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Banning political donations from third party interest groups: a summary of constitutional issues

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1 Introduction

As part of the more general debate about electoral funding and expenditure, the banning or capping of political donations from all third party interest groups, including business groups, trade unions, political associations and sporting clubs, is something that has been discussed on several occasions in recent years. In particular, the constitutional issues arising from this debate have been discussed in:

- Associate Professor Anne Twomey *The reform of political donations, expenditure and funding*, November 2008, commissioned by the NSW Government
- Commonwealth Government, Electoral Reform Green Paper, *Donations, Funding and Expenditure*, December 2008 and
- NSW Parliament, Joint Standing Committee, *Public Funding of Election Campaigns*, March 2010

Other relevant parliamentary reports include the June 2008 Legislative Council Select Committee report on Electoral and Political Party Funding in New South Wales. The Research Service has itself published a number of papers on election finance law. Setting the scene for the wider discussion, Briefing Paper No 8/2007 observed:

> Just as representative democracy cannot work effectively without political parties, political parties cannot operate without adequate funding. This is particularly true at election times when the contest for political ascendency is at its most intense. Difficult questions arise at this point, however. How much funding is appropriate, and from what source or sources? Should corporations and trade unions be permitted to donate to political parties, or should there be a blanket prohibition on these sources of funding, as has occurred in Canada in recent months?

This debate has now come to a head in NSW with the O'Farrell Government proposing to ban political donations from all third party interest groups to political parties, elected MPs, groups contesting Upper House elections,

candidates and third-party campaigners.

Note that this paper is to be read in conjunction with e-brief 2/2012, "Proposed changes relating to the caps on electoral expenditure by political parties: a summary of constitutional issues".

2 Select Committee inquiry

The Election Funding, Expenditure and Disclosures Amendment Bill 2011 [the 2011 Bill] was introduced in the Legislative Assembly on 12 September 2011. On 12 October it was forwarded without amendment to the Upper House where, on 23 November, the Bill was referred by resolution of the House to a Select Committee for inquiry. The terms of reference include:

> (a) the constraints imposed by the bill on community and not-for-profit organisations, including unions, community groups, clubs and environment and social justice organisations and their ability to engage in the political process, …
>
> (h) the risks of a successful constitutional challenge.

3 The current law on political donations and the 2011 Bill

The regulation of political donations in NSW is found in Part 6 of the *Election Funding, Expenditure and Disclosures Act 1981*. Caps are set on political donations, a limit of $5,000 for registered parties or groups, and a limit of $2,000 for non-registered parties, elected members, candidates or third-party campaigners (s 95A).[1] Disclosure requirements apply (s 95B(6)), as do certain exceptions to these caps, for example, in respect to donations for the exclusive purpose of a federal election campaign.

Current s 96D restricts the making of donations to individual electors or entities with a "relevant business number" (an ABN, or a number allocated or recognised by ASIC). A limited number of "prohibited donors" are also declared, namely, property developers; tobacco industry business entities; or liquor or gambling industry business entities (s 96GAA).

The 2011 Bill would insert new s 96D headed "Prohibition on political donations other than by individuals on the electoral roll", as follows:

> (1) It is unlawful for a political donation to a party, elected member, group, candidate or third-party campaigner to be accepted unless the donor is an individual who is enrolled on the roll of electors for State elections, the roll of electors for federal elections or the roll of electors for local government elections.
> (2) It is unlawful for an individual to make a political donation to a party, elected member, group, candidate or third-party campaigner on behalf of a corporation or other entity.
> (3) It is unlawful for a corporation or other entity to make a gift to an individual for the purpose of the individual making a political donation to a party, elected member, group, candidate or third-party campaigner.
> (4) Annual or other subscriptions paid to a party by a person or entity (including an industrial organisation) for affiliation with the party that are, by the operation of section 85 (3), taken to be gifts (and political donations to the party) are subject to this section. Accordingly, payment of any such subscription by an industrial organisation or other entity is unlawful under this section.
> (5) Dispositions of property between branches of parties or

> between associated parties that are, by the operation of section 85 (3A), taken to be gifts (and political donations to the parties) are not subject to this section.

In the Agreement in Principle speech of 12 September 2011 for the Bill, the Premier stated:

> This bill will ban donations from other than individuals, including corporations, industrial organisations, peak industry groups, religious institutions and community organisations—in other words, third party interest groups. It will do this by making it unlawful for a political donation to be made or received if the donor is not an individual who is on an electoral roll for Commonwealth, State or local government elections. The bill also will link the electoral communication expenditure of political parties with that of their affiliates to ensure that the effectiveness and fairness of campaign finance rules are not undermined. These reforms are a reasonable, measured and fair way to inject more transparency and accessibility into the State's political processes. It will invest the power to donate solely in those who have the power to vote, those with the greatest stake in the system.

Mr O'Farrell concluded:

> It is inevitable that these laws and, I expect, this bill will trigger discussion and debate about constitutional principles. It has always been a great excuse to do nothing and a way to justify the status quo. I believe that a ban on donations other than those by individuals does not place unreasonable restrictions on the implied freedom of political communication mandated by the Commonwealth Constitution. The measures in this bill are designed to rid this State of the risk, reality and perception of corruption and undue influence. To this end, they are consistent with the principles endorsed by the High Court in the Lange case. The bill's symbolic and practical effect should not be underestimated.

4 Expert opinions

One of the issues considered by the the 2010 Joint Standing Committee inquiry into the *Public Funding of Election Campaigns* was the constitutional validity of various proposals to ban or cap political donations, in particular in respect to the implied freedom of political communication under the Commonwealth Constitution (see below). Submissions and evidence were received from constitutional experts on the matter, which included the following observations.

Professor George Williams submitted to the inquiry:

> It is possible for the New South Wales Parliament, consistent with the Australian and New South Wales Constitutions, to regulate donations to political parties taking part in State and local government elections in New South Wales….
>
> Such regulation could impose significant restrictions upon the making of donations to the participants in such political processes, such as by capping the level of donations or restricting the making of donations to natural persons. It would be important in each case to provide a careful and rational justification as to why any restriction serves to enhance the quality of democracy in the State as well as the quality of participation in democratic processes by electors and candidates.

Expanding on this opinion in evidence, Professor Williams said:

> I do have sympathy for the idea that those entitled to make contributions ought to be those entitled to vote on the basis that if you ask what the value is in a democracy of giving money it is a form of expression of someone who is entitled to participate in the democratic process. There is no particular value of corporations or legal entities being able to make contributions. It comes to again what functional role do they play within the system? Also from a constitutional point of view it is defensible that you limit it to natural persons because I do not think there is any strong political reason why corporate entities have any rights in this area.[2]

On the other hand Professor Williams was of the view that:

> any attempt to ban only donations from a single source, such as developers, would likely be unconstitutional….

In her submission ***Associate Professor Anne Twomey*** wrote:

> Rather than banning all political donations, some types could be banned and others capped to limit any potential influence on the part of the donor. For example, donations by corporations, unions, partnerships and associations could be banned, on the basis that none of them have a right to vote in elections, while donations by individuals, who are enrolled as voters, could be capped at a figure such as $1000. This is the approach that has been taken in Canada.

Associate Professor Graeme Orr submitted that he could find no constitutional impediment to:

> (1) Capping donations, provided the limit is at a reasonable level, such as A$1000 pa or above.
>
> (2) Restricting donations to political parties to those eligible to vote. Despite its strong 'free speech' guarantees, the US has long provided that corporate, union and foreign donations directly to parties are impermissible. There is, however, no justification for banning non-citizen residents from donating on the same basis as citizens/registered electors.
>
> (3) Limiting or banning contributions from particular sources, such as property developers. Other submissions (eg Professors Williams and Twomey) suggest otherwise. I disagree…there is evidence that corruption and undue influence (and its perception) is chiefly sourced in donations from a couple of industries. *It is precisely that kind of evidence that a Court will look for in deciding whether any restriction on political freedom is justified. Justification here means tailored or 'proportionate' to the problem at hand. If anything, specific legislative surgery is easier to justify than a more general, swingeing ban.*

The Joint Standing Committee report noted in respect to the views expressed by Twomey and Orr:

> 5.76 Both Dr Orr and Dr Twomey considered that, while there would not be constitutional impediments to banning all donations except low amounts from individuals, there might be practical reasons to allow entities to continue to make donations.
>
> 5.77 In her submission to the inquiry, Dr Twomey stated that, in order to reduce the need for a large increase in public funding and corresponding burden on the public purse, the Committee could consider the option of allowing 'non-voters, such as corporations and unions to make political donations, but to cap them at a higher level, such as $20,000, so the donation from a large corporation or property

> developer is no more valuable to government than the donation of smaller corporations, associations or interest-groups.'

Twomey's 2008 report: In her 2008 report, *The reform of political donations, expenditure and funding*, Twomey's analysis seemed to point to a less categorical conclusion in respect to the constitutionality of a complete ban on political donations from third party interest groups. It should be noted, however, that her analysis on this occasion was not directed to precisely the same point as that which arises in respect to the 2011 Bill. She emphasized in her 2008 report that a cap (rather than a ban) on political donations from individuals and third party interest groups alike is more likely to be upheld as valid:

> While the High Court would be likely to find that the reduction of the risk of corruption and undue influence is a legitimate end, it is likely also to find that a complete ban on donations to political parties and candidates is not reasonably appropriate and adapted to serving this end. Allowing individuals to make small donations to political parties is unlikely to give rise to risks of corruption or undue influence. Caps that prevent individuals or corporations from giving large donations to political parties are more likely to be regarded as reasonably appropriate and adapted to serve the end of avoiding corruption and undue influence.[3]

Twomey's comments on the 2011 Bill: Twomey discussed the 2011 Bill in a Radio National interview on 16 September this year. There she appeared to confirm the view that a ban on donations other than by individuals by and on their own behalf to political parties, groups (as defined under the Act)[4] and candidates would be constitutionally valid. The potential problem she identified was with Bill's ban on the making of donations by anyone other than individuals to a "third-party campaigner", going so far as to describe this as "vulnerable" and "courageous legislation" (proposed ss 96D(1) and (2)). A "third-party campaigner" is defined under the Act as follows (s 4):

> ***third-party campaigner*** means an entity or other person (not being a registered party, elected member, group or candidate) who incurs electoral communication expenditure during a capped expenditure period (as defined in Part 6) that exceeds $2,000 in total.

Twomey explained that this aspect of the 2011 Bill would apply to donations to "lobby groups and the like". The register for third party campaigners for the 2011 NSW State Election included trade unions, along with such interest groups as the Australian Christian Lobby, Get Up Limited, the Property Council of Australia, Sporting Shooters Association of Australia (NSW) Inc and SSAA Pty Ltd – St Marys Indoor Shooting Centre. Twomey commented:

> you see, normally with these sorts of things a legitimate end is avoiding the perception or the reality of corruption. So in relation to political donations, the question is, you're trying to remove the possibility of people buying influence. It's much, much harder to argue that, though, in relation to a hotel contributing to the hotels' associations to run a campaign about, you know, things relevant to hotels—or the environment, or whatever it is.

Twomey added:

> Well, I think this one might be a little bit tricky once people realise the

> potential ramifications of it. On its face, just banning donations from corporations and the like—probably not such a problem, particularly if you increase public funding to parties, and I suspect that's where they're going. But it's the bit about banning those donations to third party groups that potentially has all sorts of problems which the constituencies of some of these parties will start presumably complaining about.

5 The implied freedom of political communication

5.1 Key findings and cases

The implied freedom of political communication is the issue around which many of the key constitutional questions turn in this debate. The Commonwealth Government's 2008 Electoral Reform Green Paper, *Donations, Funding and Expenditure*, explained:

> 7.24 Imposing caps or bans on private funding also raises constitutional issues. The power to make laws with respect to elections to the Senate and the House of Representatives is subject to the express requirement of sections 7 and 24 of the Constitution that Senators and members of the House of Representatives be 'directly chosen by the people', and to the implied freedom of political communication derived from those and other provisions of the Constitution, identified by the High Court of Australia in a series of cases.

The 2008 Green Paper noted that:

> 7.25 In one case, *Roach v Electoral Commissioner,*[5] which involved consideration of the words 'directly chosen by the people', Gummow, Kirby and Crennan JJ said that those words required a 'substantial reason' for denying a member of the Australian community 'a voice in the selection of … legislators'. A 'substantial reason' was said to be a reason that is 'reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government'.
>
> 7.26 In another case, *Lange v Australian Broadcasting Corporation*,[6] the High Court found that freedom of communication on matters of government and politics was an 'indispensable incident' of the system of representative and responsible government which is established by sections 7 and 24 of the Constitution.

Under the *Lange* doctrine:

> Communication between electors and legislators and the officers of the executive and between electors themselves, on matters of government and politics is "an indispensable incident" of that constitutional system.[7]

In *Hogan v Hinch* French CJ commented that the range of matters that may be characterised as "governmental and political matters" for the purpose of the implied freedom is "broad" and "not limited to matters concerning the current functioning of government".[8] It is broad but not unlimited in scope and application. The joint judgment in *Hogan* endorsed the view, previously expressed by McHugh J that the implied freedom arises from and is confined by the "necessity to promote and protect representative and responsible government". According to McHugh J, "Because it arises by necessity, the freedom is limited to 'the extent of the need'". He went on to say that the exercise of judicial power, for instance, is not a

subject "involved in representative or responsible government in the constitutional sense".[9]

It is acknowledged that the implied freedom is not equivalent to the kind of individual right provided for in constitutional or statutory bills of rights. It does not create or confer an individual right of communication. Rather, the implied freedom precludes the curtailment, by the exercise of legislative or executive power, of a protected freedom already existing under the general law.[10] In *Aid/Watch v Commissioner of Taxation,*[11] having regard to Australia's "coherent system of law", this was held to extend to any burden imposed by the common law on political communication.

The implied freedom can be said to be *sui generis* to the Australian Constitution, with the result that international comparisons may only provide very limited guidance.[12]

5.2 A two-part test

A two-part test was formulated by the High Court in Lange *v Australian Broadcasting Corporation*,[13] as modified in *Coleman v Power*,[14] to determine whether a law offends against the implied freedom of political communication. Two questions are to be asked, as follows:

> 1. Does the law effectively burden freedom of communication about government or political matters in its terms, operation or effect?
> 2. 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 maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 of the Constitution for submitting a proposed amendment of the Constitution to the informed decision of the people?[15]

If the first question is answered yes, and the second question no, the law will be invalid.

The key elements of the test can be formulated as follows:

> 1. Whether the law burdens freedom of political communication;
> 2. Whether the law serves a "legitimate end";
> 3. Whether the law is reasonably appropriate and adapted to serving that legitimate end in a manner that is compatible with the system of representative and responsible government prescribed by the Commonwealth Constitution.

In *Lange* the Court referred to the example of *Australian Capital Television Pty Ltd v Commonwealth,*[16] *a case* that involved the *Political Broadcasts and Political Disclosures Act 1991* which banned political advertising during election campaigns and introduced mandatory free radio and television political advertising time, stating:

> In ACTV…a majority of this Court held that a law seriously impeding discussion during the course of a federal election was invalid because there were other less drastic means by which the objectives of the law could be achieved.[17]

The reasoning in *Lange* was that both the manner in which a law seeks to achieve its end, as well as the end itself, must be compatible with the prescribed system of representative and responsible government.[18]

5.3 The implied freedom of political communication and State law

One question is whether the implied freedom applies to the laws of the States. The source of the implied freedom is after all to be found in the text and structure of the Commonwealth Constitution. One consequence of this may be that the implied freedom applies only to communications relating to politics and government at the Commonwealth level. Nonetheless, it may yet apply to some State laws, depending on their terms, operation or effect, but not to others.

Again, a difference in emphasis may be discernable on the current High Court. In *Hogan v Hinch*, a case relating to the contravention of suppression orders issued by the County Court of Victoria pursuant to the *Serious Sex Offenders Monitoring Act 2005* (Vic), French CJ commented that the limit suggested on the implied freedom, as applying only to the Commonwealth level, "is not of great practical assistance". Indicating a broad and inclusive approach to its application to State law, he observed:

> There is today significant interaction between levels of government in Australia. The use of cooperative executive and legislative arrangements between Commonwealth and state and territory governments through the Council of Australian Governments, ministerial councils and otherwise, makes it difficult to identify subjects not capable or potentially capable of discussion as matters which are or should be or could be of concern to the national government.[19]

In support of this approach French CJ referred to statements made by the full court in *Lange*, as follows:

> this Court should now declare that each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia.[20]

And further:

> the discussion of matters at State, Territory or local level might bear on the choice that the people have to make in federal elections or in voting to amend the Constitution, and on their evaluation of the performance of federal Ministers and their departments. The existence of national political parties operating at federal, State, Territory and local government levels, the financial dependence of State, Territory and local governments on federal funding and policies, and the increasing integration of social, economic and political matters in Australia make this conclusion inevitable.[21]

Potentially, an approach of this kind could have a long reach into State law. In *Coleman v Power* the application of the implied freedom to Queensland's *Vagrants, Gaming and Other Offences Act 1931* was conceded by the respondents and was therefore not at issue in the case. Nonetheless, after referring to the same passage from *Lange*, McHugh J commented that, "bearing in mind the integrated character of law enforcement" the concessions "were properly made". With the implied freedom extending to "the activities of the executive arm of government", McHugh J concluded that "The conduct of State police officers is relevant to the system of representative and responsible government set up by the Constitution".[22]

In the same case, McHugh J later observed that it is a "necessary implication" of the system of representative government "that no legislature or government within the federation can act in a way that interferes with the effective operation of that system", at least to the extent that it is necessary to maintain that system.[23] To this he added, having regard in part to ss 106 and 107 of the Commonwealth Constitution, "the powers of the Commonwealth, the States and Territories must be read subject to the Constitution's implication of freedom of communication on matters of government and politics".[24]

For its part, the joint judgment in *Hogan v Hinch* confined itself to noting that it was:

> unnecessary to pursue whether there is an insufficient connection with any "federal issue" to attract the implied freedom of political communication.[25]

The joint judgment did not endorse the broad and inclusive approach favoured by French CJ.

Jurisdictional issues of this kind were discussed by Twomey in 2008. In summary, it was said that, because funds raised by State political parties can be used for federal as well as State and local elections, just as fund-raising for federal election campaigns can take place in NSW, "The consequence is that a State law that imposes limits on political donations made in NSW, or given to the NSW branch of a party, might be regarded as unconstitutional because it interferes with Commonwealth elections". Twomey's general view at that time was that "A co-operative Commonwealth/State approach to the financing of political parties is therefore preferable".[26]

The issue was addressed by the Liberal Party of Australia (NSW Division) in its submission to the 2010 Joint Standing Committee on Electoral Matters inquiry. The optimal solution suggested was a referral of powers on donations to the Commonwealth. Failing that, a State based approach was advocated, based on a requirement that political parties that contest State elections "quarantine various categories of income in separate accounts", with the ban on donations from third party interest groups applying only "to funds that can be deposited into State Campaign Account(s)".[27]

5.4 Is the implied freedom found in the NSW Constitution Act 1902?

A further issue is whether an implied freedom of political communication can be derived from the text and structure of the NSW Constitution Act? The likelihood is that it cannot, if only because, unlike the WA *Constitution Act* and ss 7 and 24 of the Commonwealth Constitution, it contains no reference to the Houses of the NSW Parliament being "directly chosen by the people".

Of course that may not be decisive. In *Egan v Chadwick*, the power of the Legislative Council to scrutinise executive conduct was expressly acknowledged to derive from the principle of responsible government. With *Lange* and other cases in mind, Spigelman CJ observed that "In New South Wales, no less than at the Commonwealth level, responsible government 'is part of the fabric on which the written words of the Constitution are superimposed'".[28] He added:

> The principle of responsible government …is part of the Constitution of New South Wales.[29]

The precise implications of such observations remain to be determined. The kind of creative judicial interpretation which discovered the implied freedom at the Commonwealth level may yet result in a similar finding in the NSW context. If that proves to be the case, it can be assumed that the same test will apply at the State as at the Commonwealth level.

The NSW Constitution question could be looked at as a threshold issue or, alternatively, as one that need only arise if, on the facts of the case, the implied freedom under the Commonwealth Constitution is not found to apply to the State law in question – the result of an insufficient connection with a "federal issue". In either case, if the implied freedom applied under the State or Commonwealth Constitution, the key elements of the *Lange* test would apply.

5.5 Uncertainties

Several academic constitutional lawyers have commented on the complexities and difficulties of this jurisprudence. For Professor Jeffrey Goldsworthy, for example, the implied freedom constitutes a wrong turn in constitutional law, based on "specious legal rationalisation" which is designed to achieve an apparently "desirable outcome".[30]

Less fundamental is the argument that the High Court has, in part as a result of changing personnel, encountered "difficulties in arriving at a clear and coherent set of rules in this area". Tom Campbell and Stephen Crilly argue that, with the Court confining its reasoning to narrow questions of law, "we have no reasonably precise idea what 'political communication' is, and what the test of whether communication is 'political' might be".[31] Reflecting on the inclusive interpretative approach favoured by French CJ in *Hogan v Hinch*, they point out that this line of reasoning, based on the degree of interaction between all levels of government, "might well lead to the conclusion that virtually anything can inform a vote in a federal election".[32]

6 Constitutional issues and banning donations from third party interests groups

The question is whether the constitutionality of the proposed ban in the 2011 Bill on political donations from all third party interest groups to political parties, elected MPs, groups contesting Upper House elections, candidates and third-party campaigners is likely to be upheld?

6.1 Does the proposed ban on third party donations have a sufficient connection with a "federal" issue?

The federal structure of Australian political parties and the likely or potential interconnectedness of State and Commonwealth electoral matters would suggest that a sufficient connection does exist for the implied freedom under the Australian Constitution to apply. It is hard to envisage the High Court arriving at a different conclusion.

6.2 Does the proposed ban on third party donations burden freedom of political communication?

The uncertainty attending the meaning of political communication was discussed above (section 5.5). According to Campbell and Crilly:

> Despite the freedom's origin in the safeguarding of free and fair federal elections, judges have applied it to Victorian hunting regulations, the demotion of a former Prime Minister of New Zealand, a protestor calling one particular police officer corrupt, and protests against the suppression of sex offenders' identities under Victorian legislation.[33]

None of the decided cases seem to bear directly on the issue of the banning of donations from third party interest groups. Some guidance might be found in the *ACTV* case, where the impugned legislation banned paid political advertising, providing in its place free time to parties based on their showing in the previous federal election. Perhaps some direction might also be suggested by the *Aid/Watch* case, which concerned the charitable status of an advocacy organisation agitating for the relief of poverty by means of foreign aid. In that case, it was found that agitation for legislative and political changes contributes to Australia's constitutional system of representative and responsible government.[34]

It is likely that the proposed ban on donations from all third party interest groups would constitute a burden on "political communication". In its submission to the 2010 Joint Standing Committee on Electoral Matters inquiry, the Liberal Party of Australia (NSW Division) submitted:

> From decisions of superior courts in Australia…it is clear that any law which limits the right of a donor or places limits on expenditure will be seen as burdening freedom of political communication.[35]

Clearly, by limiting the funds available to parties, elected MPs, groups contesting Upper House elections, candidates and third-party campaigners the ban could impact on the flow of information to voters at State elections. Indeed, the likely effect on political communication might be judged "direct and substantial", making it harder to justify, it has been suggested, than a law whose effect is "indirect or incidental".[36] On the other hand, the effect of the ban would need to be considered in light of any increase in the public funding of elections.

6.3 Does the proposed ban on third party donations serve a "legitimate end"?

In identifying the "legitimate end" sought by the proposed ban the High Court is likely to have regard to the Premier's Agreement in Principle speech. There it was said that the reforms are a:

> a reasonable, measured and fair way to inject more transparency and accessibility into the State's political processes. It will invest the power to donate solely in those who have the power to vote, those with the greatest stake in the system.

And further that:

> The measures in this bill are designed to rid this State of the risk, reality and perception of corruption and undue influence. To this end, they are consistent with the principles endorsed by the High Court in the Lange case.

At the very least therefore the 2011 Bill can be said to purport to serve a legitimate end. In respect to this, in the *ACTV* case, the Commonwealth Parliament had enacted the relevant 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.[37]

In light of recent reforms to the *Election Funding, Expenditure and Disclosure Act 1981*, it might be said that the end of avoiding "the risk, reality and perception of corruption and undue influence" is already achieved under the current legislation. This is because political donations are already prohibited from those sources - property developers; tobacco industry business entities; or liquor or gambling industry business entities – where the perceived risk is greatest.

A further argument may be that the relatively modest caps (for example, $5,000 to political parties) currently in place on donations are such that the risk of corruption and undue influence is remote at best.

6.4 Is the proposed ban on third party donations reasonably appropriate and adapted to serve an end in a manner compatible with the system of representative and responsible government?

As noted, under the two-part test in *Lange* the manner in which a law seeks to achieve its end, as well as the end itself, must be compatible with the prescribed system of representative and responsible government.[38]

The reasonably appropriate and adapted test has been said to provide Australian Parliaments with a "margin of choice" as to how a legitimate end may be achieved, at least in those cases where there is not a total ban on political communications. The result is that the test does not call for "nice judgments as to whether one course is slightly preferable to another". In the words of McHugh J:

> But the Constitution's tolerance of the legislative judgment ends once it is apparent that the selected course unreasonably burdens the communication given the available alternatives.[39]

In effect, does the law pass the test of proportionality?[40] Could the same outcome have been achieved by less drastic means?

As formulated by McHugh J, a law will not be reasonably appropriate and adapted to achieving an end in a manner that is compatible with the prescribed system of representative and responsible government if the burden on political communication is such that "communication on political and governmental matters is no longer "free"'. The test of freedom is not an absolute one. Rather, it asks whether, under the impugned law, political communication is regulated in a manner that may "enhance or protect" such communication. For McHugh J, "Regulations that have that effect do not detract from the freedom. On the contrary, they enhance it".[41] The paradox, therefore, is that while the law at issue burdens political communication, it does so in a manner that improves the system of representative or responsible government.

6.5 Arguments for

In support of the proposed ban it would be argued that, in order to prevent the risk, perception and reality of corruption and undue influence, the making of political donations must be restricted to individuals. No other less

restrictive approach, even that of permitting small donations from third party interest groups, will achieve that end. As such, the proposed ban on political donations is appropriate and adapted to achieve a legitimate end.

It would also be argued that the proposed ban would serve a legitimate end "in a manner that is compatible with the system of representative and responsible government". This is because allowing only individuals to make political donations is consistent with the constitutional system of representative government in which members of both houses of Parliament are to be "directly chosen by the people". It would be argued that just as the act of voting in an election is confined to individuals, so it is appropriate to limit to individuals the ability to donate to a political player in the electoral system.

As the Premier said in the Agreement in Principle speech for the 2011 Bill, it would "invest the power to donate solely in those who have the power to vote, those with the greatest stake in the system". There may be an echo here of what the US Supreme Court famously said in the landmark one-vote-one-value case *Reynolds v Sims*: "Legislatures are elected by voters, not farms or cities or economic interests".[42]

As noted above, George Williams has suggested, "there is no particular value of corporations or legal entities being able to make contributions". Anne Twomey has also observed that:

> donations by corporations, unions, partnerships and associations could be banned, on the basis that none of them have a right to vote in elections.

Similar considerations prompted the 2006 Canadian ban on political donations from trade unions, corporations and other groups.[43] When introducing the legislation, the Government commented:

> We believe that money should not have the ear of government, and the federal accountability act will help take government out of the hands of big corporations and the big unions and give it back to ordinary Canadians.

Discussing the Canadian legislation, Colin Feasby noted that one rationale for the ban on donations from third party interest groups was that:

> Limiting the right to make political contributions to individuals reinforces the role of the individual in the democratic process. As such, the prohibition of political contributions by corporations and unions broadly aligns the right to make contributions with democratic rights under the *Charter* [*of Rights and Freedoms*].[44]

In broad terms, behind the proposed ban on donations is the argument that it would assist in freeing the electoral system, and with it the system of representative government itself, from the potentially "corrupting" influence of sectional interests. Such an argument may be associated with a view of representative government as serving the common interests of all members of society, irrespective of their particular interests organised around what the utilitarian political philosopher James Mill described as "classes, professions and fraternities".[45] If the organisation of interests around parties or groups is to some extent inevitable, the purpose of regulation from this perspective is to minimise any potential for the reality or risk of corruption and undue influence.

In support of the proposed ban on donations to *third party campaigners*, it could be argued that without such a ban the Act's objects relating to caps on third-party campaign expenditure might be circumvented (these caps are discussed in e-brief 2/2012). For instance, when a corporation or trade union had reached its expenditure cap, it might seek to channel funds to a sympathetic interest group on the understanding that the funds would be used by that third-party campaigner for a particular purpose, thereby undermining the integrity of the legislative scheme.[46]

6.6 Arguments against

From a critical perspective, the 2011 Bill may be judged an undue burden on political communication, one that leaves such communication less "free" than before. It might be said that, by prohibiting any donations from third party interest groups to the key participants in a State election, including third party campaigners, the baby of democratic participation may be thrown out with the bath water of actual or potential corruption.

If the legitimate end in question is not achieved by the current legislative scheme, some modest variation on it could well achieve the desired goal, such as reducing the donations caps still further. Another option may be to extend the categories of "prohibited donors' under the Act. But, then, the "prohibited donors" element to the legislation may itself be vulnerable to constitutional challenge, on the ground that the making of small political donations is unlikely to result in actual or perceived corruption or undue influence.

Further, it might be contended that some political parties with current representation in the NSW Parliament could be disproportionately disadvantaged by a ban on donations to parties from third party interest groups. As Twomey commented in a Radio National interview on 16 September 2011:

> So for example the constituency of the Shooters and the Fishers Party is mostly various sorts of shooting and fishing associations and clubs; the constituency of the Greens is various environmental groups and they're going to be limited by this. And in particular the Shooters and Fishers Party, most of their donations come from hunting associations and shooting clubs, and those sorts of things. So they could potentially be quite seriously hit by this….

This line of reasoning seems to lead to the conclusion that the 2011 Bill could favour the major parties, thereby entrenching their advantage over existing or future minor parties, and consequently detracting from "free" political communications. Relevant perhaps was the majority finding in the *ACTV* case invalidating federal legislation banning political advertising during election campaigns and introducing free radio and television time. For the majority,[47] the Act discriminated "against new and independent candidates", whose access was limited to a maximum of 10% of the available free time. As Mason CJ said, the legislation "is weighted in favour of the established political parties represented in the legislature immediately before the election and the candidates of those parties".[48]

Another issue raised by Twomey was that the ban on donations from interest groups to such third party campaigners as Get Up! would be particularly vulnerable to constitutional challenge.

Such a ban, it could argued, would only serve to inhibit, not enhance, the market place of political ideas. Would such a ban pass the proportionality test? Is there any evidence suggesting that donations by non-individuals to third party campaigners have resulted in corruption or undue influence? Even if the proposed ban was upheld in respect to parties, groups, members and candidates, the same may not apply to third-party campaigners.

Informed by the idea of meaningful collective action in a pluralist democracy, the Bill could also be said to prevent individuals from donating to political parties through their chosen medium of, for example, a political association, sporting club or advocacy organisation. Against such a ban, it could be argued that individuals with common concerns about issues of public interest choose to express their views through interest groups, seeing this as a more effective means of influencing the broader public debate. An aspect of this is that, at election times, individuals may prefer to donate to political parties through these mechanisms of collective action, taking the view that this would constitute a better vehicle for political participation compared to the option of making an individual donation. Interest group donations can be viewed as a confirmation of the choices made by individuals to join together to achieve political ends, the very essence of pluralist democracy.[49]

6.7 Contrasting philosophies

Opposing philosophical perspectives on representative government seem to be at issue here. The fact is that representative government, a familiar and seemingly straightforward idea, contains many complex and difficult conundrums, which can be approached at different levels of detail and abstraction. As for the High Court, Hayne J has observed that "the notion of representative government was relevantly and sufficiently expressed at a very high level of abstraction" in *Lange*, based on the key constitutional expression "directly chosen by the people".[50] The outcome of any application of that abstract notion to the proposed ban on political donations would seem to be uncertain.

7 Conclusion

This paper has sought to canvass opinions and issues arising from the proposed ban on political donations from third party interest groups in the 2011 Bill, with particular reference to the implied freedom of political communication under the Commonwealth Constitution. One point to make is that significant issues of interpretation remain to be clarified in respect to the implied freedom. A second point is that these issues can only be resolved by the High Court.

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1 According to the Election Funding Authority, the amount is adjusted annually for inflation

2 NSW Parliament, Joint Standing Committee, *Public Funding of Election Campaigns*, March 2010, para 5.83

3 Twomey, *The reform of political donations, expenditure and funding* p 16.

4 By s 4 of the Act, a "group" is defined to mean: (a) in relation to State elections—a group of candidates, or part of a group of candidates, for a periodic Council election, or (b) in relation to local government elections—a group of candidates, or part of a group of candidates, for a local government election.

5 (2007) 233 CLR 162.

6 (1997) 189 CLR 520.

7 *AID/Watch v Commissioner of Taxation* (2010) 272 ALR 417 at [44] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

8 *Hogan v Hinch* (2011) 275 ALR 408 at [49] (French CJ).

9 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at [66]; cited with approval in *Hogan v Hinch* (2011) 275

ALR 408 at [93] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ). See also the views expressed by McHugh J in *Coleman v Power* (2004) 220 CLR 1 at [89].

10 *Mulholland v AEC* (2004) 220 CLR 181 at [107]-[109] (McHugh J).

11 (2010) 272 ALR 417 at [44] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

12 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at [17] (Gleeson CJ) and [166] (Hayne J).

13 (1997) 189 CLR 520.

14 (2004) 220 CLR 1.

15 *Hogan v Hinch* (2011) 275 ALR 408 at [47] (French CJ).

16 (1992) 177 CLR 106.

17 (1997) 189 CLR 520 at 568; quoted with approval in *Coleman v Power* (2004) 220 CLR 1 at [93] (McHugh J).

18 *Coleman v Power* (2004) 220 CLR 1 at [94 -95] (McHugh J).

19 *Hogan v Hinch* (2011) 275 ALR 408 at [48] (French CJ).

20 (1990) 189 CLR 520 at 571; *Hogan v Hinch* (2011) 275 ALR 408 at [49] (French CJ).

21 (1990) 189 CLR 520 at 571-2; *Hogan v Hinch* (2011) 275 ALR 408 at [49] (French CJ).

22 (2004) 220 CLR 1 at [78]-[80].

23 (2004) 220 CLR 1 at [89].

24 (2004) 220 CLR 1 at [90].

25 *Hogan v Hinch* (2011) 275 ALR 408 at [99] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

26 Twomey, *The reform of political donations, expenditure and funding*, p 1.

27 Liberal Party of Australia (NSW Division), *Submission to Public Funding of Election Campaigns Inquiry*, 22 January 2010, p 16.

28 [1999] 46 NSWLR 563 at [15] and [23].

29 1999] 46 NSWLR 563 at [45**].** In *Muldowney v South Australia* (1996) 186 CLR 352 the South Australian Solicitor General conceded that, despite any express reference to representative government in the State's *Constitution Act 1934*, by reading various provisions of the Act together an implication of representative government was to be found therein. The argument was not decided upon however: (1996) 186 CLR 352 at 365 (Brennan CJ); 370 (Dawson J); 373 (Toohey J); 377 (Gaudron J); and 387-8 (Gummow J, McHugh J agreeing).

30 J Goldsworthy, "Constitutional implications revisited" (2011) 30(1) *The University of Queensland Law Journal* 9 at 34.

31 T Campbell and S Crilly, "The implied freedom of political communication, twenty years on" (2011) 30(1) *The University of Queensland Law Journal* 59 at 68.

32 Ibid at 67.

33 Ibid - the references are to *Levy*, *Lange*, *Coleman* and *Hinch* respectively.

34 (2010) 272 ALR 417 at [45] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

35 Liberal Party of Australia (NSW Division), *Submission to Public Funding of Election Campaigns Inquiry*, 22 January 2010, p 10. The submission noted that: "The Liberal and Labor Parties in NSW are divisions or branches of political parties that are federal in structure. Their national organizations are registered under Commonwealth, not State legislation. However, these NSW divisions or branches also contest Federal elections, endorsing candidates and funding expenditure" (page 15).

36 *Hogan v Hinch* (2011) 275 ALR 408 at [95] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ). Reference was made to the views of Gleeson CJ in *Mulholland* (2004) 220 CLR 181 at [40].

37 (1992) 177 CLR 106 at 129 (Mason CJ); quoted with approval in *Coleman v Power* (2004) 220 CLR 1 at [94] (McHugh J)/

38 *Coleman v Power* (2004) 220 CLR 1 at [94 -95] (McHugh J).

39 *Coleman v Power* (2004) 220 CLR 1 at [100] (McHugh J).

40 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at [85] (Gummow, Kirby and Crennan JJ, referring to Lange at 567 fn 272)

41 *Coleman v Power* (2004) 220 CLR 1 at [97] (McHugh J).

42 377 US 533, 567 (1964).

43 There the making of political donations is restricted to individuals who are able to claim tax credits for political contributions.

44 C Feasby, "Constitutional questions about Canada's new political finance regime" (2007) 45(3) *Osgoode Hall Law Journal* 513 at 559.

45 Quoted in MB Vieira and D Runciman, *Representation*, Polity Press, 2008, p 46.

46 Note that, by s 95C(1) of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW), only three donations can be made to third-party campaigners in any financial year.

47 Mason CJ, Deane, Toohey, Gaudron and McHugh JJ. McHugh J upheld the Act's validity in respect to the Territories.

48 (1992) 177 CLR 106 at 146 (Mason CJ). A minority of the Court on the other hand

found on behalf of the Act's constitutional validity. Brennan and Dawson JJ. Brennan J held that Part IIID of the Act was valid, except those aspects that burdened the functioning of the States.

[49] Viewed in this light, this aspect of the 2011 Bill might be said to burden the right to freedom of association, said by some judges of the High Court to be "an essential ingredient of political communication".*Mulholland v AEC* (2004) 220 CLR 181 at [114]. (McHugh J reviewing the previous views expressed by Gaudron and Toohey JJ).

[50] *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at [195] (Hayne J).

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