Liberal Democratic Party. Around half of candidates in Commonwealth elections receive sufficient support to obtain some public funding. Public funding schemes were also established in the Australian Capital Territory in 1992, Queensland in 1994, Victoria in 2002 and Western Australia in 2006. All, except for Queensland (see below), apply a 4% threshold for eligibility for public funding.

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. 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.

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. 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.

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343 For a description of public funding schemes in the various States see: Brenton Holmes, ‘Political financing: regimes and reforms in Australian states and territories’, Commonwealth Parliamentary Library Background Note, 19 March 2012.
**New South Wales**

In New South Wales there is currently public funding for the reimbursement of electoral communication expenditure, as well as administrative funding and special funding to small or new parties that otherwise would not qualify for funding.

The scheme for the reimbursement of electoral communication expenditure is set out in Part 5 of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW). There is a threshold for receiving this form of public funding, being the receipt of 4% of first preference votes (in the Legislative Council election or on average across those Assembly electorates that a party contests) or the election of a member (s 57). If parties meet this threshold, then they are entitled to be reimbursed proportions of their actual expenditure during the capped expenditure period.

The method of reimbursement is based upon a division between major and minor parties (although these terms are not given in the Act). A minor party is one which runs endorsed candidates in the Legislative Council but no more than 10 candidates in the Legislative Assembly. If it meets the threshold, it is entitled to be reimbursed 100% of the first third of the amount spent under its expenditure cap, 75% of the second third and 50% of the final third under its expenditure cap. The weighting is towards the lower amounts of spending, on the basis that minor parties have fewer resources and are less likely to spend up to their expenditure cap. While a party would get back 75% of its expenditure if it spent up to 100% of its expenditure cap, it would, for example, get back 87.5% of its expenditure if it only spent up to 60% of its expenditure cap.

In the case of all other parties (i.e. those that run candidates in the Legislative Assembly but don't run candidates in the Legislative Council or those that run more than 10 candidates in the Legislative Assembly) they may be reimbursed 100% of the first 10% of their actual expenditure under the expenditure cap, 75% of the next 80% of expenditure, and 50% of the last 10% of expenditure under the expenditure cap (s 58).

Candidates are also eligible for reimbursement if they meet the applicable threshold (s 60), but the same item of expenditure cannot be claimed by both a candidate and the party (s 61). Payments that are due to a candidate may be directed by the candidate to be paid to the party that endorsed the candidate (s 67), which is usually the case.

Administrative funding of parties was reformed significantly in 2013. In part, it is aimed at defraying the costs involved in administering the scheme of caps on donations and expenditure and the reporting involved in the disclosure scheme. It does not cover, however, any party that does not have a member elected to Parliament. Its focus is solely on those parties that have elected members. There is now a sliding scale for caps up to which actual administrative expenses can be reimbursed. The annual cap starts at $200,000 for the first elected member, reducing to $150,000 for the second, $100,000 for the third, and $83,000 for each elected member thereafter, up to a cap of 25 members in total (s 97E). The sliding scale recognises efficiencies in scale and that the most significant administrative costs arise in establishing and maintaining the management
systems and accounting systems that all parties must have. There is also provision for the reimbursement of the administrative expenses of Independent members, up to a cap of $200,000 each (s 97F). Payments may be made quarterly (s 97GA).

New or small parties that would otherwise not qualify for funding have access to a smaller Policy Development Fund. It applies to parties that have been registered in NSW for at least 12 months. The cap for reimbursement is calculated by reference to the number of first preference votes received by any candidate endorsed by the party at the previous State election. However, there is a floor of a minimum payment of $5000 for any registered party during the first 8 years from its registration (s 97I).

Queensland

In 2011, when the Queensland Government implemented caps upon political donations and campaign expenditure, it also changed the public funding of political parties. The threshold for a party or a candidate to receive public funding was the receipt of at least 4% of first preference votes. Once this was achieved, a registered party was reimbursed all of the first 10% of its electoral expenditure, three quarters of the next 80% of its electoral expenditure and half the remaining 10% of its electoral expenditure, up to its expenditure cap. Candidates were given lower levels of reimbursement, receiving all of the first 10% of their electoral expenditure, half of the next 80% and a quarter of the remaining 10%.

The effect of this change was to increase significantly public funding of eligible parties. For example, under the new system the ALP was reimbursed $5,265,588 for its electoral expenditure at the 2012 election, whereas under the previous arrangements of an amount received per first preference vote, it would have received only $1,110,783. The effect upon smaller parties was also significant. Under the old system, Katter’s Australian Party would have received $480,530, but under the new system it received $1,037,374 and was eligible to receive up to $4,738,000, had it spent more on its election campaign.348

In 2014, public funding for election expenditure reverted back to payments per first preference vote received. This occurred at the same time as caps on donations and expenditure were scrapped and the disclosure threshold was increased to $12,400, allowing parties to receive much more through political donations, both declared and undeclared. Despite the reversion to an amount per first preference vote, the system still works on a reimbursement basis. Hence a registered party is entitled to receive the lesser of the amount calculated by reference to first preference votes and the amount of electoral expenditure it claims to have incurred (as accepted by the Commission). The amount payable per first preference vote for the financial year ending on 30 June 2014 was $2.90 for a party and $1.45 for a candidate. The amount is to be indexed for future years.349

349 Electoral Act 1992 (Qld), s 225.
The Queensland Government initially proposed to raise the threshold for eligibility for public funding to 10% of first preference votes, but this was later reduced to 6%, being two percentage points higher than the previous 4% eligibility threshold.

In addition, administrative funding was previously paid under the 2011 system to registered political parties and independent Members of Parliament. It was paid to eligible parties at a rate of $40,000 per elected member, with a state-wide cap for parties of $1 million. This was repealed in 2012 on the ground that Queensland taxpayers should not have to pay for the administration of political parties, particularly in times of financial constraint. It was replaced in 2014 by ‘policy development payments’, for which a registered political party is eligible if it has at least one elected Member of Parliament. The amount payable is calculated by reference to the number of formal first preference votes given to ‘relevant candidates’, being those who achieved more than 6% of the total number of formal first preference votes in the relevant electoral district. The amounts payable to parties are significant, with almost $4.5 million being allocated to parties before the next election. There is no requirement that the money actually be spent upon policy development. It can be spent upon anything, including campaign advertising.

**Australian Capital Territory**

Registered political parties and independents are eligible for funding if they receive at least 4% of formal first preference votes in an electorate. There is no requirement to prove actual expenditure. At the 2012 election the rate payable was $2.00 per eligible vote. In 2012, the Labor party received $171,982 in public funding, the Liberal Party received $172,064, the ACT Greens received $47,546, the Australian Motorist Party received $9,588 and the Bullet Train for Canberra Party received $8,222. In addition, administrative funding is provided in indexed amounts starting at $20,000 annually for Members of the Legislative Assembly. These amounts cannot be used for electoral expenditure.


351 Electoral Act 1992 (Qld) s 223 – a registered party is entitled to election funding if one of its endorsed candidates receives at least 6% of formal first preference votes. See s 224 re candidates.

352 Guardianship and Administrative and Other Legislation Amendment Act 2012 (Qld), s 15.


354 Electoral Act 1992 (Qld), s 240.


In 2014 a Select Committee of the Legislative Assembly considered the issue of whether there should be full public funding for election campaigns and decided against it as ‘no appropriate model has been identified’. However, it did recommend a substantial increase in public funding of elections to $8.00 per formal first preference vote.  

**South Australia**

South Australia enacted a system of public funding for parties and candidates in 2013, but it does not come into effect until 1 July 2015. It follows the American approach of voluntary acceptance of public funding in exchange for compliance with expenditure limits. If a party or independent candidate lodges a certificate agreeing to comply with expenditure caps, then the party or candidate is eligible for public funding if the 4% threshold of first preference votes is achieved, or if the candidate is elected. Funding is paid on a ‘per vote’ basis, calculated at $3.50 per vote for the first 10% of total votes in the electoral district, reducing to $3.00 per vote for the rest. The intention is to advance ‘political equality by boosting the finances of legitimate minor parties’ and to reduce the ‘significant financial advantage afforded to major parties in circumstance where one blanket figure is applied to a primary vote’.

**Public funding in comparable countries**

**United Kingdom**

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. In 2012-13, the Conservatives, Labour and the Liberal Democrats each received £455,193, the Democratic Unionist Party and the Social Democratic and Labour Party each received £155,788, the Scottish National Party received £171,337 and Plaid Cymru received £151,509.

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In the United Kingdom, there are also grants given to support the Opposition parties in recognition that they have none of the advantages of incumbency. ‘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. The amounts allocated for the payment of ‘Short money’ in 2014-15 are as follows.\(^{361}\)

<table>
<thead>
<tr>
<th>Parties</th>
<th>General</th>
<th>Travel</th>
<th>Leader Opp</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Labour</td>
<td>£5,740,052</td>
<td>£167,203</td>
<td>£777,538</td>
<td>£6,684,794</td>
</tr>
<tr>
<td>Democratic Unionist</td>
<td>161,544</td>
<td>4,705</td>
<td></td>
<td>166,249</td>
</tr>
<tr>
<td>Green Party</td>
<td>64,151</td>
<td>1,868</td>
<td></td>
<td>66,019</td>
</tr>
<tr>
<td>Plaid Cymru</td>
<td>77,598</td>
<td>2,260</td>
<td></td>
<td>79,858</td>
</tr>
<tr>
<td>SDLP</td>
<td>68,532</td>
<td>1,996</td>
<td></td>
<td>70,528</td>
</tr>
<tr>
<td>SNP</td>
<td>181,993</td>
<td>5,301</td>
<td></td>
<td>187,294</td>
</tr>
</tbody>
</table>

‘Cranborne money’ is also paid to support Opposition members and cross-benchers in the House of Lords. In 2014-15 the allocated amounts were £572,717 for Labour and £73,565 for the cross benchers.\(^{362}\) Parties also receive ‘in-kind’ support through free political broadcasts during election campaigns and free postage.

**United States**

Public funding of elections exists in 24 states and 16 local jurisdictions throughout the United States.\(^{363}\) There is little uniformity in the design of these systems.

The most prominent public funding scheme is that for presidential elections. For constitutional reasons, it is a voluntary scheme. There are three elements to it – support for primary elections, support for the presidential election and support for national nomination conventions.

During the primaries, a participating candidate may receive one-for-one matching funds for the first $250 that the candidate receives from each individual contributor. Public funding is therefore related to the popular support for the candidate, based upon the number of small donations that the candidate can raise. To qualify for this public funding, a candidate must (a) be seeking nomination by a political party; and (b) have raised in excess of $5000 in at least 20 states. This is intended to show wide geographical support for the candidate. In return for public funding, the candidate abides by an expenditure limit for all primaries, which in 2012 was approximately $45.6 million. An additional limit applies to expenditure within any one State.\(^{364}\)

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At the general election, if a presidential candidate chooses to accept public funding, then he or she must contain all campaign expenditure to the size of the grant (except for the payment of legal and accounting compliance expenses, which may be funded by private donations). In 2012 the two major party nominees for president were each eligible to receive a flat grant of $91.2 million in public funding. 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.

As noted above, in 2012 neither major candidate\textsuperscript{365} took the public funding, as both considered that they could raise and spend much more from private donations. Indeed, no major candidate has accepted funding for the primaries since Al Gore in 2000 and no major candidate has accepted it for the presidential election since John McCain in 2008. This has undermined the effectiveness of the public funding scheme and given rise to calls for its abolition. In 2011, the Republican Party unsuccessfully proposed abolishing public funding for presidential elections.\textsuperscript{366}

The third source of public funding is subsidies paid for party nomination conventions. In 2012, this amounted to $18.2 million per nominating convention. These subsidies were abolished in April 2014.

\textit{Canada}

In Canada there were three ways in which parties received public funding – tax credits for political donations; reimbursement of a proportion of campaign costs; and quarterly allowances for administrative costs. While the tax credits and the partial reimbursement of campaign costs remain, the quarterly allowance was recently abolished and is being gradually wound down to zero.

The tax credits provided for political donations are much higher than those for charitable donations, making political donations very attractive for the well-off. The level of the tax credit, however, is set on a diminishing scale, starting at 75\% for the first $400 donated and reducing for higher amounts.\textsuperscript{367} The intention is to give an incentive to parties to seek a large number of small donations. In 2009 the tax credit for political donations was estimated to cost the Treasury $20 million.\textsuperscript{368}

Registered political parties that meet the threshold of 2\% of valid votes cast at the election or 5\% of votes cast in a contested electoral district, may be reimbursed half of

\textsuperscript{365} In contrast, three minor candidates, Gary Johnson, Jill Stein and Buddy Roemer received public funding in the primaries: http://www.fec.gov/pages/fecrecord/2013/january/decembrercertifications.shtml.


\textsuperscript{367} Income Tax Act 1985 (Canada), s 127(3).

their election expenses within the expenditure cap. If candidates receive at least 10% of valid votes in their electoral district, they may be reimbursed for 60% of their expenses.

The same threshold of 2% of the national vote or 5% of the vote in an electoral district contested by the party, applies in relation to the quarterly allowance to parties. The allowance is calculated by reference to the party’s proportion of the vote in the previous election. It is now in the process of being wound down to zero after the Harper Conservative Government decided to repeal it against the wishes of the other parties that relied upon it. The amounts provided to parties by the quarterly allowance were significant. In 2011, for example, the Liberal Party received $6,508,786 and the New Democratic Party received $7,141,852. While the biggest beneficiary of the quarterly allowance was the Conservative Party with $11,212,744, it was also by far the greatest beneficiary of public funding through the tax-credits granted for political donations, so it will be proportionately better off than the other political parties once the quarterly allowance is terminated.

In addition, in Canada parties receive indirect public funding through free broadcasting of political advertisements and statements. Each broadcaster is required to make 6.5 hours of prime time broadcasting available for the transmission of political announcements. A registered political party, having at least one candidate whose nomination has been confirmed for an election, may be granted an allocation of broadcasting time. New parties may also request access to free broadcasting time. Television networks are also required to give free broadcasting time, amounting to at least 2 minutes per registered party.

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. 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.

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369 Canada Elections Act 2000, s 435.
370 Canada Elections Act 2000, s 464.
371 Canada Elections Act, SC 2000, c 9, s 345.
372 The factors affecting the allocation of broadcasting time include, with equal weight, (a) the percentage of seats in the House of Commons held by each of the registered parties at the previous general election and (b) the percentage of the popular vote at the previous general election of each registered party: Canada Elections Act, SC 2000, c 9, s 338(1).
373 Canada Elections Act, SC 2000, c 9, s 339.
374 Canada Elections Act, SC 2000, c 9, s 345.
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.\textsuperscript{376} The same point was made by Gleeson CJ in \textit{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.’\textsuperscript{377}

In the \textit{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
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.’\textsuperscript{378}

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’.\textsuperscript{379} 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 \textit{ACTV} case, a number of judges were concerned that the mechanism
for granting free political advertising overly favoured incumbents.\textsuperscript{380} Justice Dawson,

\begin{footnotes}
\textsuperscript{376} \textit{Buckley v Valeo} 424 US 1 (1976), 92-3; \textit{MacKay v Manitoba} [1989] 2 SCR 357; 61 DLR (4th) 385, 392
(Cory J).
\textsuperscript{378} \textit{Australian Capital Television Pty Ltd v Commonwealth} (1992) 177 CLR 106, 239 (McHugh J) [my
emphasis].
\textsuperscript{379} \textit{Mulholland v Australian Electoral Commission} (2004) 220 CLR 181, 238 (Gummow and Hayne JJ);
\textsuperscript{380} \textit{Australian Capital Television Pty Ltd v Commonwealth} (1992) 177 CLR 106, 131-2 (Mason CJ); 172
(Deane and Toohey JJ); and 239 (McHugh J).
\end{footnotes}
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. 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.

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. Apart from the risk that voters will be confused or misled by ‘shell 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 disillusion the public and undermine trust in the system of representative government.

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.’ 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.

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

381 Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106, 190 (Dawson J, dissenting).
382 Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106, 162 (Brennan J); 189 (Dawson J).
383 Mulholland v Australian Electoral Commission (2004) 220 CLR 181, 239 (Gummow and Hayne JJ); 271 (Kirby J); and 306 (Heydon J).
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.\textsuperscript{387}

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.\textsuperscript{388} 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.

If public funding simply enhances the capacity of parties and candidates to engage in political communications, it does not give rise to constitutional problems. However, where public funding is used to substitute for private funding (either as a result of caps or bans upon donations), then the nature, extent and adequacy of the public funding will be critical to the assessment of the constitutional validity of the law.

The possibility that public funding might be regarded as off-setting limitations on donations, thereby avoiding any burden on the implied freedom of political communication, was raised in \textit{Unions NSW v New South Wales}. There, the majority observed:

\begin{quote}
The public funding provided by the … Act is not equivalent to the amount which may be paid by way of electoral communication expenditure under the Act. It is not suggested that a party or candidate is likely to spend less than the maximum allowed. The party or the candidate will therefore need to fund the gap. It follows that the freedom is effectively burdened.\textsuperscript{389}
\end{quote}

Their Honours regarded any reduction of the burden by virtue of the availability of public funding as irrelevant to the first stage of the \textit{Lange} test.\textsuperscript{390} Keane J also pointed out that the public funding provisions were enacted when caps were initially imposed upon donations and were therefore not directed at off-setting the later reduction in the amount of donations resulting from the ban upon donations by corporations, unions and others.\textsuperscript{391}

If there were a complete ban upon donations and all political parties and candidates were provided with public funding up to the limit of the relevant expenditure cap, then there would still be a burden on the implied freedom (because of the expenditure cap) and the question would be whether the overall package, including public funding, was for a legitimate end and was reasonably appropriate and adapted to serve that legitimate end in a manner compatible with the constitutionally prescribed system of representative and

\textsuperscript{389} Unions NSW v New South Wales (2013) 88 ALJR 227, [38] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
\textsuperscript{390} Unions NSW v New South Wales (2013) 88 ALJR 227, [40] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
\textsuperscript{391} Unions NSW v New South Wales (2013) 88 ALJR 227, [117] (Keane J).
This would depend, amongst other things, upon the public funding to be provided to new parties, small parties and independents.

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. 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.

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.

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.

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. It was argued that the use of a taxpayers’ money to 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

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392 See the constitutional analysis above in relation to the validity of expenditure caps and the validity of banning donations.

393 *Buckley v Valeo* 424 US 1 (1976), 94.

394 *Buckley v Valeo* 424 US 1 (1976), 96.

395 *Buckley v Valeo* 424 US 1 (1976), 99-100.

396 *Buckley v Valeo* 424 US 1 (1976), 102-4.

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.\(^{398}\)

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 is 2% of the national vote or 5% of the total vote in the constituencies in which the party runs candidates.\(^{399}\)

**The constitutional validity of public funding schemes that compensate for well-funded opponents**

One of the problems with voluntary public funding schemes if that a publicly funded candidate, who agrees to comply with expenditure limits, may face a privately-funded opponent who is able to spend vast amounts more without limit, or may face attacks from well-funded third party campaigners. In Arizona, under its *Clean Elections Act 1998*, a publicly funded candidate in those circumstances was able to access increased public funding. Once a privately funded candidate exceeded the expenditure limit imposed upon his or her publicly funded opponent, this triggered the making of additional funding to the publicly funded candidate on a roughly dollar for dollar basis of spending above the cap. This was challenged and struck down by the US Supreme Court in 2011 in *Arizona Free Enterprise Club’s Freedom Club PAC v Bennett*.\(^{400}\) While the legislation simply increased the amount that could be spent upon political communication, arguably enhancing First Amendment interests, it was regarded as a penalty upon the speech of the privately funded rival that would discourage spending upon political communication.\(^{401}\) The Supreme Court therefore held it to be invalid.

\(^{398}\) *MacKay v Manitoba* [1989] 2 SCR 357; 61 DLR (4th) 385, 392 (Cory J)

\(^{399}\) *Canada Elections Act* 2000 (Canada), ss 435 and 464.

\(^{400}\) 564 US ___ (2011).

\(^{401}\) 564 US ___ (2011) (Roberts CJ at 10-11).
Allowing the public to decide how public funding is distributed to parties and candidates

Bruce Ackerman and Ian Ayres, in 2002, proposed a system known as ‘Voting with Dollars’, under which each voter would be given a $50 dollar voucher which could be distributed between candidates and parties at federal elections according to the wishes of the voter. In the United States, with 120 million voters, this would inject $6 billion of public funding into the system and would accurately reflect voter support for candidates and parties.

The allocation of the money by voters would be done through the medium of a blind trust established by the Federal Election Commission. The idea is that donations should be secret in the same way that voting became secret to prevent undue influence and bribery at elections. Parties would be unaware of who had actually supported them and would therefore be less susceptible to undue influence. Other, private donations could also be made anonymously to parties and candidates through the Federal Election Commission.

Matching funding

Another way of determining the distribution of public funding is to allow private donors to determine how public funding is distributed, through the use of ‘matching funding’.

In Germany, at least as at 2012, public funding was 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 received in membership fees, contributions by elected representatives and donations of up to €3,300 from natural persons in the previous year. There was also an overall cap for public funding of €133 million and a party could not receive more in public funding than it has otherwise earned in a year from private sources. Payments were made four times a year calculated by estimates based upon former entitlements with adjustments being made when needed.

In practice, this has resulted in about 40% of public funding being distributed according to votes received and about 60% being distributed by reference to funds raised by parties from individuals. This balances the assessment of public support for a party by using both votes recorded at the last election and current public support through membership

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403 The proposed break-up of the $50 was $10 for House elections, $15 for Senate elections and $25 for Presidential elections.
404 *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.
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.\footnote{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.}

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.\footnote{Buckley v Valeo 424 US 1 (1976), 107.}

New York City, for example, 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 $175 per donor (i.e. candidates receive $1050 in public funding for each $175 donation from a separate donor).\footnote{Michael Malbin, Peter Brusoe and Brendan Glavin, ‘Small Donors. Big Democracy: New York City’s Matching Funds as a Model for the Nation and States’ (2012) 11 *Election Law Journal* 3.} Public funding is limited to 55% of the expenditure cap, ensuring that candidates still have to have wide-ranging public support through donations. Donations from corporations that are ‘doing business’ with the City are limited and not subject to matching.\footnote{See the web-site of the New York City Campaign Finance Board: [www.nyccfb.info](http://www.nyccfb.info). See also: UK Electoral Commission, *The funding of political parties*, (December 2004), p 99.}

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.\footnote{UK, House of Commons, Constitutional Affairs Committee, *Party Funding*, (HC 163–1, 2006), p 55.} The UK Electoral Commission preferred the use of tax relief schemes to matching funding, because it regarded matching funding as more administratively complex.\footnote{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 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.

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.\textsuperscript{412}

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’.\textsuperscript{413}

\textbf{Practical issues concerning public funding}

\textit{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 actual 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.\textsuperscript{414} 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.\textsuperscript{415} Hence it cannot form more than one half of a party’s income.

Currently in NSW there is a partial reimbursement scheme for around 75\% of electoral communication expenditure. It does not include all expenses that might arise in an election campaign. There is also public funding for party administration. Both are subject to an initial threshold so that those beneath the threshold must fund 100\% of their electoral and administrative costs (except for those eligible for policy development

funding). If there was a move towards ‘full public funding’, would this just apply to election campaign funding or would it extend to all costs of a political party? If it extended to all costs of the party, then this would mean that parties are effectively controlled by government including the amount of funding they receive, as this would effectively dictate matters such as how many people they could employ and on what salaries and what sort of activities they could undertake, as all would have to fall within whatever public funding was provided. The German issue might then arise about the extent to which political parties must be free from governmental interference.

If, on the other hand, full public funding only went to electoral expenditure, or a sub-set such as electoral communication expenditure, then parties would still need to be able to raise donations to fund other aspects of their activities, leaving them open to the same risks of influence.

**Methods of calculating thresholds and amounts of public funding**

Constitutional courts, as noted above, have generally accepted that there are 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.  

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”’. 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 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 should apply 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 serve a legitimate end in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

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416 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.


418 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.
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). 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.

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 about 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, leaving it with large debts.

A point that ought to be made is that there is a difference between funding that is based upon first preference votes and funding that 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. 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. Hence in New South Wales, funding is granted

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419 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.
421 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.
422 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.
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.\footnote{This is done in Germany: K D Ewing, \textit{The Cost of Democracy – Party Funding in Modern British Politics} (Hart Publishing, Oxford, 2007), p 270.} 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 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.\footnote{Broadcasting Act 1989 (NZ), s 75.} 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.\footnote{Andrew Geddis, ‘The Regulation of Campaign Funding in New Zealand: Practices, Problems and Prospects for Change’ in K D Ewing and Samuel Issacharoff, \textit{Party Funding and Campaign Financing in International Perspective} (Hart Publishing, Oxford, 2006) p 24.} 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.\footnote{In New York City, candidates for district council elections that have a minimum of 75 contributors raising at least $5000, may receive matching funding. Candidates for mayor must raise at least $250,000 from a minimum of 1000 contributors: \url{www.nyccfb.info}.} 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. The main difficulty with this proposal is the extra administration involved in counting these financial votes (although that problem might be reduced by electronic voting). A similar approach is used in Italy, and the United States. 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. The money is distributed according to existing public funding formulas.

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 and will soon be implemented in South Australia. 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. 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. This is particularly the case in the United States where bonus funding for publicly funded candidates facing privately financed opponents has been held to be constitutionally invalid. Where, however, candidates do not qualify for public funding, it may be appropriate that they not be affected by expenditure limits or donation limits.

Where 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. If a system of ‘full public funding’ were proposed, to off-set a ban upon political donations, the public funding could be granted as reimbursement for actual expenditure up to the expenditure cap limit. This would raise questions, however, about how parties and candidates that do not meet the existing threshold for funding are to be treated. It would also require the expansion of the expenditure caps to cover not only all election expenditure but also party administration costs or the retention of a donations system to cover those other costs.

428 Reginald Austin and Maja Tjernström (eds), Funding of Political Parties and Election Campaigns, (International Institute for Democracy and Electoral Assistance, Stockholm, 2003) p 123.
430 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.
431 UK, House of Commons, Constitutional Affairs Committee, Party Funding, (HC 163-1, 2006), p 47.
433 Canada Elections Act 2000 (Canada), s 435.
If all candidates and parties are publicly funded, then it would encourage large numbers of hopeless candidates to run for elected office at the tax-payer’s expense (unless there were tougher nomination conditions, which might raise their own constitutional problems). If some candidates and parties, being those that lack public support, are not publicly funded, then they must be permitted to raise funds in some manner to cover their expenses. If a split system is run, with those achieving 4% or more of first preference votes receiving full public funding and banned from receiving donations, and those receiving less than 4% of first preference votes having to be self-funded through private donations, then this needs to be known before the elections, as candidates and parties that do not get public funding would need to know how much they could spend, based upon how much they have raised. If a split system were run, therefore, it may be necessary to determine public funding in advance by some method other than voting – eg the ‘voting with dollars’ system discussed above, or a qualifying method under which parties or independent candidates must have a particular number of registered supporters, each of whom has paid a small amount, such as $10.

**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.\(^{434}\)

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.\(^{435}\) At the 2010 election, alone, it has been estimated that the Labor Party spent $14 million and the Coalition spent $12.7 million on free-to-air television advertising alone.\(^{436}\)

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 still be given to reducing campaign expenditure by requiring broadcasters to provide free or ‘at cost’ advertising to political

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parties during election campaigns. Care would need to be taken to avoid breaches of s 51(xxxi) of the Constitution. 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 serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative government. 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. It could be capped by virtue of the fact that public funding comes from a particular fund, the size of which is determined by other factors (eg in the United States, the fund for presidential campaign public funding is determine by tax-payers checking a box on their tax returns). Capped public funding gives budgeting certainty and limits the financial exposure of taxpayers.

437 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).


439 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.
CHAPTER 7 – ENFORCEMENT AND ANTI-AVOIDANCE MEASURES

Offences and penalties

New South Wales

In New South Wales, the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) makes many acts in relation to political donations ‘unlawful’. For example, it is unlawful for:

- a person to accept a political donation to a party, candidate or third-party campaigner that exceeds the applicable cap (s 95B);
- a party, candidate or third-party campaigner to incur electoral communications expenditure that exceeds the applicable cap (s 95I);
- political donations to a party to be used otherwise than for the objects and activities of the party (s 96(1)), including for the personal use of an individual acting in a private capacity (s 96(2));
- a party to make payments for electoral expenditure for a State election campaign except from the State campaign account (s 96(3));
- a candidate, member or group to accept political donations unless the donations are made to the official agent of the candidate, member or group (s 96A(1)-(2));
- a third-party campaigner to make electoral communication expenditure or accept political donations for the purpose of such expenditure, unless the third-party campaigner is registered, has an official agent and the payments are made by, and donations are made to, the official agent using an official campaign account (s 96AA);
- a person to accept a reportable political donation without making a record of the details and providing a receipt (s 96C);
- a person to accept a political donation from an individual who is not enrolled on the electoral roll or an entity that does not have an Australian Business Number or other relevant business number (s 96D);
- a person to make or accept certain indirect campaign contributions (other than volunteer labour) to a party or candidate greater than $1000 in value (s 96E);
- a party or a candidate or member endorsed by a party to make a political donation to a candidate or group not endorsed by that or any other party (s 96EA);
- a person to accept a reportable political donation from an unknown source (s 96F);
- a person to receive a reportable loan without recording the details (s 96G);
- a prohibited donor to make a political donation (s 96GA(1));
- a person to make a political donation on behalf of a prohibited donor (s 96GA(2));
• a person to accept a political donation that was made by a prohibited donor or by someone on behalf of the prohibited donor (s 96GA(3));
• a prohibited donor to solicit another person to make a political donation (s 96GA(4)); and
• a person to solicit another person on behalf of a prohibited donor to make a political donation (s 96GA(5)).

Whether or not these unlawful acts amount to criminal offences is dealt with in Division 5 of Part 6 of the Act. Unlawful acts that involve breaches of caps on political donations and electoral expenditure result in the relevant person being guilty of an offence ‘if the person was, at the time of the act, aware of the facts that result in the act being unlawful’ (s 95HA(1)). This does not mean that the person must have known that the act was unlawful. It is not a question of knowledge about the law. Rather, the question is whether or not the person knew all the facts that cumulatively resulted in the unlawful act occurring. For example, if the act is unlawful because of aggregation provisions but the person receiving the donation was not aware that a number of donations had been given that exceeded the aggregation cap, no offence would be committed.

Sub-section 96HA(2) also makes it an offence if a person makes a donation ‘with the intention of causing the donation to be accepted in contravention of Division 2A’, which deals with caps on donations. Hence, although s 95B only prohibits the acceptance of a political donation that breaches the applicable cap, not the making of that donation, this is remedied by s 96HA(2) which makes it an offence to make the donation where there is an intention of causing it to be accepted in contravention of s 95B. For example, if a person gave a political donation of $10,000 to a candidate, intending that it be accepted in breach of the cap, he or she would be guilty of an offence.

Where an unlawful act is an offence, the maximum penalty in the case of a political party is 200 penalty units (i.e. a fine of $22,000) or in any other case 100 penalty units (i.e. a fine of $11,000). Further, if proceedings are commenced in the Local Court, the maximum penalty is 40 penalty units (a fine of $4,400) (s 111(2)).

In relation to the other unlawful acts listed above that do not involve breaches of caps on donation or expenditure, a person is also guilty of an offence if the person was at the time of the act aware of the facts that resulted in the act being unlawful (s 96I). The same penalties apply.

In addition, if a person unlawfully accepts a political donation, loan or indirect campaign contribution, an amount of equal value (or double if the person knew the act was unlawful) may be recovered as a debt due to the State from the relevant party or person (s 96J). This is the case even if the actual acceptance was not unlawful because the person accepting the donation was unaware that other donations had been made by the same donor, causing the donation to exceed the aggregate cap.
Proceedings for an offence against the Act can only be commenced within three years of the offence being committed (s 111(4)). Proceedings can only be commenced with the consent of the Election Funding Authority (s 111(5)).

Alison Byrne of the NSW Electoral Commission argued in a recent paper that the enforcement provisions concerning political donations and expenditure are inadequate and ineffective because of the necessity of proving knowledge in relation to each separate element of the offence. She observed:

Funding and disclosure laws in NSW are inadequate. Contraventions of the provisions have not, to date, been prosecuted due to the difficulty in proving knowledge on the part of the accused for each element of the offence. The standard of liability does little to promote the objects of the EFED Act when breaches such as exceeding donation and expenditure caps, accepting donations from prohibited donors and failure to maintain a separate campaign account go unpunished. Further, there is little deterrent value to enforcement provisions that are not applied.

She suggested that some offences should be made strict liability offences so that they could be properly enforced and would operate as an effective deterrent. She considered that this would be suitable where the penalties are relatively low (eg a fine) and where the offender holds a position of responsibility (eg a party agent) and it is reasonable to expect that he or she ought to be aware of the applicable law.

**International**

According to IDEA, most countries that have penalties for offences concerning unlawful campaign finance impose both fines and imprisonment. For example, in Germany custodial sentences of 3-5 years apply for certain campaign finance law breaches.

Some countries, however, have additional penalties for those who breach campaign finance laws. For example, in Malta an offender is prohibited from voting or being elected to office for four years and if already holding elected office, he or she is removed from it. In Malaysia an offender is prohibited from voting or being elected for a period of five years from conviction. In Portugal an offending party’s public funding is suspended. In Tonga, the election of any offender is declared void and he or she is removed from office.

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440 This will be the Electoral Commission once the Electoral and Lobbying Legislation Amendment (Electoral Commission) Act 2014 (NSW) comes into force.
442 IDEA, ‘What penalties are envisioned for offences related to unlawful conduct of campaign financing?’: [http://www.idea.int/uid/fieldview.cfm?field=481](http://www.idea.int/uid/fieldview.cfm?field=481).
443 Germany, Bundestag, ‘State funding of political parties in Germany’, revised 1 November 2012: [http://www.bundestag.de/blob/189744/554b4ea7746b48ef31612792a9cfc461/party_funding_05-data.pdf](http://www.bundestag.de/blob/189744/554b4ea7746b48ef31612792a9cfc461/party_funding_05-data.pdf).
444 IDEA, ‘What penalties are envisioned for offences related to unlawful conduct of campaign financing?’: [http://www.idea.int/uid/fieldview.cfm?field=481](http://www.idea.int/uid/fieldview.cfm?field=481).
Canada

In Canada, election campaign offences have penalties that routinely include the possibility of imprisonment as well as a fine. Offences include some that impose strict liability and, others that require the proof of intent. Offences may be prosecuted summarily or on indictment. Strict liability offences have maximum penalties of a fine of $2000 or 3 months imprisonment or both. Offences involving intent that are prosecuted on indictment have a maximum penalty of a fine of $50,000 or imprisonment for 5 years or both.\(^{445}\)

In addition, certain offences are classified as ‘illegal practices’ or ‘corrupt practices’, such as accepting a prohibited gift of other advantage. These attract an additional form of punishment, as follows:

\(502(3)\) Any person who is convicted of having committed an offence that is an illegal practice or a corrupt practice under this Act shall, in addition to any other punishment for that offence prescribed by this Act, in the case of an illegal practice, during the next five years or, in the case of a corrupt practice, during the next seven years, after the date of their being so convicted, not be entitled to

\(a\) be elected to or sit in the House of Commons; or

\(b\) hold any office in the nomination of the Crown or of the Governor in Council.\(^{446}\)

United States

In the United States, campaign finance offences may also lead to imprisonment. If the offence involves a contribution, donation or expenditure between $2000 and $25,000, then the penalty is a fine or a maximum 1 year imprisonment. If it involves $25,000 or more, it is a fine of up to $250,000 or a maximum 5 years imprisonment.\(^{447}\)

Campaign officials and politicians have been imprisoned campaign finance offences. For example, in 2013 in New York the campaign treasurer of a mayoral candidate and a fundraiser for the candidate were both imprisoned for conspiracy to circumvent the $4950 contribution limit by funneling donations through other persons. The judge noted that prison sentences were necessary because the crimes undermined the electoral process and the public’s confidence in the system.\(^{448}\) In 2013 a federal congressman, Jesse Jackson

\(^{445}\) Canada Elections Act, s 500(1)-(5).

\(^{446}\) Canada Elections Act, s 502(3).

\(^{447}\) 2 USC § 437g(d)(1).

Jr, was convicted of the misuse of $750,000 of campaign contributions for personal use and sentenced to two and a half years in prison.\textsuperscript{449}

**New Zealand**

In New Zealand penalties under the *Electoral Act* for corrupt practices are up to 2 years imprisonment or a fine of $100,000 for candidates, party secretaries or registered third parties or $40,000 for others.\textsuperscript{450} Penalties for illegal practices are fines of up to $40,000 for candidates, party secretaries or registered third parties and up to $10,000 for others.

**United Kingdom**

The United Kingdom also has custodial sentences for breaches of campaign finance laws. For example, the penalty for the offence of facilitating the making of donations by impermissible donors is a fine or 6 months imprisonment for a summary conviction and a fine or 1 year imprisonment if charged on indictment.

**Anti-circumvention measures**

While New South Wales has provisions that address specific types of circumvention of caps, such as a ban on certain indirect donations and an offence for prohibited donors to solicit others to make donations on their behalf, there is no general anti-circumvention provision with an appropriately stiff penalty.

In Canada, s 405.2 of the *Canada Elections Act* expressly prohibits any attempt to circumvent caps on donations or any collusion to do so. It provides:

\begin{itemize}
\item[(405.2 (1))] No person or entity shall
  \begin{itemize}
  \item[(a)] circumvent, or attempt to circumvent, the prohibition under subsection 404(1) or a limit set out in subsection 405(1) or section 405.31; or
  \item[(b)] act in collusion with another person or entity for that purpose.
  \end{itemize}
\end{itemize}

\begin{itemize}
\item[(2)] No person or entity shall
  \begin{itemize}
  \item[(a)] conceal, or attempt to conceal, the identity of the source of a contribution governed by this Act; or
  \item[(b)] act in collusion with another person or entity for that purpose.
  \end{itemize}
\end{itemize}

\begin{itemize}
\item[(3)] No person who is permitted to accept contributions under this Act shall knowingly accept a contribution that exceeds a limit under this Act.
\end{itemize}


\textsuperscript{450} *Electoral Act 1993* (NZ) pt 7.
Prohibited agreements

(4) No person or entity shall enter into an agreement for the provision for payment of goods or services to a registered party or a candidate that includes a term that any individual will make a contribution, directly or indirectly, to a registered party, a registered association, a candidate, a leadership contestant or a nomination contestant.

Punishment for such an offence can range up to 5 years imprisonment (s 500(5)). In addition, s 405.3 prohibits donations being made through an intermediary.

In the United Kingdom there is also a broad anti-circumvention provision in the Political Parties, Elections and Referendums Act 2000 (UK):

61 Offences concerned with evasion of restrictions on donations

(1) A person commits an offence if he–
(a) knowingly enters into, or
(b) knowingly does any act in furtherance of,
any arrangement which facilitates or is likely to facilitate, whether by means of any concealment or disguise or otherwise, the making of donations to a registered party by any person or body other than a permissible donor.

(2) A person commits an offence if–
(a) he knowingly gives the treasurer of a registered party any information relating to–
(i) the amount of any donation made to the party, or
(ii) the person or body making such a donation, which is false in a material particular; or
(b) with intent to deceive, he withholds from the treasurer of a registered party any material information relating to a matter within paragraph (a)(i) or (ii).

New Zealand also has express anti-circumvention provisions. For example, the circumvention of the expenditure caps for candidates (set out in s 205C) is prohibited by s 205F(3) of the Electoral Act 1983 (NZ), which provides:

(3) Every person who enters into an agreement or enters into an arrangement or understanding with any other person for the purpose of circumventing either of the maximum amounts prescribed in section 205C is guilty of a corrupt practice.

Equally, the circumvention of a cap of $12,500 for political advertising by unregistered third parties (set out in s 204B(1)(d)) is prohibited by s 204D, which provides:

204D Offence to avoid limit set out in section 204B(1)(d)
(1) An unregistered promoter may not enter into an agreement, or enter into an arrangement or understanding, with any other person for the purpose of circumventing the maximum amount prescribed in section 204B(1)(d).
(2) A body corporate or unincorporated may not encourage its members to take any action for the purpose of circumventing the maximum amount prescribed in section 204B(1)(d).
(3) No person may incorporate or form 2 or more bodies corporate or unincorporated for the purpose of circumventing the maximum amount prescribed in section 204B(1)(d).
(4) Every person who wilfully contravenes subsection (1), (2), or (3) is guilty of an illegal practice.

Note that this provision goes so far as to prohibit the incorporation of a body or the formation of two or more bodies for the purposes of circumventing the cap. Section 206X(3) also prohibits the circumvention of caps imposed on registered third-parties. Sections 207J and 207L prohibit the circumvention of bans on anonymous and foreign donations.

Gifts

Another area where an express prohibition may need to exist concerns gifts made to candidates, as they may be disguised forms of political donations. In New South Wales the declaration of gifts is dealt with by way of a pecuniary interests register and a requirement of a code of conduct. Clause 3 of the Code of Conduct for Members of Parliament provides that Members must not accept gifts that may pose a conflict of interest or which might give the appearance of an attempt to improperly influence the Member in the exercise of his or her duties.

In Canada, there is a legal requirement that prohibits candidates from accepting gifts that may be seen to influence them and candidates must report all gifts over $500 received while a candidate. The Canada Elections Act provides:

92.2(1) No candidate shall accept any gift or other advantage that might reasonably be seen to have been given to influence him or her in the performance of his or her duties and functions as a member, were the candidate to be elected, during the period that
(a) begins on the day on which he or she becomes a candidate; and
(b) ends on the day on which he or she withdraws, in the case of a candidate who withdraws in accordance with subsection 74(1), on the day on which he or she becomes a member, in the case of a candidate who is elected, and on polling day, in any other case.

Exception
(2) Despite subsection (1), a candidate may accept a gift or other advantage that is given by a relative or as a normal expression of courtesy or protocol.
Such an offence is deemed a ‘corrupt practice’, which can result in a person being prohibited from running for Parliament or holding a Government office for seven years (s 502(3)).

**Limits on prosecutions**

In New South Wales there is a three year limit for bringing prosecutions for offences, running from the date the offence was committed. In many cases, the offence will not be revealed until after this limitation period has ended.

Limitation periods, however, may be longer in other jurisdictions. For example, under s 511 of the *Canada Elections Act*, if the Electoral Commissioner believes on reasonable grounds that an offence has been committed, he or she may refer the matter to the Director of Public Prosecutions who decides whether to initiate a prosecution. Prosecutions for election campaign offences must commence no later than 10 years after the offence is committed and no more than five years after the Electoral Commissioner became aware of the facts giving rise to the prosecution (s 514).
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.