[redacted]

From: Anthony Gray [redacted]
Sent: Tuesday, 26 February 2013 2:34 PM
To: Electoral Reform
Subject: Submission - Electoral Reform

Attachments: AJPH.x.pdf; The Compatibility of Election Funding Laws with the Implied Freedom of Political Communication.docx

AJPH.x.pdf (247 KB) The Compatibility of Election ...

Good afternoon

I read your recent discussion paper on electoral reform with interest.

I enclose two documents by way of submission:
(a) an article I recently had published on compulsory vs optional voting
(b) a paper I have recently completed considering the constitutionality of recent Qld and NSW electoral funding reforms.

You may find these submissions useful in your deliberations.

Regards Anthony

Professor Anthony Gray
Deputy Head, USQ Law School
Course Leader, LAW3201 Constitutional Law

AJPH
AUSTRALIAN JOURNAL OF POLITICS AND HISTORY

The Constitutionality of Australia's Compulsory Voting System

ANTHONY GRAY
University of Southern Queensland

Electoral law has been the subject of several High Court decisions in recent years, and this jurisprudence, as well as some of the political science literature, is canvassed here. I argue that there are serious constitutional question marks over Australia's system of "compulsory voting". There are two particular constitutional arguments against "compulsory voting". Firstly it infringes the implied freedom of political communication which the High Court has recognised since 1992. Secondly, it is inconsistent with the right to vote recognised by the High Court as being implicit in s7 and s24 of the Constitution. On this basis citizens entitled to vote should have the freedom not to do so (as is the case in many other representative democracies in which voting is voluntary).

Current Law

"Compulsory voting" is a current feature of Australia's electoral system, provided for in the *Commonwealth Electoral Act* 1918 (Cth). The word "current" is used because, although "compulsory voting" has long been a feature of Australia's electoral landscape, it was not the practice at the time the Australian Constitution was written. To a very large degree the founding fathers left the design of Australia's electoral system to the Parliament itself,[1] subject to express and implicit requirements of the Constitution.[2] The first use of "compulsory voting" occurred in the 1915 Queensland election. It soon spread to other states, and was introduced federally by the *Commonwealth Electoral Act* 1914 (Cth).[3]

It is appropriate to place inverted commas around "compulsory voting". Australia's electoral system is commonly described in this way, in contradistinction to other systems where those otherwise eligible to vote have a choice of whether or not to attend a polling place to cast a vote. Strictly speaking the *Electoral Act* provides that it is an offence for an "elector" not to "vote".[4] An "elector" is defined in s4 as someone whose name appears on an electoral roll. Section 101 in effect requires a citizen who

[1] *Rowe v Electoral Commissioner* (2010) 243 Commonwealth Law Reports (CLR) 1 p.50 (Justices Gummow and Bell), and p.68 (Justice Hayne).

[2] For instance, the requirement that Senators and members of the House of Representatives be directly chosen by the people of the Commonwealth (s7 and 24 respectively), s8, s9, s30,s 31 and s51(36), allowing for the Commonwealth Parliament to make laws respecting the qualification of electors in federal elections, and the method of choosing members, and the implied freedom of political communication, about which more will be said later; Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* (Annandale, NSW, 2010), p.18.

[3] Scott Bennett, *Compulsory Voting in Australian National Elections*, Research Brief No 6 (Canberra, 2005-2006).

[4] s245(1).

meets the eligibility requirements for voting[5] to enrol as a voter.[6] The Act does not define "vote", but since Australia has secret voting, it seems that "electors" might meet their obligations by attending a polling booth, collecting a ballot paper, having their name ticked off, and then depositing a blank or otherwise informal ballot into the ballot box.[7] The Electoral Commissioner has no way of knowing who casts an informal ballot. The only practical way of enforcing a requirement that someone actually express a preference is to monitor voters as they mark ballot papers. This is not provided for in the Act,[8] and would inherently threaten secret voting.

Section 245 of the *Commonwealth Electoral Act* 1918 (Cth) is the relevant provision. Subsection (1) states that "it shall be the duty of every elector to vote at each election". The section requires the Electoral Commissioner to prepare a list of electors who have apparently failed to vote at an election. Divisional Returning Officers must then send a penalty notice to those listed. The section allows various exceptions to the obligation to vote, particularly where the person is overseas at the time of a poll, is disqualified, dead, or otherwise has a "valid and sufficient reason" for failing to vote.[9] Religious beliefs are specifically provided for as an exception to the requirements of s245.[10] Unless one of the exceptions applies, failing to vote attracts a fine of between $20 and $50.[11]

In 1926, in *Judd v McKeon*, the High Court squarely addressed a challenge to an equivalent provision of the *Commonwealth Electoral Act* 1918.[12] This provision made it an offence for an elector to fail to vote without a valid and sufficient reason, in terms virtually identical to the current requirements in s245. The challenger admitted he had not voted at the past election. This was because all of the candidates sought to "perpetuate capitalism with its exploitation of the working class, war, unemployment, prostitution etc.", things about which he had strongly opposed views. He claimed that the provisions of the Act were not supported by s9 of the Constitution, which allows the Commonwealth Parliament to pass laws prescribing the method of its election. A majority disagreed.

In the joint reasons, Chief Justice Knox, Justices Gavan Duffy and Starke said that "choice meant simply making a selection between different things or alternatives

---

[5] s93.

[6] Section 101(6) punishes a failure to do so with a maximum one penalty unit.

[7] In *Faderson v Bridger* (1971) 126 CLR 271, 272 Chief Justice Barwick (with whom Justice McTiernan agreed) stated it was not an offence, having collected a ballot paper, not to mark it so that the vote was valid. This would presumably include persons who just left the ballot paper completely blank, or who incorrectly placed some numbers upon it. This was also the view in *Lubcke v Little* [1970] VR 807 and *Douglass v Ninnes* (1976) 14 SASR 377; cf. *O'Brien v Warden* (1981) 37 Australian Capital Territory Reports (ACTR) 13, 16 (where Chief Justice Blackburn stated that casting an informal ballot was a breach of the Act); Orr, *The Law of Politics*, pp.62-63. Elsewhere Orr states that "electoral officials probably do have power to force electors to actually vote, whether by stopping them leaving the ballot box or otherwise directing them": "The Choice Not to Choose: Commonwealth Electoral Law and the Withholding of Preferences", *Monash University Law Review*, Vol. 23 (1997), pp.285, 292.

[8] The closest provision is arguably s233, providing that a voter, once in receipt of a ballot paper, shall without delay mark their vote upon it. See Orr, "The Choice Not to Choose", pp.285, 292. Further, s239 and s240 state that voters "shall" mark their ballot papers in a particular way, which does not contemplate leaving a ballot paper blank.

[9] S245(1)(d).

[10] S245(14).

[11] S245(15), (5)(c).

[12] *Judd v McKeon* (1926) 38 CLR 380; see also *Faderson v Bridger* (1971) 126 CLR 271.

submitted, to take by preference out of all that was available".[13] Justice Isaacs agreed that a "method of choosing" could incorporate a compulsory voting system.[14] Justice Higgins dissented, on the basis that the challenger had a "valid and sufficient reason" for not voting, since none of the candidates reflected the voter's wishes:

> It is to be presumed in favour of Parliament, unless it clearly say the contrary, that the Act of Parliament does not compel a man to say that he has a preference when he has none — does not compel him to tell a lie. If in what is obviously a labour constituency there were two labour candidates and an anti-labour elector regarded one labour candidate as being as bad as the other, this would, in my opinion, be a valid reason for declining to vote.[15]

Recently, in *Rowe v Electoral Commissioner*,[16] several members of the High Court noted the *Judd* decision. None expressed reservations though it was not necessary to do so since the question of compulsion in voting was not directly raised in this case.

The Implied Freedom of Political Communication

Judd v McKeon did not consider the question of the compatibility of compulsory voting with an implied freedom of political communication. This implication in the *Constitution* was only drawn sixty-six years after the *Judd* decision.[17] However this right is now central to the question of the constitutionality of mandatory voting.[18] In *Australian Capital Television Pty Ltd v Commonwealth* (1992) the Court recognised an implied freedom of political communication, implicit in Australia's system of representative and responsible government. In subsequent cases there was some refinement of the approach to be taken in applying the implied freedom. Eventually, a unanimous court in *Lange v Australian Broadcasting Corporation* agreed on a two stage test:

> First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s128 for submitting a proposed amendment of the *Constitution* to the informed decision of the people [...] If the first question is answered 'yes' and the second is answered 'no', the law is invalid.[19]

---

[13] *Ibid.*, 383.

[14] *Ibid.*, 385; see to like effect Justice Rich, 390.

[15] *Ibid.*, 388.

[16] (2010) 243 CLR 1, Justices Gummow and Bell, p.51, Justice Hayne, p.75, Justice Heydon, p.95, Justice Crennan, p.118, Justice Kiefel, p.128.

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

[18] I should make clear that I favour universal adult suffrage (as a right), with very limited exceptions. I, like most others, wish to see higher voter turnout at elections. I agree with Heather Lardy that "active participation [...] is to be preferred to non-voting", if not with the comment she makes in the space in the quote "whether voluntary or compelled". I would prefer to see high participation rates in elections, but am more ambivalent about the use of compulsory voting mechanisms to achieve this aim. Heather Lardy "Is There a Right Not to Vote?", *Oxford Journal of Legal Studies*, Vol. 24, 2 (2004), pp.303, 317.

[19] (1997) 189 CLR 520, 567-568 (Chief Justice Brennan, Justices Dawson, Toohey, Gaudron, McHugh, Gummow, and Kirby).

Subsequently, in *Coleman v Power*,[20] the Court agreed to substitute "in a manner" for "the fulfilment of" to better express its intention that it was not just the end, but the way in which that end was furthered, that needed to be compatible with representative and responsible government.

Clearly this "freedom" is of limited scope. It is a negative "right" or freedom from interference by legislation, rather than a positive right, upon which litigation for damages could be based.[21] It is not a general right to free speech (as appears in other rights documents). Rather it is limited to instances of "political" communication. It includes verbal and non-verbal communication,[22] and can be applied to state-level as well as national politics.[23] It is not inconsistent with a requirement that political parties be registered, and that only registered parties can have their name added to the ballot paper.[24] The Court has even upheld a law making it illegal for a person to publish material explaining how voters could avoid giving preferences to the major political parties, despite the implied freedom.[25]

Let us consider s245 of the *Electoral Act* and compulsion to vote in the light of the implied freedom of political communication as clarified in *Lange*. Specifically, does s245 *effectively burden communication about political or government matters?* Clearly it does meet this first test. It requires a person who may not wish to attend at a polling booth and, at least, to collect a ballot paper. The Court has found that the freedom of political communication includes non-verbal as well as verbal communication.[26] Surely, the very act of a person not attending a polling booth to cast a vote at an election is a form of communication — a message of indifference, apathy, lack of awareness, or even hostility towards what is on offer from the parties or candidates from which the voter is asked to choose. If voting is political expression,[27] then so too is lack of voting.[28]

---

[20] (2004) 220 CLR 1, 50 (Justice McHugh), Justices Gummow and Hayne (77-78) and Justice Kirby (82).

[21] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

[22] *Levy v Victoria* (1997) 189 CLR 579.

[23] *Stephens v Western Australian Newspapers Ltd* (1994) 182 CLR 211.

[24] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181.

[25] *Langer v Commonwealth* (1996) 186 CLR 302; for critique see Anne Twomey, "Free to Choose or Compelled to Vote? – The Rights of Voters After *Langer v The Commonwealth*", *Federal Law Review*, Vol. 24 (1996), pp.201, 216-220.

[26] *Levy v Victoria* (1997) 189 CLR 579, mirroring the position of the US, where flag burning has been upheld as protected by the First Amendment free speech right: *Texas v Johnson* 491 US 397 (1989), as has the wearing of a black armband to protest against a war: *Tinker v Des Moines Independent Community School District* 393 US 503, 514 (1969).

[27] "Voting is essentially an expressive exercise. By voting, the individual shows something of herself, displaying desires, beliefs, judgments, and perceptions. The voter gives voice to her sentiments and views, concretizes them, and asserts them, though anonymously, through the marking of a candidate's name or the 'yes' or 'no' of a referendum": Adam Winkler, "Expressive Voting", *New York University Law Review*, Vol. 68 (1993), pp.330, 333. The High Court accepted in *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 that a ballot was a communication about political and government matters. The Supreme Court in *Doe v Reed* noted the "expressive activity" involved in signing a referendum petition: 130 S. Ct. 2811 (2010). This issue divided the US Supreme Court recently, with the majority denying that the act of voting was an act of communication (*Nevada Commission on Ethics, Petitioner v Michael A Carrigan* 131 S. Ct 2343, 2350 (2011) (Justice Scalia, with whom Chief Justice Roberts, Justices Kennedy, Thomas, Ginsburg, Breyer, Sotomayor and Kagan agreed); cf. Justice Alito, concluding that "voting has an expressive component in and of itself" (2354)). The expression conveyed is limited; all members of the Supreme Court have noted

No Australian case has specifically found that the implied freedom of political communication includes the right not to communicate. However, these issues have arisen in the United States in the context of the First Amendment protecting freedom of speech generally. Most have found that the First Amendment protects the right not to communicate. Examples include *West Virginia State Board of Education v Barnette*, where the court set aside a State requirement that citizens pledge allegiance to the US flag,[29] *Wooley v Maynard*, where the court set aside a state requirement that all licence plates bear the State's motto,[30] *Miami Herald Publishing Co v Tornillo*, where the Court set aside a state law requiring a newspaper to give a person attacked in the paper equal space to rebut criticisms made,[31] *Pacific Gas and Electric Co v Public Utilities Commission*, where the court set aside a State requirement that an energy company include particular third-party literature with its bills,[32] and *Hurley v Irish-American Gay, Lesbian and Bisexual Group of Boston*, where the Court struck out a requirement that organisers of a St Patrick's day parade feature the respondents in their parade, because the organisers had a right to choose "the content of (their) own message".[33] The Supreme Court in *Burdick v Takushi*[34] confirmed that "reasonable regulation of elections does not require voters to espouse positions that they do not support".[35]

Various commentators have agreed that since voting is a form of speech, non-voting is also a form of speech, and would be protected by the First Amendment.[36] The

---

that the function of an election is not to provide a means of giving vent to short-range political goals, pique or personal quarrels (*Burdick v Takushi* 504 US 428, 438 and 445). Geoffrey Brennan and Loren Lomasky develop the view of voting as expressive conduct in *Democracy and Decision: the Pure Theory of Electoral Preference* (Cambridge and New York, 1993).

[28] As Graeme Orr notes, deliberately informal ballots might express "a complete dissatisfaction with all the choices available at a particular poll, or, more extremely, disapproval of the electoral process altogether": "The Choice Not to Choose", pp. 285, 285; see also Brennan and Lomasky, *Democracy and Decision*, p.179: "individuals may en masse refrain from voting as a means of expressing lack of support for the current incarnation of a traditionally favored party [...] If she is one among many such, the electoral outcome will respond".

[29] 319 US 624 (1943) (the court discussed the First Amendment generally as well as specifically the freedom of speech aspect).

[30] 430 US 705 (1977); "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all" (714).

[31] 418 US 241 (1974)

[32] 475 US 1 (1986), on the basis that the choice to speak includes a choice of what not to say (16).

[33] 115 S. Ct. 2338, 2347 (1995). These (and other cases) are discussed in some detail in Abner Greene, "The Pledge of Allegiance Problem", *Fordham Law Review*, Vol. 64, (1996), pp.451, 463-468.

[34] 504 US 428 (1992).

[35] 438 (Justice White, with whom Chief Justice Rehnquist, Justices O'Connor, Scalia, Souter and Thomas agreed). In dissent on the actual decision regarding the constitutionality of a ban on write-in voting, Justices Kennedy, Blackmun and Stevens agreed in effect with the principle at hand, concluding that such a ban meant the voter "had no way to cast a meaningful vote" (442).

[36] Jason Halperin, "A Winner at the Polls: A Proposal for Mandatory Voter Registration", *New York University Journal of Legislation and Public Policy*, Vol. 3 (2000), pp.69, 103: "The freedom to speak includes the freedom not to speak. Any other reading of the Constitution would fly in the face of the nation's bedrock values of individual liberty and freedom [...] forcing someone to vote is tantamount to forcing that person to speak or to express their opinion, and such a requirement would not be constitutional"; Jeffrey Bloomberg, "Protecting the Right Not to Vote from Voter Purge Statutes", *Fordham Law Review*, Vol. 64 (1995), pp.1015, 1016: "a voter may view abstention as a vehicle for expressing dissatisfaction"; Anthony Ciccone, "Current Public Law and Policy Issues: The Constitutional Right to Vote Is Not a Duty", *Hamline Journal of Public Law and Policy*, Vol. 23

content of the communication is, concededly, ambiguous. It may be that the message is that the person who declines to vote does not find any of the candidates acceptable. Not voting may reflect apathy, that a person does not care which individuals and parties take office; or disengagement from, or lack of understanding of politics.[37]

The author cannot then agree with comments in the literature that "non-voting per se expresses nothing at all. Given that the reasons for a voter's abstention are not known, the mere act of abstaining constitutes, at best, a very garbled form of communication".[38] Whether or not a communication is garbled does not change its character as communication; we recognise positive voting as communication, though certainly the fact we vote for a particular candidate/political party/Prime Ministerial candidate is "garbled" communication, potentially meaning many different things. We should similarly regard a choice not to vote as communication, despite its "garbled" nature. It seems clear that a requirement that someone obtain a ballot paper and place it in the ballot box does burden communication about government and political matters.

The second test to emerge from *Lange* asks whether a law is *appropriate to a legitimate end in a manner compatible with representative and responsible government.* The arguments here must be carefully drawn. Temptation to debate the general merits of compulsory and voluntary voting must be avoided. There are of course arguments in favour of compulsory voting in terms of giving government greater legitimacy, and of requiring the public collectively to join in expressing an opinion about their government. There are also arguments against in terms of the infringement of liberty, or drafting of voters who may not understand the issues. These arguments are well considered elsewhere.[39] Our inquiry here is of a more limited nature. Only some of these arguments have relevance.

Certainly, there is an argument that compulsory voting increases the turnout of voters at elections.[40] The turnout at Australian elections is extremely high by comparison with other democracies, and there is historical evidence of a substantial

---

(2002), pp.325, 347-348: "the hallmark of a free society is that citizens are free to make their own choices including whether or not to vote in a given election contest"; Note, "The Case for Compulsory Voting in the United States", *Harvard Law Review*, Vol. 121 (2007), pp.591, 601: "the First Amendment right to free speech does imply an inverse right not to be compelled to speak".

[37] While certainly disengagement from or lack of understanding of political processes is a matter of concern, this is not immediately relevant for present discussion purposes.

[38] Lardy, "Is There a Right Not to Vote?", pp.303, 318, and to like effect, Note, "The Case for Compulsory Voting in the United States", pp.591, 603: "the value of the statements individuals make by not voting is actually quite limited. If not voting is meant to be a statement of dissatisfaction with the candidates and their policies, then it is not a very effective one. With respect, is the positive casting of a vote for a candidate, when that candidate already has a clear majority of the voters, any more 'valuable'?"

[39] Orr, "The Choice Not to Choose", pp.288-292; Ciccone, "Current Public Law and Policy Issues", pp.325, 336; Lardy, "Is There a Right Not to Vote?", p.303; Katherine Swenson, "Sticks, Carrots, Donkey Votes and True Choice: A Rationale for Abolishing Compulsory Voting in Australia", *Minnesota Journal of International Law*, Vol. 16 (2007), pp.525, 544-545; Sean Matsler, "Compulsory Voting in America", *Southern California Law Review*, Vol. 76 (2003), pp.953, 961; Sarah Birch, *Full Participation: A Comparative Study of Compulsory Voting* (Tokyo and New York, 2009).

[40] Sarah Birch documents a 13 per cent average increase in voter turnout in a country with compulsory voting: *Full Participation*, p.96.

increase in turnout following the rollout of compulsory voting.[41] A high turnout of voters might improve the extent to which a government (and country) is considered "democratic", "legitimate",[42] and reflective of the will of the people. Given the theory of representative government is that the government represents the people, it might make sense that as many people as possible cast a vote in the election. The fact of voting might reinforce the fact that a person is a member of a society;[43] social contract theory may also play its part here, in that a duty to vote may be one of its terms.[44]

However, the argument that compulsory voting means elected governments have more legitimacy,[45] and therefore that an individual within that society as a result has more "respect" for the government, and therefore derives "benefit" in that way, is considered tenuous. Few argue that because the system of voting in places such as the United Kingdom and United States is voluntary, that the governments there are less legitimate in the eyes of citizens.[46] Hasen records that Italy has the highest level of turnout among Western democracies;[47] Birch notes the very high turnout rates for elections in the former USSR and the current North Korea;[48] Norris argues that turnout rates may be used to justify one-party contests.[49] Clearly there is no necessary link between turnout and "legitimacy", which is obviously a product of many different factors.[50] Others argue that by "forcing" otherwise unwilling citizens to vote,

---

[41] Bennett, *Compulsory Voting in Australian National Elections*; Arend Lijphart, "Unequal Protection: Democracy's Unresolved Dilemma", *American Political Science Review*, Vol. 91 (1997), pp.1, 8-9, claiming that compulsory voting lifts turnout by between 7 and 16 percentage points.

[42] Note, "The Case for Compulsory Voting in the United States", pp.591, 594: "there are serious questions about how legitimate a government is when the vast majority of citizens have not elected it"; Lisa Hill, "Low Voter Turnout in the United States: Is Compulsory Voting a Viable Solution?", *Journal of Theoretical Politics*, Vol. 18, 2 (2006), pp.207, 209.

[43] Winkler, "Expressive Voting", p.330; *Roach v Electoral Commissioner* (2007) 233 CLR 162, 199: "the existence and exercise of the franchise reflects notions of citizenship and membership of the Australian federal body politic" (Justices Gummow, Kirby and Crennan).

[44] Jean-Jacques Rousseau, *The Social Contract* trans and ed. M. Cranston (Harmondsworth, 1968); Justice Crennan in *Rowe v Electoral Commissioner* [2010] HCA 46 recognised the "centrality of the franchise to a citizen's participation in the political life of the community".

[45] This appears in Note, "The Case for Compulsory Voting in the United States", pp.591, 594: "there are serious questions about how legitimate a government is when the vast majority of citizens have not elected it"; and Orr, *The Law of Politics*, p.64; "in Australia, compulsion appears designed not so much [...] as an act of self-expression as to promote a more utilitarian aim of legitimating elections and the governments they produce". Sarah Birch, an advocate of compulsory voting systems, is ambivalent: "there is limited comparative evidence both for and against the proposition that compulsory voting enhances popular perceptions of political legitimacy": *Full Participation*, p.112.

[46] According to Richard Hasen, "it is hardly self-evident that a government program forcing voting would increase a societal belief in the legitimacy of government": "Voting Without Law?", *University of Pennsylvania Law Review*, Vol. 144 (1996), pp.2135, 2165.

[47] *Ibid.*, p.2170; G. Bingham Powell Jr, "American Voter Turnout in Comparative Perspective", *American Political Science Review*, Vol. 80 (1986), pp.17, 38 (quoting a turnout rate of 92 per cent in Italy, the highest of all countries studied).

[48] Birch, *Full Participation*, pp.3-5, which she explains by governmental "pressure" and the perception of informal "sanctions" for not voting.

[49] Pippa Norris, *Electoral Engineering: Voting Rules and Political Behaviour* (Cambridge and New York, 2004), p.168.

[50] Other arguments in favour of compulsory voting include (Note, "The Case for Compulsory Voting in the United States", pp.591, 596-598), that compulsory voting reduces the role of money in politics. However, despite Australia's long history of compulsory voting, state governments have seen fit to introduce legislative controls on electoral spending, in response to concerns over the role of money in

compulsory voting actually dilutes the quality of the decision that voters have made, by introducing the "ignorant and uninterested".[51] Brennan and Lomasky similarly conclude that

> persons who lack a full quota of wisdom and moral motivation do better not to vote at all. Their ballots add noise that is at best random to the total electoral outpouring, thus making it more likely that those best equipped to ascertain the common good will find themselves among the overall minority.[52]

They also question the connection between turnout and legitimacy on the basis that citizens do not directly elect leaders,[53] have close to no control over how political parties actually act, and struggle to make politicians account for what they have done, making the legitimacy of a government and its decisions less a factor of turnout than is commonly supposed.[54] There is little evidence that compulsory voting has much bearing on the political knowledge of citizens or their engagement with politics.[55]

Of course, in the original democracy of ancient Athens, voting was not compulsory.[56] Today just one quarter of democracies actually feature compulsory voting at present.[57] In order to properly assess whether compulsory voting is compatible with representative government, it is instructive to consider in some detail the writing of a leading philosopher on the theory of representative government, John Stuart Mill, and in particular his text *Considerations on Representative Government*.[58] Mill, a strong upholder of representative government as being the ideal form of government, believed that ultimate sovereignty resided in the people,[59] with people

---

politics, suggesting that this argument for compulsory voting may be specious. Secondly, it is claimed that compulsory voting might improve political awareness and engagement, and reduce negative campaigns, making campaigns and politics less partisan and divisive. In contrast, it is submitted the current debate in Australia over matters such as the carbon tax and asylum seeker policy reflects a highly partisan and divisive political landscape, throwing into doubt any claim that compulsory voting reduces animosity in political debate.

[51] Keith Jackee and Guang-Zhen Sun, "Is Compulsory Voting More Democratic?", *Public Choice*, Vol. 129 (2006), pp.61, 69-70; Richard Katz, *Democracy and Elections* (New York and Oxford, 1997), p.245; Henry Abraham, *Compulsory Voting* (Washington, 1955), "little would be gained by a mass of uninformed at the ballot booth" (p.33).

[52] Brennan and Lomasky, *Democracy and Decision*, p.185.

[53] John Stuart Mill made the same point: *Utilitarianism, On Liberty, Considerations on Representative Government*, ed. Geraint Williams (Vermont, 2010), p.280.

[54] *Ibid.*, pp.178-179.

[55] Birch, *Full Participation*, pp.62, 77.

[56] It is reported that election officials "corralled" voters with red-dyed rope to encourage voting: Aristophanes, *The Acharnians* in *The Complete Plays of Aristophanes* 13, 15 (ed. Moses Hadas, trans. B.B.Rogers, 1962). The Athenian system was a form of direct rather than representative democracy, in that citizens could actually attend the assembly and express their view: M.I. Finley, *Democracy, Ancient and Modern* (London, 1985), pp.51-52.

[57] Birch, *Full Participation*, p.1.

[58] (1861); page references will be drawn from John Stuart Mill, ed. Williams, *Utilitarianism, On Liberty, Considerations on Representative Government*.

[59] The sovereignty of the people as a key aspect of representative government was also discussed at some length by Alexis de Tocqueville, *Democracy in America*, ed. Richard Heffner (New York, 1956), p.56: "from their origin, the sovereignty of the people was the fundamental principle of most of the British colonies in America". Members of the High Court have accepted the sovereignty of the people: *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 72 (Justices Deane and Toohey) ("the central thesis of (the doctrine of representative government) is that the powers of government belong to, and are derived from, the governed, that is to say, the people of the Commonwealth"); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138: "the very concept of

having a "voice" (presumably meaning vote) in the exercise of that sovereignty.[60] He believed the people to be the "masters" of all operations of government and that the people exercise, through their representatives, the "ultimate controlling power".[61] Whilst he was in favour of a broad franchise,[62] he spoke in terms of people having the right to "have their consent asked and opinion counted".[63] Mill lauded de Tocqueville's work on American democracy:

> Almost all travellers are struck by the fact that every American is in some senses both a patriot, and a person of cultivated intelligence, and M. de Tocqueville has shown how close the connection is between these qualities and their democratic institutions. No such wider diffusion of the ideas, tastes, and sentiments of educated minds has ever been seen elsewhere, or even conceived as attainable.[64]

These comments take place in a context where voting in America has never been compulsory.[65] In fact, it is a minority of nations that have a system of compulsory voting, and a further minority of such nations that actively enforce the "requirement".[66] These sources confirm that, according to the leading writers on representative government and democracy, compulsory voting is certainly not required by that system. However, is it "compatible" with representative government?

If we accept, as philosophers, academics and judges have, that the Australian people are sovereign, and that they delegate certain powers to their elected representatives, it seems circuitous, to say the least, to say that the elected representatives have the power to mandate to the people that they participate in making such a choice. If we accept Mill's doctrine that the people are the masters of all political power and its ultimate controllers, it is surely wrong that their delegates should enjoy the right to tell them to exercise it, or restrict how they can exercise it. ("Exercise it" is taken to include a decision not to exercise a choice). As Justice Fullagar famously put it in the *Australian Communist Party v Commonwealth* case, "a stream cannot rise higher than its source".[67] It is submitted that the Parliament in effect directing individuals providing the source of Parliament's power to create laws to choose members of Parliament is an

---

representative government and representative democracy signifies government by the people through their representatives [...] the sovereign power which resides in the people is exercised on their behalf by their representatives" (Chief Justice Mason); "the doctrine of representative government [...] forms part of the fabric of the *Constitution*. That doctrine reflects [...] the central thesis and the theoretical foundation of our *Constitution* [...] that all powers of government ultimately belong to, and are derived from, the governed": *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 180; Trevor Allan: "in political theory, the legislative power derives from the consent of the people and is to be understood as a trust for their benefit": "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism", *Cambridge Law Journal*, Vol. 44 (1985), pp.111, 129; Harley G.A. Wright, "Sovereignty of the People: The New Constitutional Grundnorm", *Federal Law Review*, Vol. 26 (1998), p.165; George Winterton, "Popular Sovereignty and Constitutional Continuity", *Federal Law Review*, Vol. 26 (1998), p.1; Andrew Fraser "False Hopes, Implied Rights and Popular Sovereignty in the Australian Constitution", *Sydney Law Review*, Vol. 16 (1994), p.213.

[60] Mill, *Utilitarianism*, p.223.

[61] *Ibid.*, 246.

[62] *Ibid.*, p.262.

[63] *Ibid.*, p.302.

[64] *Ibid.*, p.300.

[65] I must acknowledge two exceptions, that of Georgia and Virginia, which had compulsory voting in the eighteenth century: Henry Abraham, "What Cure for Voter Apathy?", *National Municipal Review*, Vol. 39 (1952), p.346.

[66] Bennett, *Compulsory Voting in Australian National Elections*, pp.5-6.

[67] (1951) 83 CLR 1, 258.

example of a stream well above its source,[68] if in this analogy, the source of the stream is the delegation of power from the sovereign body (being the people), and the stream the actual law-making authority of Parliament. Nor can there be any magic percentage of turnout, above which it is said that the people are "sovereign", but below which the people are not sovereign. It is the fact that the people have the right to cast the vote which reflects their sovereignty, not the percentage that in fact do so.

Is There a Right to Vote (and not vote) in the Australian Constitution?

Section 41 of the *Constitution* expressly confers a right to vote. However, this section has been interpreted very narrowly by the High Court.[69] More promisingly, in recent cases the Court has identified that elements of the Constitution implicitly protect people's participation in democratic processes. In *Roach v Electoral Commissioner*[70] a majority found that a law denying all (or short-term) prisoners the right to cast a vote at a federal election was contrary to the Constitution. The majority based this decision primarily on s7 and s24, requiring members of Parliament be directly chosen by the people. Chief Justice Gleeson stated that these provisions "have come to be a constitutional protection of the right to vote".[71] Other members of the majority did not use this phrase, but given their view, that "voting in elections for the Parliament lies at the very heart of the system of government for which the *Constitution* provides",[72] it is submitted they would agree with a "right to vote". Justices Gummow, Kirby and Crennan in this case used similar wording to that applied to the implied freedom of political communication discussed earlier, asking whether the departure from universal adult suffrage was "appropriate and adapted to serve an end which was compatible and consistent with the maintenance of the constitutionally prescribed system of representative government".[73] They were not satisfied that denial of the franchise to all (or short-term) prisoners was so consistent.

In 2010, by a majority of 4-3,[74] the High Court invalidated provisions closing the electoral roll to new electors at 8 p.m. on the day the electoral writs were issued, and ending transfer of enrolment of electors as of 8 p.m. on the third working day following the issue of writs. Prior to passage of the *Electoral and Referendum Amendment (Close of Rolls and Other Measures) Bill 2010* voters had had up to 8 p.m. seven days after the date of the writ to register or amend their enrolment. The validity of these changes (which denied the franchise to approximately 100,000 voters) was challenged in *Rowe*

---

[68] This does not mean people have the right to disobey statutes passed by Parliament; rather that it is circuitous, in the author's view, to suggest that the delegation of the power from the sovereign to the delegate be forced or controlled by the delegate.

[69] In effect, it has been limited to those on the rolls in 1901: *R v Pearson; Ex Parte Sipka* (1983) 152 CLR 254; see for discussion Anne Twomey, "The Federal Constitutional Right to Vote in Australia", *Federal Law Review*, Vol. 28 (2000), pp.125, 138-141. I have in another article expressed my objection to such a narrow interpretation: Anthony Gray, "The Guaranteed Right to Vote in Australia", *Queensland University of Technology Law and Justice Journal*, Vol. 7, 2 (2007), pp. 178-197.

[70] (2007) 233 CLR 162.

[71] *Ibid.*, 74.

[72] Justices Gummow, Kirby and Crennan (198); a leading researcher in this area also refers to the "right to vote": "the implied constitutional protection for the *right to vote* (emphasis added) is to be discerned in s24 of the Constitution": Twomey, "The Federal Constitutional Right to Vote in Australia", pp.125, 126.

[73] *Ibid.*, p.199; Justice Gleeson talked of a "rational connection" between a constitutionally valid objective and the limitation in question, and minimum impairment of the constitutional right (p.178).

[74] *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

v Electoral Commissioner. Chief Justice French in the majority in *Rowe* noted that the requirements in s7 and s24 that the Parliament be chosen directly by the people was a "constitutional bedrock [...] confer(ring) rights on the people of the Commonwealth as a whole".[75] Justices Gummow and Bell in the majority refer with evident approval[76] to a passage in the judgment of Chief Justice Gleeson in *Roach* referring to a "right to vote". They adopted the tests given by the majority in *Roach*, namely (from the joint reasons) whether the law disqualifying a person otherwise qualified to vote was reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government, and whether (according to Chief Justice Gleeson), the interference bore a rational connection with a constitutionally valid objective, and was minimally invasive of the constitutional right.[77] The other member of the majority, Justice Crennan, accepted that s7 and 24 recognised the "embedding of the right to vote" by the people.[78] She applied a similar test to that discussed above, denying that the changes to Commonwealth legislation regarding the closing of the rolls were "necessary or appropriate".[79]

The right to vote has been recognised in international human rights instruments.[80] The Supreme Court of the United States has confirmed that "the right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restriction on that right strikes at the heart of representative government".[81] Accepting, then, that a majority of the High Court, consistently with international human rights instruments, has recognised a "right to vote", the question is whether a right to do something includes a right not to do it. The authorities here are somewhat mixed. Some US authorities have confirmed that the right to vote recognised in that country's Constitution[82] must include the right not to cast a vote. Given that voting is not compulsory in the United States, this has occurred in the context of systems, for instance, that require registration of voters, or systems deleting voters from registration lists if they do not vote.[83] The Fifth Circuit has stated that the right to vote includes the right not to vote, in the course of striking out a provision requiring voters to register

---

[75] Para 1.

[76] Para 123.

[77] Para 161.

[78] Para 368.

[79] Para 384.

[80] Article 21 of the *Universal Declaration of Human Rights* ("everyone has the right to take part in the government of the country, directly or through chosen representatives"); Article 25 of the International *Covenant on Civil and Politics Rights*, "the right to vote and to be elected by genuine periodic elections which shall be by universal and equal suffrage"; the *European Convention on Human Rights* includes a right to freedom of thought (Article 9) and freedom of expression (Article 10). Section 3 of the *Canadian Charter of Rights and Freedoms* includes a right to vote.

[81] *Reynolds v Sims* 377 US 533, 555 (1964); cf *Bush v Gore* 531 US 98, 101-109 (2000).

[82] Article 1 Section 2 states that the House of Representatives is to be chosen by the people; Article 4 Section 2 provides that the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states (see also the Fourteenth Amendment), section 2 of the Fourteenth Amendment refers to a "right to vote"; see also the Fifteenth, Seventeenth, Nineteenth, Twenty-Fourth and Twenty-Sixth Amendments.

[83] Australian expatriates or "eligible overseas electors" also face a use it or lose it rule.

annually.[84] The Fourth Circuit has also decided that the right to vote includes the "right to say that no candidate is acceptable".[85] The US originally had a write-in system, with voters having the right to name their own candidates, until in 1888 the "Australian ballot system"[86] was introduced, with candidates' names listed. In some early cases, prohibitions on write-in ballots were struck down on the basis they unacceptably interfered with an individual's right to vote.[87]

While care must be taken in using precedents created in another jurisdiction to answer an Australian legal question, provisions of the Australian Constitution dealing with voting bear some resemblance to the voting provisions of the US Constitution, specifically the clause requiring that members of Parliament (Congress) be chosen directly by the people.[88] The majority justices in *Roach* itself made extensive use of international materials on voting to inform their opinions.[89] These issues have presented themselves in other democracies, and it is reasonable to consider how these issues have been resolved in other democracies.

There is less Australian material on whether a right to do something includes a right not to do so.[90] I have acknowledged that two High Court decisions have upheld the validity of compulsory voting,[91] and the fact that those decisions were made in another era, prior to the recognition of the implied freedom of political communication, and prior to recent decisions that have come to recognise a "right to vote". However, the High Court has been called on to consider whether the "right" to trial by jury where the proceeding is by way of indictment for a federal offence, contained in s80 of the Constitution, can be waived if the accused chooses to do so. This was in the split decision of *Brown v The Queen*,[92] to which my attention now turns. The majority judgments found that the "right" to trial by jury enshrined by s80 could not be waived.

---

[84] *Beare v Briscoe* 498 F. 2d 244 (5th Cir, 1974); the same position was taken by the Supreme Court of Michigan in *Michigan State UAW Community Action Program Council v Austin* 198 NW 2d. 385, 390 (Mich. 1972).

[85] *Dixon v Maryland State Administration Board of Election Laws* 878 F. 2d 776, 782 (4th Cir, 1989); *Hoffman v Maryland* 928 F. 2d 646 (4th Cir, 1991). Academic support of a right not to vote includes Jeffrey Blomberg, "Protecting the Right Not to Vote from Voter Purge Statutes" (1996) 64 *Fordham Law Review*, Vol. 64 (1996), p.1015; Swensen, "Sticks, Carrots, Donkey Votes and True Choice", p.525; Ciccone, "Current Public Law and Policy Issues", p.325. Academic argument that voting is (or should be) compulsory appears in Lardy, "Is There a Right Not to Vote", p.303; Orr, "The Choice Not to Choose", p.285; Christopher Carmichael, "Proposals for Reforming the American Electoral System After the 2000 Presidential Election: Universal Voter Registration, Mandatory Voting and Negative Balloting", *Hamline Journal of Public Law and Policy*, Vol. 23 (2002), p.255; Matsler, "Compulsory Voting in America", p.953; Note, "The Case for Compulsory Voting in the United States", p.591.

[86] *Burdick v Takushi* 504 US 428, 446 (1992) (Justices Kennedy, Blackmun, Stevens).

[87] *Sanner v Patton* 155 Ill. 553, 562-564, 40 NE 290, 292-293: 'if [...] [prohibiting write-in voting] be [...] correct, the voter is deprived or the constitutional right of suffrage [...] there is nothing left worthy of the name of the right of suffrage — the boasted free ballot becomes a delusion"; *Patterson v Hanley* 136 Cal. 265, 270, 68 P. 821, 823, 68 P. 985 (1902); *Oughton v Black* 212 Pa. 1, 6-7; 61 A. 346, 348 (1905), applied by Justices Kennedy Blackmun Stevens (dissenting) to strike out Hawaiian write-in voting bans in *Burdick v Takushi* 504 US 428, 446-447 (1992).

[88] Article 1, Section 2 (US House of Representatives), Seventeenth Amendment (US Senate); compared with s7 and s24 of the Australian *Constitution*.

[89] E.g. Chief Justice Gleeson, pp.177-179; Justices Gummow, Kirby and Crennan, pp.190, 203-204.

[90] For discussion, see Lisa Hill *On the Alleged Existence of a Right Not to Vote*, paper presented to the Australian Political Studies Association Annual Conference, Macquarie University, 2009.

[91] *Judd v McKeon* (1926) 38 CLR 380; *Faderson v Bridger* (1971) 126 CLR 271.

[92] (1985) 160 CLR 171.

This was largely because jury trials were held to be a fundamental institution within criminal justice,[93] the fact that the guarantee was for the benefit of the community as a whole as well as for the benefit of the individual,[94] and in history in Great Britain waiver was not permitted.[95]

Powerful dissents were written by Chief Justice Gibbs and Justice Wilson. Chief Justice Gibbs referred to an ancient principle of statutory interpretation, *quilibet potest renunciare juri pro se introducto*, that any person can waive a statutory provision introduced entirely for their benefit.[96] The principle has been applied in case law,[97] and Chief Justice Gibbs found it was applicable to provisions in the Constitution, unless they were enacted for the benefit of the public rather than for an individual.[98] Chief Justice Gibbs referred to US and Canadian authority allowing an accused to waive their right to a jury trial. This included the well-known comments of Justice Frankfurter, for the Supreme Court, that to deny an individual a choice to waive safeguards provided in the Constitution "and to base such denial on an arbitrary rule that a man cannot choose to conduct his defense before a judge rather than a jury unless, against his will, he has a lawyer to advise him, although he reasonably deems himself the best advisor for his own needs, is to imprison a man in his privileges and call it the *Constitution*".[99]

This dissenting reasoning may be employed to argue here, similarly, that the right to vote includes the right not to exercise it.[100] The ancient rule of statutory interpretation is applicable here, that a statutory provision introduced for a person's benefit can be waived. The only argument against this would be to suggest that the right to vote is not "entirely" for the individual person's benefit, but helps to guarantee representative government, broad franchise, bringing together of members of the public in a collective decision, legitimacy of government etc.[101] The response is that it is a mistake to think that representative government requires compulsory voting, since there are demonstrable examples of countries with a system of representative government that do not have compulsory voting, including the two that were of greatest significance in Australian constitutional development, the United Kingdom and United States. It is

---

[93] Justice Brennan, 197.

[94] Justice Deane, 201, and Justice Dawson, 208-209. For similar reasons, the United States Supreme Court has found that an individual may not unilaterally waive their right to jury trial: *Singer v United States* 380 US 24 (1965); this argument is developed in Note, "The Case for Compulsory Voting in the United States", pp.591, 599-600.

[95] Justice Deane, 203.

[96] Reference to this doctrine appears in Sir Edward Coke, Sir Thomas Littleton, Francis Hargrave and Charles Butler, *First Part of the Institutes of the Laws of England* (1832, 19th ed), section 140. Several states have introduced amendments allowing accused persons to elect not to have a jury in respect of State criminal offences: see for example s614 of the *Criminal Code* 1899 (Qld).

[97] Examples include *Wilson v McIntosh* [1894] AC 129, 133; *Toronto Corporation v Russell* [1908] AC 493, 500; *Korponey v Attorney-General Canada* (1982) 132 DLR (3rd) 354, 362.

[98] *Ibid.*, p.178; to like effect Justice Wilson (186): "being intended to confer a right upon an accused person, the right may be foregone by election".

[99] *Adams v United States; ex rel McCann* 317 US 269, 280 (1942).

[100] I acknowledge again the sense in which voting is "compulsory" in Australia — that it is compulsory for eligible voters to attend at the polling booth and collect a ballot, rather than to fill it out, even if the popular perception of "compulsory voting" might differ. Further, the orthodox view is that the founding fathers intended to leave it to Parliament to decide on many matters relating to how our democracy could work. This of course raises the question of the extent to which the intentions of our founding fathers is relevant to current questions of constitutional interpretation, an issue considered beyond the scope of this article.

[101] See Note, "The Case for Compulsory Voting in the United States", p.600.

somewhat difficult to argue that if I have a right to vote, the fact that another member of society has a right to vote also produces a "benefit" to me, as appealing as a broad franchise is (to most). Such a benefit, if it exists, would be quite indirect.[102]

There is, somewhat ironically, some support for the argument I make in the judgment of Justice Gummow in *Langer v Commonwealth*.[103] While Justice Gummow in that case found against *Langer*, he did in dicta link the "right to vote"[104] with the concept of voluntariness: "In my view s24 does not confer upon each elector a personal right to vote for the candidate of that elector's choice, and, *therefore* (emphasis added) a right (or immunity) not to state a preference for a candidate for whom the elector does not wish to be elected." Obviously then, if Justice Gummow now accepts a "right to vote", as his decision in *Rowe*, and to some extent *Roach*, suggests, he would agree that compulsory voting is not consistent with such a right, based on his comments in *Langer* linking the two.

The past precedents validating compulsory voting are not seen to be strong obstacles to the argument favoured here. The statement of the joint reasons in *Judd v McKeon* that "in common parlance, to choose means no more than to make a selection between different things or alternatives submitted, to take by preference out of all that are available"[105] is highly contentious. It is not really a choice if one happens not to like any of the options submitted, and would rather not have any of them. Forcing someone to choose is surely a contradiction in terms.[106] With respect, it is a pious "choice" that the people have if the choice they are required to make does not in fact reflect their wishes. It follows that I cannot agree with comments by some of the judges in *Langer v Commonwealth*. Chief Justice Brennan, for instance, concluded: "It is not to the point that, if a ballot paper were filled in otherwise than in accordance with (the requirements of the *Commonwealth Electoral Act* 1918 (Cth), the vote would better express the

---

[102] The author respectfully disagrees with the conclusion drawn in *ibid.* that "the individual act of voting is essential to the collective's ability to have democratic government, and as such, should not be waivable". In this author's view, it is the right of the individual to vote that is essential to democratic government, not whether a particular individual in fact does so. The author of the note claims that without compulsory voting, "the level of voting theoretically will be below the socially optimal level" (p.601), without stating what this "socially optimal level" is. Brennan and Lomasky point out that often, a voter would more efficiently use their time to do things other than vote: *Democracy and Decision*, p.185.

[103] (1996) 186 CLR 302.

[104] To which the joint judgment in *Rowe* of which he was a member alluded (49) (in the context of quoting with evident approval the judgment of Chief Justice Gleeson in *Roach*, where Gleeson expressly adopted a "right to vote").

[105] (1926) 38 CLR 380, 383 (Chief Justice Knox, Justices Gavan Duffy and Starke). Chief Justice Brennan referred with evident approval to judgments in *Judd* and *Faderson*; see also Justices Toohey and Gaudron, p.333, Justice McHugh, p.341: "members of Parliament may be chosen by the people even though the people dislike voting for them".

[106] This is in some ways very similar to the argument of the dissentient in the case, Justice Higgins. He argued that presumably Parliament did not intend to compel a person to say they had a preference when they had none, using the argument to say that if a voter did not like any of the candidates placed before them, a failure to vote in those circumstances would be for a valid reason and so not contrary to law (p.388). Again, I understand that (arguably) technically voting is compulsory in Australia only in the sense of collecting a ballot paper, rather than filling it out (notwithstanding s233, which requires a voter to immediately upon collection mark their ballot paper). However, I maintain that most voters, having being compelled in this manner to attend, are likely to fill the paper out on the basis that they have collected the ballot so they may as well complete it, or may misunderstand the compulsory voting rule to believe that they are required to fill the paper out.

voter's political opinion."[107] With respect, why not? Surely, if we are in fact a representative democracy, we are interested in capturing, to the fullest extent possible, what the voter's political opinion is. A system that gives voters limited options, none of which may be particularly appealing for a range of reasons, requires the voter to select the least unappealing of them, and then to say that those elected have been "chosen" by the people does not, in my opinion, reflect the true meaning of the word "choice", or the substantive meaning of a system of representative democracy which fundamentally underlies the Constitution.

Anne Twomey makes a similar point:

> If it is a voter's choice not to give his or her preference to either of two candidates whom he or she equally dislikes, then surely it is more 'democratic' to fulfil the wishes of the voter by not distributing that person's preference, rather than forcing it to be distributed to, and assist in the election of, a person whom the voter does not want to be elected? Rather than the 'diminished expression of the elector's preferences', this could be characterised as a full and accurate expression of the elector's preferences.[108]

Brennan and Lomasky concur, noting:

> Individuals may en masse refrain from voting as a means of expressing lack of support for the current incarnation of a traditionally favored [*sic*] party. A seasoned Democrat who finds it impossible to vote for the Republican candidate however much she detests her own party's candidate may simply stay away from the polls. If she is one among many such, the electoral outcome will respond — but the response is not arbitrary, and one presumably would not want to insist that such a non-voter should vote. Nonvoting is precisely the means whereby her preference is given effect.[109]

Similarly, the analogy drawn by Justice Isaacs in *Judd* is not, with respect, convincing. His Honour claimed that "I am equally free from doubt that Parliament in prescribing a method of choosing representatives, may prescribe a compulsory method. It may demand of a citizen his services as a soldier or juror or voter".[110]

If that argument were sound in 1926, it is surely not sound today. The High Court has now recognised a "right to vote" implicit in the Constitution, not a duty.[111] It has not recognised a "right" to serve in the military or a "right" to act as a juror; as a result it is not to the point, in the author's view, to argue that because the government can demand someone serve in the military, it can demand someone vote at an election. The former is (may be) a duty; the other a right. One justification for the distinction between conscription and jury service, on the one hand, and voting, on the other, may be provided by the classic liberalism philosophy that a person's rights may only be infringed when they impact on another's. A person refusing to serve in the military may deny others the right to safety, someone refusing to act on a jury may deny another the right to a fair trial; on the other hand, it is said that a person refusing to vote does not impact on the rights of others; in fact their votes become proportionately more

---

[107] *Ibid.*, 317; see also Justice McHugh, 341: "members of Parliament may be 'chosen by the people' even though the people dislike voting for them".

[108] Twomey, "Free to Choose or Compelled to Lie?, pp.215-216.

[109] Brennan and Lomasky, *Democracy and Decision*, pp.179-180.

[110] *Ibid.*, p.385.

[111] Some argue that citizenship imposes a duty to vote, that a corollary of the benefits one derives from membership of a society is the obligation to select who will govern the society: Birch, *Full Participation*, p.42; Bart Engelen, "Why Compulsory Voting Can Enhance Democracy", *Acta Politica*, Vol. 42 (2007), p.23.

important and more likely to influence the outcome of the election.[112] This is part of a larger debate about the interplay between rights and duties, much of which is beyond the scope of this article. However, I argue that the right to vote is inconsistent with saying that there is a duty to vote. Others have indicated that a right is a ground for a duty on others, not on the person with the right.[113] Dworkin writes that individual rights are "political trumps". These exist when for some reason a collective goal is not a sufficient justification for denying what they, as individuals, wish to do.[114] Given that I have argued against the position that increased participation increases legitimacy of the government elected (which might be argued to be a collective goal), I would argue here that the individual's right not to express a view is a "trump". Forcing someone to express a view is anti-democratic.[115]

Another important claim made by the dissentient in *Judd*, Justice Higgins, was that the "obligation" to vote was not an absolute one, and was subject to the requirements of the Constitution. The particular context in Justice Higgins's judgment was the case of a person whose religious views precluded them from voting. In that circumstance, according to Justice Higgins, this would represent a good reason for not voting and so the person could not be charged with a breach of electoral laws.[116] These dicta comments are reflected in the current section of the electoral law.[117] Two points can be made in respect of this aspect. Firstly, this position reflects that even where there was deemed to be an obligation to vote, some judges have recognised that the "obligation" is subject to the Constitution, and the rights for which it provides. If the "obligation" to vote is subject to s116, there is no reason why it cannot be subject to the implied right to vote established in cases such as *Roach* and *Rowe*. Further, in terms of rights, the right to religious freedom is an important right. But so too is the right (freedom) of political communication. One cannot be reified over the other, which is required by an argument that while someone with religious objections to something to do with voting in an election need not vote, someone with philosophical objections to something to do with voting in an election must vote. It is submitted the Constitution protects both equally.[118]

The High Court's 1971 decision in *Faderson v Bridger*[119] adopts much of the reasoning of the majority in *Judd*. Comments here are confined to new arguments presented in *Faderson*. Chief Justice Barwick, with whom Justice McTiernan agreed,[120] stated: "To face the voter with a list of names or persons, none of whom he may like or

---

[112] This argument is developed by Katz, *Democracy and Elections*, p.245.

[113] See for instance Joseph Raz, "On the Nature of Rights", *Mind*, Vol. 93 (1984), pp.194, 196. On the specific question of political participation, Raz concludes that the "right" to political participation creates a duty on the government to publicise its plans and reasons for its decisions (p.201).

[114] Ronald Dworkin, *Taking Rights Seriously* (London, 1977), p.xi.

[115] Henry Abraham: "it is difficult to see how we can remain faithful to the principles of democracy by compelling people to exercise an ostensible privilege, that of voting, contrary to their will": *Compulsory Voting*, p.33.

[116] 387.

[117] Currently, s245 of the *Commonwealth Electoral Act* 1918 (Cth) recognises this exception, providing in (14) that a person who fails to vote because of their religious views does not commit an offence against the section.

[118] An advocate of compulsory voting, Lisa Hill, concludes that those with a "genuine conscientious objection" should have the right to abstain from voting: "Compulsory Voting: Residual Problems and Potential Solutions", *Australian Journal of Political Science*, Vol. 37, 3 (2002), pp.437, 443-448.

[119] (1971) 126 CLR 271.

[120] The only other judge in the case was Justice Owen, who simply adopted *Judd*.

really want to represent him and ask him to indicate a preference amongst them does not present him with a task that he cannot perform".[121] With respect, it is not argued here, and Faderson was not arguing, that he could not perform the task. It was that he would rather not to do so, because to require him to do so would not truly represent his view, and that in a free and democratic society, citizens should not be required to express a view at an election that does not is in fact truly their own. As Graeme Orr suggests:

> There is a curious sort of behaviourism in this reasoning. Is voting a purely physical act, understood by the law as the mere making of certain marks on a ballot paper, which do not necessarily reflect any voter intentionality and presumably must be decided upon randomly if the voter has no real preferences? In that case, a vote is just a set of marks, to be mechanically interpreted and accorded the status 'valid' or 'invalid' by the rules governing formality, just as a reader of English might seek to interpret and understand the marks that monkeys, divorced from any literary intentionality, might happen to make on paper in a typewriter.[122]

A "None of the Above" Option?

A compromise position between the optional and compulsory voting camps might be to allow voters to mark ballot papers to indicate that none of the candidates listed is acceptable. The availability of this option is favoured by many advocates of compulsory voting.[123] In my view, there is not a great deal of difference between someone not attending the polling booth because they do not favour any of the candidates, and someone attending the polling booth but indicating they do not favour any of the candidates. The intended message is the same, such that I think both options should be available. It is hard to see how requiring citizens to indicate that they do not favour any of the candidates improves the legitimacy of those elected at such ballot.

In many ways, attending the polling booth but ticking the "no candidate acceptable" is not much less "garbled" than non-attendance, in the language of Lardy. We still do not know why the candidates were not acceptable, whether it was by a large amount or a small amount, or what the candidates need(ed) to do to make themselves acceptable. Further, as some commentators acknowledge, another reason why people may prefer not to cast a vote is that they genuinely do not have a view, are uninformed and/or take no interest in politics or government matters. Requiring these voters to attend, even if the "no candidate acceptable" option is available, still does not result in their true view being captured. As Brennan and Lomasky might say, it just adds more "noise", albeit a different sound. For these reasons, I prefer the solution of not having compulsion, rather than compulsion with-an-out.[124]

---

[121] *Ibid.*, p.273.

[122] "The Choice Not to Choose", pp.285, 290-291.

[123] Lisa Hill, "Compulsory Voting: Residual Problems and Potential Solutions", pp.437, 443; Sean Matsler, "Compulsory Voting in America", *Southern California Law Review*, Vol. 76 (2003), pp.953, 974; Christopher Carmichael, "Proposals for Reforming the American Electoral System After the 2000 Presidential Election", *Hamline Journal of Public Law and Policy*, Vol. 23 (2002), pp.255, 305; Note, "The Case for Compulsory Voting in the United States", pp.591, 603; Lardy, "Is There a Right Not to Vote?", pp.303, 318.

[124] For the same reasons, I do not favour Mark Latham's approach of encouraging people to vote informally — I choose the more direct method of not requiring voters with no preference to cast a ballot in the first place.

Conclusion

There are constitutional grounds upon which a challenge to Australia's current compulsory voting system may be made. These grounds are of relatively recent recognition, such that older cases that established the validity of compulsory voting systems no longer present serious obstacles. Specifically, a system of compulsory voting infringes the implied freedom to political communication, because declining to vote is a form of communication, and representative government, implying as it does the sovereignty of the people, is inconsistent with a requirement by the Parliament that members of the sovereign choose members of Parliament. Further, the High Court has recently recognised a right to vote created by the system of government contemplated by s7 and s24 of the Constitution; a right to vote includes a right not to vote, inconsistent with any compulsory obligation. Active participation in public life, the engagement of the public in political affairs and democratic government are laudable aims; however they should be encouraged in ways other than unconstitutional compulsion, for constitutional reasons.

The Compatibility of Election Funding Laws with the Implied Freedom of Political Communication

Introduction

In recent times, various Australian Governments in Australia have expressed concerns with the influence of money on the outcome of political processes. There are understandable fears that corruption of the political system might occur, for example by a donor donating a large amount of money to a government or candidate, and then expecting 'favours' in return, or that a perception arising that a government is beholden to particular sectional interests that have donated money to that government's political campaigning. Part of the response to this has included the introduction of disclosure regimes, requiring that donations to political parties be publicly noted, to avoid any possibility that donations can be made secretly, with the inevitable suspicion surrounding a donation made in such circumstances in terms of whether there was a quid pro quo in response. This author does not consider such a requirement to be constitutionally contentious, and the article will not further consider disclosure aspects of electoral laws. Of course, there are existing laws in each jurisdiction to deal with corruption, and the article will not further consider those laws. They do, however, form part of the broader context in which current arguments arise.

More problematic are recent moves in some states to limit the extent to which a person can make a political donation ('caps on donations'), and the extent to which a political party, a candidate, or a third party can incur electoral expenditure ('caps on expenditure'). Currently, two states have introduced such schemes, with at least one other state actively considering such reforms. A Federal Government white paper considered such reforms at federal level, although at the time of writing, this has not been acted upon. The word 'problematic' is used in relation to such schemes, given that the High Court of Australia has recognised an implied freedom of political communication. There is at least an argument that caps on donations and caps on expenditure burden the freedom of political communication in a way that is vulnerable to constitutional challenge.[1] Part A of this paper will outline the existing schemes, Part B will explain the implied freedom of political communication, and Part C will consider whether these schemes are consistent with the implied freedom.

Part A Outline of Existing State Regimes

Queensland

The *Electoral Reform and Accountability Amendment Act* 2011 (Qld), inserting new Part 9A of the *Electoral Act* 1992 (Qld),[2] introduced caps on donations and caps on expenditure. Important definitions in this context include that of a 'political donation'. Section 250 of the *Electoral Act* 1992 (Qld) defines a political donation to be a gift made to a registered political party, candidate or third party accompanied by a written statement from the donor that the gift is to be used for campaign purposes during the 'capped expenditure period'.[3] The Act requires political parties, candidates, registered third parties, and unregistered third parties

---

[1] The Legislative Council (NSW) *Inquiry into the Provisions of the Election Funding, Expenditure and Disclosures Amendment Bill 2011* (NSW)(2012) concluded there was a 'significant risk' of constitutional challenge to aspects of the recent New South Wales amendments (p104).

[2] In the remainder of the discussion of the Queensland laws, references to 'Act' mean the *Electoral Act* 1992 (Qld).

[3] According to s197, this is generally the period commencing on the second anniversary of the previous election, or when the writs are issued for the upcoming election, whichever is earlier. (Queensland does not have fixed term Parliaments).

that receive a political donation to keep a State campaign account.[4] All 'political donations' must be paid into the State campaign account.[5]

There are caps on the amount that an individual[6] can donate to a political party and to a candidate or third party. These are $5000 per year in the case of a political party, and $2000 per year to the others.[7] Section 253 makes it unlawful for a person to make a political donation exceeding these limits.[8] The section states that it includes within the concept of 'political donation' payments made other than by political parties for 'electoral expenditure'.[9] Section 199 defines electoral expenditure as payment for advertising in various media that advocates a vote for or against a candidate, or for or against a political party, during the 'capped expenditure period'.[10] It is unlawful for the political party, candidate or third party to receive political donations in excess of these amounts.[11]

The Act imposes limits on the amount of 'electoral expenditure' that can be incurred by a party in any financial year. These are generally $80 000 for political parties, $50 000 for any one candidate at a general election, $75 000 at a by-election, $75 000 for an independent candidate, $750 000 for a registered third party[12] and $10 000 for an unregistered third party.[13] Section 297 provides for the registration of third parties; the benefit of registration by a third party is that they are entitled to incur much more electoral expenditure per year than can an unregistered third party. Refusal of registration is on very limited grounds.[14]

New South Wales

The New South Wales provisions are very similar, and only important differences will be noted. The definition of a political donation is very similar,[15] but donations need not be accompanied by the written statement required in the Queensland law. Again, an agent must be established to deal with donations, which must be placed in a campaign account. There are similar caps to Queensland on the extent to which an individual can make a political donation - $5000 to a registered party or 'group' of candidates, and $2000 to an unregistered political party, an elected member, candidate or third party campaigner.[16] The New South Wales law specifically prohibits corporations from making political donations, or from individuals making political donations on behalf of a corporation.[17] It also prohibits donations from property developers, or those in businesses related to tobacco, liquor or gambling.[18]

---

[4] S218.
[5] S219.
[6] An individual includes a corporation (s32D *Acts Interpretation Act* 1954 (Qld)).
[7] These amounts are adjusted for inflation.
[8] These limits apply to donations to that political party as a whole, including branches in other states and territories in Australia (s253(2)); similar provisions apply to donations to individual candidates (s255) and to third parties (s257).
[9] S253(4)(a).
[10] This is defined in s197, as noted above.
[11] S254, s256 and s258 respectively.
[12] No more than $75 000 is to be spent in any one electorate.
[13] No more than $2000 is to be spent in any one electorate.
[14] Section 298(3) states that refusal may only occur if the application is incomplete or inaccurate.
[15] S85 *Election Funding, Expenditure and Disclosure Act* 1981 (NSW).
[16] S95A.
[17] S96D; this is in the form of a ban on accepting donations unless the donor is registered on the roll of electors for state elections (s96D(1)).
[18] S96AA.

The Act contains various caps on expenditure on State elections during the 'capped expenditure period'. This period is the period between 1 October in the year preceding when the election is held, and the election.[19] The most important are the caps[20] on total 'electoral communication expenditure' by a political party, which is $100 000 multiplied by the number of electoral districts in which the party endorses a candidate.[21] A cap of $100 000 applies to a candidate endorsed by a party for election to the lower house;[22] for an independent candidate for the lower house, the figure is $150 000.[23] Third party campaigners are capped in what they can incur as 'electoral communication expenditure' at $1 050 000 if they were registered under the Act at the time the capped expenditure period commenced for the election, or else half of that amount.[24] There is an additional cap on electoral communication expenditure involving mentioning the name of a candidate or name of the electorate, where it is communicated to electors in that electorate and not mainly communicated to those outside it, of $50 000 per electorate, or $20 000 for a third party campaigner.[25]

It is important to bear in mind that, in respect of both the Queensland and New South Wales schemes, restrictions on political donations are accompanied by increased public funding of political parties, about which more is said below.

For the remainder of the article, these regimes will be referred to as the laws providing for caps on political donations, and campaign expenditure limits.

Implied Freedom of Political Communication[26]

For many years, theorists reflected upon the links between freedom of speech and democracy. As Mill put it:

> It is by political discussion that the manual labourer, whose employment is a routine, and whose way of life brings him in contact with no variety of impressions, circumstances, or ideas, is taught that remote causes and events which take place far off have a most sensible effect even on his personal interests; and it is from political discussion and collective political action that one whose daily occupations concentrate his interests in a small circle round himself learns to feel for and with his fellow citizens and becomes consciously a member of a great community.[27]

---

[19] S95H; elections are typically held in the fourth weekend in March every four years in New South Wales, subject to earlier dissolution by the Governor (s24A and B *Constitution Act* 1902 (NSW)).

[20] Caps on subject to indexation (s95F(14)) and there is provision for aggregation of expenditure of parties that are within a coalition, support the same candidate etc (s95G(1)).

[21] S95F(2).

[22] S95F(6); $200 000 in a by-election (s95F(9)).

[23] S95F(7); $200 000 in a by-election (s95F(9)).

[24] S95F(10); $20 000 in a by-election (s95F(11)).

[25] These limits are part of, and not additional to, the caps mentioned earlier.

[26] Some of the judges have also suggested a (related) freedom of association. However, at the time of writing, this doctrine has not been utilised to decide any Australian cases. I have chosen to focus this article on the implied freedom of political communication, rather than freedom of association per se; see Jeremy Moss and Joo-Cheong Tham 'Freedom of Association, Political Parties and Party Funding' in Joo-Theong Tham, Brian Costar and Graeme Orr ed *Electoral Democracy: Australian Prospects* (2011).

[27] John Stuart Mill *Considerations on Representative Government* (Currin Shields ed, Liberal Arts Press, 1958, United States) p130; in *On Liberty*, Mill did not think that Parliament would enact laws contrary to political discussion 'except during some temporary panic, when fear of insurrection drives ministers and judges from their propriety' (p84). He claimed that in constitutional countries, it was not to be apprehended that the government would often attempt to control expression of opinion (p84), and strongly re-asserted the general public interest in a full and frank exchange of views: 'the peculiar evil of silencing the expression of an opinion is that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose what is almost as great a benefit, the clearer perception and

The High Court expressly accepted the link in a series of cases commencing in the early 1990s, where it discerned in the *Constitution* an implied freedom of political communication. The Court determined that inherent in the system of representative and responsible government for which the Constitution is a freedom to discuss, read, access and hear communication that is 'political' in nature. The Court has found that the requirement in the *Constitution* (s7 and 24) that Parliament be chosen by the people requires freedom of communication on matters of government and politics. The freedom includes communication between electors and the elected representatives, between the electors and the candidates for election, and between the electors themselves.[28] The freedom is not a personal right; rather a negative freedom, in the sense of a freedom from interference, rather than a positive source of rights or ability to sue for breach. The Court has suggested that two questions must be asked in considering the compatibility of a law with the implied freedom:

(a) Does the law effectively burden freedom of communication about governmental or political matters in terms, operation or effect;
(b) If so, is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the system of representative government enshrined in the *Constitution*.[29]

There have been numerous High Court decisions on the implied freedom, and these must be considered to see what light they can place on the issue at hand, namely the extent to which the abovementioned restrictions on political donations and electoral expenditure is compatible with the implied freedom.

Perhaps the implied freedom decision that is closest on the facts to the current issue is one of the cases where the implied freedom was first recognised, *Australian Capital Television Pty Ltd v Commonwealth of Australia*.[30] As a result, that decision and its implications will be considered in some depth. Briefly, the Court there considered legislation banning a broadcaster from broadcasting political advertising during an election period. It also required broadcasters to provide free time for election broadcasts, based largely (90%) on the number of votes obtained by the particular political party at the previous election. There was some discretion to award 10% of the free time, but it was likely that it too would be allocated largely to parties successful at the previous election. This was likely to have the effect of stopping new political parties, or new independent candidates, from securing much (or any) free air time. Other would-be advertisers who were not political parties or candidates, for

---

livelier impression of truth, produced by its collision with error .. we can never be sure that the opinion we are endeavouring to stifle is a false opinion; and if we were sure, stifling it would be an evil still (p85) ...the only way in which a human being can make some approach to knowing the whole of a subject, is by hearing what can be said about it by persons of every variety of opinion, and studying all modes in which it can be looked at by every character of mind. No wise man ever acquired his wisdom in any mode but this (p88): John Stuart Mill *On Liberty* (Geraint Williams ed, 1972, Everyman London).

[28] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560.

[29] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561-562, as slightly reworded by a majority of the High Court in Coleman v Power (2004) 220 CLR 1, 51 (McHugh J), 78 (Gummow and Hayne JJ), 82 (Kirby J).

[30] (1992) 177 CLR 106; compare with a similar English case which upheld as valid prohibitions on political advertising appearing on the BBC. The House of Lords found such restrictions compatible with freedom of expression in Article 10 of the *European Convention on Human Rights*: *R v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, although Lord Scott stated that there were sound arguments that at least in some respects the prohibition could be said to be inconsistent with the freedom of expression enshrined in Article 10 (para 42).

example a business group or a union group, were prohibited from advertising during the election period. A majority of the High Court declared the legislation to be invalid, infringing the constitutionally implied freedom of political communication.

The majority viewed the freedom in broad terms. Mason CJ said that freedom of communication was essential to accountability and representative government. It was available to a citizen who might wish to communicate their views on a wide range of matters that might call for political action.[31] It was available to elected representatives to explain and account for their decisions and actions and inform people so they could make informed judgments.[32] The freedom was not confined to communications between candidates and/or elected representatives on the one hand, and voters on the other. Mason CJ said that representative government depended on free communication between all persons, groups and other bodies in the community.[33] Mason CJ accepted that the implied freedom was not absolute, and given the government's references to avoiding the actuality or the perception of corruption and the need for a 'level playing field', some restrictions on communication might be justified. Specifically, he accepted that the need to raise substantial funds to conduct an electoral campaign did generate a risk of corruption and undue influence.[34] However, they would need to be proportionate to the legitimate end, and shown to be 'reasonably necessary to achieve the competing public interest'.[35] He was not satisfied that they were in this case, and cast some doubt on the veracity of the government's argument regarding the need for the restrictions:

> All too often attempts to restrict the freedom in the name of some imagined necessity have tended to stifle public discussion and criticism of government. The Court should be astute not to accept at face value claims by the legislature and the Executive that freedom of communication will, unless curtailed, bring about corruption and distortion of the political process.[36]

Deane and Toohey JJ distinguished between a law with respect to the prohibition and restriction of communications about government or governmental instrumentalities or institutions, and one with respect to some other subject and whose effect on political communications was incidental. The first type of law would be much more difficult to justify as consistent with the implied freedom of political communication. They indicated that such laws would only be valid if justified on the basis that the limits were conducive to the overall availability of effective means of political communication, or don't go beyond what was reasonably necessary for the preservation of an ordered and democratic society or for the protection or vindication of the legitimate claims of individuals to live peacefully and with dignity within such a society.[37]

Deane and Toohey JJ had a similar view to Mason CJ that the freedom was broad, extending beyond communications by representatives and potential representatives to the voters. It included communication from the voters to the representatives, and between the represented.[38] This law substantially infringed the freedom, by denying to the represented the

---

[31] 138 (Mason CJ).
[32] 139 (Mason CJ).
[33] 139 (Mason CJ).
[34] 144-145 (Mason CJ).
[35] 143-144 (Mason CJ).
[36] 145 (Mason CJ).
[37] 169.
[38] 174; to like effect Gaudron J (212) and McHugh J (231). All members of the High Court in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560 agreed that representative government required

opportunity of participating in the political debate by a very common and effective means of political communication, advertising.[39] They conceded, as did Mason CJ, that the implied freedom was not absolute, and accepted that the high cost of election campaigning did threaten the level playing field. They specifically noted that some form of control of spending may be supported on such grounds. However, it was not sufficient to support total bans on political communication through the most effective communication channels.[40]

Two judges, Mason CJ and McHugh J, drew a distinction between so-called content-based restrictions, and restrictions on the mode of communication.[41] Their Honours indicated that restrictions on the former would be even more difficult to justify than laws dealing with the latter:

> Generally speaking, it will be extremely difficult to justify restrictions imposed on free communication which operate by reference to the character of the ideas or information.[42]

Gaudron J was particularly concerned with the restrictions on individuals other than candidates, and organisations.[43] Although they could use other means of communication apart from radio and television advertising, the ban was not reasonable and appropriate regulation given that candidates and parties were receiving free time[44] (upon the rules in the Act for the allocation of time, giving preferred treatment to incumbent parties).

McHugh J stated that it was for the electors and candidates to choose which forms of lawful communication they prefer to use to disseminate political information, ideas and argument. Their choices were outside the zone of government control.[45] McHugh J said the potential or even existence of corruption and undue influence in the political process did not provide the compelling justification needed for infringement of the constitutional freedom of political communication. Less drastic means were available to deal with this concern. He mentioned the creation of special offences, disclosure of contributions, public funding, and limits on contributions as some options.[46] As with Mason CJ, McHugh J was concerned with the evidence of advertising and money corrupting elections, rather than mere suggestion:

> Before legislation such as (the one here) could be upheld on the 'level playing field' theory, it would need to be demonstrated by acceptable evidence, and not merely asserted, that, by reason of their practical control of the electronic media, some individuals and groups so dominate public discussion and debate that it threatens the ability of the electors to make reasoned and informed choices in electing their parliamentary representatives. By itself, domination of the electronic media is not a constitutionally compelling justification for banning the broadcasting of political matter at federal elections any more than a major newspaper accepting advertisements from only one political party would justify banning the publication of political advertisements in that newspaper during the election period.[47]

---

political communication between the electors and elected representatives, between the electors and the candidate for election, and between the electors themselves.

[39] 174.

[40] 175.

[41] 143 and 234-235 respectively.

[42] 143 (Mason CJ).

[43] She expressed no opinion on whether the restrictions on candidates might be consistent with the implied freedom, given their ability to access free advertising (220).

[44] 221.

[45] 236.

[46] 239.

[47] 239-240.

The Court has clarified that the implied freedom of political communication is not restricted to the spoken or written word.[48] For example, Brennan CJ specifically noted that non-verbal conduct capable of communicating an idea about the government or politics of the Commonwealth and which was intended to do so could be entitled to immunity under the implied freedom.[49] The implied freedom applies in the State context.[50]

American First Amendment Jurisprudence

Given that there is no direct High Court of Australia authority on the compatibility of donation and expenditure limits with the implied freedom of political communication, it seems worthwhile to consider how other nations have reconciled freedom of speech with the arguments around the need for campaign finance restrictions. The United States Supreme Court has directly considered these issues on a number of occasions and is an obvious choice in terms of comparisons, provided certain things are borne in mind. Firstly, the First Amendment of the United States *Constitution* is a general right to free speech, as opposed to the more narrowly drawn Australian implied freedom in relation to political communication. In fact, that distinction, between speech generally and speech that has political connotations, is largely irrelevant to the current debate, given that we are discussing donations to political parties and expenditure by political candidates and parties. Secondly, the United States right is a positive one, founding an action for its breach, while the Australian one is a negative right, in the sense of a protection from laws. Again, that difference is largely idle in the current debate, which concerns the constitutionality of political donation and expenditure limits. There are numerous examples in the case law on the Australian implied freedom where the judges have applied United States First Amendment jurisprudence,[51] justifying a detailed consideration of the United States jurisprudence here.

One directly relevant case to the current discussion is *Buckley v Valeo*,[52] where the United States Supreme Court considered provisions of the *Federal Election Campaign Act* 1971 (US). Amongst other provisions, that Act (a) limited political donations to $1000 per individual or organisation (b) limited a (registered) political committee to donations of $5000 to a candidate and a total donation across candidates of $25 000 (c) limited expenditures by

---

[48] *Levy v State of Victoria* (1997) 189 CLR 579.

[49] 595; 'a rudimentary knowledge of human behaviour teaches that people communicate ideas and opinions by means other than words spoken or written' (Kirby J, 638); 'in an appropriate context any form of expressive conduct is capable of communicating a political or government message to those who witness it' (McHugh J, 623).

[50] *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211. There is some ongoing debate as to whether this remains the position, and whether a separate implication is to be derived from state constitutions, or whether the implication is derived only through the federal Constitution, and thereby limited to matters with obvious federal implications: Anne Twomey 'The Application of the Implied Freedom of Political Communication to State Electoral Funding Laws' (2012) 35(3) *University of New South Wales Law Journal* 625; other leading academics in this field have suggested recently they believe that the implied freedom applies in the state context: Legislative Council (NSW) *Inquiry into the Provisions of the Election Funding, Expenditure and Disclosures Amendment Bill 2011* (2012), Submission 27 (Joo-Cheong Tham) and Submission 2 (Graeme Orr).

[51] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 231 (McHugh J), *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 79 (Deane and Toohey JJ); *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 130-131 (Mason CJ Toohey and Gaudron JJ), 182 (Deane J), *Levy v Victoria* (1997) 189 CLR 579, 594 (Brennan CJ), 623 (McHugh J) and 638-641 (Kirby J), *Coleman v Power* (2004) 220 CLR 1, 75-76 (Gummow and Hayne JJ); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 247 (Gummow and Hayne JJ); in fairness, there have also been judges denying the relevance of the United States First Amendment case law: *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 182 (Dawson J), *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 157-159 (Brennan J).

[52] 424 US 1 (1976).

an individual or group relative to a particular identified candidate to $1000 per candidate per election, and imposed various limits on the ability of an individual candidate to fund their own campaign, (e) limited overall general election and primary campaign candidates, depending on the office sought.[53]

A majority of the Court partially invalidated the legislation.[54] It found that the limits on political donations ((a) and (b) above) were appropriate responses to the reality or perception of improper influence or corruption.[55] The majority found that to the extent that large contributions were given to secure 'political quid pro quos' from current and potential office holders, they could undermine the integrity of representative democracy.[56] While a contribution was a general expression of support for the candidate and their views, it did not communicate the underlying basis of the support. The size of the contribution provided only a very rough guide of the intensity of the contributor's support for the candidate, so the limit on contributions only marginally restricted the contributor's ability to engage in free speech.[57] However, the caps on individual expenditure, limits on candidates' personal spend, and overall campaign expenditure caps ((c) and (d) above) violated first amendment rights, substantially restricting the ability of citizens to engage in political expression. It found those caps necessarily reduced the quantity of expression by limiting the number of issues discussed, depth of their exploration and size of audience reached.[58] The limit on spending more than $1000 in relation to a specifically identified candidate could be easily circumvented, thus undermining its effectiveness, and weighing against its constitutionality given its impact on first amendment rights.[59]

The question has arisen as to whether corporations are entitled to the freedom of speech for which the first amendment provides. A state legislature attempted to ban corporations from making contributions or expenditures to influence referendum processes unless the issue put to the people directly affected the corporation's property, assets or business. A majority of the Court struck out the law as being offensive to the First Amendment. The court found the inherent worth of speech did not depend on the identity of the speaker. Such speech was 'indispensable' to decision making in a democracy.[60]

---

[53] The Act also required various record-keeping and reporting of donations and expenditure; these will not be considered in detail. The case also considered the validity of public financing of election campaigns; this will not be considered in detail.

[54] In dissent, Chief Justice Burger (235) and Justice Blackmun (290) did not agree that a distinction should be drawn between the donations and the expenditure. As Chief Justice Burger put it, 'contributions and expenditure are two sides of the same First Amendment coin' (241). He dismissed the majority's constitutional distinction between the two as 'word games' (244). Criticism of the supposed distinction between donations and expenditure also appears in the academic literature; see for example Lillian BeVier 'Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform' (1985) 73 *California Law Review* 1045, 1063; Archibald Cox 'Freedom of Expression in the Burger Court' (1980) 94 *Harvard Law Review* 1, 55-73.

[55] 30.

[56] 26-27.

[57] 20.

[58] 19.

[59] 45.

[60] *First National Bank of Boston et al v Bellotti, Attorney-General of Massachusetts* 435 US 765 (1978). In contrast, for a time at least, the Supreme Court was prepared to uphold restrictions on corporations using corporate general finances for independent expenditure on political candidates on the basis of corruption or perception of corruption concerns, and the supposed distorting effects on a democracy of corporations, which often contain 'immense aggregations of wealth': *Austin v Michigan State Chamber of Commerce* 494 US 652 (1990).

Not surprisingly, attempts were made to circumvent these requirements. One problem was that the restrictions on contributions, disclosure rules etc were interpreted to apply only to so-called 'hard money', or money raised for federal elections. A donor could get around this restriction by donating so-called 'soft money', which was money intended to influence state or local elections or, as interpreted by the electoral authorities, money intended to influence both federal and non-federal elections. Another problem was that expenditure limits and disclosure requirements were interpreted by the court to apply only to 'express advocacy' of a particular candidate. This rule could be circumvented by the supporter using the money to fund advertising that amounted to 'issue advocacy' rather than advocacy of a particular candidate. If the ad amounted to issue advocacy rather than express advocacy, it could be funded by soft money and the identity of the advertiser need not be identified to the public. In Senate hearings, one Senator lamented that these loopholes had 'virtually destroyed our campaign finance laws, leaving us with little more than a pile of legal rubble'. In response, Congress sought to bring 'soft money' within the existing campaign finance regime.[61] It ignored the past distinction between express advocacy and issue advocacy, creating the concept of 'electioneering communication' for the purposes of the Act, specifically prohibiting such expenditure by corporate or unions.

The Court upheld Congress' attempt to do so, affirming the ability of 'soft money' to have a corrupting influence or give rise to the perception of corruption. In this way, there was no relevant difference between 'hard money' and 'soft money'. Further, the court said that the distinction between express advocacy and issue advocacy was not a fixed rule in the *Constitution*, merely a rule of interpretation. It did so in the course of validating provisions limiting the ability of corporations to use general funds to finance 'electioneering communications', which was a broader concept than 'express advocacy'.[62] The *McConnell* court found that 'electioneering communication' was the functional equivalent of express advocacy.[63] In contrast, true issue advocacy remained protected by the first amendment.

Although it has not overruled the decision in *Buckley*, it has indicated that in some circumstances at least, limits on individual donations may infringe the first amendment. This occurred in *Randall v Sorrell*,[64] where six justices struck out state restrictions on political donations. It is difficult to discern a ratio for the case given the large number of judgments, but the majority took into account the very low cap ($200-$400), its implications for the ability of a candidate to run a campaign, its implications for association rights, failure to index the cap, low party limits, application of the limit to volunteers' out of pocket expenses, and lack of evidence of corruption and how the caps were needed to fight it. There was

---

[61] *Bipartisan Campaign Reform Act 2002* (US).
[62] *McConnell v FEC And Others* 540 US 93 (2003).
[63] However, the Court clarified in *FEC v Wisconsin Right to Life Inc* 551 US 449 (2007) that an organisation wishing to run ads that claimed a filibuster to block voting on judicial nominees was a delaying tactic, and asked viewers to contact named elected officials was permitted to do so, as part of the organisation's first amendment rights. The content of the advertising was not 'express advocacy' or the functional equivalent of 'express advocacy'. An ad should only be seen as the functional equivalent of express advocacy if it was susceptible of no reasonable interpretation other than an appeal to vote for or against a specific candidate. The ads in question in *Wisconsin* did not meet this test, and the legislature could not, consistently with the First Amendment, prohibit such speech. The Court also rejected a motive test for deciding whether the advertiser was involved in the equivalent of express advocacy. Some dissatisfaction with the apparent distinction between express advocacy and issue advocacy was apparent, with Alito J claiming that 'what separates issue advocacy from political advocacy is a line in the sand drawn on a windy day' (499).
[64] (2006) 548 US 230; Deborah Goldberg and Brenda Wright 'Defending Campaign Contribution Limits After Randall v Sorrell (2007-2008) 63 *New York University Annual Survey of American Law* 661.

specific evidence that such caps would substantially reduce the amount of money that would be available to candidates to conduct elections.

In its most recent decision, the United States Supreme Court invalidated a ban on corporate independent expenditures for electioneering communication.[65] The corporation released a documentary about a presidential candidate and wanted to make it available to the general public on video-on-demand during a primary election campaign. It was argued the video was in breach of the ban; such behaviour attracted criminal sanctions.

The Court re-affirmed that speech was a fundamental aspect of democracy, and part of the necessary accountability of politicians to the people. Laws burdening such speech should be strictly construed, and could only be justified by a compelling interest and narrowly drawn to achieve that interest, inflicting the least damage on free speech.[66] The court found that independent expenditures, including those incurred by corporations,[67] did not give rise to corruption or the perception of corruption.[68] There was little evidence that independent expenditures even ingratiated the donor to the donee.[69] The court disagreed with the *Austin* court's acceptance of distortion as a ground upon which corporate political spending could be curbed,[70] or that such restrictions were justified due to concerns that the interests of shareholders of donor corporations could not otherwise be protected.[71] The Court noted that the record in *McConnell* was more than 100 000 pages long and did not contain any direct examples of votes being exchanged for expenditures, and only very minor evidence of ingratiation.[72]

Summary of United States Position[73]

---

[65] *Citizens United v Federal Electoral Commission* 558 US 310, 130 S.Ct 876 (2010)(Roberts CJ Kennedy Scalia Alito and Thomas J, Stevens Ginsburg Breyer and Sotomayor JJ dissenting); in so doing, the court overruled *Austin v Michigan Chamber of Commerce* 494 US 652 (1990) and *McConnell v Federal Election Commission* 540 US 93 (2003) in relation to the constitutionality of limits on independent political expenditure.
[66] 898 (reference is to the S.Ct series report, the case does not provide individual page numbers to the US series report).
[67] The court found that corporations were entitled to the same first amendment protection as individuals (900).
[68] 910.
[69] 910; consistent with the purpose of this article, I do not discuss here the court's views on the disclosure aspects of the challenged provisions.
[70] 904-907.
[71] 912-913; for an argument that campaign finance regulation is justified on equality grounds, see J Skelly Wright 'Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?' (1982) 82 *Columbia Law Review* 609.
[72] 910.
[73] The United States cases are discussed in a range of literature; for example Francis Bingham 'Show Me the Money: Public Access and Accountability After *Citizens United*' (2011) 52 *Boston College Law Review* 1027; Lili Levi 'Plan B for Campaign Finance Reform: Can the FCC Help Save American Politics After Citizens United?' (2011-2012) 61 *Catholic University Law Review* 97; James Bopp Jr, Joseph La Rue and Elizabeth Kosel 'The Game Changer: Citizens United's Impact on Campaign Finance Law in General and Corporate Political Speech in Particular' (2011) 9 *First Amendment Law Review* 251; Jacob Eisler 'The Unspoken Institutional Battle Over Anticorruption: Citizens United, Honest Services and the Legislative-Judicial Divide' (2011) 9 *First Amendment Law Review* 363; Benjamin Sachs 'Unions, Corporations and Political Opt-Out Rights After Citizens United' (2012) 112 *Columbia Law Review* 800; Molly Walker Wilson 'Too Much of a Good Thing: Campaign Speech After Citizens United' (2010) 31 *Cardozo Law Review* 2365; Richard Briffault 'WRTL and Randall: The Roberts Court and the Unsettling of Campaign Finance Law' (2007) 68 *Ohio State Law Journal* 807; Richard Briffault 'The Return of Spending Limits: Campaign Finance After *Landell v Sorrell*' (2005) 32 *Fordham Urban Law Journal* 399; Frank Sorauf 'Politics, Experience and the First Amendment: The Case of American Campaign Finance' (1994) 94 *Columbia Law Review* 1348.

. The United States Supreme Court has drawn a fundamental distinction between limits on donations, which might be constitutionally permissible, and limits on spending by independent bodies, candidates or parties, which may be unconstitutional according to first amendment jurisprudence
. concerns about actual or perceived corruption arising from contributions may justify restrictions (*Buckley*), although in its most recent pronouncement in *Citizens United*, a majority of the Court specifically held that independent expenditure did not give rise to corruption concerns, potentially signalling that the cap on donations permitted in *Buckley* may now also be constitutionally suspect
. while at one time apparently more supportive of restrictions on corporations spending money on political campaigning (*Austin, McConnell*), the Court has determined that the same first amendment protection applies to corporations as to individuals (*Bellotti, Citizens United*)
. individuals and parties will attempt to find ways around regulation in this area (as with others), so any restrictions need to be carefully drawn – specifically, they should be tailored to a demonstrably justified interest, and should not be overbroad in seeking to achieve any legitimate objective/s; arguments that restrictions are necessary to prevent the distorting effects of donations, to prevent corruption or to protect shareholders (in the case of a corporate donor) are not necessarily taken at face value
. distinctions between express advocacy and issue advocacy – specifically counting the former, but not the latter, in terms of policing spending limits, may not be helpful, unless the concepts are carefully defined (*Wisconsin, McConnell*).

Assessing the Australian Provisions for Compatibility with the Implied Freedom in the Light of the American Learning

Now we must apply the two-limbed *Lange* test to the Queensland and New South Wales laws. The discussion will apply to both spending limits and donation limits, since the author considers that most of the arguments apply to both in a similar way,[74] excepting some differences to which the discussion below will allude.

Firstly, we ask whether these laws effectively burden communication about government or political matters in terms, operation or effect. Clearly, in my view, they do. The High Court itself has accepted that 'communication' for current purposes can include the non-verbal.[75] The United States authorities confirm that a political donation is a kind of speech, as is electoral expenditure. A donation to a political party is communication - it indicates support for at least some of that party's policies; a donation to an individual candidate indicates support for that candidature. If a political party or a third party is limited in the extent to which they can incur 'electoral expenditure' (Queensland) or 'electoral communication expenditure' (New South Wales), due to expenditure restrictions, the spending cap clearly burdens their ability to communicate about political matters; the whole purpose of incurring

---

[74] It is true that the American jurisprudence has in the past drawn a sharp division between donation limits on the one hand, and expenditure limits on the other (*Buckley v Valeo* 424 US 1 (1976)). The author tends to agree with dissentient Burger CJ in that case that donations and expenditure are in many ways different sides of the same coin. The supposed distinction between expenditure and spending has been sharply criticised in the literature (eg Lillian BeVier 'Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform' (1985) 73 *California Law Review* 1045, 1063; Archibald Cox 'Freedom of Expression in the Burger Court' (1980) 94 *Harvard Law Review* 1, 55-73), and it is unclear how strongly the current United States Supreme Court adheres to the distinction, when in *Citizens United v FEC* it undercut at least those aspects of *Buckley* that relied on corruption concerns as justifying campaign finance regulation 130 S. Ct 876, 901-902 (2010)(pin point page references to 558 US 310 not available).

[75] *Levy v State of Victoria* (1997) 189 CLR 579.

electoral expenditure or electoral communication expenditure is to communicate a political message. An outright ban on donations from corporations and other businesses (NSW) clearly burdens their ability to communicate their political views. The answer to the first *Lange* limb is yes.[76]

The more contentious question is the second one – whether the law is appropriate and adapted to serve a legitimate end in a manner which is compatible with representative and responsible government. We bear in mind the distinction made by two judges in *Australian Capital Television* between content-based restrictions, and restrictions on an activity or mode of communication, restrictions of the former type being even more difficult to justify.[77] Donation and expenditure restrictions are clearly content-based restrictions, because they apply to donations with presumed political messages, and to expenditure on political communication. They restrict based on the content of the message.[78] As a result, according at least to Mason CJ and McHugh J in *Australian Capital Television*,[79] they are more difficult to justify than would, for example, restrictions on total donations that a person or organisation could make to any particular body, or restrictions on spending that could be incurred by a particular body. I consider now what legitimate end/s may be served by the kinds of restrictions found in the Queensland and New South Wales legislation.[80]

(1) Preventing Corruption and/or Perception of Corruption

Some advocates for political donation and/or expenditure regulation use the argument that such restrictions help to reduce corruption and/or undue influence in politics.[81] The Explanatory Notes to the 2011 Queensland Act state that its objects include the prevention of

---

[76] Anne Twomey agrees: 'limits placed upon campaign expenditure .. have the effect of burdening freedom of political communication contrary to the first element of the Lange test': 'Freedom of Communication and its Constitutional Limits on Electoral Laws' in Joo-Cheong Tham, Brian Costar and Graeme Orr ed *Electoral Democracy: Australian Prospects* (2011) p203; 'laws that ban or impose limits upon political donations or election campaign expenditure are likely to be regarded as burdening the constitutionally implied freedom of political communication. This is because they have the effect of limiting the quantity and breadth of communication about political matters': *The Reform of Political Donations, Expenditure and Funding* (2008) p 1 (prepared for the NSW Department of Premier and Cabinet); Anne Twomey 'The Application of the Implied Freedom of Political Communication to State Electoral Funding Laws' (2012) 35(3) *University of New South Wales Law Journal* 625, 646; as does Graeme Orr, at least to some extent: 'a political donation is at most a weak form of expression': *The Law of Politics: Elections, Parties and Money in Australia* (2010) p246; as does Joo Cheong –Tham: 'the giving of money by donors itself tends to be an act of political expression, with the political contribution signalling support for a party or candidate': *Money and Politics: The Democracy We Can't Afford* (2010) p16.

[77] Mason CJ (143), McHugh J (234-235).

[78] Admittedly, they are not the worst type of content-based restriction that the author could imagine, one that would prohibit a particular idea, for example banning speech on the topic of communism, or liberalism. However, they are still restrictions based on the political nature of the speech.

[79] It is also true that these comments have not been picked up to this point in subsequent free speech cases in Australia.

[80] In so doing, it has been pointed out that on occasions, Parliaments make these kinds of changes not for altruistic reasons, but because they believe the changes may benefit their particular political party: Colin Feasby 'Constitutional Questions About Canada's New Political Finance Regime' (2007) 45 *Osgoode Hall Law Journal* 513, 565. Cynics might observe that the changes to Queensland donation and expenditure laws were introduced shortly before the political party that introduced them was swept from office in a landslide election defeat in March 2012. Introduction of the laws might be seen to be beneficial to them, given their likely lengthy period in opposition, and likely impaired ability to raise funding for political purposes as a result.

[81] Joo-Cheong Tham *Money and Politics: The Democracy We Can't Afford* (2010) p109.

undue influence or the perception of undue influence by donors or lobby groups.[82] Then Premier of New South Wales, in her speech introducing the amendments, spoke of the need to maintain (restore?) public confidence in the impartiality of government decision making and improve the transparency of government process. Then Deputy Premier of Queensland, in his speech introducing the amendments, spoke of the need for government to be free of the 'undue influence associated with large political donations', and railed against those able to make large donations being able to 'leverage' more from the political process than others.[83] For discussion purposes, I will refer to these sentiments as reflecting the corruption rationale for capping donations and expenditure. These arguments seem more likely to be applied to donation limits, rather than expenditure limits.

Firstly, as Mason CJ said in *Australian Capital Television Pty Ltd*, courts must not accept at face value assertions by the legislature that limits on political communication are necessary to avoid corruption of the political process through the influence of money.[84] It is very easy to assert that money is or has been corrupting the political process. However, the Court has rightly insisted on evidence-based arguments of corruption, rather than mere legislative assertion.[85]

Very often, the evidence has been lacking. For instance, as the United States Supreme Court expressly noted in its *Citizens United* decision of another American case, *McConnell*, of the 100 000 pages of records in that case, there was no evidence of votes being exchanged for expenditure, and only very minor evidence of ingratiation. Similarly, in *Randall* the Court was not convinced of the case for regulation based on corruption.

Several political scientists have devoted research to this issue. It is fair to say the results are mixed:[86]

> Despite the claims of the institutional critics and the growing public concern over (lobby groups) during the past decade, the scientific evidence that political money matters in legislative decision making is surprisingly weak. Considerable research on members' voting decisions offers little support for the popular view that (lobby groups') money permits interests to buy or rent votes on matters that affect them.[87]

---

[82] The Explanatory Notes to the New South Wales Act that introduced the donation and expenditure rules, the *Election Funding and Disclosures Amendment Act* 2010 (NSW), does not explicitly state the reasons for the introduction of the measures.

[83] The Federal Government *Electoral Reform Green Paper* (2008) also suggested caps on donations and expenditure to avoid perceptions of undue influence and corruption (para 7.8). Proposed legislation developed after the Green Paper did not proceed: *Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill* 2008, 2009. Neither of these bills contained a proposed cap on donations or expenditure.

[84] 145; Graeme Orr *The Law of Politics: Elections, Parties and Money in Australia* (2010) p246: 'small donations .. present little risk of corruption'.

[85] McHugh J made a similar point in that case concerning the need for actual evidence as opposed to mere assertion, but he made that comment in the context of arguments that restrictions were necessary to create a level playing field; as did George Williams in his submission to the Legislative Council (NSW) *Inquiry into the Provisions of the Election Funding, Expenditure and Disclosures Amendment Bill 2011* (2012), arguing that a 'careful and rational justification' was required (Submission 1).

[86] 'Empirical research on whether campaign donations influence policy decisions is equivocal': Deborah Cass and Sonia Burrows 'Commonwealth Regulation of Campaign Finance – Public Funding, Disclosure and Expenditure Limits' (2000) 22 *Sydney Law Review* 478, 480.

[87] 'Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees' (1990) 84(3) *American Political Science Review* 797, 798; Ian Ramsey, Geoff Stapledon and Joel Vernon 'Political Donations by Australian Companies' (2001) 29 *Federal Law Review* 188, 193; Iain McMenamin 'Business, Politics and Money in Australia: Testing Economic, Political and Ideological Explanations' (2008) 43 *Australian Journal of Political Science* 377, 391; Brian Costar 'Equality, Liberty and Integrity and the Regulation of Campaign Finance' in Joo-Cheong Tham, Brian Costar and Graeme Orr ed *Electoral Democracy:*

There is cause to doubt the power of outside money to deliver consistently favo(u)rable political outcomes. A correlative relationship between money and political outcomes is not the same as a causal relationship; more money may often simply reflect greater underlying constituent support for a candidate. At a minimum, the 'hedging strategy' of corporations – giving money to both parties – suggests that corporations lack complete confidence that their donations will lead to favo(u)rable political outcomes.[88]

In conclusion on this point, then, the Court has been right to assert that it will not blindly accept statements from politicians that infringements on the freedom of political communication are justified in order to avoid corruption. Convincing evidence is needed. The political science literature is not clear that donations are linked to corruption or the perception of corruption, as noted by the United States Supreme Court in *Citizens United.* None of the politicians' speeches advocating such regimes, or the research papers that preceded the recent reforms in Australia, includes specific evidence of corruption deriving from donations. Of course, corruption is an ever present danger in any society, and bodies are needed to ensure that corruption does not flourish. Both Queensland and New South Wales have such bodies and such laws, and the law is enforced, as demonstrated by current events in New South Wales, and events in Queensland's recent political history.[89] The author has no difficulty with registers and disclosure of political donations; this can assist in dealing with any fears of corruption.

In short, it would be open for a court to say that the restrictions in the new Queensland and New South Wales are not reasonably appropriate and adapted to meeting the legitimate end of preventing corruption of our political system, given the lack of real evidence of the connection between donations and corruption. It seems even more difficult to justify expenditure limits on the need to avoid corruption, since there is even less of a link between

---

Australian Prospects (2011) p167; Susan Clark Muntean 'Corporate Independent Spending in the Post-BCRA to Citizens United Era' (2010) 13 *Business and Politics* 1; Bradley Smith 'Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform' (1996) 105 *Yale Law Journal* 1049; Kathleen Sullivan 'Political Money and Freedom of Speech' (1997) 30 *University of California Davis Law Review* 663, 679; Henry Chappell 'Campaign Contributions and Congressional Voting: A Simultaneous Probit-Tobit Model' (1982) 62 *Review of Economics and Statistics* 77; Janet Grenzke 'Shopping in the Congressional Supermarket: The Currency is Complex' (1989) 33 *American Journal of Political Science* 1; William Welch 'Campaign Contributions and Legislative Voting: Milk Money and Dairy Price Supports' (1982) 35 *Western Political Quarterly* 478; John Lott 'Empirical Evidence in the Debate on Campaign Finance Reform' (2001) 24 *Harvard Journal of Law and Public Policy* 9; cf Richard Briffault 'The Political Parties and Campaign Finance Reform' (2000) 100 *Columbia Law Review* 620, J Skelly Wright 'Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?' (1982) 82 *Columbia Law Review* 609.

[88] Francis Bingham 'Show Me the Money: Public Access and Accountability After Citizens United' (2011) 52 *Boston College Law Review* 1027, 1054-1055; in the Australian context, the fact that donors overwhelmingly donate to both major political parties has also been noted: Joo Cheong-Tham *Money and Politics: The Democracy We Can't Afford* (2010) p66. The author is loathe to drawn generalisations from specific examples, but in Queensland businessman Clive Palmer, an extremely generous donor in the past to the Liberal National Party, has recently resigned his membership from the party, partly in response to government decisions that clearly were not favourable to him, for example the contract for construction of a rail freight line in Queensland going to one of Mr Palmer's competitors, when Mr Palmer's company was a tenderer for the work. The example of Mr Palmer does not show that a generous donor to a political party received favourable treatment in response. Another example is provided by Norton, who notes the motor vehicle industry obtains more by way of budgetary and tariff assistance than any other industry, yet of the three largest companies in this industry, Holden and Toyota made no donations through the 1998-1999 to 2009-2010 period, and Ford last gave money in 2004-2005: Andrew Norton *Democracy and Money: The Dangers of Campaign Finance Reform* (Centre for Independent Studies Policy Monograph 119, 2011) p4.

[89] For example, former Beattie Government Minister Gordon Nuttall is currently in prison for accepting bribes whilst in Parliament.

the amount a political party might spend in an election campaign, and any particular donor who might wish for political favours.

(2) Level Playing Field

Another argument in favour of both donation and expenditure limits is that they are necessary to achieve some kind of equality across the political spectrum.[90] This argument appealed, for example, to the Supreme Court of Canada who noted

> To ensure a right of equal participation in democratic government, laws limiting spending are needed to preserve the equality of democratic rights and ensure that one person's exercise of the freedom to spend does not hinder the communication opportunities of others ... such spending limits are necessary to prevent the most affluent from monopolizing election discourse and consequently depriving their opponents of a reasonable opportunity to speak and be heard.[91]

In *Harper v Canada*,[92] the majority referred to an egalitarian model of election as being

> An essential component of our democratic society ... individuals should have an equal opportunity to participate in the electoral process. Under this model, wealth is the main obstacle to equal participation ... the egalitarian model promotes an electoral process that requires the wealthy to be prevented from controlling the electoral process to the detriment of others with less economic power ... the State can restrict the voices which dominate the political discourse so that others may be heard as well ... these (Canadian) provisions seek to create a level playing field for those who wish to engage in the electoral discourse. This, in turn, enables voters to be better informed; no one voice is overwhelmed by another ... advancement of equality and fairness in elections ultimately encourages public confidence in the electoral system.

However, the comments of McHugh J in *Australian Capital Television Pty Ltd* are highly relevant here. Specifically addressing the claimed justification there of a ban on television and radio political advertising as being necessary to create a level playing field, he stated that convincing evidence needed to be led that under the existing system, one voice was in fact drowning out others, so compromising the ability of electors to make an informed choice amongst a range of views. Simple assertions that restrictions were required for such reasons should not be blindly accepted. [93]

Does the available evidence confirm domination of political communication by one voice at the expense of others? Hardly. There is in fact remarkable equality in the level of spending by the major political parties in Australia. For instance, in the Annual Returns submitted to the Australian Electoral Commission by the major parties for the 2010-2011 year, the latest year for which figures are available and bearing in mind the last federal election was held in August 2010, the record shows the Australian Labor Party federally had receipts of approximately $37 million, and expenditure of approximately $36 million. The Coalition, including the Liberal Party and National Party, had receipts of approximately $37 million,

---

[90] Joo-Cheong Tham and David Grove 'Public Funding and Expenditure Regulation of Australian Political Parties: Some Reflections (2004) 32 *Federal Law Review* 397, 419; Joo-Cheong Tham *Money and Politics: The Democracy We Can't Afford* (2010) p109; Deborah Cass and Sonia Burrows 'Commonwealth Regulation of Campaign Finance – Public Funding, Disclosure and Expenditure Limits' (2000) 22 *Sydney Law Review* 477, 490; J Skelly Wright 'Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality' (1982) 82 *Columbia Law Review* 609; cf Graeme Orr *The Law of Politics: Elections, Parties and Money in Australia* (2010) p246: 'small donations ... represent little ... threat to political equality'.

[91] *Libman v Quebec* [1997] 3 S.C.R 569, para 47.

[92] [2004] 1 S.C.R 827, para 62-63.

[93] 239-240.

and expenditure of approximately $36 million.[94] Certainly, as between the 'main' political parties, or those with the only realistic opportunity of forming government, there is remarkable equality, not inequality, in their ability to raise money, and their spending levels.

If the argument is that minor parties are somehow disadvantaged and cannot make their voice heard, again the argument is difficult to make on the evidence. For instance, there is clearly a financial disparity between the position of the Australian Greens and that of the major parties. In the 2010-2011 year, the Greens had $4.55 million in receipts, and $4.5 million in payments. This is substantially lower than the major parties. However, at the 2010 election the Australian Greens increased their primary vote in the House of Representatives from 8% to 12% of first preferences, and in the Senate from 9% to 13%. Given this scale of swing in favour of the Australian Greens at the 2010 election, it is hard to argue that communication is being dominated by the major political parties, or that alternative voices cannot be heard.

As Norton notes, one of the likely consequences of these restrictions is, rather than create a level 'playing field', to make it tougher for new players to enter the field.[95] The corollary of the limits on political donations is an increase in public funding of parties. However, this funding is restricted to parties with at least 4% of the vote, potentially excluding new political players. It does not compensate third parties for restrictions on their ability to donate or spend. Further, small parties that lack the membership numbers to become registered face even tighter restrictions on the donations they can receive and the electoral expenditure that they can incur. He points out the Australian Labor Party strongly relied on union donations to become established, and the Liberal Party was reliant on donations from business. These parties may not have existed otherwise. How does a law making it tougher for new entrants help create a level playing field?

One must also acknowledge the growth of the Internet, twitter and other forms of communication through which people gain access to information.[96] In the days where newspapers and television dominated means of communication, an argument that the main political players are the only ones able to afford advertising on such a medium, such that minority voices are shut out, might have had more validity. These days, where increasingly people are turning to electronic media for their news, the explosive growth of blogs, twitter etc, lack of financial muscle is not the inhibitor it may have been in the past in terms of communicating views. These trends must be borne in mind in seriously assessing claims that limits on spending and donations are necessary, or appropriate and adapted, to create some kind of 'level playing field'.

There is relatively little case law in Europe upon which to draw in relation to restrictions on political donations and expenditure. However, Article 10 of the *European Convention on Human Rights* protects the (non-absolute) right to receive and impart information and ideas, without interference from a public authority. The European Court has repeatedly affirmed the essentiality of freedom of expression in a democratic society.[97] In *Bowman*, the European

---

[94] In the 2009-2010 year, the ALP had about $7.7 million in receipts, and $6.9 million in expenditure; the Coalition had approximately $7.2 million in receipts, and $8.5 million in expenditure.

[95] *Democracy and Money: The Dangers of Campaign Finance Reform* (Centre for Independent Studies Policy Monograph 119, 2011); Anne Twomey also suggests that expenditure limits might benefit incumbents at the expense of newcomers: 'Freedom of Political Communication and its Constitutional Limits' in Joo-Cheong Tham, Brian Costar and Graeme Orr ed *Electoral Democracy: Australian Prospects* (2011) p204.

[96] See also Stephanie Palmer 'Legal Challenges to Political Finance and Election Laws' in Keith Ewing, Jacob Rowbottom and Joo-Cheong Tham *The Funding of Political Parties: Where Now?* (2012) p184.

[97] *Case of Mouvement Raelien Suisse v Switzerland* [2012] ECHR 1598, [48].

Court found that a 1983 United Kingdom Act limiting expenditure by a third party to five pounds in relation to a political candidate violated Article 10. Arguments that such restrictions were necessary and proportionate to a legitimate end of promoting a level playing field among candidates were not accepted there, given the range of other inequalities that continued to exist, and the fact the press were free to support whichever political party or candidate they wished.[98] More recently, a ban on political television advertising, justified by the government as being necessary to create a more level playing field and stop the wealthy from dominating debate, was again found to be inconsistent with Article 10.[99] The Court there noted there was little scope under Article 10 for restrictions on political speech or on debate on matters of public interest.[100]

In conclusion, the argument that caps on donations or expenditure are necessary to create some kind of level playing field are dubious at best. In terms of an evidence-based enquiry, rather than mere assertion, the revenue and expenditure of various Australian political parties does not show clearly that voices are not being heard due to financial differences. Such restrictions may have unexpected side effects, such as artificially protecting incumbents, and muffling new voices. Exponential growth of costless electronic communication has allowed many more people to get their voices heard, undermining the 'market power' of newspapers and television in communicating ideas. European courts have generally rejected arguments about the need for spending or advertising restrictions on political matters based on notions of equality; so should Australian courts.

(3) The Position of Corporates

The New South Wales legislation bans, among others, donations by corporations, or from individuals acting on behalf of corporations, in requiring that donations be accepted only from donors on the state electoral roll. Can this ban be considered to infringe the *Lange* test regarding freedom of political communication?[101]

In asking this question, it is considered to be beside the point, with respect, to point out as some politicians have that such a ban is acceptable because 'corporations don't vote'.[102] The argument is that the implied freedom of political communication is derivative of representative democracy, and so cannot be breached when communication rights of non-voting bodies are affected by legislation.

With respect, it is submitted this argument is flawed. It is flawed because it forgets the broad basis of the implied freedom of which the High Court spoke in *Australian Capital Television.*

---

[98] *Bowman v United Kingdom* [1998] ECHR 4, [37] and [47]. Subsequently, the *Political Parties, Elections and Referendums Act 2000* (UK) was passed, limiting campaign expenditure in the year prior to an election, and limiting third party expenditure in this period, and see also the *Political Parties and Elections Act 2009* (UK); see for discussion Keith Ewing *The Costs of Democracy: Party Funding in Modern British Politics* (2007). I am not aware that the validity of this Act has been tested in terms of compatibility with Article 10.

[99] *Tv-Vest and Rogaland Pensjonistparti v Norway* [2008] ECHR 1687, [70-71].

[100] *Tv-Vest and Rogaland Pensjonistparti v Norway* [2008] ECHR 1687, [59]; *Case of Mouvement Raelien Suisse v Switzerland* [2012] ECHR 1598, [61]. Earlier, a majority of the House of Lords validated the BBC's actions in refusing to air anti-abortion ads on the basis they were 'offensive' despite Article 10 arguments: *R v British Broadcasting Corporation, ex parte Pro-Life Alliance* [2003] UKHL 23, Jacob Rowbottom 'Article 10 and Election Broadcasts' (2003) 119 *Law Quarterly Review* 553.

[101] Two leading academics in this field have suggested that the requirement that donors be on the state electoral roll, effectively excluding corporates and others, is perhaps the most vulnerable provision constitutionally: Legislative Council (NSW) *Inquiry Into the Provisions of the Election Funding, Expenditure and Disclosures Amendment Bill 2011* (NSW)(2012), Anne Twomey (Submission 5) and Joo-Cheong Tham (Submission 27).

[102] Premier O'Farrell expressed this sentiment when introducing the changes affecting corporations.

It was not confined to communications between candidates and voters. It included communications from all persons, groups and bodies in society.[103] Surely, this must include a corporation. Communication does not occur in a vacuum; it is heard by someone. People who hear communication by corporations are voters. In this way, even if corporates don't have a right to communicate political messages under the *Constitution*, voters have a constitutional right to hear the communication from the corporation, and preventing them from funding political parties or candidates clearly infringes the right of voters to hear a range of views, where that cash would have enabled views to be aired. There is no threat to democracy created by a wealthy corporation wanting to donate money different from a wealthy individual wanting to donate money, and it is very likely that the High Court would find such a blanket ban to be not reasonably appropriate and adapted to a legitimate end in a manner consistent with representative government. Bans on corporate donations are very likely to inhibit the ability of political parties and individuals to communicate political messages to voters,[104] and very difficult to justify on the second *Lange* limb. As Anne Twomey concludes that given the caps on donation levels:

> It is difficult to see how the provisions that completely ban capped political donations from anyone not on the electoral roll as well as certain individuals who are on the electoral roll can be regarded as reasonably appropriate and adapted to serving .. a legitimate end.[105]

Support for this position is gained from the case law in the United States. The Court has clarified there that first amendment protections do not depend on the identity of the speaker, and can apply to speech by corporations.[106] As indicated above, while the Court was for a time willing to allow some restrictions on corporate expenditure in the political sphere,[107] in its most recent judgment the Supreme Court specifically overruled these findings, and in so doing emphatically re-asserted the constitutional right of corporations to incur political expenditure as they chose fit.[108] The High Court could accept the United States doctrine that corporations have first amendment rights, but they need not. They would also be free to accept the narrower doctrine that although the corporation itself does not have the constitutional right to say it, the voter has a constitutional right to hear it. Either way, the result would be the same; the ban could not stand.

Similar comments may be made about the ban on donations by those who are not on the electoral roll. Although that person may not vote, their communication could be heard by those who do vote. It is hard to see how such a ban meets the *Lange* test either.

---

[103] Mason CJ, 139.

[104] It is true that under corporations law, company directors must act in the best interests of shareholders, and questions might arise regarding whether a political donation by a company meets this test unless the company believes it will gain some quid pro quo from the donation: Joo-Cheong Tham *Money and Politics: The Democracy We Can't Afford* (2010) p80; Jacob Rowbottom 'Institutional Donations to Political Parties' in Keith Ewing, Jacob Rowbottom and Joo-Cheong Tham *The Funding of Political Parties: Where Now?* (2012) p21. On the other hand, it may be that the board believes that the policies of a particular political party are more broadly in line with that company's interests. It is not considered sinister to act in favour of a particular political party, whether that be to donate money to it, or to vote for it, because the actor believes it is in their best interests to do so; such action is what an economist might call a 'rational utility maximiser'.

[105] 'The Application of the Implied Freedom of Political Communication to State Electoral Funding Laws' (2012) 35(3) *University of New South Wales Law Journal* 625, 647.

[106] *First National Bank of Boston et al v Bellotti, Attorney-General of Massachusetts* 435 US 765 (1978).

[107] *Austin v Michigan State Chamber of Commerce* 494 US 652 (1990), *McConnell v FEC And Others* 540 US 93 (2003).

[108] *Citizens United v Federal Electoral Commission* 558 US 310 (2010).

(4) Circumvention is Relatively Easy

The American regulators were to a large extent frustrated in their attempts to regulate political expenditure through the use of loopholes to evade legislative requirements.[109] It is very difficult to draft legislation that will withstand determined attempts to circumvent its intent.[110] For instance, in the context of the Queensland legislation, the definition of 'political donation' in s250 is key, because caps are applied to 'political donations'. A donor would be able to circumvent this limit by making it clear the donation was not intended to be used for campaign purposes. The fact that the amount was actually used for campaign purposes is not sufficient to make it a 'political donation'. Further, s199 is crucial in defining 'electoral expenditure', which is capped in amount. The definition includes material that 'advocates' a vote for or against a candidate or political party. A clever advertiser could be sure not to 'advocate' such a thing, while getting their message across. For instance, advertising at election time against the carbon tax, or against WorkChoices-type legislation may not be considered to be 'electoral expenditure' if it did not mention any particular candidates or political parties, though it may have a clear political message. In relation to third party spending caps in Queensland and New South Wales, limits may be avoided if multiple parties, rather than one party, conveys a particular message. For example, rather than the Australian Council of Trade Unions incurring large expenditure in excess of the limit, a number of unions could incur individual expenditure, to avoid exceeding the limit. Rather than the Business Council of Australia incurring large expenditure in excess of the limit, individual members could incur expenditure, to avoid exceeding the limit.

These brief examples highlight the difficulty, if not futility, in seeking to control political donations and spending. The existence of loopholes might suggest that these restrictions are not reasonably and appropriately adapted to a legitimate end in a manner compatible with representative and responsible government. Again, they will have a skewed effect, with limited impact on those players able to secure competent legal advice to assist with (legally) circumventing the laws, and greater impact on those who are not able to understand or pay for advice on complying with the complex rules.[111]

(5) Other Arguments

The High Court noted that the Australian *Constitution* reflected principles of representative and responsible government, and the implied freedom was derived from those principles. Perhaps more contentious is to consider whether the Australian *Constitution* reflects principles of a *liberal* democracy. Given that the document is concerned to outline the extent of powers of the Federal Government, enshrines some limits on the extent to which both Federal and State Governments have the ability to pass laws, and reflects a federal system generally with some limited express rights, an argument might be made that principles of *liberal* democracy pervade the document. It is uncontentious that liberalism was a prevailing philosophy at the time the document was drafted.

Why does this matter? Norton writes that

---

[109] *Citizens United v Federal Electoral Commission* 130 S. Ct 876, 885 (pinpoint references not available in the US report); see in the Canadian context Colin Feasby 'Constitutional Questions About Canada's New Political Finance Regime' (2007) 45 *Osgoode Hall Law Journal* 513, 532-536.

[110] Graeme Orr 'The Currency of Democracy: Campaign Finance Law in Australia' (2003) 26(1) *University of New South Wales Law Journal* 1, 22: 'the larger concern with caps on donations ... involves their workability. It is generally assumed that US-inspired contrivances would be adapted to avoid any caps'.

[111] Graeme Orr *The Law of Politics: Elections, Parties and Money in Australia* (2010) p262.

From a liberal democratic perspective, private money is not the main political problem. It is the vast concentration of resources and power in the state that gives those in government great control over the lives of others. Creating checks and balances on that power is the key goal of liberal-democratic constitutionism through devices such as regular elections, formal limits on legislative power, an independent judiciary and federalism. Political rights and freedoms, including giving and spending money for political reasons, are a necessary element of this system. They enable individuals and organisations to criticise and oppose the government of the day by using the electoral process to check government power ... this is why liberal democrats should see state controls on political donations and spending as deeply suspicious. These controls limit the capacity of people who are not in power to oppose the people in power ... donations caps limit the fundraising potential of opposition parties or candidates ... donations bans partially strip some organisations and individuals of political rights to oppose the government ... general limits on 'third party' political expenditure protect governments from big campaigns against them.[112]

Large scale political campaigns have been financed in the past by third parties, with recent examples including the protest against WorkChoices, and the protest against the proposed mining tax. Whatever the merits of such arguments, a democrat would surely be heartened that those affected by proposed changes to the law had/have the ability to undertake protest and lobbying activity, an ability that is largely denied to them by the new laws in New South Wales and Queensland.[113]

On a somewhat related matter, the author laments recent moves by (coincidentally?) both the New South Wales and Queensland Governments to not fund advocacy activities by those organisations receiving state government money, or to withdraw funding (or threaten to do so) to organisations that conduct advocacy on behalf of their constituents.[114] Such advocacy can make a valuable contribution to political and legal debate, and should not be stifled by threats of withdrawal of funding, or funding conditional on non-advocacy.[115] These moves, together with the caps on donations and expenditure, suggest something of an unhealthy pattern of attempting to suppress, rather than encourage, open discussion about political

---

[112] Andrew Norton *Democracy and Money: The Dangers of Campaign Finance Reform* (Centre for Independent Studies Policy Monograph 119, 2011) p2.

[113] This is subject to their ability to circumvent the new laws.

[114] The current Queensland Attorney-General is on record as saying that money provided to community legal centres should not be used to pay for lobbying campaigns on political issues (Chris Merritt 'Legal Centres on Collision Course Over Right to Lobby' *The Australian*, 14/9/2012); Imre Salusinszky recently reported on changes to funding of New South Wales community legal centres prohibiting the use of funding on lobbying activities and public campaigning: 'Legal Centre Pays Price for Bid to Cripple Coal', *The Australian*, 20/12/2012 p6).

[115] Similar restrictions have been successfully challenged in the United States. For example, prohibition by Congress on the use of federal funds for editorialising on non-commercial broadcasting was held to be offensive to First Amendment rights (*Federal Communications Commission v League of Women Voters* 468 US 364 (1984), although a challenge to laws prohibiting recipients of health funding from advocating abortion was dismissed by a majority of the court (*Rust v Sullivan* 500 US 173 (1991), Blackmun and Stevens JJ dissenting on the freedom of speech argument); see Kenneth Levit 'Campaign Finance Reform and the Return of *Buckley v Valeo* (1994) 103 *Yale Law Journal* 469, 478-486. A loose analogy is possible between the current issue and arguments regarding s96, allowing the Federal Government to make financial grants to States on whatever conditions it thinks fit. Authority suggests that this power is circumscribed by at least some constitutional prohibitions (*Attorney-General (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559). It might be argued by analogy that the States' financial support to an organisation could not be on the basis that it waives constitutional rights of freedom of communication on political matters. Some analogy might also be possible with the statutory 'right' to trial by jury in s80 of the Constitution; the High Court has found that such a constitutional 'right' cannot be waived, because the right is not a personal right to the accused, but for the benefit of society generally: *Brown v The Queen* (1986) 160 CLR 171, 178-183 (Gibbs CJ, dissenting). It could similarly be argued here that the implied freedom of political communication is not a right that can be 'waived', because it is not in the nature of a personal right of an individual, but a right the exercise of which is for the benefit of all members of society.

matters, including by voices with which the government does not agree. It is not a pattern to which the courts should accede.

Conclusion

This article has outlined recent changes to electoral finance laws in parts of Australia, capping and limiting donations, and limiting electoral expenditure, and considered the compatibility of such regimes with the High Court's jurisprudence recognising an implied freedom of political communication. Though that freedom is limited, as the Court has pointed out, the author has argued there is a probability that the new restrictions are not constitutionally valid, applying the tests the High Court has provided for the freedom. In terms of the two-limbed *Lange* test, the new laws do impact on communication about political matters. It is difficult to argue that they are reasonably appropriate and adapted to a legitimate end, given the lack of evidence presented that such laws are in fact necessary to deal with supposed concerns regarding corruption or level playing fields. The High Court has rightly insisted on evidence that incursions on fundamental rights like freedom of communication are in fact truly necessary, rather than motherhood statements that such laws are needed. Such evidence has not been provided in the current context. Generally, courts in other jurisdictions have also been concerned with the threat to freedom of communication posed by restrictions on political speech, as should Australian courts. Restrictions based on the identity of the donor, such as bans on corporate donations or from those not on the electoral roll, have struck difficulty elsewhere, and arguably fall short of constitutional validity applying the Australian rules as well, once it is borne in mind that the freedom of communication is not simply a freedom to speak but also a freedom to hear others speak.

Fundamentally in the freedom of communication cases, the High Court found that a robust liberal democracy requires strong debate and discussion about political matters. Strong debate and discussion often require money in order to take place. These laws, by stifling the ability of political parties to raise and spend it, by stifling the ability of individuals and corporations to communicate, stifle the ability of individuals to receive a full range of messages. These types of provisions are constitutionally offensive.