

The High Court on Election Funding – Legitimate Ends and the Validity of Reforms

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Introduction

In 1992 the High Court identified for the first time an implied freedom of political communication. It derived this implication from ss 7 and 24 of the Constitution, which require that the Houses of the Commonwealth Parliament be directly chosen by the people and s 128 which provides that constitutional amendments cannot be made without the approval of the people voting in a referendum. The Court concluded that in order for the people to exercise their voting responsibilities under the Constitution, they must be capable of making a free and informed vote. This meant that there must be free political communication which aids electors in forming their voting intentions.¹

Any law that burdens this implied freedom of political communication will be held to be constitutionally invalid, unless the law is reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the system of representative and responsible government prescribed by the Commonwealth Constitution. This is known as the *Lange* test.²

In 1992, in the *Australian Capital Television* case, the High Court struck down the validity of laws that banned all political advertising on electronic media and permitted free political broadcasts by political parties.³ The ostensible purpose of the law was to reduce the cost of election campaigns and thereby reduce the risk or perception of corruption or undue influence that arises from parties raising large amounts through political donations.⁴ While the Court accepted that anti-corruption purposes would amount to a legitimate end,⁵ a majority did not accept that the law itself was reasonably appropriate and adapted to serve this end. In particular, two concerns stood out. First, it banned advertising on the electronic media by third parties, such as environmentalists, charities, business groups and others who wished to make political advertisements and influence voters in relation to the election.⁶ Secondly, the arrangements for the allocation of free-time for political broadcasts favoured the incumbents, because they were based upon votes received at the previous election.⁷ The impact upon the implied freedom of

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¹ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; and *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

² *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567-8, as altered by *Coleman v Powers* (2004) 220 CLR 1, [92]–[96] (McHugh J), [196] (Gummow and Hayne JJ), [211] (Kirby J).

³ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

⁴ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 130-1 (Mason CJ).

⁵ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 130 and 144 (Mason CJ); 155-6 (Brennan J); 189 (Dawson J); 238 (McHugh J).

⁶ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 145 (Mason CJ); 173 (Deane and Toohey JJ); 220 (Gaudron J).

⁷ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 131-2 (Mason CJ); 172 (Deane and Toohey JJ); and 239 (McHugh J).

political communication was disproportionate to the legitimate end and the laws were held to be invalid.

The case of *Unions NSW v New South Wales*

The High Court did not address the issue of campaign funding again until the 2013 case of *Unions NSW v New South Wales*.⁸ By then, the High Court's jurisprudence on the implied freedom of political communication was far more extensive, and the laws governing campaign funding in New South Wales had undergone fundamental changes. It is necessary, to make sense of the case and the issues arising from it, to briefly sketch the various changes made to campaign funding laws in NSW.

First, in 2009, bans were imposed by the Rees Labor Government upon property developers, prohibiting them from making political donations.⁹ Then in 2010, more comprehensive reforms were introduced by the Keneally Labor Government.¹⁰ Caps were imposed upon political donations of \$5000 for parties and \$2000 for candidates and third-party campaigners. Caps were also imposed upon electoral communication expenditure by parties, candidates and third-parties. The cap for a major party running candidates in all electorates was approximately \$9.3 million and for smaller parties that run candidates in Legislative Council elections but no more than 10 candidates in the Legislative Assembly, the cap was \$1,050,000. The same cap of \$1,050,000 applied to third-party campaigners. In addition, the legislation significantly increased public funding for elections, with parties being reimbursed for 75% or more of their electoral communication expenditure under the expenditure cap. Parties also received generous funding for administrative purposes.

Despite the imposition of caps on donations, the ban on donations by property developers was not lifted in 2010. Instead, it was extended to include donations by tobacco, liquor and gambling entities. Together, they are now classified as 'prohibited donors'.¹¹ This classification also extends to close associates, including directors and officers of corporations engaged in these businesses, their spouses, related bodies corporate, shareholders with at least 20% voting power in such corporations and their spouses and the beneficiary of any trust engaged in these businesses.¹²

In 2012, legislation enacted under the O'Farrell Coalition Government banned all political donations, other than those from persons on the electoral roll.¹³ This meant that donations from corporations, unions, partnerships, clubs and associations were all prohibited, along with donations by persons such as non-citizens who were not on the electoral roll. The legislation also aggregated the expenditure caps of political parties and affiliated organisations, in a way that only affected the Labor Party and its affiliated

⁸ *Unions NSW v New South Wales* (2013) 88 ALJR 227.

⁹ *Election Funding and Disclosures Amendment (Property Developers Prohibition) Act* 2009 (NSW).

¹⁰ *Election Funding and Disclosures Amendment Act* 2010 (NSW).

¹¹ *Election Funding, Expenditure and Disclosures Act* 1981 (NSW), s 96GAA.

¹² *Election Funding, Expenditure and Disclosures Act* 1981 (NSW), s 96GB.

¹³ *Election Funding, Expenditure and Disclosures Amendment Act* 2012 (NSW).

unions. The unions challenged these 2012 amendments in the High Court in *Unions NSW v New South Wales*.

The unions did not challenge the caps on donations or on expenditure. They accepted that these aspects of the election funding legislation were enacted for legitimate anti-corruption purposes.¹⁴ They argued, however, that the ban on *all* donations by corporations, unions and others, was not for any anti-corruption purpose and was therefore invalid. Before getting to this point, however, they had a number of hurdles to leap.

Whether the law burdened the implied freedom of political communication

One of them was the question of whether the law banning these political donations actually burdened the implied freedom of political communication. The law wasn't directed to the content of political communications or the manner in which they were made. It didn't ban anyone from making political communications or expressing their political views. So how did it burden the implied freedom?

Two possible arguments arose. The first, which has been accepted by the United States Supreme Court,¹⁵ is that the making of a political donation is itself a form of political communication – i.e. that the donor supports the policies of the party or candidate that receives the donation and that it supports their election. There are, however, some difficulties with this argument. For a start, many people and corporations donate to opposing political parties.¹⁶ Their message is not so much one of support as one of self-interest, with the donor seeking to be in favour with whoever wins government.¹⁷ Secondly, if the making of a political donation is a form of political communication, then it communicates nothing if it remains secret. This suggests that donations as a form of political communication would only be protected if publicly disclosed. At the Commonwealth level, donations under \$12,800 need not be disclosed, suggesting that they have no role as part of political communication and would therefore not be constitutionally protected.

The High Court avoided addressing this issue. Instead, it opted for the second argument which was that a law that has the effect of reducing expenditure on political communications, by reducing the number of sources from which donations can be raised,

¹⁴ *Unions NSW v New South Wales* (2013) 88 ALJR 227, [9] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

¹⁵ *Buckley v Valeo* 424 US 1 (1976) 21.

¹⁶ Note the 1995-8 study which showed that of the top 10 donors, all but one donated to both the Coalition and the ALP: I Ramsay, G Stapledon and J Vernon, 'Political Donations by Australian Companies', (2001) 29 *Federal Law Review* 179, 203-4.

¹⁷ See: I Ramsay, G Stapledon and J Vernon, 'Political Donations by Australian Companies', (2001) 29 *Federal Law Review* 179, 181; J Fisher, 'Why Do Companies Make Donations to Political Parties?' (1994) 42 *Political Studies* 690; and G Gallop, 'From Government in Business to Business in Government' (1997) 83 *Canberra Bulletin of Public Affairs* 81.

is a law that burdens the implied freedom of political communication.¹⁸ The assumptions behind this conclusion do not necessarily stack up. First, it is assumed that a reduction in the sources of donors will result in a reduction in funds that could be spent upon political communications. This is not necessarily the case. It must be remembered that parties are reimbursed for 75% or more of their electoral communication expenditure. Their expenditure is also capped. The existence of fixed term Parliaments in NSW means that parties have four years to raise the amount needed to fund the difference between the publicly funded amount and the expenditure cap. For a major party that runs candidates in all electorates, that amounts to around \$2.3 million that needs to be raised over a four year period to fund electoral communications expenditure. That's around 115 donations of \$5000 annually, or just over one such donation per electorate annually. It does not seem to be a great burden, especially when there are 4.6 million voters on the roll in NSW and one can even draw upon donations from voters across the whole country, giving a pool of 15 million potential donors.

When faced with a similar argument, the US Supreme Court dismissed it, observing that political parties and candidates would simply have to raise funds from a wider field of people and could still raise large amounts if they had sufficiently broad support.¹⁹

The second assumption is that more money for expenditure on political communication necessarily amounts to more political communication and a more informed electorate. Yet if a party has more money to spend on political advertising, it tends to be spent on the repetition of the same advertisements, rather than greater diversity of political views or more information on policy differences. As Brennan J observed in the *Australian Capital Television* case, television advertisements tend to trivialise political issues and are directed to emotions rather than the intellect.²⁰ There is also a counter argument that if a law were to reduce the domination of the airwaves by major parties, there would be more opportunity for diverse political communication from other voices that are normally drowned out during election periods. Hence a law that had the effect of reducing the amount of political advertising by political parties might have the effect of increasing the quality, diversity and free-flow of political communication. The point is that we do not know whether this is the case, and neither did the High Court in reaching its conclusions about the effect of a law banning certain types of political donations.

Thirdly, there are many other laws, such as tax laws, that more directly reduce the amount of money that a party can draw upon to fund electoral communications expenditure. It would be very surprising, however, if laws such as that imposing the goods and services tax were regarded as burdening the implied freedom of political communication.

Whether the law was reasonably appropriate and adapted to serve a legitimate end

¹⁸ *Unions NSW v New South Wales* (2013) 88 ALJR 227, [38] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); and [120] (Keane J).

¹⁹ *Buckley v Valeo* 424 US 1 (1976) 22.

²⁰ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 160 (Brennan J).

Having accepted that a law banning corporate and union donations burdened the implied freedom of political communication, the High Court in *Unions NSW* then considered the second part of the *Lange* test. Is the law reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the constitutionally prescribed system of responsible and representative government? In this case the Court held that the law was not made for a 'legitimate end'. Indeed, it rather coyly claimed that 'the purpose of its wide, but incomplete, prohibition is inexplicable'.²¹ The critical problem was that the caps on donations had removed the corrupting influence of large donations. A political donation of \$5000 by a corporation was worth exactly the same as the \$5000 of a union and the \$5000 of an individual on the electoral roll. None would buy any more influence than the other. The Government could not explain to the Court why a \$5000 donation by a union or a corporation was more likely to give rise to corruption and undue influence than a donation in the same amount by a voter.

The Government had argued that only voters have an interest in the choice of a government and therefore they should be the only ones allowed to donate. This argument was rejected by the Court which pointed out that there are 'many in the community who are not electors but who are governed and are affected by decisions of government'.²² Their Honours considered that these non-voters 'have a legitimate interest in governmental action' and may seek to influence elections either directly or indirectly through the support of a party or candidate, through donations or otherwise.²³ This includes corporations, unions, other entities and non-citizens.²⁴

As for the aggregation provisions, the Court found it much easier to hold that they burdened the implied freedom of political communication, as they directly limited expenditure on political communication.²⁵ While an argument might have been able to be run that they supported the legitimate end of a 'level playing field', this was thwarted by the fact that the provisions were skewed so that they only applied to the Labor Party and its affiliated unions. They did not aggregate the expenditure of other parties and their closely associated organisations. Hence, such an argument was doomed to fail. Nor could the Government argue that they were intended to achieve an anti-corruption purpose. The best it could contend was that the aggregation provision was intended to prevent avoidance of the caps.²⁶ But this argument was based upon an assumption that the Labor Party and its affiliated unions were effectively the one body with the same

²¹ *Unions NSW v New South Wales* (2013) 88 ALJR 227, [59] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

²² *Unions NSW v New South Wales* (2013) 88 ALJR 227, [30] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

²³ *Unions NSW v New South Wales* (2013) 88 ALJR 227, [30] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); [144] (Keane J).

²⁴ *Unions NSW v New South Wales* (2013) 88 ALJR 227, [56] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

²⁵ *Unions NSW v New South Wales* (2013) 88 ALJR 227, [61] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). See also Keane J at [163].

²⁶ *Unions NSW v New South Wales* (2013) 88 ALJR 227, [62] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

interests, which the Court rejected.²⁷ Their Honours noted that even though unions may have similar interests to the Labor Party, this does not mean that they are effectively the same body or that their objectives are necessarily the same.²⁸ Unions are as much entitled to participate in political communication as any other body or person (although there is no personal *right* to do so).

A complete ban on all donations

Various politicians have suggested that as an antidote for the current corruption scandals in the Independent Commission Against Corruption ('ICAC'), there should be full public funding of elections and all political donations should be banned. There are numerous problems with this proposition.

First, even if political donations were banned, those who seek corrupt influence over Members of Parliament would simply do so by other means – such as personal gifts, expensive holidays, funding of 'fact-finding' trips, jobs for the Member's children or offers of future employment for the Member after leaving Parliament. If prohibited donors are currently prepared to break the law by making political donations in cash or through employees or other organisations, there would appear to be no reason why they would not also break laws banning all donations. Hence, it would be very difficult to contend that such a measure would prevent corruption. At most it would make corruption more difficult to identify.

Secondly, it sends out two appalling messages:

1. that our politicians and political parties are so corrupt they cannot help themselves from breaching donation laws and must therefore be shielded from all such temptation; and
2. that instead of punishing people for criminal acts, we should reward them.

It is rather like paying a child not to shop-lift or giving car thieves luxury cars so that they aren't tempted to steal the cars of others. But it is worse than that. This is because Members of Parliament are entrusted to make the laws. If they, of all people, are unable to be trusted to obey the laws that they make, then that is a massive breach of trust that will seriously undermine our democratic system.

Thirdly, full public funding of political parties and candidates would impose a serious burden on taxpayers. Taxpayers spent over \$20 million reimbursing parties and candidates for expenditure in relation to the 2011 election.²⁹ This covered around 75% of

²⁷ *Unions NSW v New South Wales* (2013) 88 ALJR 227, [62]-[63] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

²⁸ *Unions NSW v New South Wales* (2013) 88 ALJR 227, (French CJ, Hayne, Crennan, Kiefel and Bell JJ); [165] (Keane J).

²⁹ \$15,076,709 was paid to 7 parties and \$4,938,363 was paid to 326 candidates: Election Funding Authority, *Annual Report 2011-2012*, p 7:

https://www.efa.nsw.gov.au/_data/assets/pdf_file/0020/128720/EFA_AR2011-12_RS_FINAL_JAN_2013.pdf.

electoral communication expenditure by those parties and candidates that received over 4% of first preference votes. It did not cover the other parties or candidates, or anything falling outside electoral communications expenditure. Taxpayers also fund parties to the tune of approximately \$9 million per year from the Administrative Fund.³⁰ If all donations were to be banned and all the costs of all political parties and all candidates were to be picked up by tax-payers, this would significantly increase this very large existing impost on taxpayers, swallowing up many millions of additional dollars which could be better spent on services to the community.

Fourthly, if all the expenses of parties and candidates were paid by the public, then there would most likely be a surge in the number of parties and candidates that have little to no public support. Any person with an opinion could run for Parliament at public expense. This would not only be expensive for taxpayers, but has the potential to result in massive ballot papers, voter confusion and high levels of informal voting.

Fifthly, from a practical point of view, it would be extremely difficult to design any system of full public funding that fairly and equitably distributed funding amongst parties and candidates. I am unaware of any other democratic country in the world that has done so.

Sixthly, such a scheme is likely to have unwanted consequences. For example, all the corporate and union money that previously was paid in donations to parties and candidates would most likely instead be paid to third-party campaigns or be used directly for third-party campaign expenditure. While third-party campaigners would presumably still be subject to expenditure caps, this would not prevent the proliferation of third-party campaigners, who could run campaigns in concert, taking the political agenda away from parties and candidates and dominating the airwaves, as they do in the United States.

Finally, such a scheme is likely to be constitutionally invalid. It would certainly impose a burden on the implied freedom of political communication, even if public funding was paid up to the level of expenditure caps. This is because the expenditure cap would presumably have to be extended to cover *all* expenditure on communications by political parties, not just that which occurs during the currently regulated 6 month period before elections. The question then would be whether the law is reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the constitutionally prescribed system of representative and responsible government. As in the *Unions NSW* case, it would be extremely difficult to argue that a maximum donation of \$5000 to a party is any more likely to give rise to corruption or undue influence than a complete ban on donations.

The High Court, in *Unions NSW*, noted that the ban in that case stopped short of a complete ban on donations. Their Honours observed in relation to a complete ban that ‘if

³⁰ In the 2011-12 financial year \$9,581,460 was paid to 7 parties and 1 independent from the Administrative Fund and in the 2012-13 financial year \$8,026,423 was paid to 7 parties and 3 Independents from the Administrative Fund: Election Funding Authority, *Annual Report 2011-2012*, p 32; and *Annual Report 2012-13*, p 8.

challenged, it would be necessary for the defendant to defend a prohibition of all donations as a proportionate response to the fact that there have been or may be some instances of corruption, regardless of source'.³¹ If the problem, as seen in the ICAC, is that people have been breaching the existing laws, then it is difficult to see why they would be any less likely to breach a complete ban on donations. If the aim is to prevent corrupt breaches of the law, then there are more appropriate and adapted ways of achieving this, such as increasing penalties and providing the means for more rigorous enforcement of the law.

Bans on political donations by particular types of donors

The other interesting question is whether the existing bans on donations from prohibited donors are constitutionally valid. A challenge to these laws is currently being brought by a Newcastle property developer, Mr Jeff McCloy.³²

The first question is whether the law burdens the implied freedom. While the High Court held in *Unions NSW* that much broader bans on donations by any corporations, unions, entities and persons, other than those on the electoral roll, burdened the implied freedom by reducing the potential sources of expenditure on political communications, an argument might be made that the much more limited ban on donations from prohibited donors would not have any significant effect upon the capacity of parties and candidates to fund their political communications. If this argument succeeded, it would raise the more vexed and so far unresolved question of whether the making of the donation is itself a form of political communication which is burdened by the law.

If the second stage of the *Lange* test is reached, then the same question arises as to why a \$5000 donation by a property developer is any more likely to corrupt than a donation from anyone else. However, when it comes to perceptions of corruption and undue influence, the history of scandals concerning donations from property developers and others who have strong financial interests in the decisions of government may be relevant. The High Court noted in *Unions NSW* that prohibited donors may have 'interests of a kind which requires them to be the subject of an express prohibition'.³³ It also observed that the 'history which may explain or support the targeting of the "prohibited donors" in Div 4A was not addressed in detail in argument', as it was not necessary to do so.³⁴ Both these statements recognise a possibility that such a history could be relied upon to justify these bans. If compelling evidence could be brought to show that donations made by persons or entities falling within these particular categories are more likely to give rise to corruption or the perception of corruption and undue influence, and that the caps on donations do not remove that risk, then such provisions

³¹ *Unions NSW v New South Wales* (2013) 88 ALJR 227, [59] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). See also Keane J at [127] re the irrelevancy of s 96D being a 'step towards the comprehensive prohibition on all political donations'.

³² Writ of summons, No S211 of 2014, *McCloy v NSW and ICAC*, 28 July 2014.

³³ *Unions NSW v New South Wales* (2013) 88 ALJR 227, [57] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

³⁴ *Unions NSW v New South Wales* (2013) 88 ALJR 227, [58] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

might survive if regarded as reasonably appropriate and adapted to serve that legitimate end.

Conclusion

The regulation of campaign finance laws is fraught with both constitutional and practical difficulty. This is not, however, an excuse for doing nothing. Reforms that are carefully considered and clearly aimed at legitimate ends such as preventing or reducing the risk or perception of corruption, will be valid. The real difficulty lies in ensuring that laws are made for these purposes alone and are not manipulated to the advantage either of particular political parties, or to the benefit of parties generally over the ability of third-parties to have their say in political debate. Laws of these kinds have been struck down twice by the High Court. That ought to be a clear warning about how such laws should be framed in the future.