TOWARDS A MORE DEMOCRATIC POLITICAL FUNDING REGIME IN NEW SOUTH WALES

A Report Prepared for the New South Wales Electoral Commission

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LIST OF RECOMMENDATIONS

Recommendation 1: 'Associated entities' should be subject to disclosure obligations.

Recommendation 2: Returns should disclose the total receipts of political parties and associated entities.

Recommendation 3: The returns of political parties and associated entities should itemise sums received in the six-month disclosure period that exceed $1000.

Recommendation 4: If a political party, related political parties and associated entities together receive $100 000 or more from a single donor in a six-month reporting period, an obligation should be imposed to disclose gifts within 14 days.

Recommendation 5: If a donor makes a political donation of $100 000 or more to a political party, related political parties and its associated entities as a whole in a six-month reporting period, an obligation should be imposed to disclose these gifts within 14 days.

Recommendation 6: Political parties and associated entities should be required to lodge weekly returns during election periods that disclose details of receipts with sums to be itemised when $1000 or more is contributed by a person for the benefit of a party as a whole, whether to national, state or territory branches of that party.

Recommendation 7: There should be a ban on receiving anonymous contributions of $200 or more by candidates, political parties, associated entities and third parties.

Recommendation 8: Election spending limits should apply at least for a period of six months prior to the elections with consideration given to having the limits apply for the entire duration of the electoral cycle.

Recommendation 9: In principle, election spending limits should cover 'electoral expenditure' as defined by the *Election Funding and Disclosures Act 1981* (NSW) and/or 'campaign expenditure' as defined by the UK *Political Parties, Elections and Referendum Act 1998.*

Recommendation 10: The level of election spending limits should be further investigated with serious consideration given to setting it according to the level of spending in the 2003 NSW Elections.

Recommendation 11: Election spending limits should be imposed at both state and constituency levels.

Recommendation 12: In designing elections spending limits, serious consideration should be given to the Canadian system of election spending limits.

Recommendation 13: Third parties should be subject to election spending limits.

Recommendation 14: Contribution limits set at a low level (e.g. $1000 per annum for each individual) should be adopted as part of a reform package including increased public funding and election spending limits.

Recommendation 15: The implementation of the contribution limits should be phased in.

Recommendation 16: Membership fees (including trade union affiliation fees) should be set at a reasonable level and should be exempt from contribution limits.

Recommendation 17: Ministers and parliamentarians should be banned from attending party fund-raisers (as is the case in Queensland).

Recommendation 18: There should be an obligation placed on government departments to publish at regular intervals specific information on the meetings between lobbyists and government representatives including the name of the

lobbyist/s, dates of contact, meeting attendees and a summary of issues discussed. This obligation should extend to party fund-raisers.

Recommendation 19: A Party and Candidate Support Fund should be established to provide for:

- election funding payments;
- annual allowances; and
- policy development grants.

Recommendation 20: The NSW Government should implement the Senate Finance and Public Administration's recommendations concerning disclosure of government advertising information (with adaptations to the different system of government departments).

Recommendation 21: The NSW Parliament Public Accounts Committee, or another appropriate parliamentary committee, should conduct annual inquiries into NSW Government advertising.

Recommendation 22: The NSW Government Advertising Guidelines should be amended to require that fact be distinguished from opinion.

Recommendation 23: The specific prohibitions relating to party-political advertising found in the NSW Government Advertising Guidelines should be maintained.

Recommendation 24: The exception of 'appropriate public information' in the 'quarantine' period prohibition should be removed.

Recommendation 25: The length of the 'quarantine' period should be increased beyond two months in the lead up to state elections with serious consideration given to increasing it to six months in the lead up to such elections.

Recommendation 26: Measures should be taken in order to provide regular independent scrutiny of the implementation of the NSW Government Advertising Guidelines.

Recommendation 27: Consideration should be given to providing regular independent scrutiny of the NSW Government Advertising Guidelines through:

- the NSW Auditor-General having oversight of NSW government advertising; and/or
- strengthening of the Peer Review System.

I. INTRODUCTION: A DANGEROUSLY UNSUSTAINABLE SYSTEM

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

> My experience tells me the current system is dangerously unsustainable… If left unchecked, spiralling media costs will continue to fuel the need for our political parties to seek donations. There is no doubt the Australian public are uncomfortable with the interaction of donations and politics. They have every right to be. It is my strong belief that all political parties need to work together to change the funding of the political process.[1]

Another former general secretary of the NSW ALP, Senator Mark Arbib – now federal Minister for Employment Participation – has echoed Roozendaal's sentiments by calling for corporate contributions to be scrapped in favour of a publicly-funded system to 'ensure the integrity of the Australia's political system'.[2] Last year, then NSW Premier Nathan Rees committed to the coming state elections being conducted under 'a public funding model',[3] a commitment that his successor, current NSW Premier Kristina Keneally, has stated that she will honour.[4]

Disquiet with the NSW political finance regime cuts across party lines. Andrew Stoner, the leader of the NSW National Party, has called for 'fundamental reform of political fundraising to limit the influence of unions and corporations'.[5] Opposition

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[1] New South Wales, *Parliamentary Debates*, Legislative Council, 21 September 2004, 11117 (Eric Roozendaal), <http://www.parliament.nsw.gov.au/prod/parlment/members.nsf/0/d9ccd231bed39458ca256ebe0004b5ab/$FILE/Roozendaal.pdf> at 28 January 2008.

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

[3] Leesha McKenny and Lisa Carty, 'Rees Sets Own Agenda', *Sydney Morning Herald* (Sydney), 15 November 2009, <http://www.smh.com.au/national/rees-sets-own-agenda-20091114-ifj9.html> at 10 February 2010.

[4] Brian Robins, 'Election Campaign Funding Hits Hurdle', *Sydney Morning Herald* (Sydney), 2 January 2009; ABC Television, Interview with Kristina Keneally, *Stateline*, 4 December 2009, <http://www.abc.net.au/news/video/2009/12/04/2762677.htm> at 27 January 2010.

[5] Andrew Stoner, 'Counting the Cost of Political Advertising', *Daily Telegraph* (Sydney), 27 September 2007, 1.

Leader, Barry O'Farrell, has said that a Coalition government would adopt a 'whole-of-system' approach that involved election spending limits, limits on political donations and limiting government advertising in the lead up to elections. [6] NSW Liberal Party Shadow Treasurer, Michael Baird, has also been forthright with his concerns by urging reductions in political donations on the ground that:

> Where political donations are corrosive, is when the donations are sought to influence outcomes, and directly taint or corrupt an impartial process … The ability to buy legislation remains a potential reality.[7]

These voices should be heeded. They testify to the gravity of the issues involved: a key index of the health of a state's democracy is the character of its political finance regime. These voices also represent a vehement rejection of the status quo. Following the groove of current practices is, in the words of Roozendaal, 'dangerously unsustainable'.

This report joins in this chorus of calls for reform. It has four main sections. Following this introduction, Part II identifies the aims of a democratic political finance regime whilst Part III describes current funding and spending patterns of NSW political parties. Part IV of the report provides a critical evaluation of the NSW political finance regime based on the aims of political finance regimes. This evaluation identifies significant problems, specifically:

- deficiencies with the disclosure system;
- corruption of the political process through the sale of access and influence;
- an unfair playing field in NSW state elections due to election spending patterns; and
- a pre-occupation with fundraising undermining the health of the political parties.

Part V of the report provides a blue-print for reform to address these problems. Key elements of this blue-print are:

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[6] McKenny and Carty, above n 3.
[7] Quoted in Andrew Clennell, 'Baird the Younger Honours Father', *Sydney Morning Herald* (Sydney), 30 May 2007, 5.

- a more robust disclosure scheme;
- election spending limits;
- contribution limits (with an exemption for membership fees);
- stricter regulation of fund-raisers;
- a Party and Candidate Support Fund; and
- enhanced accountability of government advertising.

The analysis in Part V stresses that there is no constitutional impediment to the New South Wales Parliament enacting this reform package under current laws and that it should do so without waiting for a national scheme.

A note: The author was commissioned by NSW Electoral Commissioner Colin Barry to write this report on NSW political funding and its regulation. The views expressed in this report are that of the author's and do not necessarily represent the views of the NSW Electoral Commission or the NSW Electoral Commissioner.

II. AIMS OF A DEMOCRATIC POLITICAL FINANCE REGIME

A democratic political finance regime should:

- protect the integrity of representative government;
- promote fairness in politics;
- support parties in performing their functions; and
- respect political freedoms.

A. Protecting the Integrity of Representative Government

As the Royal Commission on WA Inc rightly observed, the 'architectural principle' of the Australian governmental system is that elected officials are accountable to Australian citizens and expected to act in the public interest.[8] The first element of this principle, *accountability*, most importantly requires that elected officials be in 'a constant condition of responsiveness' to the citizens.[9] There is no such responsiveness without regular elections.[10] Not only should there be responsiveness during elections

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[8] Western Australia, Royal Commission into Commercial Activities of Government and Other Matters (Chair: G A Kennedy), *Report on WA Inc: Part II* (1992) 1–10.
[9] Hanna Fenichel Pitkin, *The Concept of Representation* (1967) 233 (emphasis original).
[10] Ibid 234.

but also in between elections. This was recognised by Mason CJ in *Australian Capital Television Pty Ltd v Cth:*

> the representatives who are members of Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as representatives of the people. And in the exercise of these powers the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act.[11]

Public accountability is also fundamentally concerned with public confidence hence, elected officials 'should act so as to create and maintain public confidence in their actions and in the legislative process'.[12]

The second element of this principle, *acting in the public interest,* can, of course, take on various meanings and is (and should be) hotly contested in the political arena.[13] However, what is perhaps central and uncontroversial is the merit principle: elected officials 'should act on reasons relevant to the merits of public policies or reasons relevant to advancing a process that encourages acting on such reasons'.[14]

Political funding can undermine the principles of accountability and acting in the public interest by leaving in its wake particular kinds of corruption.[15] Secrecy can lead to *corruption of electoral processes*: effective accountability through elections requires informed voting – citizens will not, however, be able to cast informed votes if they are in the dark as to the finances of the parties and candidates. A democratic political finance regime should be an antidote to this type of corruption 'by providing

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[11] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138 ('*ACTV*') (emphasis added).
[12] Dennis Thompson, *Ethics in Congress: From Individual to Institutional Corruption* (1995) 70–1.
[13] Some of these disagreements stem from the complex character of political representation, see Pitkin, above n 9, Ch 10. Speaking of the American context, for instance, Thompson has spoken of '[the] classic tension in representative government … [t]he dual nature of Congress – as an assembly of local representatives and as a lawmaking institution': Thompson, above n 12, 69.
[14] Thompson, above n 12, 20.
[15] As the following discussion indicates, there are various shades and meanings of corruption: see, for example, Editors, Introduction in Arnold J Heidenheimer, Michael Johnston and Victor T LeVine (eds) *Political Corruption: A Handbook*, (1990) 3, 7–13; Syed Hussein Alatas, *Corruption: Its Nature, Causes and Functions* (1990) 1–5; Oskar Kurer, 'Corruption: An Alternative Approach to its Definition and Assessment' (2005) 53 *Political Studies* 222.

details of the funding sources of political parties'.[16] As emphasised by Kim Beazley, when proposing the federal funding and disclosure regime as Special Minister for State:

> The whole process of political funding needs to be out in the open … Australians deserve to know who is giving money to political parties and how much.[17]

The other way political money threatens the integrity of representative government is through *corruption of public office* or, put differently, the 'improper use of public office for private purposes'.[18] There are three main forms of such corruption. First, there is *corruption through graft* when the receipt of private funds directly leads to political power being improperly exercised in favour of contributors. Bribery of public officials is a prime instance of such corruption. Such corruption was at issue in WA Inc and the Fitzgerald Inquiry into the Joh Bjelke Petersen Queensland Government. Similarly, it was of such corruption that former Queensland Minister, Gordon Nuttall was found guilty.[19]

Second, there is *corruption through undue influence.* Such corruption is much more insidious and constitutes a species of conflict of interest. Substantial political contributions tend to create a conflict between private interests and public duty[20] and, therefore, the possibility that holders of public office will give undue weight to the interests of their financiers rather than deciding matters on their merits and in the

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[16] Joint Standing Committee on Electoral Matters, Commonwealth Parliament, *Interim Report on the Inquiry into the Conduct of the 1993 Election and Matters Related Thereto: Financial Reporting by Political Parties* (1994) [7].
[17] Commonwealth, *Parliamentary Debates*, House of Representatives, 2 November 1983, 2215 (Kim Beazley, Minister for Aviation, Special Minister of State and Minister Assisting the Minister for Defence: 2nd Reading Speech to Commonwealth Electoral Legislation Amendment Bill 1983). For similar sentiments, see Electoral and Administrative Review Commission, *Report on Public Registration of Political Donations, Public Funding of Election Campaigns and Related Issues* (1992) [2.5].
[18] Thompson, above n 12, 7.
[19] Michael McKenna and Sarah Elks, 'Corrupt Ex-Minister Gordon Nuttal in Jail Facing Extra Charges', *The Australian* (Melbourne), 16 July 2009, <http://www.theaustralian.com.au/news/corrupt-ex-minister-gordon-nuttal-in-jail-facing-extra-charges/story-0-1225750676560> at 1 December 2009.
[20] Daniel Lowenstein, 'On Campaign Finance Reform: The Root of All Evil is Deeply Rooted' (1989) 18 *Hofstra Law Review* 301, 323–9.

public interest.[21] In contrast with corruption through graft, corruption through undue influence does not require explicit bargains or that a *specific act* result from the receipt of funds. It arises when the structure of incentives facing public officials results in *implicit bargains* of favourable treatment or a *culture* of delivering preferential treatment to moneyed interests. As explained by the Bowen Committee on Public Duty and Private Interest:

> Conflict of interest generally differs from bribery because it does not require a transaction between two parties. It needs only one person, the officeholder possessing the interest in point. The distinction between bribery and this category … is that, whilst a benefit conferred as a bribe is directed to a particular transaction or series of transactions, gifts, hospitality or travel may be provided to create *a general climate of goodwill* on the part of the beneficiary. The 'debt' might not be called in for years or ever.[22]

Corruption through undue influence manifests itself in various ways. More blatant forms involve the sale of political access and influence (see Section IV(B): 'Corrupting the Political Process through the Sale of Access and Influence'). Here, formal and informal ways for money to influence politics come together in an unsavoury mix: businesses secure favourable hearings by buying access and influence and also through the lingering effect of their contributions (a phone call from a big donor, for example, being more likely to be returned than one from a constituent). With perceptions of the merits of any issue invariably coloured by the arguments at hand, preferential hearings mean that when judging what is in the 'public interest', the minds of politicians will be skewed towards the interests of their financiers.[23]

The third form of corruption of public office is *corruption through the misuse of public resources.* This occurs when public resources are used for other than their legitimate purposes. These illegitimate purposes might be grounded in personal or party interests. For instance, the party in government might use public monies to pay

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[21] Charles Beitz, 'Political Finance in the United States: A Survey of Research', (1984) 95(1) *Ethics* 129, 137; Thomas F Burke, 'The Concept of Corruption in Campaign Finance Law', (1997) 14 *Constitutional Commentary* 127; Thompson, above n 12, 55.
[22] Committee of Inquiry Concerning Public Duty and Private Interest (Chair: N H Bowen) *Public Duty and Private Interest* (1978) 14 (emphasis added).
[23] See Yasmin Dawood, 'Democracy, Power, and the Supreme Court: Campaign Finance Reform in Comparative Context' (2006) 4(2) *International Journal of Constitutional Law* 269, 280–1.

for advertising principally aimed at boosting electoral fortunes (see Section V(F): 'Enhanced Accountability of Government Advertising'). More subtly, a governing party might use information secured through public office not for official purposes, but in an effort to fundraise for the parties, for instance, through 'off the record' briefings given by Ministers to fee-paying businesses.

The last example illustrates how these various forms of corruption of public office are not mutually exclusive and, indeed, may overlap – secret briefings by Ministers to their business patrons involves not only corruption through the misuse of public resources but also corruption through undue influence. Similarly, this example highlights how corruption stemming from private funding can intertwine with corruption related to public resources; this is not surprising considering that motivation for corruption due to private funding tends to arise when the party or politician enjoys some degree of public power (and therefore, access to public resources).

A democratic political finance regime should aim to prevent all these forms of corruption of public office. This was a point well recognised by Kim Beazley. In his Second Reading Speech for the Political Broadcasts and Political Disclosures Bill 1991 (Cth) – the Bill that introduced a ban on political advertising and annual disclosure returns – Beazley noted that:

> There is no greater duty upon the representatives of the people in a democratic society than the duty to ensure that they serve all members of that society equally. This duty requires government which is *free of corruption and undue influence*.[24]

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

> The public is entitled to be assured that *parties and candidates* which make up the government or *opposition of the day* are free of undue influence or improper outside influence.[25]

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

Neville Wran, then NSW Premier, expressed similar sentiments when introducing the Election Funding Bill 1981 (NSW), the Bill which introduced the very first Australian election funding and disclosure scheme. According to Wran, the Bill 'removes the risk of parties selling political favours and declares to the world that the great political parties of New South Wales are not up for sale'.[26]

B. Promoting Fairness in Politics

The principle of political equality lies at the heart of democracy. By insisting that each citizen has equal political status, this principle not only implies that political freedoms be formally available to all citizens but also, as John Rawls has argued, that such freedoms have 'fair value'.[27] As Rawls has put it, '[t]he fair value of the political liberties ensures that citizens similarly gifted and motivated have roughly an equal chance of influencing the government's policy and of attaining positions of authority *irrespective of their economic and social class'*.[28] The aim here, in Ronald Dworkin's words, is to ensure that citizens have 'a genuine chance to make a difference'[29] – they should have leverage over the political process.

This aim is perhaps the most difficult challenge facing political finance regimes in capitalist economies like Australia. The value of political freedoms will depend upon background inequalities. Specifically, significant social and economic inequalities will undermine the value of such freedoms for those who are marginalised – the poor, the disadvantaged, and the powerless. In such contexts (as in the case of Australia and New South Wales), there is a serious likelihood that such freedoms, while formally

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[25] Ibid 3482 (emphasis added). For similar sentiments, Kim Beazley, Minister for Aviation, Special Minister of State and Minister Assisting the Minister for Defence, 2nd Reading Speech to Commonwealth Electoral Legislation Amendment Bill 1983, above n 17 (emphasis added).

[26] New South Parliament, *Parliamentary Debates,* Legislative Assembly, 15 April 1981, 5944 (Neville Wran, Premier and Treasurer).

[27] John Rawls, *A Theory of Justice* (first published 1972, revised ed. 1999) 225; John Rawls (edited by Erin Kelly) *Justice as Fairness: A Restatement* (2001) 149. Carmen Lawrence has noted that '[d]espite the otherwise general equality in voting power, many are suspicious that not all citizens are equally able to influence their representatives': Carmen Lawrence, 'Renewing Democracy: Can Women Make a Difference?' (2000) 12(4) *The Sydney Papers*, 54, 58.

[28] Rawls, *Justice as Fairness*, above n 27, 46 (emphasis added).

[29] Ronald Dworkin, 'Equality, Democracy, and Constitution: We the People in Court' (1990) 28(2) *Alberta Law Review* 324, 338.

available, cannot be meaningfully exercised by many.[30] Indeed, Rawls has observed that laissez-faire capitalism 'rejects … the fair value of equal political liberties'.[31]

Ensuring the fair value of political freedoms in New South Wales will involve radical redesign of its social, economic and political institutions, a task that clearly cannot be borne alone by a political finance regime. At the same time, proper design of a political finance regime is crucial to ensuring fair value of political liberties[32] and an over-riding aim of such a regime should be to ensure fairness in politics.

This aim has several key elements. First, a democratic political finance regime should facilitate fair access to the public arena, that is, the forums in which public opinion and policy is articulated, influenced and shaped. Citizens and their political organisations will only obtain leverage when there is such access. Such access moreover provides the principal guarantee that the public agenda is responsive to the opinions of the citizenry.[33] In other words, fair access to the public arena secures public accountability.

The 'public arena' is, of course, a multifarious and complex notion with public opinion and policy expressed and shaped in numerous ways including door-to-door campaigning, party newsletters, lobbying and, increasingly, advertisements through the mass media. It is also a finite and 'limited space'[34] where the loudness of one voice can drown out others. In particular, those with far superior means of communication can exclude less resourced citizens. This is one of the central risks that must be addressed by a political finance regime.

The importance of access to the public arena stems from the deliberative nature of democracy. Democracy is not simply a matter of the majority getting what it wants. Such crude majoritarianism fails to recognise that at the heart of political competition is a battle of rival ideas, policies and ideologies: politics is conducted through debate

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[30] Norman Daniels, 'Equal Liberty and Unequal Worth of Liberty' in Norman Daniels (ed), *Reading Rawls: Critical Studies on Rawls' A Theory of Justice* (1975) 253–81.
[31] Rawls, *Justice as Fairness*, above n 27, 137.
[32] See Ibid 149.
[33] See Charles Beitz, *Political Equality: An Essay in Democratic Theory* (1989).
[34] Rawls, *Justice as Fairness*, above n 27, 150.

and discussion. Such deliberation is the basis upon which citizens engage in the *making of laws* by arguing their various positions and seeking to influence others. Deliberation also plays another role. Many citizens will be bound by laws with which they disagree. Deliberation is a process of *justifying* laws and policies to the public. It is through such justification that respect is accorded to citizens as *subjects of laws* who may or may not agree with those laws.[35] In this sense, citizens are 'the "makers" and the "matter" of politics'.[36]

The centrality of democratic deliberation explains why the principle of political equality does not imply equal political power. In rare situations, equal political power is mandated by the principle of political equality. Voting rights provide a relatively uncontroversial example. With these rights, we can see how political equality finds expression in the key objective advanced by the original *Commonwealth Electoral Act,* that of 'equality of representation throughout the Commonwealth'.[37] In the realm of franchise, we can see the force of Harrison Moore's observation that the 'great underlying principle' of the *Commonwealth Constitution* is that citizens have 'each a share, and an equal share, in political power'.[38]

In other realms of political activity (including that of political funding), equal political power, however, is generally not a requirement of political equality. Democratic deliberation means that not all ideas or voices are given equal weight. Ideally, superior ideas gain greater support while their lesser competitors fall by the wayside. In the context of political deliberation, what political equality generally requires is conditions of fair deliberation;[39] conditions that only exist with fair access to the public arena.

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[35] See Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (2004) 4–5. For a fuller discussion of the purposes of democratic deliberation, see Gutmann and Thompson, *Why Deliberative Democracy?*, 10–13 and Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (1996) 41–4.

[36] Beitz, above n 33, 98.

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

[38] Harrison Moore, *The Constitution of the Commonwealth of Australia* (1st ed, 1902), 329. This statement was cited with approval in *ACTV* (1992) 177 CLR 106, 139–40 (Mason CJ).

[39] See discussion in Beitz, above n 33, 12–14, 15–16.

Most importantly perhaps a political finance regime should promote fairness in electoral contests. As emphasised by Royal Commission on WA Inc:

> The first institution of representative government, the Parliament, must be constituted in a way which fairly represents the interests and aspirations of the community itself. *The electoral processes must be fair*.[40]

Fairness in this context implies fair competition amongst candidates and parties.[41] This, firstly, means that a political finance regime should ensure open access to electoral contests. It should prevent the costs of meaningful access to the public arena escalating to prohibitive levels. It should be vigilant to the danger that meaningful access will be placed beyond the reach of most citizens through the 'competitive extravagance'[42] of parties that seek to outbid each other by spending excessive amounts in campaigning. This may warrant election spending limits (see Section V(B): 'Election Spending Limits').

Ensuring meaningful access to the public arena may also require 'compensating steps',[43] for example, public funding so that the electoral contest is open to 'worthy parties and candidates [that] might not [otherwise] be able to afford the considerable sums necessary to make their policies known'.[44]

A democratic political finance regime will also promote fair electoral competition by advancing 'fair rivalry'[45] between the main parties. It should act as an antidote to '[a] serious imbalance in campaign funding'[46] between the major and minor political

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[40] Royal Commission into Commercial Activities of Government and Other Matters, above n 8, [1]–[10] (emphasis added). See also Corruption and Crime Commission of Western Australia, *Report on the Investigation of Alleged Public Sector Misconduct Linked to the Smiths Beach Development at Yallingup* (2007) 90.

[41] The notion being emphasised here is of fair competition and not competition per se. A competitive system, even a highly competitive one, is not necessarily fair: Beitz, above n 33, 200–1.

[42] T H Marshall, 'Citizenship and Social Class' in T H Marshall, *Class, Citizenship and Social Development* (1964) 65, 90.

[43] Rawls, *A Theory of Justice*, above n 27, 198.

[44] Kim Beazley, Minister for Aviation, Special Minister of State and Minister Assisting the Minister for Defence, 2nd Reading Speech to Commonwealth Electoral Legislation Amendment Bill 1983, above n 17. This specific aim is long-standing.

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

[46] Kim Beazley, Minister for Aviation, Special Minister of State and Minister Assisting the Minister for Defence, 2nd Reading Speech to Commonwealth Electoral Legislation Amendment Bill 1983, above n 17.

parties or, in the words of Neville Wran, reduce 'the gross disparity between financial resources available to different parties'.[47] Further, as Ewing has argued, 'no candidate or party should be permitted to spend more than its rivals by a disproportionate amount'.[48]

Fair rivalry amongst the major parties, that is, the parties contending for government, may demand more than the absence of a gross disparity in resources. The most important choice citizens make in an election is to choose the party or coalition that will form government. For this choice to be meaningful in Australia's predominantly two-party system, the two alternatives may need to be equally represented. If so, then fair rivalry amongst the major parties would imply a situation approximating 'equality of arms'.

Also, there should be fairness between the electoral contestants, that is, the political parties and candidates on the one hand, and other political participants on the other. The latter, often referred to as third parties in electoral law jargon, should, firstly, have adequate access to the public arena as they play an essential role in elections. Their role should, however, be understood against the central function of elections as a process of determining who is to govern. This function suggests that the electoral contestants have a privileged (but not dominant) place during election time. At the very least, the role of electoral contestants should not be swamped by third parties. For example, third parties should not be able to outspend political parties and candidates. Neither should political parties and candidates be subject to unfair speech by third parties, for example, political attacks made groups whose identities are unknown.

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[47] New South Parliament, *Parliamentary Debates*, Legislative Assembly, 15 April 1981, 5944 (Neville Wran, Premier and Treasurer).
[48] Keith Ewing, *Money, Politics and Law: A Study of Electoral Finance Reform in Canada* (1992) 18.

C. Supporting Parties in Performing their Functions

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

> There can be no argument about the ubiquity, pervasiveness and centrality of party in Australia. The forms, processes and content of politics – executive, parliament, pressure groups, bureaucracy, issues and policy making – are imbued with the influence of party, party rhetoric, party policy and party doctrine. Government is party government. Elections are essentially party contests, and the mechanics of electoral systems are determined by party policies and party advantages. Legislatures are party chambers. Legislators are overwhelmingly party members. The majority of electors follow party identification. Politics in Australia, almost entirely, is party politics.[49]

Parties are central to Australia's democracy and, indeed, 'modern democracy is unthinkable save in terms of parties'.[50] As Neville Wran, then NSW Premier, observed in his 2nd Reading Speech to the Election Funding Bill 1981 (NSW):

> The strength and stability of the Westminster system lies in the strength of the party system. The political parties are the unacknowledged pillars of parliamentary democracy … No one suggests that political parties are perfect institutions – far from it – but it is unrealistic to deny the importance of political parties in our system of government. They are the very foundation of parliamentary democracy.[51]

There is little doubt then that the New South Wales political finance regime should be rooted in the centrality of political parties. This means that such a regime should ensure that parties are adequately funded. Adequacy, though, does not mean what the parties want (or think they need for campaigning purposes) and must be strictly judged against the functions that parties ought to perform.

It may be said, however, that the only functions that parties perform are as vehicles to gain political power. This is true but only in part. What it obscures are the various democratic functions that parties perform. Foremost, political parties have

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[49] Dean Jaensch, *Power Politics: Australia's Party System* (1994) 1–2.

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

[51] New South Parliament, *Parliamentary Debates,* Legislative Assembly, 15 April 1981, 5938–9 (Neville Wran, Premier and Treasurer).

representative functions, that is, functions aimed at reflecting public opinion. They perform an *electoral function* whereby political parties, in their efforts to secure voter support, respond to the wishes of the citizenry. They also have a *participatory function* as they offer a vehicle for political participation through membership, meetings and engagement in the development of party policy. The relationship between political parties and the citizenry is not, however, one way. As Sartori has noted, '[p]arties do not only *express;* they also *channel*'.[52] Alongside their representative functions, political parties also perform an *agenda-setting function* in shaping the terms and content of political debates. For example, the platform of a major party influences, and is influenced by, public opinion. Political parties further perform a *governance function*. This function largely relates to parties who succeed in having elected representatives. These parties determine the pool of people who govern through their recruitment and preselection processes. They also participate in the act of governing. This is clearly the case with the party elected to government and also equally true of other parliamentary parties as they are involved in the lawmaking process and scrutinise the actions of the executive government.

There are, of course, many other intermediary organisations, many of which perform one or more of these functions that have been ascribed to political parties. The media, for example, clearly performs an agenda-setting function and, to a lesser and controversial extent, a responsive function. Non-government organisations like interest groups also perform responsive and agenda-setting functions while the public service obviously has a governance function. But no other institution or group *combines* these various functions. That is why Sartori was correct to argue that '[p]arties are *the* central intermediate and intermediary structure between society and government'.[53]

D. Respecting Political Freedoms

The aim of promoting fairness in politics implies respect for political freedoms. As noted earlier, this aim is directed at ensuring the fair value of political freedoms.

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[52] Giovanni Sartori, *Parties and Party Systems: A Framework for Analysis: Volume 1* (1976) 28 (emphasis original).
[53] Ibid ix.

However, given how deeply implicated such freedoms are in this area, in particular freedom of political expression and political association (as discussed below), respect for political freedoms deserves separate standing as a distinct end of a political finance regime.

Respecting Freedom of Political Expression

Freedom of political expression is essential for citizens to participate in democratic decision-making.[54] The reason is fairly obvious. Democratic decision-making depends upon citizens being able to argue for their own views, to listen to the opinions of others, to debate and to dissent. At a most fundamental level, democratic deliberation depends on political expression.

Political funding can involve political expression in two fundamental ways. The giving of money itself by donors tends to be an act of political expression with the political contribution signalling support for a party or candidate (although not necessarily in a public manner). Moreover, money is an enabling resource for engaging in political expression: most of the essential tools of campaign communications (for example, pamphlets, posters and advertisements) have to be paid for. It clearly follows that regulation of political funding throws up challenges for freedom of political expression. In Australia, these challenges also have constitutional significance as the High Court has implied a freedom of political communication from the *Commonwealth Constitution* (see Section V(G): 'Constitutional Considerations').

In understanding these challenges, it is useful to distinguish between two aspects of freedom of political expression. There is, firstly, 'freedom from' which emphasises the absence of state regulation of political expression or, put differently, freedom from state interference in political discussion (an aspect with which the constitutional freedom is centrally concerned). The other aspect, 'freedom to', turns on the ability of citizens to actually engage in political expression. While 'freedom to' of course

[54] In terms of freedom of *political* expression, the rationale based on democratic participation is the most pertinent and compelling, see Eric Barendt, *Freedom of Speech* (2005, 2nd ed) vi, 18–19. See also Tom Campbell, 'Rationales for Freedom of Communication' in Tom Campbell and Wojciech Sadurski (eds) *Freedom of Communication* (1994) 17, 37–41.

depends on 'freedom from', it requires more than just the absence of state regulation and extends to a range of factors, notably, the adequacy of resources to engage in political expression. Both aspects of freedom of political expression need to be taken into account – citizens should be significantly free from legal constraints on political activity *as well as* having a meaningful capacity to engage in such activity. Casting this in Rawls' phraseology, freedom of political expression should not only be formally available to all citizens but should also have a fair value.

What follows is that respect for freedom of political expression does not dictate any particular formula or combination of 'freedom from' (state regulation) and 'freedom to'. The desirable balance between them is often a complex matter depending not only on normative principles but also the specifics of the factual context. Because proper respect for freedom of political expression is contingent on such specifics, such freedom does not create an in-principle bar against state regulation of political expression.[55]

This point is sometimes obscured by excessive emphasis on the metaphor of the 'marketplace of ideas'. This metaphor likens the political forum to a market for goods and services and suggests a 'free' market of political debate in the sense that not being subject to state regulation will result in a rich diversity of ideas. With this metaphor, freedom of political expression is typically equated to 'freedom from'.

The essential flaw of this metaphor (or at least uses of it) is that while it correctly takes into account state regulation, it ignores the structures of private power. It neglects how financial inequalities amongst citizens in the context of expensive means of communications, for instance, radio and television, create blockages in accessing the public realm. These blockages mean that rather than fostering a flourishing diversity of ideas, 'freedom from' (that is, an absence of state regulation of political expression), instead, produces a political agenda biased in favour of powerful interests.[56] The result, for most citizens, is that freedom of political expression is only formally available but with little or negligible value.

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[55] See Beitz, *Political Equality*, above n 33, 209–13.
[56] See Stanley Ingber, 'The Marketplace of Ideas: A Legitimizing Myth' (1984) *Duke Law Journal* 1.

More useful metaphors for the public realm are those of a 'town hall'[57] or 'public square' meeting. These metaphors suggest that the public realm is a limited space (only a limited number of persons can speak at a public meeting) that is not only governed by *state regulation* but also structures of *private power*. Further, it implies that state regulation has a role in setting out the rules and procedures for fair deliberation (like the rules of a public meeting).[58] Importantly, such regulation might be required to counteract the silencing effects of 'private aggregations of power'.[59] As eloquently put by Fiss:

> It [the state] may have to allocate public resources – hand out megaphones – to those whose voices would not otherwise be heard in the public square. It may even have to silence the voices of some in order to hear the voices of the others.[60]

In terms of specific measures regulating political funding, protecting freedom of political expression may very well require state funding of parties and candidates and limits on political spending.

The preceding discussion underlines how misleading the characterisation of the debate between those who favour state regulation of political expression on the one hand, and those who oppose such regulation on the other, as a conflict between political equality and liberty. This characterisation operates upon an unduly narrow conception of liberty that reduces freedom of political expression to 'freedom from'. A more expansive and plausible understanding of freedom of political expression that combines 'freedom from' and 'freedom to' reveals that 'what at first seemed to be a conflict between liberty and equality [is] a conflict between liberty and liberty'.[61]

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[57] This metaphor is famously used by Alexander Meiklejohn: Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (1948).

[58] The connection between political finance and democratic deliberation is powerfully made by Gutmann and Thompson: Gutmann and Thompson, *Democracy and Disagreement*, above n 35, 134; Gutmann and Thompson, *Why Deliberative Democracy*, above n 35, 48–9. See also Ian Shapiro, 'Enough of Deliberation: Politics is about Interests and Power' in Stephen Macedo (ed) *Deliberative Politics: Essays on Democracy and Disagreement* (1999) 28, 34–6.

[59] Owen Fiss, *The Irony of Free Speech* (1996) 2.

[60] Ibid 4.

[61] Ibid 15. See also Beitz, above n 33, 209–13.

Even when there is a genuine conflict between freedom of political expression on one hand, and equality (or, more accurately, political fairness), on the other, resolution of this conflict does not imply the absence of state regulation. Like all political freedoms, freedom of political expression is not absolute and can be legitimately limited on the grounds of competing public interests, whether they be political fairness or protecting the integrity of government. Whether such limitation is justifiable will depend on a complex series of factors including the weight of the countervailing public interest, the extent to which the limitation is properly tailored to advancing this interest and the severity of the limitation (including the risk that the limitation will lead to an abuse of state power).

Respecting Freedom of Political Association

Various types of political associations are active in Australian politics. There are, of course, the political parties which put up candidates in a bid to gain public office. There are also groups which are not seeking public office but aim to influence the outcomes of elections or public debate more generally. These political associations are fundamental to the proper workings of Australian democracy. In a mass democracy, leverage is usually secured through acting collectively. It is very rare for a citizen of ordinary means to have political leverage on her or his own accord. It is only through mobilising in groups like parties, interest and community groups that a citizen is capable of securing meaningful political power; it is through collective actions – acting through associations – that citizens secure a modicum of influence over the political process. In particular, associations are necessary in order to engage in meaningful political expression. As Gutmann puts it:

> organized association is increasingly essential for the effective use of free speech … Without access to an association that is willing and able to speak up for our views and values, we have a very limited ability to be heard by many other people or to influence the political process, unless we happen to be rich or famous.[62]

The importance of political associations to citizens securing meaningful political power underscores how such associations and the freedom to form and act through

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[62] Amy Gutmann, 'Freedom of Association: An Introductory Essay' in Amy Gutmann (ed) *Freedom of Association* (1998) 3.

them, is crucial to protecting the integrity of representative government, in particular, to ensure the accountability of the exercise of public power as well as fairness in politics.[63]

Underlying the importance of the freedom of political association is the principle of pluralist politics. This principle stipulates that there should be a diverse range of avenues available for citizens to combine in order to influence the political process and to express their views. This principle is also implicit in the functions to be performed by political parties: party politics should provide citizens with different ways to engage in political activity and to be represented; party policies and programmes should offer clear and meaningful choices.

The principle of pluralism provides further explanation as to the justification for freedom of political association.[64] Political associations require a meaningful degree of freedom from state regulation in order to develop their distinctive identities, messages and activities. This applies in particular to political parties: pluralism in party politics cannot be sustained without parties have meaningful autonomy in organising their affairs. Put differently, freedom of party association from state regulation is necessary so that parties can perform their functions in a democratic society.[65]

As with freedom of political expression, freedom of political association does not imply an absence of state regulation. State regulation might be necessary in order to promote ‘freedom to’ associate, for instance, through state funding assisting marginal sectors of society in forming organisations. Freedom of political association is also not absolute and can be properly limited in certain circumstances. The functions of the parties themselves may, for example, furnish reasons for limiting such freedom. For instance, parties cannot properly discharge their participatory functions if their

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[63] For a general argument that freedom of association is based on the idea of popular sovereignty, see Jason Mazzone, ‘Freedom’s Associations’ (2002) 77 *Washington Law Review* 639.
[64] See generally Howard Davis, *Political Freedom: Associations, Political Purpose and the Law*, (2000) 47.
[65] For a rejection of a rights-based approach to freedom of party association and a preference for a functional analysis, see Samuel Issacharoff, ‘Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition’ (2001) 101(2) *Columbia Law Review* 274.

membership rolls have been corrupted, a problem that may require state intervention. Moreover, state regulation might be necessary in order to secure pluralism and fairness in politics. It might also be needed as an antidote to the '[t]he monopolistic position of parties'[66] or the 'oligopoly status' of major parties.[67] Whether these rationales justify limitation of freedom of political association will depend (as with freedom of political expression) on various circumstances[68] including the weight of such rationales, the extent to which the limitation is adapted to advancing this rationale and the severity of the limitation (including the risk that the limitation will lead to an abuse of state power).[69]

III. FUNDING AND SPENDING PATTERNS OF NSW POLITICAL PARTIES

One thing is clear in terms of the finances of NSW parties - they are heavily reliant on private funding. Table 1 draws on the returns lodged by the parties for the 1999, 2003 and 2007 NSW State Elections and analyses the split between private and public funding by treating the sum of political donations reported as giving rise to the total of private funding whilst the sum of election funding (whether it be provided through the federal or NSW scheme) as giving rise to the total of public funding.[70] It indicates that, while the composition of private and public funding varies according to each party, there is little doubt that private funding is the mainstay of the parties' budgets.

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[66] Davis, above n 64, 45.

[67] Beitz, *Political Equality*, above n 33, 191.

[68] For fuller examination of this point, see Jeremy Moss and Joo-Cheong Tham Freedom of Association, Political Parties and Party Funding in Joo-Cheong Tham, Brian Costar and Graeme Orr, *Electoral Regulation and Prospects for Australian Democracy* (2011 forthcoming). See generally Peter de Marneffe, 'Rights, Reasons, and Freedom of Association' in Gutmann, above n 62, Ch 6.

[69] The last point threads through Nathaniel Persily's argument for non-interference in the primary elections of American political parties, see Nathaniel Persily, 'Toward a Functional Defence of Political Party Autonomy' (2001) 76 *New York University Law Review* 751.

[70] There are two caveats that should be noted. First, there are various forms of private funding, notably, investment income, that are not captured by the returns and this analysis. The effect of this omission is that the amount of private funding will be understated. Second, the returns seem to treat the amounts received in relation to membership fees and fundraising ventures as being separate from 'political donations' proper despite the legislation including all of these amounts within its definition of 'political donations' (see *Election Funding and Disclosures Act 1981* (NSW) s 87). The analysis has followed the approach taken by the returns but this may have resulted in some degree of double-counting, thereby overstating the amount of private funding.

Table 1: Private and Public Funding of NSW Parties: 1999, 2003 and 2007 NSW State Elections

Party	Total Private Funding (Political Donations)	Total Public Funding (Election Funding)	Total Funding	% Private Funding (Political Donations)	% Public Funding (Election Funding)
ALP	41,849,696	9,693,471	51,543,167	81.19%	18.81%
Liberal Party	38,728,278	5,176,279	43,904,557	88.21%	11.79%
National Party	12,507,845	2,642,165	15,150,010	82.56%	17.44%
Greens	3,052,419	1,188,384	4,240,803	71.98%	28.02%
Christian Democrats	2,465,870	865,039	3,330,909	74.03%	25.97%
The Shooters Party[71]	1,524,887	400,996	1,925,883	79.18%	20.82%

Tables 2–4 give some sense of the *number* of donors for each party for the 1999, 2003 and 2007 NSW State Elections. Its accuracy, however, is limited by the fact that the number of donors contributing political donations of less than $1500 is not publicly reported. Bearing this limitation in mind, we firstly notice that the parties are reliant on a relatively small number of contributors. For the 1999 and 2003 NSW State Elections, the party that received the highest number of donors (for political donations of $1500 and more) was the ALP and even then the number of donors only stood at 294. The number of donors significantly increased for the 2007 NSW State Election, reaching more than two and three thousand for the ALP and the Liberal Party respectively. That said, the numbers are still relatively small: the number of donors to the ALP and Liberal Party were 0.06% and 0.07% respectively of the total number of persons enrolled for the 2007 NSW State Election (i.e. 4 374 029).[72]

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[71] The Shooters Party was identified as 'John Tingle – The Shooters Party' in the 1999 State Election Summary.
[72] NSW Electoral Commission, *Summary of Percentage of Votes to Enrolment: Legislative Council Election 2007* (2007) NSW Electoral Commission <http://www.elections.nsw.gov.au/__data/assets/pdf_file/0009/40005/LC_2007_Summary_Percentage_Votes.pdf> at 9 February 2010.

Tables 2–4 also suggest that of those who make political donations, the majority tend to make donations at the lower end of the scale. Take, for example, the figures for the 2007 NSW State Election: more than half of donors (for amounts of $1500 and more) to the ALP and the Liberal Party made donations within the range of $1500 to $5000; in the case of the National Party, Greens and the Christian Democrats, their respective proportions were more than 70%.

Table 2: Number of Donors by Donation Amount: 2007 NSW State Election

Party	Total Donors for Donations $1500 and More	$1500 - $5000 (number of donors / percentage of total donors)	$5001 - $10000 (number of donors / percentage of total donors)	$10001 - $15000 (number of donors / percentage of total donors)	> $15000 (number of donors / percentage of total donors)
ALP	2458	1468 / 59.7%	430 / 17.5%	263 / 10.7%	297 / 12.1%
Liberal Party	3144	2082 / 66.2%	536 / 17.1%	334 / 10.6%	192 / 6.1%
National Party	254	196 / 77.2%	43 / 16.9%	11 / 4.3%	4 / 1.6%
Greens	81	58 / 71.6%	10 / 12.4%	1 / 1.2%	12 / 14.8%
Christian Democrats	33	29 / 87.9%	3 / 9.1%	1 / 3.0%	0 / 0.0%
Shooters Party	25	12 / 48.0%	4 / 16.0%	2 / 8.0%	7 / 28.0%

Table 3: Number of Donors by Donation Amount: 2003 NSW State Election

Party	Total Donors for Donations $1500 and More	$1500 - $5000 (number of donors / percentage of total donors)	$5001 - $10000 (number of donors / percentage of total donors)	$10001 - $15000 (number of donors / percentage of total donors)	> $15000 (number of donors / percentage of total donors)
ALP	294	109 / 37.1%	53 / 18.0%	27 / 9.2%	105 / 35.7%
Liberal Party	287	165 / 57.5%	54 / 18.8%	28 / 9.8%	40 / 13.9%
National Party	77	44 / 57.1%	22 / 28.6%	4 / 5.2%	7 / 9.1%
Greens	34	18 / 52.9%	8 / 23.5%	5 / 14.7%	3 / 8.8%
Christian Democrats	28	23 / 82.1%	3 / 10.7%	2 / 7.1%	0 / 0.0%
Shooters Party	20	15 / 75.0%	3 / 15.0%	2 / 10.0%	0 / 0.0%

Table 4: Number of Donors by Donation Amount: 1999 NSW State Election

Party	Total Donors for Donations $1500 and More	$1500 - $5000 (number of donors / percentage of total donors)	$5001 - $10000 (number of donors / percentage of total donors)	$10001 - $15000 (number of donors / percentage of total donors)	> $15000 (number of donors / percentage of total donors)
ALP	124	36 / 29.0%	28 / 22.6%	10 / 8.1%	50 / 40.3%
Liberal Party	147	86 / 58.5%	30 / 20.4%	7 / 4.8%	24 / 16.3%
National Party	44	22 / 50.0%	15 / 34.1%	5 / 11.4%	2 / 4.5%
Greens	6	4 / 66.7%	0 / 0.0%	0 / 0.0%	2 / 33.3%
Christian Democrats	12	10 / 83.33%	1 / 8.33%	0 / 0.0%	1 / 8.33%
John Tingle – Shooters Party	15	10 / 66.7%	2 / 13.3%	2 / 13.3%	1 / 6.7%

However, Table 5 which draws on returns lodged for the 2007 NSW State Election, indicates that importance in terms of number of donors is not the same as importance in terms of amount. In the case of the ALP, the Liberal Party and the Greens, donations of $10 000 or more respectively constituted 63.3%, 53.7% and 64.3% of the total donations of $1500 or more. The number of donors contributing these amounts, however, respectively constituted 22.8%, 16.7% and 16% of the total number of donors (for donations of $1500 or more).

It should, however, be noted that the patterns of political donations for the National Party and Christian Democrats are quite different – both can claim to be more reliant on smaller donations. Of the donations it received by the National Party (of $1500 or more), 79.1% of this amount came from donations within the range of $1500 and $10 000; in the case of the Christian Democrats, the figure is even higher, standing at 89.1%.

Table 5: Importance of Donations According to Amount: 2007 NSW State Election

Party	Total Amount of Donations Received Valued at $1500 or More	$1500 - $5000 (Amount of donations / percentage of total donations)	$5001 - $10000 (Amount of donations / percentage of total donations)	$10001 - $15000 (Amount of donations / percentage of total donations)	> $15000 (Amount of donations / percentage of total donations)
ALP	$21 300 913	$4 681 333 / 22.0%	$3 140 796 / 14.7%	$3,407,159 / 16.0%	$10 071 625 / 47.3%
Liberal Party	$22 326 609	$6 039 182 / 27.1%	$4 291 543 / 19.2%	$3 840 006 / 17.2%	$8 155 878 / 36.5%
National Party	$1 045 596	%517 285 / 49.5%	$309 823 / 29.6%	$133 507 / 12.8%	$84 981 / 8.1%
Greens	$679 465	$158 615 / 23.3%	$84 000 / 12.4%	$11 143 / 1.6%	$425 707 / 62.7%
Christian Democrats	$123 406	$82 906 / 67.2%	$27 000 / 21.9%	$13 500 / 10.9%	$0 / 0.0%
Shooters Party	$556 748	$45 175 / 8.1%	$29 940 / 5.4%	$27 774 / 5.0%	$453 748 / 81.5%

We can now turn to patterns of electoral expenditure. Table 6 provides information on the amounts spent by the major parties on electoral expenditure in the 1999, 2003 and 2007 NSW State Elections as well as the increases that have occurred from each election. Table 6 indicates that the increases in spending vary according to each party. The spending of the Liberal Party in the 2003 NSW State Election was significantly lower than the amount it spent in the 1999 NSW State Election. Its spending in the 2007 NSW State Election, however, was a substantial increase from its expenditure in the 2003 NSW State Election.

These variations aside, the overall trend is reasonably clear – an increase in the total amount of electoral expenditure. The total for the 2007 NSW State Election was 75.54% higher than the level for the 1999 NSW State Election and 48.13% higher than that for the 2003 NSW State Election. Further, these increases (in nominal terms) can be explained to a significant extent by the amount of electoral expenditure made by the largest spender, the ALP. The amount of electoral expenditure it made in the 2007 NSW State Election was respectively 141.21% and 47.7% higher than the amounts it expended in the 1999 and 2003 NSW State Elections.

Table 6: Electoral Expenditure of Parties: 1999, 2003 and 2007 NSW State Elections

	1999 STATE ELECTION	2003 STATE ELECTION		2007 STATE ELECTION		
Party	**Total Expenditure 1999 State Election**	**Total Expenditure 2003 State Election**	**% Increase from 1999 State Election – 2003 State Election**	**Total Expenditure 2007 State Election**	**% Increase from 1999 State Election – 2007 State Election**	**% Increase from 2003 State Election – 2007 State Election**
ALP	6 972 749	11,387,667	63.32%	16,819,116	141.21%	47.70%
Liberal Party	5,690,699	3,081,051	-45.86%	5,283,867	-7.15%	71.50%
National Party	1,190,242	1,276,798	7.27%	1,719,898	44.50%	34.70%
Greens	165,743	547,974	230.62%	467,162	181.86%	-14.75%
Christian Democrats	336,595	458,275	36.15%	436,194	29.59%	-4.82%
Shooters Party	201,846	401,971	99.15%	682,960	238.36%	69.90%
Total expenditure by all parties	14,557,874	17,153,736	63.32%	25,409,197	74.54%	48.13%

IV. PROBLEMS WITH THE NSW POLITICAL FINANCE REGIME

Evaluated against the aims set out in Section II, there are four key problems with the NSW political finance regime:

- deficiencies with the disclosure scheme;
- it allows the political process to be corrupted through the sale of access and influence;
- it contributes to an unfair playing field in NSW state elections; and
- it undermines the health of the parties through a pre-occupation with fundraising.

A. Deficiencies with the Disclosure Scheme

Transparency of political funding and expenditure is crucial from the perspective of the principles of a democratic political finance regime. It is required for informed voting: if details of political funding are shrouded in secrecy, corruption of the electoral processes looms with citizens unaware of likely influences on the parties and candidates competing for public office. Such secrecy also gives rise to the appearance or perception of corruption through graft and undue influence. More generally, transparency of political funding and expenditure is necessary in order to diagnose the strengths and weaknesses of the political funding regime.

The central measures for ensuring such transparency are disclosure schemes applying to political contributions and spending. In New South Wales, the disclosure scheme under the *Election Funding and Disclosures Act 1981* (NSW) ('*EFA*') has moved from a post-election disclosure scheme to a biannual system as a result of the enactment of the *Election Funding Amendment (Political Donations and Expenditure) Act 2008* (NSW). This system operates upon the notion of a 'relevant disclosure period' which is defined to mean each six-month period ending on 30 June and on 31 December.[73] It requires the following persons and entities to lodge returns in relation to each 'relevant disclosure period':

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[73] *EFA* s 89.

- parties (whether registered under the *EFA* or not);
- candidates and groups of candidates;
- elected members of NSW Parliament;
- donors which have made a 'reportable political donation' (i.e. a donation to or for the benefit of a party, candidate or elected member exceeding $1000) for the 'relevant disclosure period'; and
- entities or persons who have incurred 'electoral expenditure'[74] exceeding $1000 for the 'relevant disclosure period'.[75]

All of these returns, except for those lodged by donors, are to be accompanied by an audit certificate.[76]

The returns lodged by the above are to disclose:

- various details of 'reportable political donations' (i.e. a donation to or for the benefit of a party, candidate or elected member exceeding $1000);[77]
- the total amount of donations where donations are not 'reportable political donations' (i.e. donations of $1000 or less) and the number of persons making such donations; [78]
- the total amount of annual party membership fees, the subscription rate/s and number of members paying such rate/s; [79]
- details, including net or gross proceeds, of each fundraising venture;[80]
- details of loans of $1000 or more;[81] and
- details of 'electoral expenditure'. [82]

The 2008 amendments also resulted in various prohibitions aimed at ensuring the integrity of the disclosure scheme. These included a prohibition on making and receiving indirect campaign contributions.[83] In relation to 'reportable political

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[74] 'Electoral expenditure' is defined by section 87 of the *EFA*.
[75] *EFA* ss 88(1)–(2).
[76] *EFA* s 96K.
[77] *EFA* s 92(2).
[78] *EFA* s 92(3).
[79] *EFA* s 92(4).
[80] *EFA* s 92(5).
[81] *EFA* ss 92(6), 96G.
[82] *EFA* s 93.
[83] *EFA* s 96E.

donations', there are prohibitions on accepting such donations in anonymous circumstances[84] or from entities without an ABN.[85]

There is little doubt that the 2008 amendments have significantly improved the disclosure of political funding in New South Wales. Together with Queensland's biannual system,[86] the current NSW scheme provides unprecedented transparency of such funding. There are nevertheless notable deficiencies. Timeliness of disclosure has clearly been enhanced by the move from post-election to biannual disclosure. At the same time, disclosure is not frequent enough to facilitate informed voting: NSW voters will tend not to know of contributions made to parties and candidates in the months leading up to state elections until after the event.

There are other significant limitations to the NSW disclosure scheme. The prohibitions against *anonymous* contributions only extend to 'reportable political donations', i.e. donations to or for the benefit of a party, candidate or elected member exceeding $1000 in the six-month disclosure period. This threshold is too high. The *EFA* seems to be tightly linking the amount at which such a prohibition kicks in to the disclosure threshold for political contributions. This is quite misconceived. The ban against anonymous contributions should be set much lower than the disclosure threshold. The purpose of such a ban is that it provides a paper trail that allows the enforcement of the disclosure thresholds. Tightly linking the level of the ban with disclosure thresholds defeats this purpose.

Further, the information to be disclosed by the biannual returns fails to reveal the total income received by the parties and candidates. As noted above, the returns require disclosure of the total amount of political donations as well as loans exceeding $1000 (received in the six-month disclosure period). There is no requirement to disclose the total receipts (or income); nor is there any requirement to itemise sums (other than loans and political donations) received exceeding $1000 (e.g. investment income).

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[84] *EFA* s 96F.
[85] *EFA* s 96D.
[86] *Electoral Amendment Act 2008* (Qld).

Lastly, there is a gaping hole in relation to 'associated entities' of parties with these groups not subject to separate disclosure obligations. Such entities include groups that are controlled by one or more parties or that operate wholly or to a significant extent for the benefit of one or more parties.[87] In colloquial terms, these are front groups for the parties. In New South Wales, they would likely include for the ALP (NSW), the Bob Carr Campaign c/- Ken Murray and the Randwick Labour Club; for the Liberal Party (NSW), its state electoral councils and branches and the 500 Club Ltd; for the National Party (NSW), its electorate councils and for the Shooters Party (NSW), its various branches.[88]

B. Corrupting the Political Process through the Sale of Access and Influence

Table 7 details the amounts that parties raised through fundraising in relation to the 1999, 2003 and 2007 NSW State Elections and indicates that fundraising is a crucial form of income especially for the ALP and the Liberal Party. It is likely, however, that these figures significantly understate the extent of fundraising by the parties as they do not include fundraising by 'associated entities' (see above Section IV(A): 'Deficiencies with the Disclosure Scheme')

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[87] See, for example, definition of 'associated entities' in section 287 of the *Commonwealth Electoral Act 1918* (Cth).
[88] These examples are drawn from the NSW Election Funding Authority, below n 181.

Table 7: Declared Fundraising: 1999, 2003 and 2007 NSW State Elections

Party	1999 Election Cycle ($)	2003 Election Cycle ($)	2007 Election Cycle ($)
ALP (NSW)	1 040 074	2 921 216	7 740 153
Liberal Party (NSW)	368 821	28 269	5 268 837
Christian Democratic Party (Fred Nile Group)	26 436	6081	2 751
Greens (NSW)	15 636	28 151	218 448
National Party (NSW)	40 986	114 796	819 600
The Shooters Party	6 526	17 882	Nil

Source: NSW Election Funding Authority, *Summaries of Political Contributions Received and Electoral Expenditure Incurred by Parties that endorsed a Group or by Independent Groups at Legislative Councils 1999 and 2003;*[89] 2007 NSW State Election data supplied by NSW Election Funding Authority.

There is nothing wrong with fundraising per se. What is disturbing is the *kind of fundraising* that is now permeating NSW politics – the sale of access and influence. The NSW branches of the ALP and the Liberal Party are major culprits in this respect. For $102 000, a company can become a 'foundation partner' of the NSW ALP's Business Dialogue and secure five places to events such as boardroom lunches and dinners with state government ministers.[90] In late 2006, a few months prior to the 2007 NSW State Election, the NSW ALP held a fundraising event at the Convention Centre, Darling Harbour, which was attended by nearly 1000 people. General admission was at $500 per head while attending an exclusive cocktail party with ministers costed $15 000 for nine guests and dining with then Premier Morris Iemma was priced at a hefty $45 000.[91]

[89]Data available from the NSW Election Funding Authority: <http://www.efa.nsw.gov.au> at 5 February 2008.
[90] Andrew Clennell, 'Coalition Wins Vote for Donations Inquiry', *Sydney Morning Herald* (Sydney), 28 June 2007, 4.
[91] Anne Davies and Jonathan Pearlman, 'Top Libs Split on Corporate Donations', *Sydney Morning Herald* (Sydney), 3 November 2006, 1.

The NSW Liberal Party runs a body called the Millennium Forum. A testimonial from former Prime Minister John Howard describes it as 'one of Australia's premier political corporate forums' that 'provides a wealth of opportunities for the business community and political leaders at federal and state levels to meet and discuss key issues within an informal setting'.[92] 'Wealth', it seems, is the operative word. For sponsorship ranging from $10 000 upwards, company representatives are not only entitled to '[a]n ENGAGING programme of professional corporate events and "Off the Record" briefings'[93] but also a chance to play golf with John Howard on Sydney's Bonnie Doon golf course.[94] Corporate Australia has not been reluctant to seize these opportunities. The roll-call of the Forum's sponsors include British American Tobacco Australia, Publishing and Broadcasting Ltd, Tenix Group, major construction companies like Leighton Holdings and Multiplex Constructions and key accountancy firms such as Deloitte and Ernst & Young.[95]

Through the Millennium Forum, businesses can also join the 500 Club. According to the Forum's website:

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

All this, according to the website, will add 'a new level of value for … Club members'.[96]

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[92] Millennium Forum website, <http://www.millenniumforum.com.au/first.htm> at 7 June 2007. Note that this page is no longer available online. However, the more recent link to the Millennium Forum website contains a similar quotation: <http://www.millenniumforum.com.au/index.php?option=com_content&view=article&id=37:the-hon-john-howard-ac&catid=9:testimonials&Itemid=11> at 25 January 2010.
[93] Millennium Forum website (emphasis original), <http://www.millenniumforum.com.au/first.htm> at 7 June 2007. As above, note that this page is no longer available online.
[94] E Mychasuk and P Clark 'Howard and His Team Rented by the Hour', *Sydney Morning Herald* (Sydney), 13 June 2001, 1.
[95] A list of Millennium Forum's sponsors is available online, <http://www.millenniumforum.com.au/index.php?option=com_content&view=article&id=9&Itemid=10> at 22 January 2010.
[96] Details about Millennium Forum's events are available through its website: <http://www.millenniumforum.org.au/index.php?option=com_content&view=category&layout=blog&id=6&Itemid=7> at 22 January 2010.

Perhaps the NSW ALP and Liberal Party are merely matching their federal counterparts by peddling influence. Major companies including NAB, Westpac and Telstra paid handsomely for such influence at the 2007 federal ALP conference. At a fee of $7000 per person, their representatives were accompanied by federal ALP frontbenchers. For the privilege of sitting next to ALP luminaries, businesses also purchased tables at the conference dinner for up to $15 000.[97]

Indeed, the former Prime Minister, John Howard, was not shy in using Kirribilli House and the Lodge for fundraising.[98] In June 2007, a Liberal Party meeting held in Kirribilli House was attended by business observers who paid more than $8000 each.[99] The prize for the most successful fund-raiser perhaps goes to Malcolm Turnbull who charged $55 000 per head for a fundraising dinner to support his bid for re-election.[100] Not much seems to have changed since the election of the Rudd Government with the *Sydney Morning Herald* reporting in 2008 that a deal had been struck between the then federal ALP national secretary, Tim Gartrell, and his counter-part, the federal Liberal Party director, Brian Loughnane, to use the Great Hall and the Mural Hall of Parliament House for party fundraising purposes.[101]

With the sale of access and influence, we witness the logic of the market being ruthlessly applied to political power. Demand on the part of business for political influence is being met by supply on the part of the major parties and their leaders. As a senior ALP figure put it, '[w]e use our political leadership to raise funds because they are (sic) the best product we have to sell'.[102] Like other markets, the greater the value of the product, the higher the price. Referring to ministerial lunches organised by Progressive Business, the Victorian ALP's fund-raising arm, an experienced Victorian lobbyist has said:

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[97] Michelle Grattan and Katharine Murphy, 'Hope in the Hearts of Labor Faithful', *The Age* (Melbourne), 27 April 2007, 1.

[98] For details, see Michelle Grattan, 'Labor Legal Advice: PM Function was a Gift', *The Age* (Melbourne), 16 June 2007, 2.

[99] Brendan Nicholson, 'Rudd Open to Melbourne PM Pad', *The Age* (Melbourne), 11 June 2007, 5.

[100] Clare Masters, 'How $55, 000 will Buy You a Slice of Malcolm', *Daily Telegraph* (Sydney), 1 August 2007, 23.

[101] Alan Ramsey 'Junee Farmer Tables Dinner Time Complaint', *Sydney Morning Herald* (Sydney) 5 April 2008, <http://www.smh.com.au/news/opinion/junee-farmer-tables-dinner-time-complaint/2008/04/04/1207249457708.html> at 27 May 2008.

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

> The cost depends on how senior the Minister is. If you want a key Minister, companies pay $10 000.[103]

The clearest instances of access and influence being sold occur when payment is expressly exchanged for privileged access, say $10 000 for a Minister. It would be a mistake to think that they are the only ways in which access and influence are being sold. In some cases, large 'donations', though not directly tied to access and influence, are given to achieve the same result. Referring to a $50 000 sum given to the Victorian ALP in 2000 by Walker Corporation, a property developer, John Hughes (the company's managing director) said:

> It does not get you access on the spot, but what it does, it allows us to support the government of that particular day, if it was (former Victorian Premier) Bracks you said. If we wished to be able to put a case at some point in the future, then one could hope that it would favourably get you that access faster than others, but it does not achieve anything. At the end of the day being able to have an appointment with somebody, to be able to put your case, does not guarantee a result.[104]

Those defending such practices sometimes deny that influence is being sold. According to them, all that is sold is access to political leaders with leaders free to make up their minds on particular issues. This is highly questionable: influence is inseparable from access.[105] Businesses that pay for 'off the record' briefings with Ministers not only get to meet the Ministers but, in the words of the Millennium Forum's website, secure an opportunity to 'promote issues of concern and importance' to them.[106] The website of Progressive Business used to be very up-front

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[103] Michael Bachelard, 'Taking Their Toll', *The Age* (Melbourne), 14 May 2007, 9.
[104] As quoted in Select Committee on Public Land Development, Victorian Parliament, *Final Report* (2008) [383].
[105] As David Truman correctly observed, 'power of any kind cannot be reached by a political interest group, or its leaders, without access to one or more key points of decision in the government. Access, therefore, becomes the facilitating intermediate objective of political interest groups': David Truman, *The Governmental Process; Political Interests and Public Opinion* (1971, 2nd ed) 264.
[106] Details available from the Millennium Forum website, <http://www.millenniumforum.com.au/> at 22 January 2010.

about what was being traded when it stated that '[j]oining this influential group allows you to participate in the decision making progress' (sic).[107]

The way in which the corporate patrons of the ALP and Liberal Party obtain influence over party leaders can be quite subtle. Reporting on the fundraisers of Progressive Business, *The Age* journalist Michael Bachelard wrote:

> It's an unwritten rule that there will be no overt lobbying: businesses are there to be seen, to put a face to the name, to establish a profile in the minister's mind.[108]

While nothing specific is promised or discussed in such events, there is still value for businesses. As an executive from a property development company observed, '[i]t just smooths the path to get something heard'.[109]

Much less commented on but perhaps even more important is the impact of such influence on the broader political agenda. Those who are able to pay for access are in a privileged position to highlight matters of significance to them. Inevitably, Ministers who they can directly access will tend to pay more attention to these matters compared with other issues of public interest, unless these other issues are also taken up by powerful and articulate advocates.

What is also clear is that businesses buying such access and influence tend not to be channelling funds to parties as an open endorsement of their policies in an effort to secure their electoral success. Rather, what is being largely pursued is an access strategy: money is being given to parties to secure access and influence after the parties have been elected to public office with general indifference as to the respective merits of the party policies. By paying hefty fees, companies are able to exercise influence in clandestine circumstances such as 'off the record' briefings.[110]

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[107] ALP, *Progressive Business*, <http:///www.alp.org.au/action/progressive> at 13 November 2005. Note that this page on the ALP website is no longer active. The current website to view information about Progressive Business is located at <http://www.pb.org.au/> at 5 February 2010.
[108] Bachelard, 'Taking Their Toll', above n 103.
[109] Ibid.
[110] The website of the organization promises sponsors '"Off the Record" briefings that will keep you up to date with important political and economic developments that impact on your business': Ibid.

This is an emphatic instance of what Walzer characterises as a ‘blocked exchange’, where money is used to buy political power.[111] The result is corruption through undue influence: the purchase of access and influence creates a conflict between public duty and the financial interests of the party or candidate,[112] resulting in some public officials giving an undue weight to the interests of their financiers rather than deciding matters in the public interest.[113]

That the bargains struck in the sale of access and influence are not overt or explicit makes little difference to the question of corruption through undue influence: the structure of incentives facing parties and their leaders once a contribution is received remains the same with their judgment improperly skewed towards the interests of their financiers.[114] With these incentives, there is a double injury to the democratic process: wealthy donors are unfairly privileged while the interests of ordinary citizens become sidelined. Such injury highlights how the sale of access and influence is not only corrupt because it undermines merit-based decision-making but is also unfair: contributors are illegitimately *empowered* in the political process while others are illegitimately *disempowered.*

C. Unfair Playing Field

This section contends that the patterns of electoral expenditure in New South Wales have resulted in unfairness in the NSW elections. At the outset, however, it is important to stress that the proposition that ‘campaign expenditure buys votes’ is untenable.[115] For instance, the biggest spender on political broadcasting for the federal elections running from 1974 to 1996 only won half of these contests.[116] The flaw in this proposition is its assumption of the overriding significance of campaign spending in determining voting behaviour. Such behaviour is, on the contrary, shaped by a complex series of factors – there is the influence of long-term variations, whether it be cultural (for example, history of loyalty to a particular party), demographic (for

[111] Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (1983), 100.
[112] Lowenstein, ‘On Campaign Finance Reform’, above n 20, 323–9.
[113] Beitz, ‘Political Finance in the United States’ above n 21, 129, 137.
[114] Ibid 137.
[115] Committee on Standards in Public Life, *Fifth Report: The Funding of Political Parties in the United Kingdom* (1998) 117.
[116] Sally Young ‘Spot On: The Role of Political Advertising in Australia’ (2002) 37 *Australian Journal of Political Science* 81, 91.

example, different voting inclinations of older vs younger citizens) or class-based (for example, voting behaviour of low-income vs high-income citizens); there is also the effect of short-term circumstances including the impact of election campaigns.[117] Moreover, the impact of such campaigns is not *solely* determined by the amount of campaign spending as 'money is only one of several kinds of campaign resources'.[118] Further, these factors, both short- and long-term, interact in complicated ways with their respective weight varying not only in different electoral systems but also for elections held in the same electoral system. Not surprisingly then, there is a complex relationship between campaign expenditure and voter support[119] or, put differently, between 'spending and electoral payoffs'.[120]

This is not, however, to imply that campaign expenditure has *no* effect on increasing voter support. There is a relatively small body of research that has been undertaken on the relationship between campaign expenditure and voter support in the Australian context, all by academic geographer James Forrest.[121] Forrest has undertaken an analysis of the NSW state elections held in 1984, 1988, 1991 and 1995, and the 1990 federal election. At the risk of some oversimplification, the following conclusions can be drawn from these studies. All of the studies concluded that an increase in *relative* spending resulted in more votes. The effect of spending in increasing voter support, while significant, was, however, modest given other factors that influence voting behaviour including industry, demographic and employment factors. This was especially so in volatile elections.[122] Moreover, *how* money was spent was as important as the level of spending in determining voter support.[123] The impact of this spending also varied according to the target groups. According to Forrest:

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[117] James Forrest, 'Campaign Spending in the New South Wales Legislative Assembly Elections of 1984' (1991) 26 *Australian Journal of Political Science* 526, 526.
[118] Beitz, *Political Equality,* above n 33, 199.
[119] Young, 'Spot On', above n 116, 81, 89.
[120] Justin Fisher, 'Next Step: State Funding for the Parties?' (2002) 73 *Political Quarterly* 392, 396.
[121] As Forrest has noted, 'one area … largely if not totally ignored in the Australian context surrounds the impact on voter behaviour of party spending during the course of an election campaign': Forrest, 'Campaign Spending in the New South Wales Legislative Assembly Elections of 1984', above n 117, 526.
[122] J Forrest, R J Johnston and C J Pattie, 'The Effectiveness of Constituency Campaign Spending in Australian State Elections During Times of Electoral Volatility: the New South Wales Case 1988–95' (1999) 31 *Environment and Planning A* 1119, 1127.
[123] The summary of Forrest's research has been distilled from the following: Forrest, 'Campaign Spending in the New South Wales Legislative Assembly Elections of 1984' above n 117, 531–2; James Forrest, 'The Geography of Campaign Funding, Campaign Spending and Voting at the New South

> different aspects of media activity impact differently on each. Wavering … voters more actively use the election campaign to determine how to vote, and for these subsets campaign advertising in its widest sense has an important persuading role. For the committed voter, partisanship is the dominant influence.[124]

On the best available research, we can then conclude that an increase in relative election spending tends to result in more votes in NSW state elections. If so, the *amount* of election spending can clearly influence the outcomes of elections in a manner that is unfair: elections will, in some situations, be determined more by the sums of money expended rather than through democratic deliberation.

The question of unfairness in elections can be more specifically analysed. Section II(B): 'Promoting Fairness in Politics' identified key dimensions of electoral fairness: open access to electoral contests; fair rivalry amongst competing candidates and parties (including an absence of a serious imbalance between major and minor parties and some degree of 'equality of arms' between the major parties); and fairness between parties and candidates on the one hand, and third parties on the other.

Determining whether these principles are met is not a straightforward task. They involve comparative judgments admitting questions of degree. Moreover, the various criteria of fairness are far from precise: what does 'open access' or 'serious imbalance' actually mean?[125] That being said, these principles and their criteria are not meaningless and in fact their meaning, as the following discussion will show, can be elaborated upon by a close consideration of actual patterns of election campaign spending.

Open access to electoral contests requires at least that the sums involved in engaging in a meaningful campaign should not deter candidates or parties that enjoy significant

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Wales Legislative Assembly Elections of 1984' (1992) 23 *Australian Geographer* 66, 75; James Forrest, 'The Effect of Local Campaign Spending on the Geography of the Flow-of-the-Vote at the 1991 New South Wales State Election' (1997) 28(2) *Australian Geographer* 229, 229, 234; James Forrest and Gary Marks, 'The Mass Media, Election Campaigning and Voter Response: The Australian Experience' (1999) 5 *Party Politics* 99, 110.

[124] Forrest and Marks, The Mass Media, Election Campaigning and Voter Response, above n 123, 110.

[125] This is part of the difficulty in developing criteria for fairness, see Ingber, 'The Marketplace of Ideas', above n 56, 51–5.

support in the electorate. There are clearly challenges in meeting this principle in the NSW context – hundreds of thousands of dollars need to be raised for a meaningful state campaign with the amount running to millions of dollars for the ALP, the Liberal Party and the National Party, the major contenders to be elected as state government (see Table 7 above and Table 8 below). These amounts will typically pose a barrier to newcomers as they would usually not have ready access to resources that established political parties enjoy. This barrier to open access stems from the fact that national and state elections involve campaigns reaching out to thousands of voters, especially through the use of expensive advertisements. It is, however, exacerbated by the intensifying arms races as the parties increase the amounts that are necessary for a meaningful election campaign (see Section III: 'Funding and Spending Patterns of NSW Political Parties').

As noted earlier, fair rivalry amongst the competing parties implies an absence of a serious imbalance between minor and major parties and 'equality of arms' amongst the major parties. Any notion of imbalance (or equality) clearly depends on a conception of the appropriate balance among the parties. One way to understand the appropriate balance is through the idea of 'barometer equality'.[126] What this idea conveys is the notion that, all things being equal, parties and candidates should spend amounts of money commensurate to the public support they enjoy.

Table 8 attempts to assess whether there is a serious imbalance amongst major and minor parties, and 'equality of arms' amongst the major parties in NSW state elections according to this idea of 'barometer equality', by providing data on the amount of election expenditure per first preference vote secured in the previous election for main parties. The rationale in using the number of first preference votes secured in the *previous election* is that these figures provide a crude indicator of the public support enjoyed by the parties in a particular election.

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[126] R Hasen, *The Supreme Court and Election Law: Judging Equality from* Baker v. Carr *to* Bush v. Gore (2003) 111.

Table 8: Electoral Expenditure for 1999, 2003 and 2007 NSW State Elections

Party	1999 State Election: Total electoral Expenditure ($)	1999 State Election: Electoral expenditure for each first preference vote received in 1995 State Election, Legislative Council ($)	2003 State Election: Total electoral expenditure ($)	2003 State Election: Electoral expenditure for each first preference vote received in 1999 State Election, Legislative Council ($)	2007 State Election: Total electoral expenditure ($)	2007 State Election: Electoral expenditure for each first preference vote received in 2003 State Election, Legislative Council ($)
ALP (NSW)	6 972 749	5.85	11 387 667	8.59	16 819 116	10.38
Liberal Party (NSW)[127]	5 690 699	5.29	3 081 051	4.47	5 283 867	5.65
National Party (NSW)	1 190 242		1 276 798		1 719 898	
Greens (NSW)	165 743	1.31	547 974	5.30	467 162	1.46
Christian Democratic Party[128]	336 595	3.31	458 275	4.07	436 194	3.86
Shooters Party[129]	201 846	2.10	401 971	6.78	682 960	8.97
Total Expenditure	14 557 874		17 153 736		25 409 197	

Sources: NSW Electoral Commission, *Legislative Council Results for 1999 State Elections 2003 State Election*, available from NSW Electoral Commission, *Legislative Council Results*, <http://www.elections.nsw.gov.au/state_government_elections/election_results/legislative_council_results> at 15 February 2010); Parliament of NSW, *Periodic Election for Legislative Council 25 March 1995*, Statistics (prepared by E I Dickson, Electoral Commissioner for NSW and Returning Officer, Legislative Council Election); NSW Election Funding Authority, *Summaries of Political Contributions Received and Electoral Expenditure Incurred by Parties that endorsed a Group or by Independent Groups at Legislative Councils 1999 and 2003*, available from NSW Election Funding Authority, <http://www.efa.nsw.gov.au/__data/assets/pdf_file/0010/30142/2000schedc.pdf> and <http://www.efa.nsw.gov.au/__data/assets/pdf_file/0015/30138/2003SummaryPartiesGroups.pdf> at 5 February 2008.

[127] As first preference vote data was available only for the Coalition Party Group and not for the Liberal and National Parties individually, 'electoral expenditure for each first preference vote' has been calculated on the basis of first preference votes received by the Coalition Group and total expenditure of the two parties combined.

[128] The now Christian Democratic Party was called the 'Call to Australia (Fred Nile) Group' in the 1995 State Election; on 1 September 1997 it was renamed the 'Christian Democratic Party (Fred Nile Group)': Christian Democratic Party, *National Charter*, <http://www.cdp.org.au/fed/NationalCharter.asp> at viewed 10 February 2010.

[129] The Shooters Party was identified as 'John Tingle – The Shooters Party' in the 1999 State Election Summary.

Table 8 indicates that, for the past three NSW state elections, the ALP has consistently been the biggest spender (per first preference vote secured in the previous election). In the previous two NSW state elections, the ALP nearly outspent the Liberal Party on this measure by a ratio of two to one. This suggests a lack of 'equality of arms' amongst the major parties and also an imbalance between the ALP and other parties.

As to an imbalance between the major and minor parties, Table 8 does not indicate any clear-cut patterns (besides the ALP outspending all the minor parties). For instance, the amount spent by the Greens per first preference vote secured in the previous election has fluctuated and the amount spent by the Shooters Party on this measure has, in the past two NSW state elections, been relatively high, with its level of spending even exceeding that of the Liberal Party.

D. Undermining the Health of Parties

The health of the NSW party system suffers from the undue influence that is spawned by the sale of access and influence. As corporate financiers of the major parties increasingly call the shots, the interests and rights of citizens that should be represented become sidelined. The ideal of governing in the public interest is placed in jeopardy when, as former High Court Chief Justice Gerard Brennan observed:

> The financial dependence of a political party on those whose interests can be served by the favours of government … cynically turn(s) public debate into a cloak for bartering away the public interest.[130]

The agenda-setting function of the party system is also impaired as the policies of the major parties are disproportionately influenced by a small band of businesses.

There are other serious effects on the major parties. Their ability to effectively govern is undermined by the time consumed by subsequent rounds of fundraising. Former federal Human Services Minister Joe Hockey, for instance, is reported to have

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[130] *ACTV* (1992) 177 CLR 106, 159.

complained in the Liberal Party room about the constant pressure to attend fund-raisers.[131]

The quality of the candidates that parties recruit may also suffer from this pre-occupation with fundraising. The importance of fundraising ability in Liberal Party pre-selections, for instance, has been frankly acknowledged by Peter Costello:

> In my time in politics, the amount of time and effort put into fund-raising has exploded. Fund-raising is considered such an integral part of an MP's job that candidates for pre-selection are assessed for their fund-raising potential. A candidate who can bring in campaign funds is as highly prized as one that will bring in votes.[132]

The significance of fundraising ability can also be seen in the following instances. In the aftermath of the recent federal election, one of the factors said to have enhanced Malcolm Turnbull's chances of winning leadership of the federal Liberal Party was his ability to raise money to restore the party's depleted funds.[133] The same was also said of Alan Stockdale's (successful) candidature for presidency of the federal Liberal Party.[134] This is not to deny that Turnbull or Stockdale are worthy candidates. Rather, the point is that the calculus of merit appears to have been weighted too heavily in favour of their ability to fundraise and, arguably, has detracted attention from more important leadership attributes such as their policies and ability to effectively challenge the ALP.

The fundraising practices may also lessen the ability of the major parties to act as vehicles for popular participation. At present, the level of membership in NSW parties is quite low. The figures for individual membership,[135] stated in the returns lodged in

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[131] Michelle Grattan, 'Our Political Guns for Hire', *The Age* (Melbourne), 25 May 2005, 21.
[132] Peter Costello, 'Beware Cashed-Up Influence Peddlers', *Sydney Morning Herald* (Sydney), 12 August 2009, <http://www.petercostello.com.au/media/SMH_-_Beware_cashed-up_influence_peddlers_-_12_August_2009.pdf> at 10 February 2010.
[133] See, for example, Tony Wright 'Bold Offer Might Help Lib Reset', *The Age* (Melbourne), 26 November 2007, <http://www.theage.com.au/articles/2007/11/25/1195975872419.html> at 25 February 2008.
[134] See, for example, Michelle Grattan 'Lib Senate Leader Urges Conservatives to Unite', *The Age* (Melbourne), 26 January 2008, <http://www.theage.com.au/cgi-bin/common/popupPrintArticle.pl?path=/articles/2008/01/25/1201157673214.html#> at 25 January 2008.
[135] These figures do not include members of trade unions affiliated to the NSW ALP.

relation to the 2007 State Election by ALP, the Coalition parties, the Christian Democratic Party, the NSW Greens and the Shooters Party add up to 99 439 persons, while the total number of persons enrolled for the 2007 State Election was 4 374 029.[136] In other words, fewer than 1 out of 44 NSW voters are members of these parties.

The fundraising practices of the major parties will lessen their appeal to ordinary citizens as they tend to hollow out the meaning of party membership. As these parties sell influence to moneyed interests, they send out a signal to their rank-and-file members that the voices that will be listened to are those with large purses rather than those who faithfully subscribe to party principles.

The role of party members is also sidelined in other ways. 'Capitalist financing' increasingly outstrips 'democratic financing' through membership subscriptions in terms of financial importance.[137] This occurs through corporate fundraising, but also through the growing reliance of the major parties on investment arms.[138] This 'business' model of the party vests control over fundraising in the party leadership and tends to centralise power. With growing centralisation, responsiveness to rank-and-file members correspondingly decreases. This development directly undermines the participatory function of the major parties. In addition, the bypassing of rank-and-file members saps the ability of these parties to generate new ideas and policies, and weakens their claims to be representative of citizens.

V. THE WAY FORWARD: A REFORM AGENDA

The citizens of New South Wales are poorly served by their political finance regime. Despite its strengths, there are still deficiencies with a disclosure scheme that fails to provide timely information during elections and does not cover 'associated entities'. The major parties appear to demonstrate a laissez-faire attitude to the ethics of fundraising. With neither law nor self-regulation providing sufficient restraint, the

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[136] See NSW Electoral Commission, *Summary of the Percentage of Votes to Enrolment* (2007) <http://www.elections.nsw.gov.au/__data/assets/pdf_file/0009/40005/LC_2007_Summary_Percentage_Votes.pdf> at 13 February 2008.

[137] Maurice Duverger, *Political Parties, Their Organisation and Activity in the Modern State* (1969) 63.

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

sale of access and influence has become so normalised that such corruption through undue influence is now an endemic feature of NSW politics. Unfairness in accessing political power is paralleled by unfairness in electoral competition, with the playing field far from level. The parties themselves both benefit and suffer from this dire situation. As the major parties grow rich on political money, they are less able to serve the community and their members. All of this casts a pall of illegitimacy on NSW parties and brings the crucial activity of politics into disrepute.

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

- a more robust disclosure scheme;
- election spending limits;
- contribution limits (with an exemption for membership fees);
- stricter regulation of fund-raisers;
- a Party and Candidate Support Fund; and
- enhanced accountability of government advertising.

This section of the report will elaborate upon these various proposals. This will be followed by an analysis of the constitutional considerations as well as the question of whether reform should proceed through a federal or state scheme.

A. A More Robust Disclosure Scheme

In order to address the deficiencies with the *EFA* disclosure scheme, the following reforms are recommended:

> *Recommendation 1:* ‘Associated entities’ should be subject to disclosure obligations.
>
> *Recommendation 2:* Returns should disclose the total receipts of political parties and associated entities.

Recommendation 3: The returns of political parties and associated entities should itemise sums received in the six-month disclosure period that exceed $1000.

Recommendation 4: If a political party, related political parties and its associated entities together receive $100 000 or more from a single donor in a six-month reporting period, an obligation should be imposed to disclose these gifts within 14 days[139]

Recommendation 5: If a donor makes a political donation of $100 000 or more to a political party, related political parties and its associated entities as a whole in a six-month reporting period, an obligation should be imposed to disclose gifts within 14 days[140]

Recommendation 6: Political parties and associated entities should be required to lodge weekly returns during election periods that[141] disclose details of receipts with sums to be itemised when $1000 or more is contributed by a person for the benefit of a party as a whole, whether to national, state or territory branches of that party.[142]

Recommendation 7: There should be a ban on receiving anonymous contributions of $200 or more by candidates, political parties, associated entities and third parties.

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[139] This recommendation is based on a provision that currently exist under the Queensland disclosure scheme: *Electoral Act 1992* (Qld) Sch 'Election funding and financial disclosure based on part XX of the Commonwealth Electoral Act', ss 314AB-AEA.

[140] This recommendation is based on a provision that currently exist under the Queensland disclosure scheme: *Electoral Act 1992* (Qld) Sch 'Election funding and financial disclosure based on part XX of the Commonwealth Electoral Act', ss 314AB–AEA.

[141] This can be modelled upon *Political Parties Elections and Referendums Act 2000* (UK) ss 62-3.

[142] This can draw on clause 17, Schedule 3 of the Electoral (Greater Fairness of Electoral Processes) Amendment Bill 2007 (Cth).

B. Election Spending Limits

The Case for Election Spending Limits

There are compelling reasons to enact election spending limits in New South Wales. The *fairness* rationale has already been alluded to. As Eric Roozendaal, former General Secretary of the NSW ALP and current NSW Treasurer has argued, these limits have 'the purpose of achieving a fairer political process'.[143] This rationale was implicit in the justification that Senator O'Connor gave more than a century ago for candidate expenditure limits enacted by the original *Commonwealth Electoral Act*:

> [i]f we wish to secure a true reflex of the opinions of the electors, we must have … a system which will not allow the choice of the electors to be handicapped for no other reason than the inability of a candidate to find the enormous amount of money required to enable him [sic] to compete with other candidates.[144]

There are clear connections between the fairness rationale and election spending limits: if properly designed, they will facilitate open access to electoral contests by reducing the costs of meaningful campaigns, thereby increasing the competitiveness of these contests; they will further assist in addressing the imbalance between the ALP and other parties and containing departures from 'equality of arms' amongst the parties contending for NSW Government (see Section III: 'Funding and Spending Patterns of NSW Political Parties' and Section IV(C): 'Unfair Playing Field').

Research on New Zealand and Canadian spending limits support these arguments. Academics Johnston and Pattie have argued that:

> In New Zealand, the low spending limits for candidates in the MMP electorate contest clearly do [create a relatively 'level playing field'], by making it possible for the smaller parties' candidates in the MMP electorates contests to campaign as intensively as those representing the two larger parties [Labour and National], without having to raise large sums. This clearly acts as a substantial constraint on those two larger parties whose candidates are generally able

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

[144] Commonwealth, *Parliamentary Debates*, Senate, 30 January 1902 (Senator O'Connor: 2nd Reading Speech to Commonwealth Electoral Bill 1902) 9542.

> to outspend their opponents and in many places to obtain sufficient money to come close to the expenditure maximum.[145]

Similarly, research on the Canadian spending limits has concluded that these measures are mostly binding on incumbent candidates and that higher limits correlated with lower electoral turnout, less close races and fewer candidates running.[146]

The other rationale for regulating political spending lies not so much with its impact upon electoral outcomes but its relationship to fundraising. While research into this relationship is virtually non-existent, a tight relationship between the demand for funds and the supply of funds can be assumed.[147] Notwithstanding the complicated effect of election campaign spending on voter support, what is crucial in this dynamic is that parties and candidates *perceive* increased spending to have a positive impact on voter support (or at least not to have a negative impact on voter support). It is this perception that fuels the need to engage in more intensive fundraising like the sale of access and influence. These fundraising practices, in turn, undermine the ability of political parties to perform their legitimate functions (see Section IV(D): 'Undermining the Health of Parties'). The NSW Select Committee on Electoral and Political Party Funding captured these problems in lucid terms when it stated:

> The Committee is concerned about escalating spending levels, and in particular the extensive use of political advertising. The Committee does not consider this escalation to be healthy or sustainable. It increases pressure on parties and candidates to engage in more fundraising, thus taking time from their other representative and policy functions … The increased reliance on private funding also fosters strong ties between politicians and donors, giving rise to perceptions of undue influence.[148]

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[145] Ron Johnston and Charles Pattie, 'Money and Votes: A New Zealand Example' (2008) 27(1) *Political Geography* 113, 132.
[146] Kevin Milligan and Marie Rekkas, 'Campaign Spending Limits, Incumbent Spending, and Election Outcomes' (2008) 41(4) *Canadian Journal of Economics* 1351–74.
[147] There are, of course, other factors that influence fundraising including incumbency (in assisting in raising funds) and the marginality of a seat (that is, the more marginal a seat, the more emphasis there is on fundraising), see Forrest, 'The Geography of Campaign Funding, Campaign Spending and Voting at the New South Wales Legislative Assembly Elections of 1984', above n 123, 67.
[148] Select Committee on Electoral and Political Party Funding, NSW Legislative Council, *Electoral and Political Party Funding in New South Wales* (2008) [8.8].

What this suggests is that there is a separate case for regulating spending in order to tackle *corruption*. The anti-corruption rationale[149] argues that election spending limits can perform a *prophylactic* function by *containing* increases in campaign expenditure and therefore, the need for parties to seek larger donations – especially donations which carry the risk of graft and undue influence.[150] If effective, these limits will also regulate the time spent by the parties on fundraising and allow them to devote more time to their legitimate functions. The prophylactic function of expenditure regulation can be performed by limits set at present levels of campaign expenditure. Such limits will clearly ensure that campaign expenditure does not increase beyond this point. Otherwise, a future increase in real campaign expenditure would lead parties, in the absence of more generous public funding, to seek extra and/or larger donations to meet burgeoning campaign costs. This pressure will increase the risk of corruption that arises with political donations. Besides a prophylactic function, spending limits can also perform a *remedial function*. For instance, if present spending levels were judged to be excessive and to carry an inordinate risk of corruption, spending limits could be aimed at decreasing the amount of real spending and, in turn, the risk of graft and undue influence.

Election spending limits will also assist other regulatory measures in working more effectively. Increased public funding of political parties and candidates (as recommended in Section V(E): 'A Party and Candidate Support Fund') raises a serious risk of inflating campaign expenditure, a risk which can be dealt with by properly designed election spending limits.

Election spending limits also enhance the operation of contribution limits. Contribution limits will significantly reduce the private income of the major parties with consequent impact on their 'freedom to' engage in political expression. Election spending limits can, however, go some way to ameliorating this impact. As John Rawls has correctly observed, the public arena is a finite and 'limited space'[151] – hence, what matters in terms of political deliberation is the *relative* capacity of

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[149] Keith Ewing, 'Promoting Political Equality: Spending Limits in British Electoral Law' (2003) 2 *Election Law Journal* 499, 507.
[150] Committee on Standards in Public Life, *Fifth Report*, above n 115, 116–7.
[151] Rawls, *Justice as Fairness*, above n 27, 150.

citizens and their groups to engage in political expression. This is especially true in relation to electoral *contests*. For instance, what matters more is whether the Coalition can match the level of ALP spending rather than the objective levels of its spending (e.g. how many millions are being spent?). It is here that election spending limits can make a distinct contribution. By capping the maximum amount that any party can spend, it does, at the very least, contain the costs of an 'adequate' campaign for the major parties. If set at a level lower than present campaign expenditure, it can also reduce such costs. Thus, if election spending limits are enacted together with contribution limits, the adverse impact of the latter on 'freedom to' can be significantly contained by the former (see further Section II(D): 'Respecting Political Freedoms').

There are then cogent reasons for election spending limits. Nevertheless, various arguments have been strongly made against such measures. There is the argument that expenditure limits are 'unenforceable'[152] or 'unworkable', which is usually presupposed by Australia's experience with expenditure limits.[153] Arguments based on 'unenforceability' or 'unworkability', however, typically suffer from vagueness. In Australia these arguments, as they relate to campaign expenditure limits, appear to be proxy for two specific arguments. It is said that '[a]ny limits set would quickly become obsolete.'[154] Moreover, these limits are seen as overly susceptible to non-compliance.[155]

It is possible to quickly dispense with the first argument. For instance, the problem with obsolescence can be dealt with by automatic indexation of limits together with periodic reviews. As to the question of non-compliance, it is useful at the outset to make some general observations concerning the challenges faced by the enforcement

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[152] Committee on Standards in Public Life, *Fifth* Report, above n 115, 172.
[153] Commonwealth of Australia (Chair: C W Harders) *Inquiry into Disclosure of Electoral Expenditure* (1981) 8–9, 13.
[154] Committee on Standards in Public Life, *Fifth Report*, above n 115, 172.
[155] Before they were repealed, the Australian expenditure limits were, in fact, subject to widespread non-compliance. For example, 433 out of 656 candidates for the 1977 Federal elections did not file returns disclosing their expenditure: Commonwealth of Australia (Chair: C W Harders) *Inquiry into Disclosure of Electoral Expenditure*, above n 153, 18. But this is largely because the laws were left to decay. Indeed as early as 1911 the Electoral Office and the Attorney-General's Department signalled lax compliance in a policy of not prosecuting unsuccessful candidates for failure to make a return: Patrick Brazil (ed) *Opinions of the Attorneys-General of the Commonwealth of Australia: Vol 1 1901-14* (1981) 499–500.

of party finance regulation. Certainly, all laws are vulnerable to non-compliance. Political finance regulation is no exception and the degree of compliance will depend on various factors. It will depend on the willingness of the parties to comply. This, in turn, will be shaped by their views of the legitimacy of the regulation process and their self-interest in compliance. The latter cuts both ways. For example, breaching expenditure limits might secure the culpable party a competitive advantage through increased expenditure, but this needs to be balanced against the risk of being found out and the resulting opprobrium. Weak laws without adequate enforcement or penalties invite weak compliance.

The extent of compliance will also depend on methods available to the parties to evade their obligations. The effectiveness of political finance laws invariably rubs up against the 'front organisation' problem. This problem arises when a party sets up entities that are legally separate from the party but can still be controlled by that party. Political finance laws will be undermined if parties channel their funds and expenditure to these entities and these entities fall outside the regulatory net or are subject to less demanding obligations. The answer to this problem is to adopt the fairly robust approach towards 'front organisations' found in the *Commonwealth Electoral Act.* The definition of 'associated entity' is potentially broad and the scheme treats 'associated entities' as if they were registered political parties by subjecting both to identical obligations.[156]

A separate issue faced by political finance laws lies with third parties. The challenge posed by third parties is not that the laws provide a vehicle for parties to evade their obligations simply because third parties are, by definition, not appendages of the parties. Political finance laws that do not deal adequately with the 'third party' problem risk not evasion but irrelevance. For instance, if there was substantial third-party electoral activity, a regulatory framework centred upon parties and their associated entities would, in many ways, miss the mark by failing to regulate key political actors. This is not an insurmountable problem though and can be easily dealt with by extending regulation to third parties (discussed below).

[156] The principle of subjecting 'front organisations' to the same obligations which apply to political parties dates back to the Joint Select Committee on Electoral Reform, Parliament of Australia, *First Report* (1983) 166.

The above circumstances demonstrate that political finance regulation will *always* face an enforcement gap. But to treat these circumstances as fatal to any proposal to regulate party finance would be to give up on such regulation. By parity of reasoning, it should not necessarily be fatal to the proposal to impose expenditure limits simply because it is unenforceable to some extent because of these circumstances. The key issue is whether there is something peculiar to such limits that make it particularly vulnerable to non-compliance. It is this that is hard to make out. On its face, the regulation of political expenditure would be easier to enforce than regulation of political funding because a large proportion of such expenditure is spent on visible activity like political advertising and broadcasting. Further, the parties themselves, in a competitive system, have incentives to monitor each others' spending.

Finally, there is the argument that election spending limits constitute an unjustified interference with freedom of political communication.[157] This argument must be taken seriously, not only because it poses a question of principle but also because in Australia, a statute which unjustifiably infringes the constitutional freedom of political communication will be unconstitutional. These questions will be taken up in Section V(G): 'Constitutional Considerations'. It will be seen from that section that concerns regarding the constitutional freedom of political communication can be addressed by properly designing election spending limits and integrating them into a broader reform package.

Preliminary Observations on the Design of Election Spending Limits

There is a range of ways to configure election spending limits so that they promote electoral fairness (thereby enhancing 'freedom to' engage in political expression) and lessen the risk of corruption, while ensuring that political expression enjoys meaningful 'freedom from' regulation so as to conform with constitutional restrictions. The key elements of these limits are:

- the political communication to which they apply;
- the period for which they apply;

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[157] See Committee on Standards in Public Life, *Fifth Report*, above n 115, 118.

- the amounts at which they are set;
- the political participants covered by the limits (for example, political parties, candidates, third parties);
- the relative severity of these limits as they apply to these different types of participants; and
- the interaction of these limits with other regulatory measures directed at the same ends.

In designing election spending limits for NSW state elections, guidance can be sought from the spending limits that exist in Canada, New Zealand and the United Kingdom. Table 9 sets out the main features of spending limits as they apply to parties and candidates.

Table 9: Election Spending Limits in Canada, New Zealand and the United Kingdom

	Period for Which Limits apply	Spending Covered	Level of Limits
Canada			
Parties	'Election period', that is, the period beginning with issue of the writ and ending on poll day	'Election expenses', that is, costs incurred to directly promote or oppose a registered political party, its leader or candidate during an 'election period'	Based on number of electors for electoral district in which party has fielded a candidate
Candidates			Based on number of electors in electoral district with limits varying amongst districts with adjustments for geographically large districts and increases in limits proportionately reducing with number of electors
New Zealand			
Parties	'Regulated period', that is, generally beginning three months before date of poll or the period beginning 1 January of election year, whichever is longer	'Election expenses', that is, costs incurred in producing party advertisements	NZ$1 million plus NZ$20 000 per electoral district contested
Candidates		'Election expenses', that is, costs incurred in producing candidate advertisements	NZ$20 000 per candidate
United Kingdom			
Parties	One year before date of poll	'Campaign expenditure'* aimed at promoting or procuring electoral success for the party or directed at enhancing the standing of the party *Expenses are 'campaign expenditure' if they fall within one of the eight separate categories of expenses listed in Part I, Schedule 8 of the *PPERA*, namely, party political broadcasts, advertising, unsolicited material, manifestos and other documents, market research, press conferences and dealings with the media, transport and rallies and other events	Generally based on number of seats with £30 000 per seat
Candidates	No specific period laid down and applies after individual becomes a candidate	'Election expenses', that is, generally all expenses used for the purposes of the candidate's election	Varies for each constituency with formula taking into account size and nature of constituency

Sources: **Canada:** *Canada Elections Act* 2000 (c. 9) ss 2, 407, 422, 440-41. For the 2006 general election, the maximum spending limit for parties stood at C$18.3 million and the maximum spending limit for candidates stood at C$81 159: Elections Canada, *Report of the Chief Electoral Officer of Canada on the 39th General Election of January 23, 2006* (2006) 94. **New Zealand:** *Electoral Finance Act 2007* (NZ) ss 4, 72(1)–(2), 72, 76, 94(1)–(2), 98. **United Kingdom:** *Political Parties Elections and Referendum Act 2000* (‘*PPERA*’) (UK) ss 72, 79, Sch 9, cl 3; *Representation of People Act 1983* (UK) ss 76, 90A(1). For the 2005 general election, parties contesting all Great Britain seats were subject to a maximum spending limit of £18.84 million; in the same election, candidates were subject to a maximum spending limit of £7150 plus 7p per elector (country constituencies) and £7150 plus 5 p per elector (borough/burgh constituencies): UK Electoral Commission, *Election 2005: Campaign Spending* (2006) 13, 30.

If election spending limits are to apply to NSW elections, they should apply for a period long enough to capture the main period of campaigning. The Canadian system of applying limits upon the issuing of writs, for example, seems to be too short. A period of six months prior to the day of polling should be the minimum period with consideration given to having the limits apply for the entire duration of the electoral cycle.

> *Recommendation 8:* Election spending limits should apply at least for a period of six months prior to the elections with consideration given to having the limits apply for the entire duration of the electoral cycle.

In terms of spending covered, the definition of 'electoral expenditure' in s 87 of the *Election Funding and Disclosures Act 1981* (NSW) provides an excellent starting point. This section defines 'electoral expenditure' as:

(a) expenditure on advertisements in radio, television, the Internet, cinemas, newspapers, billboards, posters, brochures, how-to-vote cards and any other printed election material;
(b) expenditure on the holding of election rallies;
(c) expenditure on the distribution of election material;
(d) expenditure on travel and accommodation of a candidate for election;
(e) expenditure on research associated with election campaigns;
(f) expenditure incurred in raising funds for an election;
(g) expenditure on stationery, telephones, messages, postage and electronic transmissions;
(h) expenditure incurred in employing staff engaged in election campaigns;
(i) expenditure classified as electoral expenditure by the Authority; and
(j) such other expenditure as may be prescribed by the regulations.

Another good template is the definition of 'campaign expenditure' under the UK *Political Parties, Elections and Referendum Act 1998*. There are two parts to this definition: spending falls within this concept if it comes within one or more of the eight categories of expenditure *and* if it is aimed at promoting or procuring electoral

success for the party (or candidate) or directed at enhancing the standing of the party (or candidate).[158] This definition not only has the virtue of ensuring that the spending is related to the electoral success of a candidate and/or party but also, by specifying categories of expenditure, allows for greater ease of compliance.

> *Recommendation 9:* In principle, election spending limits should cover 'electoral expenditure' as defined by the *Election Funding and Disclosures Act 1981* (NSW) and/or 'campaign expenditure' as defined by the UK *Political Parties, Elections and Referendum Act 1998.*

In terms of the level of limits, this should be further investigated. Setting the level according to the spending engaged in the 2003 NSW Elections is not unreasonable – there is at least a perception that the current level of spending is too high. Moreover, election spending limits should be imposed at both the state and constituency level. In setting these limits, the Canadian approach is appealing. Under the *Canada Elections Act*, the limit is calculated according to the number of electors but the amount allocated per elector decreases as the number of electors increases. Under the current provisions, C$2.07 is allocated for each of the first 15 000 electors, C$1.04 for each of the next 10 000 electors and then C$0.52 each for the remaining electors. The amount allocated for each elector also increases according to a formula for districts with lower population density.[159]

> *Recommendation 10:* The level of election spending limits should be further investigated with serious consideration given to setting it according to the level of spending in the 2003 NSW Elections.

> *Recommendation 11:* Election spending limits should be imposed at both state and constituency levels.

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[158] Expenses are 'campaign expenditure' if they fall within one of the eight separate categories of expenses listed in Part I, Schedule 8 of the *PPERA*, namely, party political broadcasts, advertising, unsolicited material, manifestos and other documents, market research, press conferences and dealings with the media, transport and rallies and other events.

[159] *Canada Elections Act* 2000 (c. 9) ss 441(3), (10).

Recommendation 12: In designing election spending limits, serious consideration should be given to the Canadian system of election spending limits.

Alongside election spending limits being applied to political parties and candidates, there should also be limits on third party election spending. The first reason for this lies with preserving the integrity of the limits applied on parties and candidates. Without third party limits, political parties and candidates may be able to use front groups to engage in spending otherwise prohibited if they had done so directly. The other reason concerns fairness to those who are standing for office. Limits on candidate and party spending without corresponding limits on third parties mean that parties are at a disadvantage in relation to third parties in election contests. This turns on its head the principle that parties and candidates should have a privileged role in election contests and clearly has the effect of undermining the party system.[160]

Here we see a complex interplay between the fairness and anti-corruption rationales of spending limits. The latter applies with greater force to parties and candidates as they are seeking to become public office-holders. Emphasising the anti-corruption rationale without full regard to the fairness rationale may insist only on limits being applied to political parties and candidates. Such a lopsided approach will, however, leave parties and candidates less at risk of corruption but in a much weakened state to effectively assert their role in elections (see further Section II(B): 'Promoting Fairness in Politics').

Recommendation 13: Third parties should be subject to election spending limits.

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[160] Samuel Issacharoff & Pamela Karlan, 'The Hydraulics of Campaign Finance Reform' (1999) 77 *Texas Law Review* 1705, 1714–15.

C. Contribution Limits (with an Exemption for Membership Fees)

The Case for Contribution Limits

Greater restrictions on political contributions have support across the political spectrum. In a response to the Wollongong City Council scandal, former NSW Premier Morris Iemma advanced the radical proposal of completely banning political contributions in favour of a system of complete public funding.[161] Following not too far behind, his predecessor, Bob Carr, has advocated banning political contributions from organisations like trade unions and companies and only allowing those made by individuals. Former Leader of the Opposition, Malcolm Turnbull,[162] and the NSW Greens[163] hold similar positions. Queensland Premier Anna Bligh has also called for a national cap of political donations exceeding $1000 and has signalled that Queensland will act to implement such a cap by July 2010 if there is no movement on the federal front.[164] In its bipartisan report, the NSW Legislative Council Select Committee on Electoral and Political Party Funding (NSW Select Committee) recommended that there be a ban on all political donations except for those by individuals. The NSW Select Committee further recommended that contributions by individuals be limited to $1000 for each political party per annum (and $1000 for each independent candidate per electoral cycle). [165]

There are compelling arguments for a limit on contributions as recommended by the NSW Select Committee. Such limits will act as a preventive measure in relation to graft. Moreover, as the amount of money contributed by an individual increases, the risk of undue influence heightens. Therefore, bans on large contributions can directly

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

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

[163] See Report of Proceedings Before the Select Committee on Electoral and Political Party Funding: Inquiry into Electoral and Political Party Funding (3 March 2008) <http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/dfc9200362cf2c4aca257402000e38aa/$FILE/080303%20corrected%20hearing%20transcript.pdf> at 22 January 2010.

[164] Queensland Premier Anna Bligh, 'Sweeping Reforms Deliver Queensland Strong Integrity and Accountability', 10 November 2009 (media release) <http://statements.cabinet.qld.gov.au/MMS/StatementDisplaySingle.aspx?id=67319> at 27 November 2009.

[165] New South Wales Select Committee on Electoral and Political Party Funding, NSW Legislative Council, *Electoral and Political Party Funding in New South Wales* (2008) 105 (Recommendation 7).

deter corruption through undue influence (and obviate the need for selective bans, e.g. the current ban on developer donations).[166]

On a related point, such limits will promote fairness in politics as they prevent the wealthy from using their money to secure a disproportionate influence on the political process, thereby promoting the fair value of political freedoms (despite limiting the formal freedom to contribute).[167] Further, by requiring parties to secure the support of a large base of small contributors, such limits are likely to enhance their participatory function.

Significant objections to contribution limits do, however, need to be addressed. First and foremost, instituting such limits by themselves will leave the parties seriously under-funded given that they are presently heavily reliant on large contributions (see Section III: 'Funding and Spending Patterns of NSW Political Parties'). In the context of party government, jeopardising the existence of the parties must mean placing the system of government at risk. Further, contribution limits are likely means that parties will spend more time fundraising – they will need to persuade more individuals to part with their money, a development that is likely detract from the performance of their democratic functions (apart from the participatory function). This will intensify especially if the 'arms race' between the parties continues.

These objections are, however, not insurmountable. It is, firstly, imperative that contribution limits be adopted as part of a broader package of reform. One of the central difficulties with the position of those who advocate contribution limits as the principal, at times the only, reform measure is that they do not fully deal with potential (adverse) impact of such limits. To ameliorate such impact, there needs to be a reconfiguration of public funding of parties and candidates including a significant increase in such funding to make up for the shortfall resulting from limits on contributions (discussed further in Section V(E): 'A Party and Candidate Support Fund'). Such funding should provide for sustainable parties, redress any inequities

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[166] *Election Funding and Disclosures Act 1981* (NSW) ss 96GA-96GE.

[167] John Rawls has referred to restrictions on contributions as a possible means for ensuring fair value of political liberties: see John Rawls, *Political Liberalism* (1996) 357-58; Rawls, *Justice as Fairness*, above n 27, 149.

that arise from contribution limits and also lessen the risk of parties devoting an undue amount of time to fundraising. Further, contribution limits must be accompanied by election spending limits (advocated in Section V(B): 'Election Spending Limits'). The latter limits will staunch the demand that fuels the parties' aggressive fundraising activities.

> *Recommendation 14:* Contribution limits set at a low level (e.g. $1000 per annum for each individual) should be adopted as part of a reform package including increased public funding and election spending limits.

Further, in order to provide the parties time to adapt to these contribution limits, these limits should be phased in. One option would be to introduce contribution limits of $15 000 per annum for each individual and then decrease the level of the limits in following years to $10 000, $5000 and then $1000.

> *Recommendation 15:* The implementation of the contribution limits should be phased in.

An Exemption for Membership Fees (Including Trade Union Affiliation Fees)

Whilst recommending a ban on all but small donations by individuals, the NSW Select Committee proposed that membership fees be exempted from the ban provided that they are set at a reasonable level (with that level being determined by the Auditor-General).[168] This is a position with considerable merit. Membership fees are a special kind of political contribution. A person or organisation taking out membership of a political party – and paying membership fees in the process – declares support for the party's policies, platform and constitution and also signals the intent to participate in the activities of the party as a party member in order to publicly advance the agenda of the party. These circumstances identify features of membership fees that generally distinguish it from other political contributions: they tend to signal a deeper form of political participation – as the NSW Select Committee correctly recognised,

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[168] NSW Select Committee, *Electoral and Political Party Funding in New South Wales*, above n 165, 113 (Recommendation 9).

'membership of political parties is an important means for individuals to participate in the political process'[169] – *within* political parties. These features, together with the low rate of party members (see Section IV(D): 'Undermining the Health of Parties'), explain why there should be an exemption for membership fees. Whilst contribution limits permit membership fees below the limits, an exemption goes beyond such permissiveness by *encouraging* party membership.

What perhaps is the most controversial aspect of this exemption for membership fees is whether it should be extended to organisational members, in particular, trade union affiliates of the ALP – indeed, one of the most controversial issues concerning contribution limits is how it should apply to trade union affiliation fees. At the time of writing, the reform process at the federal level has reportedly stalled because of union opposition to limits banning trade union affiliation fees.[170]

This very much looks like a case of union obstructionism thwarting the public interest. As some would further argue, '[i]f big business is to be prevented from bankrolling political parties in return for favourable policies, surely the same rule must apply to unions'.[171] This report takes a contrary view: the exemption for membership fees should extend to organisational membership fees including trade union affiliation fees. As will be argued below, banning organisational membership fees will give rise to anomalies and constitutes an unjustified limitation on freedom of party association.

Anomalies

A ban on organisational membership fees will produce striking anomalies. Presumably, NSW parties will still be allowed to have constituency-based branches

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[169] NSW Select Committee, *Electoral and Political Party Funding in New South Wales*, above n 165, 113 (Recommendation 9).
[170]See Editors, 'Voters Betrayed by Failure to Clean Up Party Funding', *The Age* (Melbourne), 14 February 2010, <http://www.theage.com.au/opinion/editorial/voters-betrayed-by-failure-to-clean-up-party-funding-20100113-m6uj.html> at 3 February 2010.
[171] Janet Albrechtsen 'End the Stench of Political Donations', *The Australian* (Melbourne), 24 February 2008,
<http://blogs.theaustralian.news.com.au/janetalbrechtsen/index.php/theaustralian/comments/end_the_stench_of_political_donations/> at 25 February 2008.

with intra-branch transfers exempted from contribution limits. If so, collective affiliation based on geographical areas will still be allowed. But if collective affiliation is permitted on this basis, why limit collective affiliation based on ideological grounds (for example, environmental groups seeking to affiliate to the Greens) or those based on occupation or class (for example, farmers' groups seeking to affiliate to the National Party)?

A ban on organisational membership will detract from the participatory function of parties. In the case of the ALP, there will be the loss of membership participation provided by trade union affiliates (however attenuated, such participation is still a form of participation). If limits applying to party contributions are enacted without limits on third parties and their spending then money may very well flow on to third-party activity.[172] This would express a preference for pressure group politics over party politics as it would strongly encourage political groups to engage in independent third-party activity. Such a preference may favour issue politics over broader and more inclusive forms of politics that are more likely to emerge through the interest-aggregation performed by political parties.[173] By weakening the party system, these (likely) effects fly in the face of one of the key principles of a democratic political finance regime, support for parties in performing their functions.

Unjustified Limitation of Freedom of Political Association

It is essential that political finance regulation respects freedom of political association – such freedom is crucial to the proper workings of Australian democracy. Specifically, it is necessary in order to ensure pluralism in Australian politics, pluralism that is required both to protect the integrity of representative government as well as fairness in politics. As noted in Section II: 'Aims of a Democratic Political Finance Regime', this does not mean that state regulation of political associations is impermissible. There can be public interest grounds for limiting freedom of political association. Whether particular measures are justified will depend upon the weight of

[172] See Issacharoff & Karlan, 'The Hydraulics of Campaign Finance Reform' above n 160, 1714–15.
[173] See also Ewing, *Trade Unions, the Labour Party and Political Funding*, [4.6]–[4.7]. This is not to deny that the Australian Labor Party is already influenced by pressure group politics. For a case-study, see Philip Mendes, 'Labourists and the Welfare Lobby: The Relationship Between the Federal Labor Party and the Australian Council of Social Service (ACOSS)' (2004) 39(1) *Australian Journal of Political Science* 145.

such rationale/s, the extent to which the limitation is adapted to advancing such rationale/s and the severity of the limitation.

In evaluating a ban on organisational membership fees it is convenient to begin with the last factor, the severity of the ban. Freedom of political association possesses several key aspects, notably:

- the individual's right to form political associations, act through such associations and to participate in the activities of these associations; and
- the association's ability to determine its membership, the rules and manner of its governance and the methods it will use to promote its common objectives.[174]

Here we focus on freedom of party association and, in particular, the ability of political parties to determine their membership. Some parties, such as the Liberal Party[175] and the National Party,[176] for instance, may restrict themselves to individual memberships and are, in this way, *direct parties.* Others, like the ALP[177] and the NSW Greens,[178] allow both individual membership and membership by groups and are therefore *mixed parties*. The Constitution of the federal National Party also allows it to be a mixed party as organisations can become associations of the Party where there is no state branch.[179] Some parties like the NSW Shooters Party fall somewhere in the middle: membership is formally restricted to individuals[180] while close links are maintained with various groups.[181] In these situations such groups, while not members

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[174] Affidavit of Keith Ewing to IDSA litigation. See also Davis, above n 64, 46.
[175] See, for example, Constitution and Regulations of the Liberal Party of Australia (NSW) cl 2.1.
[176] See, for example, Constitution and Rules of the National Party of Australia (NSW) cl 2.
[177] See, for example, Rules of the Australian Labor Party (NSW) 2005–2006 cl A.2–A.3.
[178] Constitution of the Greens (NSW) cl 2.1.
[179] Constitution of the National Party of Australia (Cth) cl 71. Before 1945, various farmers' organisations had formal relationships with the Country Party, the predecessor of the National Party: Keith O Campbell, 'Australian Farm Organizations and Agricultural Policy' in 426, Colin Hughes (ed), *Readings in Australian Government* (1968) 438.
[180] Constitution of The Shooters Party (NSW), By-law (2).
[181] In the case of the Shooters Party, this is made clear by its Constitution, which states that one of its aims is '*[t]o exert a discipline through shooting organizations and clubs and within the non-affiliated shooting community*, to curb the lawless and dangerous element; and to help shooters understand that they hold the future of their sport in their own hands by their standards of conduct': Constitution of The Shooters Party (NSW) cl 2(g) (emphasis added). In relation to the 2003 State Election, The Shooters Party received thousands of dollars in contributions from various hunting and pistol clubs including the Federation of Hunting Clubs Inc, Singleton Hunting Club, St Ives Pistol Club, Illawarra Pistol Club and the NSW Amateur Pistol Association: NSW Election Funding Authority, *Details of Political*

of the party, act as *ancillary organisations*.[182] Such diversity of party structures should be respected because it is one of the main ways in which the pluralism of Australian politics is sustained.[183]

When viewed from this perspective, the impact of a ban on organisational membership fees on the freedom of party association is quite severe: it will mandate a particular party structure, direct parties, and while not directly banning parties that allow for organisational membership, will generally make them unviable unless such parties are able to secure sufficient public funding.[184]

The specific impact on the trade union-ALP relationship can be illustrated through typology developed by Bodah, Coates and Ludlam. According to these authors, there are two dimensions to union-party linkages, formal organisational integration and a level of policy-making influence, which give rise to four types of linkages:

- external lobbying type – that is, no formal organisational integration between unions and parties, with unions having no or little influence in party policy-making;
- internal lobbying type – that is, no formal organisation integration between unions and parties, but unions are regularly consulted in policy-making;
- union/party bonding type – that is, unions occupy important party positions but do not enjoy domination of party policy-making; and
- union dominance model – that is, unions occupy important party positions and dominate party policy-making[185]

Contributions of More than $1,500 Received by Parties that Endorsed a Group and by Independent Group at the Legislative Council 2003 (2003) <http://www.efa.nsw.gov.au/__data/assets/pdf_file/0008/30140/2003PartyContributions.pdf> at 5 February 2008.

[182] For fuller explanations of direct and indirect party structures, see Duverger, above n 137, 6–17.

[183] For fuller discussion, see Keith Ewing, *The Cost of Democracy: Party Funding in Modern British Politics* (2007) 35–8.

[184] This seems to be the position in relation to the Canadian New Democratic Party that still allows trade unions to affiliate on a collective basis: see Harold Jansen and Lisa Young, 'Solidarity Forever? The NDP, Organised Labour, and the Changing Face of Party Finance in Canada' (Paper presented to the Annual Meeting of the Canadian Political Science Association, London, Ontario, 2–4 June 2005) <http://www.partyfinance.ca/publications/OrganizedLabour.pdf> at 21 May 2008. See also the discussion in Ewing, *The Cost of Democracy*, above n 183, 220–1.

[185] Matthew Bodah, Steve Ludlam and David Coates, 'The Development of an Anglo-American Model of Trade Union and Political Party Relations' (2003) 28(2) *Labor Studies Journal* 45, 46; see also Steve Ludlam, Matthew Bodah and David Coates, 'Trajectories of Solidarity: Changing Union-Party

According to this typology, the trade union-ALP link fits either the union/party bonding type or the union dominance model because of the organisational integration of trade union affiliates into the ALP. As members of state and territory branches of the ALP, affiliated trade unions are guaranteed 50 per cent representation at state and territory conferences.[186] These conferences determine state and territory branch policies and elect state party officials and delegates to National Conference.[187] A ban on organisational membership fees will, however, make organisational integration between the ALP and unions much less viable; the menu of options is effectively restricted to the external/internal lobbying types.

Is there a compelling justification for such a severe incursion into the freedom of the ALP to organise itself as it sees fit? It is exceedingly difficult to see one – it is hard to escape the conclusion that such a ban represents an unjustified limitation on freedom of party association. It was such a concern with freedom of party association that led the NSW Select Committee to include trade union affiliation fees in their exemption for membership fees.[188] The key reasons given by the six-member committee, which had only two ALP members, are worth reproducing:

> The Committee considers that membership fees should not be encompassed by the Committee's proposed ban on all but small individual donations … *Similarly, the Committee believes that trade union affiliation fees should be permissible, despite the proposed ban on union donations. To ban union affiliation fees would be to place unreasonable restrictions on party structures.*[189]

Linkages in the UK and the USA' (2002) 4(2) *British Journal of Politics and International Relations* 222, 233–41. For an application of the typology to the Australian context, see Gerard Griffin, Chris Nyland and Anne O'Rourke, 'Trade Unions, the Australian Labor Party and the Trade-Labour Rights Debate' (2004) 39(1) *Australian Journal of Political Science* 89.

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

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

[188] NSW Select Committee, *Electoral and Political Party Funding in New South Wales*, above n 165, 107–8, 113 (Recommendation 9).

[189] Ibid 113 (emphasis added).

Recommendation 16: Membership fees (including trade union affiliation fees) should be set at a reasonable level and should be exempt from contribution limits.

D. Stricter Regulation of Fund-raising

It has been argued that the sale of access and influence constitutes a form of corruption through undue influence (see Section IV(B): 'Corrupting the Political Process through the Sale of Access and Influence'). In order to address such corruption, the following measures should be adopted.

Recommendation 17: Ministers and parliamentarians should be banned from attending party fund-raisers (as is the case in Queensland).[190]

Recommendation 18: There should be an obligation placed on government departments to publish at regular intervals specific information on the meetings between lobbyists and government representatives including the name of the lobbyist/s, dates of contact, meeting attendees and a summary of issues discussed.[191] This obligation should extend to party fund-raisers.

E. A Party and Candidate Support Fund

There are currently three separate pools of public funds under the *EFA*. There is the Central Fund and the Constituency Fund,[192] with two thirds of the funds credited to both funds[193] going to the Central Fund[194] and the remaining going to the Constituency Fund.[195] Registered parties, independent groups and candidates that received at least 4% of the first preference votes cast in Legislative Council elections

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[190] AAP, 'Bligh slaps bans on fundraising functions', Brisbane Times, 2 August 2009, <http://www.brisbanetimes.com.au/queensland/bligh-slaps-ban-on-fundraising-functions-20090802-e5kb.html> at 14 January 2010.
[191] This was recommended by the NSW Legislative Council General Purpose Standing Committee, *Badgerys Creek Land Dealings and Planning Decisions* (2009) 58.
[192] *EFA* s 56.
[193] *EFA* s 57 determines the total amount going to both funds.
[194] *EFA* s 58.
[195] *EFA* s 64.

or were elected are eligible to receive payments from the Central Fund,[196] with the amount of payment calculated according to a formula based on the number of first preference votes received.[197] No party, independent group or group of candidates may receive more than half of the monies in Central Fund or a proportion of funds exceeding its proportion of primary votes.[198] Candidates who received at least 4% of the first preference votes cast in a Legislative Assembly election or were elected are eligible for payments from the Constituency Fund[199] and the amount of payment is also calculated according to a formula based on the number of first preference votes received.[200] No candidate is to receive more than half of the monies in the Constituency Fund earmarked for his or her constituency[201] or a proportion of funds exceeding his or her proportion of primary votes.[202] Claims for payments from the Central Fund and the Constituency Fund are only approved if they are audited[203] and the amount claimed does not exceed the amount incurred for election campaign purposes.[204]

Registered parties eligible for payments under the Central Fund are also entitled to annual payments from the Political Education Fund.[205] These payments can be used for ‘political education purposes’. These purposes are subject to determinations made by the Authority[206] and include the posting of written materials and information.[207] The entitlement of a party to monies from this fund is based on the number of first preference votes received.[208]

These three Funds should be replaced by a Party and Candidate Support Fund. If contribution limits are introduced, a Party and Candidate Support Fund should result

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[196] *EFA* ss 59 (parties), 60 (independent groups), 61 (independent candidates).
[197] *EFA* s 62.
[198] *EFA* s 63.
[199] *EFA* s 65.
[200] *EFA* s 67.
[201] *EFA* s 68.
[202] *EFA* s 68.
[203] *EFA* s 75 lists the requirements of the audit.
[204] *EFA* s 74(2).
[205] *EFA* s 97C.
[206] *EFA* s 97D.
[207] *EFA* s 97C(2).
[208] *EFA* s 97E.

in an increase in public funding to candidates and parties in order to make up for the shortfall in private funding.

The Party and Candidate Support Fund should have three components. First, it should provide *election funding payments*. A party (or group of candidates) should be eligible for these payments if it secures:

- at least 2% of first preference votes cast as a whole for Legislative Assembly elections; or
- at least 2% of first preference votes cast in Legislative Council elections.

A candidate should be eligible for these payments if s/he secures at least 4% of first preference votes cast in the particular constituency. The amount of payments should be subject to a tapered scheme with the payment rate per vote decreasing according to the number of first preference votes received. For instance, the first 5% of first preference votes received by a party could entitle it to a payment of $2.00 per vote, while a payment rate of $1.50 per vote could be applied to the next 20% of first preference votes and a payment rate of $1.00 per vote attached to votes received beyond the 25% mark.

Second, the Fund should provide for *annual allowances.* Parties eligible for election funding payments should be eligible for these annual allowances. In addition, parties that have individual membership exceeding a certain level, for example 500, should also be eligible for these payments. The formula for distributing these allowances should be based on both votes received in the previous election and current membership figures.

Third, the Party Support Fund should include *policy development grants.* These could be modelled upon the policy development grants under the UK political finance scheme.[209] Eligibility for these grants should be the same as that which applies to annual allowances. These funds should only be used to fund activities that are strictly aimed at policy development and not electioneering.

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[209] *PPERA* s 12.

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

Recommendation 19: A Party and Candidate Support Fund should be established to provide for:

- election funding payments;
- annual allowances; and
- policy development grants.

F. Enhanced Accountability of Government Advertising

The Problem of Party-Political Government Advertising

The report will now examine a topic not adverted so far but which is crucial to address in its own right and also to ensure other elements of the reform package are not undermined: the question of government advertising.

There is little doubt that government advertising is significant in monetary terms. For instance, the NSW Government spent $111.7 million on advertising in 2006/07[210] while spending $101.6 million in 2008/09.[211] That hundreds of millions are being

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[210] NSW Audit Office, *Performance Audit: Government Advertising: Department of Premier and Cabinet; Department of Commerce* (2007) 2. See also NSW Audit Office, *Government Advertising: Department of Premier and Cabinet; Department of Services, Technology and Administration; NSW Treasury* (2009) 12 (Exhibit 12).

[211] NSW Government, *NSW Government Campaigns* (2010) <http://www.services.nsw.gov.au/advertising/campaigns.html#2> at 27 January 2010.

spent in this way does not necessarily mean that such expenditure is problematic. Indeed, government advertising clearly has a legitimate role in a representative democracy. At a general level, governments should (and need to) communicate with citizens. Laws and policies need to be publicised so citizens can organise their lives. Such publicity is not only necessary in order to provide justice to citizens who are bound by these laws and policies but also promotes efficacy of government. It is also vital in terms of ensuring accountability as publicity is a necessary pre-requisite for public comment and criticism of government. Routine operations also require governments to engage in particular forms of communication, for instance, by advertising job vacancies. As rightly noted in the NSW Government Advertising Guidelines:

> The NSW Government has an obligation to inform all people in NSW about their rights, obligations and entitlements. The government may legitimately use public funds to inform the public of these rights and obligations, as well as explain government policies, programs, services and initiatives. [212]

The specific role that government advertising plays in a representative democracy can be further understood by distinguishing between two broad types of government advertising: 'campaign' advertising and 'non-campaign' advertising.[213] As explained by the NSW Auditor-General:

> Campaign advertising is advertising placed over a specific period with the purpose of changing community behaviour, attitudes or raising awareness. Non-campaign advertising is routine in nature such as advertising job vacancies, tenders and public announcements such as road closures.[214]

There is clearly a role for 'non-campaign advertising' and in the controversies surrounding government advertising, this type of advertising has not been at issue. While more susceptible to controversy, there is also a legitimate place for 'campaign'

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[212] NSW Government, *NSW Government Advertising Guidelines Version 1.3* (2009) 2, <http://www.services.nsw.gov.au/advertising/pdf/NSWGovernmentAdvertisingGuidelines.pdf> at 27 January 2010.
[213] Senate Finance and Public Administration References Committee, Commonwealth Government, *Government Advertising and Accountability* (2005) 6–7.
[214] NSW Audit Office, *Government Advertising* (2009) above n 210, 12.

advertising. For instance, the detail of specific government programs may need to be communicated to citizens so they can access these programs. Or, laws may have been passed requiring citizens to change their behaviour, a change that may be effectively brought about by advertising. It is also increasingly accepted that government advertising can be used as a form of social marketing, that is, used to bring about positive behaviour change (whether or not such change is legally required). The advertisements run by the Victorian Transport Accident Commission to reduce the road toll is a good example of such use.[215]

Controversy, however, arises when 'campaign' advertising is said to be party-political. As the Auditor-General has noted, '[t]he important role played by government advertising can be undermined by any suggestion that it serves party political interests'.[216] This reason for this is not difficult to understand. Party-political advertising occurs when government advertising is aimed at enhancing the electoral prospects of the governing party rather than advancing the legitimate needs of government. As so understood, party-political advertising involves two wrongs: *corruption through the misuse of public resources* because government advertising is principally directed at the illegitimate purpose of securing electoral advantage for the governing party; and, *political unfairness* because such resources are only available to the governing party.

At the very least, suspicions of party-political government advertising are aroused when there is an increase in government advertising expenditure in the lead up to elections, as was the case with the 2007 NSW State Election.[217] Such developments together with the wrongs involved with party-political advertising would suggest the need for strong regulation to guard against such advertising.

Arguments have, however, been made against such regulation – one of the most important claims being that determinations of what is party-political advertising is highly contextual and regulation will not be sufficiently precise in order to provide

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[215] See Sally Young, 'A History of Government Advertising in Australia' in Sally Young (ed) *Government Communication in Australia* (2007) 181, 185–190.
[216] NSW Audit Office, *Government Advertising* (2009) above n 210, 'Foreword'.
[217] NSW Audit Office, *Government Advertising* (2007) above n 210, 2.

effective guidance.[218] It is true that '[i]t is a question of fact and law as to whether any expenditure is or is not appropriate in this context'.[219] This argument, however, overreaches. The presence of party-political government advertising, that is, advertising with a substantial purpose to enhance the electoral prospects of the party in power (or damage those of its competitors) will be clear in various situations. Government advertising that expressly advocates a vote for the party in power or directly criticises the Opposition are cases on point. The Victorian Auditor-General has also identified various situations where material could be reasonably interpreted as party-political including regular use of the name of the State Premier (for example 'the Bracks Government' or 'the Bracks Labour Government') and attacking or scorning views of others (for example: 'Under the former Kennett Government, Melbourne's hospitals were not only surviving on the smell of an oily rag but were secretly selling off the family silver').[220]

Other situations would provide strong circumstantial evidence of party-political advertising. A circumstance suggestive of party-political advertising is when government advertising takes place close to election time. Another circumstance is when advertising relates to policies that have yet to be adopted. Both these circumstances combined in the case of the 'WorkChoices' advertising campaign, lending compelling force to the following observations of the majority of the Senate Finance and Public Administration Committee:

> in the absence of enacted legislation and detailed information, what can the WorkChoices campaign achieve? The real purpose of the campaign seems to be to try to persuade the public, in advance of any scrutiny or debate on the substance of the reforms, that whatever the legislation contains it must be supported. Such a campaign is properly called propaganda.[221]

That said, the point remains that the question of whether government advertising is party-political is deeply contextual. Whether such advertising is party-political will

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[218] See, for example, Petrou Georgiou's dissent in: Joint Committee of Public Accounts and Audit, Commonwealth Parliament, *Report 377* (2000), 3.
[219] South Australian Auditor-General, *Report of the Auditor-General for the Year Ending 30 June 1997*, Pt A.4, 'Public Expenditure on Government Advertising: General Principles, <http://www.audit.sa.gov.au/96-97/a4/govadver.html> at 10 February 2010.
[220] Victorian Auditor-General's Office *Report on public sector agencies* (2002) 306–7.
[221] Senate Finance and Public Administration References Committee, *Government Advertising and Accountability*, above n 213, 51.

depend on various factors including whether it can be justified by reference to specific informational needs; its content and timing; the amount spent; and the broader political context of such advertising. The complexity attending such judgments does not mean regulation is unworkable in practice. What it implies is an emphasis on requiring governments to justify the need for the advertising they engage in with a specific onus on explaining why such advertising is not party-political.

This suggests an emphasis on strengthening the broader framework of political accountability applying to government advertising. The argument here is not only that specific measures directed at preventing party-political government advertising are important. Equally, and this point should be emphasised, a robust accountability framework is essential to prevent party-political government advertising. For instance, requiring governments to justify advertising campaigns based on specific informational needs will be one way to filter out party-political advertisements because such advertising is often not directed towards a specified information need.[222]

Improving Accountability in Relation to NSW Government Advertising

There are three key aspects of the accountability framework governing NSW Government advertising:

- disclosure of information concerning such advertising;
- accountability through parliamentary mechanisms; and
- accountability through executive mechanism.

Adequate Disclosure of Information Concerning Government Advertising

The importance of such disclosure was made clear by the NSW Legislative Assembly Public Accounts Committee:

> To maintain public trust, the Government must display a high level of transparency regarding advertising expenditure. Although spending on advertising makes up a small proportion of the budget of government agencies, the discretionary nature of such spending, coupled with the potential of the advertisements to influence voter behaviour, imposed a greater burden on

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[222] See generally NSW Audit Office, *Government Advertising* (2007) above n 210, 28.

> those agencies to disclose how much they spent on advertising and how appropriate that expenditure was.[223]

The current arrangements, however, do not provide for adequate disclosure. Under these arrangements, the NSW Department of Services, Technology and Administration publishes on its website:

- a list of advertising topics that involved media expenditure of more than $1 million together with the respective costs of media expenditure; and
- a list of specific advertising campaigns costing more than $50 000 in media expenditure together with the respective costs of media expenditure.[224]

Of note is that these arrangements do not provide information as to the *total* cost of NSW Government advertising campaigns, only the cost of media expenditure (the cost of media placement). They do not appear to include the cost of advertising agency services, the production of advertising material and the market research that informs advertising campaigns. This is one of the key reasons for the Auditor-General criticising these arrangements as being deficient and calling instead for the total cost of each campaign.[225]

The deficiencies of the current arrangements become even more glaring when evaluated against the recommendations that the Senate Finance and Public Administration Committee has made (drawing upon Canadian governmental practices). The central elements are contained in Table 10:

[223] Public Accounts Committee, NSW Legislative Assembly, *Report on Examination of the Auditor-General's Performance Audits Tabled March to August 2007* (2009) 36.
[224] See NSW Government, *NSW Government Campaigns* (2010) above n 211.
[225] NSW Audit Office, *Government Advertising* (2009) above n 210, 22.

Table 10: Key Recommendations Made by the Senate Finance and Public Administration Committee

Recommendation 10	• An annual report published by the Department of Prime Minister and Cabinet required to provide, amongst other things: - a total figure for government expenditure on advertising activities; - total figures, listed by agency, for expenditure on advertising activities; - figures for expenditure on media placement by type; - figures for expenditure on media placement by month; and - detailed information about major campaigns, including a statement of the objectives of the campaign, the target audience, a detailed breakdown of media placement, evaluation of the campaign including information about the methodology used and the measurable results, and a breakdown of the costs into 'production', 'media placement' and 'evaluative research'.
Recommendation 11	• Information included in the annual report of each government agency providing: - a total figure for the agency's advertising expenditure; and - a consolidated figure for the cost of each campaign managed by that agency.
Recommendation 12	• Information included in the annual report of each government agency providing: - a total figure for departmental expenditure on public opinion research; - a breakdown of the type of research, including the expenditure on research for advertising as a percentage of total research costs; - highlights of key research projects; and - a listing of research firms used by business volume.[226]

[226] Senate Finance and Public Administration References Committee, *Government Advertising and Accountability*, above n 213, [7.93]–[7.96].

It is clear that the current NSW arrangements fail to implement Recommendation 10. In relation to Recommendations 11 and 12, the NSW Government advertising guidelines contain this weak exhortation:

> Agencies are also *encouraged* to publish information about their advertising programs on their websites. Information may include advertising rationale, objectives, costs and outcome.[227]

Not only do these arrangements fall short of the Senate recommendations but they also fail to implement the recommendation of the NSW Auditor-General that agencies publish information on their websites about campaigns including total cost, justification audience and campaign objectives.[228]

> *Recommendation 20:* The NSW Government should implement the Senate Finance and Public Administration's recommendations concerning disclosure of government advertising information (with adaptations to the different system of government departments).

Accountability through parliamentary mechanisms

In terms of parliamentary accountability, this can occur prospectively through the appropriation process or retrospectively, that is, after the money has been spent on the advertising.

Prospective parliamentary accountability arises through the requirement in the NSW Constitution that there be an appropriation of money through an Act before public funds can be spent by the executive.[229] These requirements are of vital importance in terms of democratic accountability. The relevant provisions of the *Commonwealth*

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[227] *NSW Government Advertising Guidelines*, 10, above n 212 (emphasis added).

[228] NSW Audit Office, *Government Advertising* (2007) above n 210, 4.

[229] *Constitution Act 1902* (NSW) s 45. For equivalent provisions in other jurisdictions, see *Commonwealth Constitution* ss 81, 83; *Constitution of Queensland Act 2001* (Qld) s 66; *Public Finance and Audit Act 1987* (SA) s 6; *Public Accounts Act 1986* (Tas) s 8; *Constitution Act 1975* (Vic) s 92; *Constitution Act 1889* (WA) s 72; *Financial Management Act 1996* (ACT) ss 6, 8; *Financial Management Act 1995* (NT) s 5(2).

Constitution, ss 81 and 83[230] for instance, have been described by the High Court as assuring 'the people effective control of the public purse'.[231]

While of general importance in ensuring democratic accountability, this mechanism is significantly limited when it comes to government advertising. More often than not, government advertising is not specifically itemised in Appropriation Bills, making it difficult, if not impossible, for parliamentarians to evaluate whether money should be allocated to such advertising. The practice with NSW appropriation statutes has generally been to allocate monies to the ministries without specifying how such money is to be spent.[232] In the context of such practice there are clear limits to prospective financial accountability through the appropriations process when it comes to NSW Government advertising.

These limitations do not equally apply when the NSW Parliament holds the executive accountable for advertising expenditure after such spending has been incurred. Parliamentary committees like the Public Accounts Committee provide a crucial mechanism to secure such retrospective accountability and it is important that they conduct regular inquiries into government advertising.

> *Recommendation 21:* That the NSW Parliament Public Accounts Committee, or another appropriate parliamentary committee, should conduct annual inquiries into NSW Government advertising.

It is important to note here that the effectiveness of these committees (and public scrutiny more generally) will depend upon the information these committees have at their disposal and, in particular, whether detailed information relating to government advertising is publicly disclosed – a matter which again underscores the importance of adequate disclosure of such information (discussed above).

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[230] For a recent article examining these provisions, see Charles Lawson, 'Reinvigorating the Accountability and Transparency of the Australian Government's Expenditure' (2008) 32 *Melbourne University Law Review* 879.
[231] *Brown v West* (1990) 169 CLR 195, 205.
[232] See *Appropriation Act 2009* (NSW).

Accountability Through Executive Mechanisms

We can see now that parliamentary accountability, in both its prospective and retrospective forms, *can* play a crucial role in addressing the risk of party-political government advertising. There are, however, serious limitations to these processes. With prospective parliamentary accountability through the appropriation process, government advertising is not specifically itemised in Appropriation Bills, preventing focussed scrutiny into such advertising. With retrospective parliamentary accountability, the lack of specific information on government advertising clearly does not bode well for meaningful scrutiny. Further, both forms of parliamentary accountability are unable to deal with the content of government advertising *prior* to such advertising being undertaken. This brings us to the importance of executive accountability, specifically, accountability through guidelines on government advertising.

The NSW Government Advertising Guidelines have two major components: a set of principles and prescribed processes. The principles stipulated in the guidelines are set out below.

- Compliance with all relevant state and federal privacy, electoral, broadcasting and media laws throughout every stage of development, production and dissemination of the advertising.
- Accuracy in the presentation of all facts, statistics, comparisons and other arguments. All statements and claims included in advertisements must be able to be substantiated.
- Advertising is to be presented in an objective, fair and accessible manner.
- A reasonable person should not interpret the message as serving party political interest.
- NSW Government advertisements are to be clearly distinguishable from party-political messages and include authorisation tags (see below in this document) in accordance with the Broadcast Services Act 1992.
- Sensitivity to cultural needs and issues when communicating with people from diverse ethnic or religious backgrounds.
- The maintenance of the highest standards of decency and good taste in the portrayal of gender and sexuality.

- Awareness of the communication requirements for people with a disability.
- Compliance with all relevant NSW Government procurement policies.
- Communications are produced and disseminated by the most appropriate and environmentally responsible means taking into consideration the size and location of the target audience.
- The audience should have a convenient means of contacting the originating NSW Government Department so that complaints, questions, comments or requests for further information may be dealt with promptly.[233]

In terms of prescribed processes, Department Heads are responsible for a range of matters including advertising being 'in response to a clearly articulated need', '[a]chieves value for money' and complies with the advertising guidelines.[234] Strategic Communications and Government Advertising within the Department of Services, Technology and Administration 'coordinates and oversees planning of all NSW Government advertising'.[235] In operation is also the Advertising Peer Review System, an arrangement which subjects proposed government advertising at the 'concept stage'[236] to review by a Peer Review Team comprising persons with advertising and communications experience. This review applies three criteria:

- need of campaign;
- chosen strategy; and
- management approach.[237]

Further, approval of the Cabinet Standing Committee on the Budget is generally required with advertising campaigns that have a total budget of $50 000 or more.[238]

These guidelines can be evaluated according to five principles. The first three, drawn from various reports of parliamentary committees and Auditors-General on the topic of government advertising, concern the material presented through government advertising. They are as follows:

- Principle One: Material should be relevant to government responsibilities;

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[233] *NSW Government Advertising Guidelines*, above n 212, 2–3 (emphasis removed).
[234] Ibid 4.
[235] Ibid.
[236] Ibid 7.
[237] Ibid 8.
[238] Ibid 7.

- Principle Two: Material should be presented in an objective, fair, and accessible manner; and
- Principle Three: Material should not be directed at promoting party political interests.

The fourth principle (which is also sourced from the reports above) states that material in government advertising should be produced and distributed in an efficient, effective and relevant manner with due regard to accountability.[239]

The final principle is that of regular independent scrutiny of the guidelines. This is essential if these guidelines are to be effectively implemented. Leaving the implementation of the guidelines to the government departments alone might not provide a secure basis for effective implementation. This seems to be illustrated by the NSW Auditor-General's 2009 report on government advertising. This report examined four advertising campaigns:

- NSW Public Sector Cadetship campaign and the Investing in a Better Future campaign, both conducted by the Department of Premier and Cabinet; and
- Winter 2009 (Influenza) campaign and the Tobacco legislation change (Smoking in Cars with Kids) campaign, both undertaken by NSW Health.

Whilst the report concluded that the two NSW Health advertising campaigns complied with the NSW Government Advertising Guidelines, it did not find the same in relation to the campaigns undertaken by the Department of Premier and Cabinet. In particular, it found that the Cadetship campaign featured a photograph of the Premier, posing high risk that a reasonable person could judge the campaign as serving party political interests; and that the $1.9 budget for the Better Future campaign meant there was a high risk that it was excessive.[240]

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[239] Australian National Audit Office (1998) *Performance Audit: Taxation Reform: Community Education and Information Program*, 57–60; Joint Committee of Public Accounts and Audit, *Report 377*, above n 218, 4–7; Victorian AG's Office, *Report on Public Sector Agencies*, above n 220, 314–15; Senate Finance and Public Administration References Committee, *Government Advertising and Accountability*, above n 213, 123–6; NSW Audit Office, *Government Advertising* (2007) above n 210,36–7.

[240] NSW Audit Office, *Government Advertising* (2009) above n 210, 2–3, 30–1.

Turning now to an evaluation of the NSW Government Advertising Guidelines according to these five principles. Two of the principles are met by the guidelines. Principle One, 'Material should be relevant to government responsibilities', is satisfied by Department Heads having need to be satisfied that there is a need for the campaign (and also by the Peer Review Team evaluating the need for the campaign). Similarly, Principle Four is substantially met by the requirement that Department Heads be satisfied that advertising campaigns achieve 'value for money'.

Principle Two, 'Material should be presented in an objective, fair, and accessible manner', is also met by an express reference to this principle and also by the principle that claims and statements be substantiated. Adherence to this principle could, however, be buttressed by adopting a requirement found in the Commonwealth Advertising Guidelines that fact be distinguished from opinion. [241]

> *Recommendation 22:* The NSW Government Advertising Guidelines should be amended to require that fact be distinguished from opinion.

The guidelines, however, fall short of these principles in relation to Principles Three and Five, both of which will be further discussed below.

<u>Principle Three: Material Should Not be Directed at Promoting Party Political Interests.</u>

The guidelines address this principle in several ways. A key precept of the guidelines is that '[a] reasonable person should not interpret the message (in government advertising) as serving party political interests'.[242] The guidelines further identify the following as '[i]nappropriate use of publicly funded advertising':[243]

- the method or medium of advertising is excessive or extravagant in relation to the objective being pursued;
- the message could be reasonably understood as being on behalf of a political

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[241] Australian Government, *Guidelines on Campaign Advertising by Australian Government Departments and Agencies* (2008) [14], <http://www.finance.gov.au/advertising/docs/guidelines_on_campaign_advertising.pdf> at 10 February 2010.

[242] *NSW Government Advertising*, above n 212, 2.

[243] *NSW Government Advertising*, above n 212, 3.

party;

- the party in NSW Government is mentioned by name;
- party-political slogans or images are used in the advertising;
- the Government is linked to the Premier's name (e.g., the Smith Government);
- references are made to political party websites, publications or other materials;
- a political party or other grouping is being disparaged or held up to ridicule; and
- members of NSW Government are named, depicted or otherwise promoted in a manner that a reasonable person would regard as excessive or gratuitous.[244]

These aspects of the guidelines are to be commended and are essential in preventing party-political advertising.

> *Recommendation 23:* The specific prohibitions relating to party-political advertising found in the NSW Government Advertising Guidelines should be maintained.

The other crucial way in which the guidelines seek to prevent party-political advertising is through a quarantine period prior to state elections. As stated in the guidelines:

> Agencies should cease all major advertising activities for a period of two months prior to a state election. The only advertising to be exempt during the quarantine period will be publicity that relates to community health and safety issues, appropriate public information and services having clear commercial considerations (for example transport providers and tourism promotion).[245]

One may be excused for asking: what is the justification for such a 'quarantine' period? Aren't the specific prohibitions relating to party-political advertising sufficient from the perspective of Principle 3? There is much force to these questions.

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[244] *NSW Government Advertising*, above n 212, 3.
[245] *NSW Government Advertising*, above n 212, 6.

The answer to them lies in appreciating three points: the party in government tends to derive a 'collateral benefit in electoral terms' from advertising the implementation of its policy;[246] the principle of electoral fairness is of heightened importance in the period leading up to elections; and, there is the phenomenon of government advertising increasing in the lead up to NSW elections (see above). These points combine to provide a justification for a 'quarantine' period. They explain why, even if the specific prohibitions relating to party-political advertising are complied with, there is still a significant risk of government advertising in the lead to elections giving the party in government an unfair electoral advantage.

While the notion of the 'quarantine' period is sound, its operationalisation in the NSW Government Advertising Guidelines is problematic. The exemption for 'appropriate public information' is far too broad. After all, NSW Government advertising, whether or not undertaken during the 'quarantine' period, is supposed to provide 'appropriate public information'. Casting what should be an essential element of NSW Government advertising as an exception to the 'quarantine' period prohibition has the potential to render such a prohibition meaningless. Further, the length of the 'quarantine' period, two months leading up to the state elections, is too short as state election campaigns tend to begin before then. The length should be increased with serious thought given to increasing it to six months, the period of the 'quarantine' period under the Queensland Government advertising guidelines.[247]

> *Recommendation 24:* The exception of 'appropriate public information' in the 'quarantine' period prohibition should be removed.

> *Recommendation 25:* The length of the 'quarantine' period should be increased beyond two months in the lead up to state elections with serious consideration given to increasing it to six months in the lead up to such elections.

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[246] South Australian Auditor-General, *Report of the Auditor-General for the Year Ending 30 June 1997*, above n 219. Pt A.4.
[247] Queensland Government, *Queensland Government Advertising Code of Conduct*, <http://www.premiers.qld.gov.au/publications/categories/policies-and-codes/assets/advert-code-of-conduct.pdf> at 10 February 2010.

Principle Five: Regular Independent Scrutiny of Guidelines

It is fair to say that this principle has not been given effect to by the guidelines: the Auditor-General provides independent scrutiny of the guidelines but *not with sufficient regularity*; and the Peer Review system provides regular independent scrutiny *but not of the guidelines* (their criteria of evaluation being restricted to the need of the campaign, chosen strategy and management approach). [248]

> *Recommendation 26:* Measures should be taken in order to provide regular independent scrutiny of the implementation of the NSW Government Advertising Guidelines.

There are two models for properly giving effect to Principle Five. The first calls for the Auditor-General to undertake systematic evaluation of the guidelines. The Commonwealth Government has implemented such a model by requiring that for all advertising campaigns with an expenditure of more than $250 000 a report be written by the Commonwealth Auditor-General for the relevant Minister regarding compliance of the campaign with the Commonwealth guidelines.[249] The NSW Legislative Council Select Committee on Electoral and Political Party Funding has also recommended the adoption of a similar model based on the system operating in Ontario, Canada.[250]

This model has, however, been resisted by the NSW Auditor-General on the basis that it will limit its ability to subsequently audit the expenditure involved in government

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[248] *NSW Government Advertising*, above n 212, 8.
[249] *Guidelines on Campaign Advertising by Australian Government Departments and Agencies*, above n 241, [6]. It should be noted that the Cabinet Secretary can exempt a campaign from compliance with the guidelines on the grounds of 'a national emergency, extreme urgency or other extraordinary reasons the Cabinet Secretary considers appropriate'. Such exemption must, however, be notified to the Auditor-General and recorded in Parliament: [7].
[250] NSW Select Committee, *Electoral and Political Party Funding in New South Wales*, above n 165, 75.

advertising.[251] As an alternative, the NSW Auditor-General has recommended strengthening the Peer Review System by:

- expanding the Peer Review Team to include an independent member 'to represent the views of the community on government advertising [who] should not be required to have expertise in advertising';[252] and
- requiring the Peer Review Team to specifically attest that the advertising campaign is not party-political and not excessive.[253]

The relative de/merits of these two models warrant further examination.

> *Recommendation 27:* Consideration should be given to providing regular independent scrutiny of the NSW Government Advertising Guidelines through:
>
> - the NSW Auditor-General having oversight of NSW government advertising; and/or
> - strengthening of the Peer Review System.

G. *Constitutional Considerations*[254]

The reform agenda advocated by this report comprises of six interacting planks:

- a more robust disclosure scheme;
- election spending limits;
- contribution limits (with an exemption for membership fees);
- stricter regulation of fund-raising;
- a party and candidate support fund; and
- enhanced accountability of government advertising.

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[251] NSW Audit Office, *Government Advertising* (2009) above n 210, 17. See also NSW Select Committee, *Electoral and Political Party Funding in New South Wales*, above n 165, Appendix 6: Dissenting statement.
[252] NSW Audit Office, *Government Advertising* (2009) above n 210, 17.
[253] Ibid 20.
[254] Parts of this section draw upon Joo-Cheong Tham and Graeme Orr, *Submission on Twomey Report* (December 2008). This submission is found in the Appendix of Joo-Cheong Tham, *Submission on Electoral Reform Green Paper: Donations, Funding and Expenditure* (2008) <http://www.dpmc.gov.au/consultation/elect_reform/submissions.cfm> at 10 February 2010.

This section aims to examine the key constitutional considerations raised by this agenda.

Before delving into these considerations, several preliminary remarks are in order. The choice to have the constitutional analysis towards the end of this report is deliberate. It reflects the view that policy-making in the area of political finance (or more generally) should begin with governing principles, an evaluation of the status quo and, finally, a prescription of changes (if necessary). Constitutional considerations tend to come at the end of this chain of analysis as they involve constraints as to what changes are possible. This point is worth stressing – constitutional considerations should *not* be front-ended in the debate concerning political finance. They say very little, often nothing, as to the status quo or what ought to be done. The key question before the courts in constitutional cases concerns the validity of the legislation not its desirability. The limited role of the courts in such cases explains why courts rightly show deference to legislative judgment (discussed below).

Moreover, constitutional analysis usually provides a narrow range of principles, often failing to capture the breadth and depth of considerations that should be fully considered in questions of law reform. Underlying this are structural reasons – reasons that go to the proper role of courts. In constitutional cases, courts are concerned with legal principles derived from the constitutional texts and case law and not concerned with principles more generally. Moral and political principles like those that inform the ends of a democratic political finance regime (see Section II: 'Aims of a Democratic Political Finance Regime') do not come within the province of such concern unless they find some footing in constitutional texts and case-law. The result is that constitutional concepts are not co-extensive with broader political understandings. For instance, the implied freedom of political communication constitutes a narrower conception of freedom of political expression than that informing this report. As will be explained below, its predominant concern is with 'freedom from' (state regulation) and not 'freedom to'; formal availability of freedom of political expression is its focus, not the fair value of such freedom.

Further, constitutional principles are developed in the context of specific proceedings before the courts involving challenges to particular legislation. In such proceedings, both the range of participants and subject-matter is restricted. Compare this with the inquiry undertaken by the NSW Legislative Council Select Committee on Electoral and Political Party Funding: its terms of reference were broad and anyone could put in a submission to the inquiry.[255]

The purpose of these remarks then is to sound a general caution. Constitutional considerations should be taken seriously in the current debate on political funding but should not be allowed to dominate it. Otherwise, there will be a grave risk of 'democratic debilitation' of a particular kind:[256] a cramped and legalistic debate that not only fails to do justice to the full range of considerations but also limits participation to those with legal (constitutional) expertise.

Having now made these preliminary remarks, we can now turn to the key constitutional questions, namely:

1) Does NSW Parliament have legislative power under *Constitution Act 1902* (NSW) to enact the reform package?
2) Is the reform package constitutionally invalid because it breaches a limitation stemming from the *Commonwealth Constitution*?
3) Will the reform package be rendered inoperative because of inconsistency with federal legislation by virtue of s 109 of the *Commonwealth Constitution*?

The answer to Question 1) is most likely 'yes'. Section 5 of the *Constitution Act 1902* confers upon the NSW Parliament 'power to make laws for peace, welfare and good government of New South Wales in all cases whatsoever' subject to the provisions of the *Commonwealth Constitution*. It is established that the 'power to make laws for peace, welfare and good government of New South Wales in all cases whatsoever' is a plenary power to make laws in relation to New South Wales.[257] Putting aside

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[255] See Parliament of NSW, Select Committee on Electoral and Political Party Funding, <http://www.parliament.nsw.gov.au/partyfunding> at 21 January 2010.

[256] See generally Mark Tushnet, 'Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty' (1995) 94 *Michigan Law Review* 245, 247.

[257] *Union Steamship of Australia Pty Ltd v King* (1988) 166 CLR 1, 10. See also *Clayton v Heffron* (1960) 105 CLR 214, 250 (Dixon CJ, McTiernan, Taylor and Windeyer JJ) 265 (Kitto J), 271–3

limitations arising from the *Commonwealth Constitution*, this means that the New South Wales Parliament has the power to make laws not only in relation to participants in NSW elections but more generally in relation to political parties, candidates and other political actors that physically operate in the State of New South Wales, including parties and candidates based in New South Wales even when they are contesting federal elections or are registered under federal electoral laws. (As will be discussed below, NSW laws operating in such situations will be rendered inoperative if there is an inconsistency between such laws and federal laws but such inconsistency goes to the effect of the state law and not the power of the NSW Parliament to enact such laws – indeed, it presumes such a power as only valid state laws can be rendered inoperative.)

This means that, federal constitutional limitations aside, the NSW Parliament can enact the various elements of the reform package. Specifically, it can enact disclosure laws that apply to parties, candidates and third parties that participate in NSW elections requiring disclosure of their funds *regardless* of the use they are put to – in fact, the current disclosure obligations operate in this fashion by requiring parties, candidates and third parties to disclose political donations received whether or not such money is directed towards state and/or federal election campaigns.[258]

Similarly, the NSW Parliament can enact contribution limits applying to parties and candidates (as suggested under the reform package) that extend to *all* funds. While funding disclosure obligations and contribution limits are, of course, different in terms of *how* they regulate contributions, they do not differ in terms of *what* they regulate. Given their identical subject-matter, validity of NSW laws requiring disclosure of all contributions will mean validity of limits on such contributions. Subject to federal constitutional limitations, the NSW Parliament can also clearly enact limits that apply

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(Menzies J); *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 71–80 (Dawson J), 90–1 (Toohey J). See generally Anne Twomey, *The Constitution of New South Wales* (2004) 168–71. This power is not expressly subject to any limitation under the *Constitution Act 1902* (NSW) relating to freedom of political communication; neither has there been any court decision finding that there is such a freedom implied from the entrenched provisions of the Act: see discussion in Anne Twomey, *The Constitution of New South Wales* (2004) 205–7.

[258] *Election Funding and Disclosures Act 1981* (NSW) s 86.

to spending in New South Wales elections and establish a Party and Candidate Support Fund.

In relation to Question 2), there are two relevant limitations. The limitation that applies to the power of the NSW Parliament to regulate the Commonwealth[259] can be quickly dispensed with – these limitations do not apply in relation to the reform package as none of the measures seek to regulate the Commonwealth. The second limitation, the implied freedom of political communication, raises much more complex issues and will be discussed below (as will Question 3).

Implied Freedom of Political Communication

The High Court has implied a freedom of political communication from sections of the *Commonwealth Constitution* relating to representative and responsible government, specifically ss 7, 24, 64 and 128.[260] This freedom, while derived from provisions of the *Commonwealth Constitution*, also applies to state and territory legislation by virtue of discussion of matters at the level of state or territory (or local government) being able to bear upon the choice to be made at federal elections. According to the High Court, this inter-relationship results from national political parties, the financial dependence of state, territory and local governments on federal funding and 'the increasing integration of social, economic and political matters in Australia'.[261] As a consequence, NSW legislation that breaches this implied freedom of political communication will be constitutionally invalid.

The current test for determining whether this freedom has been breached (often referred to as the *Lange* test) has two limbs:

- Does the law (of a state or federal parliament or a territory legislature) effectively burden freedom of communication about government or political matters either in its terms, operation or effect?

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[259] See *Commonwealth v Cigamatic Pty Ltd (In Liquidation)* (1962) 108 CLR 372; *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410.
[260] *Lange v Australian Broadcasting Corporation ('Lange')* (1997) 189 CLR 520, 566–7.
[261] *Lange* (1997) 189 CLR 520, 571–2. See also *ACTV* (1992) 177 CLR 106, 142 (Mason CJ), 168–9 (Deane and Toohey JJ), 215–17 (Gaudron J); *Coleman v Power* (2004) 220 CLR 1, 45 (McHugh J).

- If the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end (in a manner) which is compatible with the prescribed system of representative and responsible government?[262]

Of the various planks of the reform package, it is contribution and spending limits that raise the most concerns under this head. It should be noted that public funding as provided under state legislation, for instance, through a Party and Candidate Support Fund, does not *on its own* implicate the implied freedom of political communication. The implied freedom protects 'freedom from' (state regulation) in that it does not 'confer personal rights on individuals'; rather it 'preclude[s] the curtailment of the protected freedom by the exercise of legislative or executive power'.[263] Providing money to political parties and candidates, whilst enhancing ability of these actors to communicate (and in this way promoting 'freedom to'), does not limit the formal freedom of others to communicate. This is not to say that public funding is irrelevant when analysing the constitutional validity of the reform package recommended. On the contrary, it becomes relevant when determining whether contribution and spending limits are constitutionally valid (as will be discussed below).

<u>Contribution Limits and the Implied Freedom of Political Communication</u>

As with the 1st limb of the *Lange* test, it is clear that limits on political contributions burden the freedom to communicate about government or political matters. This occurs in two ways. First, making a political contribution is, in most cases, a way of communicating support for the recipient party or candidate. Limits on contributions, therefore, burden the formal ability of citizens to communicate in this way through contributions that exceed the limits. Second, political contributions enable parties and candidates to communicate about government and political matters hence, limits on such contributions will impact upon their ability to do so.

Turning to the 2nd limb of the *Lange* test, there are two principal issues:

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[262] The test stated in *Lange* (1997) 189 CLR 520, 571–2 as modified by a majority in *Coleman v Power* (2004) 220 CLR 1, 50 (McHugh J), 78 (Gummow and Hayne JJ), 82 (Kirby J).
[263] *Lange* (1997) 189 CLR 520, 560.

- Do the contribution limits serve legitimate aims that are compatible with the system of representative and responsible government prescribed by the *Commonwealth Constitution*?
- Are such limits reasonably appropriate and adapted to serve such aims in a manner compatible with the system of representative and responsible government prescribed by the *Commonwealth Constitution*?

On the question of legitimate aims, the key rationales of contribution limits are to lessen the risk of corruption through graft and undue influence as well as its perception. They are also aimed at promoting the fair value of political freedoms by preventing wealth from having a disproportionate influence over the political process (see further Section V(C): 'Contribution Limits (with an Exemption for Membership Fees)').

Reasoning from first principles, both the anti-corruption and fair value rationales of contribution limits are mostly likely compatible with the system of representative and responsible government prescribed by the *Commonwealth Constitution*. The former aim is directed at protecting the integrity of representative government in New South Wales. Not surprisingly, in *Australian Capital Television Pty Ltd v Commonwealth* (*ACTV*), it was fully accepted that the ban on political broadcasting (together with the free-time regime) served a legitimate aim of lessening the risk of corruption.[264]

The fair value rationale, on the other hand, is directly derived from the principle of political equality, a principle that informs the system of representative government prescribed by the *Commonwealth Constitution*. In *ACTV,* for instance, High Court Chief Justice Mason quoted with approval Harrison Moore's observation that the 'great underlying principle' of the *Commonwealth Constitution* is that citizens have 'each a share, and an equal share, in political power'.[265]

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[264] See, for example, *ACTV* (1992) 177 CLR 106, 144–5 (Mason CJ).
[265] Moore, above n 38, 329. This statement was cited with approval in *ACTV* (1992) 177 CLR 106, 139–40 (Mason CJ).

It remains to consider whether the contribution limits, as recommended by this report, are reasonably appropriate and adapted to serve these rationales. In determining this issue, the High Court will provide a 'margin of appreciation'[266] or 'margin of choice'[267] to legislative judgment as to what regulation should be adopted. The terms of the *Lange* test reflects such judicial deference – the test is whether the regulation is *reasonably* appropriate and adapted to serve a legitimate end and not whether it is *best suited* to serve this end. In particular, the *Lange* test does not require that Australian legislatures adopt regulation serving a legitimate end that involves the *least* burden on freedom of political communication. Whilst two High Court judges have considered that regulation of the content of political communication would require a higher level of justification,[268] this is not a circumstance that applies to contribution limits.

The deference informing the *Lange* test rests on two crucial considerations. The first concerns the proper role of Australian courts. Contrasting the implied freedom of political communication with the United States First Amendment jurisprudence, Brennan CJ in *Levy v Victoria* stated that:

> Under our Constitution, the courts do not assume the power to determine that some more limited restriction than that imposed by an impugned law could suffice to achieve a legitimate purpose. The courts acknowledge the law-maker's power to determine the sufficiency of the means of achieving the legitimate purpose, reserving only a jurisdiction to determine whether the means adopted could reasonably be considered to be appropriate and adapted to the fulfilment of the purpose.[269]

This approach is, as noted by Gleeson CJ in *Coleman v Power,* based on 'the respective roles of the legislature and the judiciary in a representative democracy'.[270] Second, the concepts of representative and responsible government that inform the provisions of the *Commonwealth Constitution* which gave rise to the implied freedom are 'descriptive of a whole spectrum of political institutions', permitting 'scope for

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[266] *ACTV* (1992) 177 CLR 106, 15 (Brennan J).
[267] *Coleman v Power* (2004) 220 CLR 1, 52–3 (McHugh J).
[268] *ACTV* (1992) 177 CLR 106, 143 (Mason CJ), 234–5 (McHugh J).
[269] *Levy v Victoria* (1997) 189 CLR 579, 598.
[270] *Coleman v Power* (2004) 220 CLR 1, 31 (Gleeson CJ).

variety' in the design of electoral institutions including the regulation of political finance.[271]

Taking account such deference, whether contribution limits as recommended by this report are reasonably appropriate and adapted to serve its rationales in a manner compatible with the system of representative and responsible government prescribed by the *Commonwealth Constitution* depends on a range of factors. Chief amongst these are 'the extent of the restriction, the nature of the interest served and the proportionality of the restriction to the interest served.'[272]

Extent of restriction

As discussed earlier, contribution limits burden the freedom of political communication by, firstly, restricting the ability of citizens to communicate by making contributions above the limit and, secondly, by reducing the income available to parties and candidates and therefore their ability to engage in political communication. The burden imposed in the first way is very limited. Contributions below the limit of $1000 per annum can still convey a message of support to the recipient party or candidate. Further, the limits only affect those having the ability to make contributions above this limit, a group that is likely to constitute a small minority of citizens (see Section III: 'Funding and Spending Patterns of NSW Political Parties').

The more significant burden is on the ability of parties and candidates to engage in political communication. Specifically, contribution limits will significantly reduce the private funding available to the major NSW parties. This burden is, however, offset by the exemptions for membership fees. Parties that are successful in attracting more members are likely to be able to retain, if not enhance, their ability to engage in political communication.

Importantly, the burden placed by contribution limits is also offset by other elements of the reform package. Public funding will compensate for the fall in private income

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[271] *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 57 (Stephen J).
[272] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 144–5 (Brennan J).

through the Party and Candidate Support Fund and, in particular, provide greater subsidies to newcomers (than currently is the case). Election spending limits will limit the significance in the reduction of the overall budgets of the major parties by containing the costs of electioneering.

Nature of interest being served

As a matter of principle, both the anti-corruption and fair value rationales of contribution limits go to the heart of representative and responsible government in New South Wales. Both rationales have heightened importance given the corruption through undue influence that pervades the NSW political system due to the sale of access and influence, a development that threatens to get worse as the costs of state election campaigns escalates (see Section III: 'Funding and Spending Patterns of NSW Political Parties').

Proportionality of restriction to the interest served

This aspect concerns the design of the recommended contribution limits and the extent to which they are properly tailored to its rationales. There are compelling reasons to see these limits as being proportionate to their rationales: they do not impose a blanket ban on political contributions but only prohibit those which carry a significant risk of corruption, large contributions, and further provide an exemption for membership fees where such a risk is minimal or non-existent. Similarly, with the fair value rationale, by prohibiting large contributions the limits target contributions which allow wealth to have a disproportionate influence.

In conclusion, there is a good chance that the recommended contribution limits do not breach the implied freedom of political communication. True, they do burden the freedom, but they do so in service of the legitimate aim of preventing corruption and its risk and promoting the fair value of political freedoms. Further, there are strong arguments that they are reasonably appropriate and adapted to serve these aims stemming from the limited burden they place (in the context of election spending limits and increased public funding), the importance of their aims and the proportionality of the limits to these aims.

Election Spending Limits and the Implied Freedom of Political Communication

Before providing specific analysis of the election spending limits, it is important to clear up a possible misunderstanding: the view that the High Court's decision in *Australian Capital Television Pty Ltd v Commonwealth*[273] (*ACTV*) stands in the way of regulating election spending. The provisions challenged in this case were found in Part IIID of the *Broadcasting Act 1942* (Cth). These provisions, which were added into the principal statute by the *Political Broadcasts and Political Disclosures Act 1991* (Cth), had several key elements. Foremost, they prohibited political advertising on radio and television during federal, state, territory and local government elections. Exceptions were, however, made for various types of broadcasts including policy launches, news and current affairs programs. Alongside the bans on political advertising was a scheme that provided 'free' broadcasting time to political parties. While allocated by the Australian Broadcasting Tribunal, 90% of the time was reserved to parties represented in the previous parliament that were contesting the current election.

In a 5-2 decision, the High Court struck down the legislation for breaching the implied freedom of political communication. All the judges accepted that there were legitimate objectives underlying the legislation but the majority did not regard the scheme as pursuing these objectives in a constitutionally appropriate manner. In his leading judgment, Mason CJ focussed on what his Honour saw as the discriminatory aspects of the legislation. Speaking of the ban on political advertising, Mason CJ said:

> Pt IIID severely restricts freedom of communication in relation to the political process, particularly the electoral process, in such a way as to discriminate against potential participants in that process. The sweeping prohibitions against broadcasting directly exclude potential participants in the electoral process from access to an extremely important mode of communication with the electorate. Actual and potential participants include not only the candidates and established political parties but also the electors, individuals, groups and bodies who wish to present their views to the community.[274]

The 'free-time' scheme, according to Mason CJ, was similarly defective as it was 'weighted in favour of established political parties represented in the legislature

[273] (1992) 177 CLR 106.
[274] Ibid 145.

immediately before the election and the candidates of those parties; it discriminates against new and independent candidates'.[275]

The decision, or for that matter, the implied freedom of political communication, does not stand in the way of regulating political communication, in particular, election spending. Neither stand for the proposition that bans on political advertising are necessarily unconstitutional. As George Williams has correctly observed, while the High Court struck down the ban challenged in *ACTV*, 'the Court did not indicate that other schemes regulating electronic advertising will also be unconstitutional'.[276] On the contrary, in *ACTV*, even judges in the majority considered that restrictions on political communication may still be constitutional. For instance, Mason CJ, after accepting as legitimate concerns regarding corruption and the advantage of the wealthy in the political debate, stated:

> Given the existence of these shortcomings or possible shortcomings in the political process, it may well be that some restrictions on the broadcasting of political advertisements and messages could be justified, notwithstanding that the impact of the restrictions would be to impair freedom of communication to some extent. In other words, a comparison or balancing of the public interest in freedom of communication and the public interest in the integrity of the political process might well justify some burdens on freedom of communication.'[277]

More fundamentally perhaps, the regulation of political communication is clearly permitted (or, more accurately, not prohibited) by the *Lange* test. In *Coleman v Power,* McHugh J explained one of the key reasons for this*:*

> Communications on political and governmental matters are part of the system of representative and responsible government, and they may be regulated in ways that enhance or protect communication of those matters. Regulations that have that effect do not detract from the freedom. On the contrary, they enhance it'[278]

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[275] Ibid 146.
[276] George Williams, *Submission to the Joint Standing Committee on Electoral Matters' Inquiry into Disclosure of Donations to Political Parties and Candidates* (2004) <http://www.aph.gov.au/house/committee/em/donations/subs/sub4.pdf> at 2 December 2009.
[277] *ACTV* (1992) 177 CLR 106, 145.
[278] *Coleman v Power* (2004) 220 CLR 1, 52 (McHugh J).

In brief, the raison d'etre of the implied freedom itself permits regulation of political communication in order to enhance political communication.

Having now cleared this possible misunderstanding, we can now proceed to specifically analyse the election spending limits as recommended in this report. As with the 1st limb of the *Lange* test, it is clear that election spending limits as recommended by this report burden the freedom to communicate about government or political matters. Election spending in NSW elections is principally devoted to covering the costs of paid political communication in various forms, notably, radio, television and newspaper advertisements.[279]

In relation to the 2nd limb of the *Lange* test and the question of legitimate aims, election spending limits proposed by this report are animated by two purposes: they aim to prevent corruption and its risk as well as seek to promote fairness in elections, specifically, preventing election outcomes from being overly determined by political spending (see further Section V(B): 'Election Spending Limits').

Both the anti-corruption and fairness rationales of election spending limits will most likely be considered legitimate aims under the *Lange* test. The earlier discussion of the anti-corruption rationale as it relates to contribution limits similarly applies here. It should be further noted that in *ACTV,* Mason CJ accepted as legitimate the aim of the legislation 'to safeguard the integrity of the political system by reducing, if not eliminating, pressure on political parties and candidates to raise substantial sums of money in order to engage in political campaigning on television and radio, a pressure which renders them vulnerable to corruption and to undue influence by those who donate to political campaign funds'.[280]

In relation to the fairness rationale of preventing election outcomes from being overly determined by political spending, both Mason CJ and McHugh J in *ACTV* accepted

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[279] See *Summary of Political Contributions Received and Electoral Expenditure Incurred by Parties: 2007 NSW State General Election* (2008) NSW Election Funding Authority, <http://www.efa.nsw.gov.au/__data/assets/pdf_file/0009/63693/Parties_Summary_Published_080204.pdf> at 9 February 2010.

[280] *ACTV* (1992) 177 CLR 106, 129.

that the objective of promoting a 'level playing field' in elections as a legitimate aim.[281] This conclusion is perhaps unsurprising from the perspective of first principles. A key element of the system of representative government prescribed by the *Commonwealth Constitution* is that members of the federal Parliament be 'directly chosen' by the people of the Commonwealth.[282] In *Lange,* the High Court variously characterised this element as requiring a 'true choice' 'with an opportunity to gain an appreciation of the available alternatives' or as mandating a 'free and informed choice as electors'.[283] This was a key step towards implying the freedom of political communication, the reasoning being that there could not be such choice if electors were not able to obtain information relevant to their voting decisions.[284]

The aim of preventing election outcomes from being overly determined by political spending is similarly aimed at supporting 'true' or 'informed' choice for NSW electors. By lessening the risk of those with more money dominating elections through their spending, it allows other parties and candidates to put forth their policies and positions. In the words of Brennan J in *ACTV,* it seeks 'to reduce the untoward advantage of wealth in the formation of political opinion',[285] thereby providing electors with fuller information concerning the various alternatives in making their voting decisions. Per the sentiments expressed by McHugh J in *Coleman,* the fairness rationale in this respect, whilst burdening or regulating political communication, is aimed at enhancing such communication.

It is important to correct a misleading impression that may result from the Twomey Report that such a fairness rationale may not be a legitimate aim under the *Lange* test. In discussing the constitutional validity of expenditure limits for candidates and parties, the Twomey Report spends nearly two pages discussing the US Supreme Court decision *Buckley v Valeo*[286] noting in particular that the Supreme Court found 'the justification of equalising the financial resources of candidates (to be)

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[281] *ACTV* (1992) 177 CLR 106,146 (Mason CJ), 239 (McHugh J).
[282] *Commonwealth Constitution* ss 7, 24.
[283] *Lange* (1997) 189 CLR 520, 560 (adopting Dawson J's dicta in *ACTV* (1992) 177 CLR 106, 187).
[284] *Lange* (1997) 189 CLR 520, 560 (adopting Dawson J's dicta in *ACTV* (1992) 177 CLR 106, 187).
[285] *ACTV* (1992) 177 CLR 106, 158.
[286] (1976) 424 US 1 (discussed in the Twomey Report, 30–1).

unconvincing'.[287] This comment probably stems from the Supreme Court's view that 'the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment'.[288]

There is little reason, however, to believe that a similar conclusion will be reached in relation to implied freedom of political communication (and the Twomey Report errs to the extent that suggests so). This is not only because there are compelling reasons for accepting the fairness rationale of election spending limits as a legitimate aim (as previously discussed) but also because the High Court has signalled that the US First Amendment jurisprudence is not directly applicable to applying the implied freedom of political communication. The statements made by Brennan CJ in *Levy v Victoria* on the more restricted role of Australian courts in applying this freedom have already been alluded to. As further noted by McHugh J in *Coleman v Power*, '[the] freedom of communication under the Commonwealth Constitution is different from freedom of speech provisions in other Constitutions and that ideals relating to or arising out of other Constitutions have little relevance to the freedom of communication under the Commonwealth Constitution'.[289] The reason, according to his Honour, is that:

> freedom of political communication under the Constitution arises only by necessary implication from the system of representative and responsible government set up by the Constitution. *It is not the product of an express grant.*[290]

The analysis so far of the recommended election spending limits has concluded that these limits do place a burden on freedom of political communication in pursuit of the legitimate aims of preventing corruption and promoting fairness in elections. The final question under the *Lange* test remains: are these limits reasonably appropriate and adapted to serve such aims?

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[287] Twomey Report, 30.
[288] *Buckley v Valeo* (1976) 424 US 1, 49.
[289] *Coleman v Power* (2004) 220 CLR 1, 48 (McHugh J).
[290] *Coleman v Power* (2004) 220 CLR 1, 48 (McHugh J) (emphasis added).

Extent of restriction

There are several aspects of the election spending limits that point to the severity of their burden: they apply to the key actors in NSW elections during the period leading up to these elections, they apply at the formative moment in terms of voters making decisions, and, further, stricter spending limits are applied to third parties. On the other hand, the limits clearly permit spending below the applicable thresholds. The report has recommended that these limits be set according to the level of the 2003 State Election spending, a level that should still allow the key political actors to engage in meaningful election campaigns (see Section V(B): 'Election Spending Limits').

Nature of interest being served

Both the anti-corruption and fairness rationales of the recommended election spending limits go to the heart of representative and responsible government in New South Wales. The reasons why this is so in relation to the anti-corruption rationale have already been discussed in the earlier discussion concerning contribution limits.

The importance of the fairness rationale can be easily gathered from the reasons that result in this rationale being a legitimate aim – it is aimed at promoting a genuine choice for NSW electors. This rationale should be treated particularly seriously in the context of research indicating that money can overly influence election outcomes and intensify arms races with growing elements of unfairness (see Section IV(C): 'Unfair Playing Field').

Proportionality of restriction to the interest served

This concerns the design of the recommended election spending limits and the extent to which they are properly tailored to their anti-corruption and fairness rationales. There are persuasive reasons to conclude that these limits are proportionate to their legitimate aims. Corruption and its risk attaches to the supply of private political money, a problem that can only be effectively tackled, especially in the context of intensifying arms races, if the demand for such money is addressed. Election spending limits are an essential measure for doing so – they contain election costs, the key driver for the demand for private political money. As with the fairness rationale of

these measures, the recommended election spending limits specifically target high spending (either at the state or constituency level), situations where political spending is most likely to unduly influence election outcomes.

There are two further issues to be addressed under this head, both of which arise from *ACTV*. First, there is the question of discrimination against new and minor parties. It is difficult to see how the recommended election spending limits institute any such discrimination. As a matter of design, the level of the limits is calculated according to the number of seats contested. As a matter of practical operation, they will probably apply to major parties and not new or minor parties as it is the larger parties that will engage in the amount of spending likely to trigger the limits. Further, the spending limits are to be recommended as part of a reform package that includes an annual allowances provided by the Party and Candidate Support Fund. These allowances are calculated, amongst others factors, according to the number of party members and the level of public support and are likely to open access to election contests by providing new and minor parties with increased funds to contest the elections.

Second, there is a question of discrimination against third parties. On this point, it is clear that the recommended election spending limits do so discriminate by subjecting third parties to election spending limits that are set at a lower level than the limits that apply to political parties and candidates. Such discrimination is, however, justified. The spending limits that apply to third parties still allow them to meaningfully engage in campaigns during election time. More importantly, these limits are necessary in order to protect the privileged position of candidates and parties as contestants in the elections. This justification has even greater weight when there are contribution limits that apply to candidates and political parties (as recommended by this report): if there are contribution and spending limits on parties and candidates but no third party spending limits, there will be a strong risk that third parties will eclipse the role of parties and candidates as money will be able to flow freely to third parties whilst facing various restrictions when channelled towards parties and candidates. This justification explains why jurisdictions like Canada, New Zealand and the United Kingdom which have adopted election spending limits have subjected third parties to lower limits.

One might ask: does such a conclusion run counter to the High Court's decision in *ACTV?* The answer is no. The High Court's concern in that case was not with discrimination against third parties per se but rather with the discrimination (or inequalities) which it found in that case was not 'justified or legitimate'.[291] The principal reason seems to have been the effect of such discrimination excluding third parties from using political advertising as a medium of communication, what Mason CJ characterised in that case as 'an extremely important mode of communication with the electorate'.[292] The recommended election spending limits, however, do not produce any such effect.

The Twomey Report reached quite a different conclusion in relation to third party spending limits. According to the report, '[i]f [expenditure] limits are imposed on third parties, there is a high risk of constitutional invalidity'.[293] With respect, this argument is simply not made out by the report. The five pages or so devoted to the topic 'The constitutionality of third party expenditure limits' primarily comprise description of third-party limits in Canada, New Zealand and the United Kingdom together with discussion of some of the cases involving challenges to these limits.[294] Why such description results in a conclusion that these limits are fraught with a 'high risk of constitutional invalidity' is unclear. There is, firstly, no attempt to draw out why such decisions are relevant in the application of the implied freedom of political communication, a weakness that is especially notable in light of the comments some High Court judges have made in relation to the use of overseas jurisprudence for this purpose. Second, the limits in all three of these countries remain intact and while some cases have struck down the limits for being too low,[295] others have upheld differently designed limits.[296]

We can now draw this discussion to the close. There is a strong prospect that the recommended election spending limits are not unconstitutional for breaching the

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[291] *ACTV* (1992) 177 CLR 106, 146.
[292] *ACTV* (1992) 177 CLR 106, 145 (emphasis added).
[293] Twomey Report, 2.
[294] Twomey Report, 32–7.
[295] For example, see discussion of *Bowman v United Kingdom* (1998) 26 EHRR 1 in Twomey Report, 35–6.
[296] See, for example, discussion of *Harper v Canada* [2004] 1 SCR 827 in Twomey Report, 33–5.

implied freedom of political communication. They do place clear burdens on this freedom. However, there are cogent reasons for concluding that they are reasonably appropriate and adapted to serving the weighty aims of preventing corruption and promoting electoral fairness.

Section 109 of the *Commonwealth Constitution*

Assuming that the reform package is enacted by the NSW Parliament, there is still the question whether federal laws will render them inoperative by virtue of s 109 of the *Commonwealth Constitution*. This section states:

> When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of any inconsistency, be invalid.

There are three main ways in which there can be inconsistency under s 109. Such inconsistency arises when:

- it is impossible to obey both laws ('simultaneous obedience' inconsistency);[297]
- a law purports to confer a right, privilege or entitlement that the other purports to diminish ('rights' inconsistency);[298] and/or
- the Commonwealth law evinces an intention to 'cover the field' ('covering the field' inconsistency).[299]

If the reform package is enacted under *current* federal electoral law, there is little reason to believe that s 109 will be implicated. The *Commonwealth Electoral Act* currently does not provide for any limits on the amount of contributions; nor does it provide for any election spending limits.

Section 109 only becomes a live issue if the Commonwealth Parliament enacts laws similar to those found in the reform package, in particular, contribution and election

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[297] See, for example, *R v Brisbane Licensing Court; Ex parte Daniell* (1920) 28 CLR 23.
[298] See, for example, *Colvin v Bradley Brothers Pty Ltd* (1943) 68 CLR 151.
[299] See, for example, *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466; *Viskauskas v Niland* (1983) 153 CLR 280.

spending limits. Take, firstly, the situation where a Commonwealth law subjected parties registered under the *Commonwealth Electoral Act* to contribution limits and a NSW law also applied contribution limits to the same parties. The issues raised in this situation are very similar to those posed by the relationship between current federal disclosure laws and NSW disclosure laws, both of which can (and do) apply to the same parties. In advice tendered to the NSW Electoral Commission, the NSW Crown Solicitor correctly observed in relation to the federal and NSW disclosure laws that there was no inconsistency due to 'simultaneous obedience' inconsistency or 'rights' inconsistency. According to the Crown Solicitor, the key issue in relation to s 109 in this contest was whether there was a 'covering the field' inconsistency.[300]

A similar conclusion applies to the situation where there are federal and NSW contribution limits applying to the same political parties. In this situation, there is no 'simultaneous obedience' inconsistency as it is possible to obey both laws, for instance, by not taking any political contributions. It is unlikely there is a 'rights' inconsistency as both the Commonwealth and NSW laws limit a pre-existing freedom to donate rather than creating the freedom. What is likely to exist is a 'covering the field' inconsistency in that the Commonwealth statute 'by prescribing the rule to be observed' (in relation to contributions to these parties) 'shows an intention to cover the subject matter and provide what the law upon it shall be'.[301] Unless the Commonwealth law has a 'clearing the field' clause stipulating that it should operate concurrently with the NSW contribution limits, the latter limits, by operating in relation to the same subject matter as the federal contribution limits, i.e. contributions to federally-registered parties, are likely therefore to be rendered inoperative because of s 109 of the *Commonwealth Constitution*.

The situation is more complicated where there is a Commonwealth law limiting the amount of spending in federal elections and a NSW law limiting the amount that can be spent in NSW elections. As with contribution limits, there is no 'simultaneous obedience' inconsistency as it is clearly possible to obey both laws (e.g. by not engaging in election spending either in federal or NSW elections). It is also unlikely

[300] Crown Solicitor, New South Wales, *Advice: Disclosure of donations and gifts to political parties for Federal Elections* (18 October 2007) [5.33] (copy on file with author).
[301] *Ex parte McLean* (1930) 43 CLR 472, 483 (Dixon J).

there is a 'rights' inconsistency for a similar reason - both the Commonwealth and NSW laws limit a pre-existing freedom to spend rather than creating the freedom.

The real issue with s 109 turns on whether there is a 'covering the field' inconsistency. Unless the Commonwealth law has a 'clearing the field' clause stipulating that it should operate concurrently with the NSW election spending limits, it is likely that the federal election spending limits will be seen to demonstrate an intention to 'cover the field' *in relation to federal election spending.* To the extent that NSW election spending limits apply to *federal election spending,* they are likely to be considered inconsistent. This, however, is a question of fact that cannot be answered in advance. It turns, firstly, on the design of both the Commonwealth and NSW spending limits (e.g. what spending do they apply to? what period do they apply to?). It also depends on the respective timing of the Commonwealth and NSW elections. For instance, if there were two years separating these elections, the likelihood of a s 109 inconsistency is much more remote.

To conclude, there are no real issues with s 109 inconsistency if the reform package is enacted under current federal law. If, however, the Commonwealth Parliament enacts contribution limits, there is a good chance that the NSW contribution limits will be rendered inoperative (unless there is a 'clearing the field' clause). In the event that federal election spending limits are enacted, s 109 will also be implicated but its effect on NSW election spending limits will be complicated.

H. A Federal or State solution?

What is emerging as one of the key issues in the debate concerning the NSW political finance regime is whether changes should be made by the NSW Parliament alone or as part of a national regime. Influential voices have argued for the latter. When introducing the Election Funding Amendment (Property Developers Prohibition) Bill 2009, then NSW Premier, Nathan Rees, stated that:

> consistent national reform is the ideal way forward. That approach is the most practical way to minimise loopholes arising from our Federal system of government and the national structure of

political parties in Australia.[302]

The main thesis of the Twomey Report, as found in its conclusion, is that:

> 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.[303]

This report dissents from these views – there is no compelling reason why New South Wales should not (or cannot) enact its own political funding regime. First, the Commonwealth Parliament and executive have no power to regulate key areas of political funding, specifically, the regulation of government advertising and lobbying. In these areas, the question of whether there should be a federal or state solution is a non-issue as such regulation must of necessity be put in place by the NSW Parliament or executive. One of the weaknesses of the Twomey Report is that it fails to fully address these areas.

Second, there are areas of political funding which the Commonwealth Parliament does have the power to legislate - and has in fact done so - but where there is no real issue of inconsistency (due to s 109 of the *Commonwealth Constitution*) between federal and NSW electoral laws in that both sets of laws can operate concurrently. Two notable areas are the disclosure scheme and the election funding provisions. For more than two decades (since the federal funding and disclosure scheme came into effect in 1984), the federal and NSW schemes have operated concurrently and there is little reason to think that amendments to the NSW schemes (for instance, by enhancing disclosure requirements or establishing a Party and Candidate Support Fund) will alter this position (see further discussion in Section V(G): 'Constitutional Considerations').

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[302] New South Wales, *Parliamentary Debates,* Legislative Assembly, 25 November 2009, 19917 (Nathan Rees) <http://www.parliament.nsw.gov.au/prod/parlment/hanstrans.nsf/V3ByKey/LA20091125/$File/541LA164.pdf> at 20 January 2010.

[303] Twomey Report, 63.

Third, two points derived from the preceding analysis of constitutional issues are worth repeating:

- the NSW Parliament most likely has the power to enact:
    - contribution limits that apply to parties and candidates regardless of the use to which these contributions are put (whether it be for NSW or federal elections);
    - limits that apply to election spending in NSW elections; and
- there are most likely no s 109 issues in the context of current federal electoral laws (which do not provide for either contribution or election spending limits).

In brief, under current federal electoral laws, NSW Parliament is most likely to be able to enact contribution and election spending limits that are constitutional and do not suffer from 'loopholes' due to conflicting federal laws.

The Twomey Report took a contrary review, resting its principal recommendation for a national co-operative scheme, amongst others, on constitutional reasons,[304] specifically the likelihood of bans on contributions and third-party election spending limits falling foul of the implied freedom of political communication. There are, however, several difficulties with the Report's constitutional analysis: two specific and the other general.

The first specific problem relates to the conclusion that '[i]f [expenditure] limits are imposed on third parties, there is a high risk of constitutional invalidity'.[305] As discussed earlier, this conclusion is simply not made out by the Report. The second problem concerns the Report's reference to the problem of 'soft money' in the United States, that is, the evasion of *federal* political finance laws through state party structures.[306] This reference appears to conflate the distinct constitutional issues relating to federalism that affect federal and state laws. With federal laws, the principal issue stems from the central parliament or legislature possessing *defined powers*. It is this feature that explains the limited scope of US campaign finance laws and the problem of 'soft money'. The issue, on the other hand, with state laws is quite

[304] Twomey Report, 63.
[305] Twomey Report, 2.
[306] Twomey Report, 5.

different. In Australia, they are typically enacted by legislatures with plenary power but can be rendered inoperative by inconsistent federal laws through s 109 of the *Commonwealth Constitution.*

The more general difficulty with the report's constitutional analysis is, if bans on contributions and third-party limits were constitutionally suspect because of the implied freedom of political communication, there is nothing a national co-operative response will do to alleviate these constitutional difficulties. Indeed, the report's arguments on this count are not arguments for a national co-ordinated response but for *no response*. On its conclusions, if the NSW Parliament enacted these measures, a single piece of state legislation would (likely) be invalid while a national co-operative response would merely magnify the problem by resulting in nine pieces of Commonwealth, state and territory laws being struck down.

It should be conceded, of course, that there is likelihood of 'loopholes' if the Commonwealth Parliament enacts contribution and spending limits. As noted previously, such federal laws will pose issues in terms of s 109 of the *Commonwealth Constitution.* If the prospect of such laws being enacted are likely – a matter of which is unclear at the time this report is being written – the NSW Government should engage in discussions with its federal counterpart aimed at putting in place arrangements so that the federal and NSW limits can operate concurrently, for instance, by inserting a 'clearing the field' clause in the federal electoral laws.

VI. CONCLUSION

The New South Wales public has good cause to be discontented with how money influences politics in their State: some flows of money are shrouded in secrecy; the peddling of access and influence has become a pervasive, insinuating form of corruption into the body politic; the level of campaign spending has made elections increasingly unfair; and a destructive pre-occupation with fundraising is enervating political parties.

All this has occurred in a regulatory context that is largely laissez-faire: NSW political parties and candidates face little restrictions in terms of what political money

they can receive and spend. This ‘freedom from’ (regulation) has not, however, contributed to enhancing the quality of democracy in New South Wales; on the contrary, political parties and candidates have (ab)used this freedom to engage in corrosive practices that undermine the public interest. It is time to decisively reject the laissez-faire approach and lay down the foundations for a more democratic political finance regime in New South Wales.