Submission
No 10

INQUIRY INTO PROVISIONS OF THE ELECTION FUNDING, EXPENDITURE AND DISCLOSURES BILL 2011

Name: Dr Iain Stewart

Date received: 10/01/2012

Dr John Kaye MLC
Committee Chair
Select Committee on Election Funding Bill 2011
Parliament House
Macquarie Street
Sydney NSW 2000

10 January 2012

ELECTION FUNDING, EXPENDITURE AND DISCLOSURES AMENDMENT BILL 2011

From Dr IAIN STEWART[1]

CONTENTS

1 Associate Professor, Macquarie Law School, Macquarie University, Sydney 2109; email [redacted]

The views expressed in this submission are solely my own. I am not a member of any political party.

SUMMARY

This submission will consider, as requested by the Committee, *potential constitutional implications* of the Election Funding, Expenditure and Disclosures Amendment Bill 2011 ("the Bill").

This submission will consider mainly the question of *donations*, partly because this appears to me to be the aspect in which the proposed law is most likely to be at constitutional risk and partly because, of course, the question of party expenditure is dependent on that of party income. I will not get into the disclosed and published figures on political funding in NSW and will limit my legal observations to matters that do not require those figures.

It will be suggested that the Bill, if enacted,

a) *might infringe the implied freedom of political communication,*

b) *would infringe, if such has been recognised, an implied freedom of political participation,*

c) *would infringe, if such were to be recognised, an implied freedom of political association, and*

d) *would be likely to be challenged in the High Court.*

It will also be proposed that, if the Bill were to be enacted, its commencement should be not by proclamation but wholly upon receiving assent.

A. THE BILL AND FREEDOM OF SPEECH OR OF POLITICAL COMMUNICATION

I have read the Digest of the Bill, prepared by the Legislation Review Committee, which expresses concerns that the Bill may in several ways infringe the constitutionally implied freedom of political communication.[2] I share those concerns.

This sort of issue is hot-button in the USA, where two years ago legislation restricting corporate donations was found to be unconstitutional.[3] The Supreme Court found that it breached the First Amendment to the US Constitution, which protects freedom of speech.[4] Critics of the decision have pointed to unequal capacity to exercise that freedom. President Obama denounced the decision:

> The Supreme Court has given a green light to a new stampede of special interest money in our politics. [...] It is a major victory for big oil, Wall Street banks, health insurance companies and the other powerful interests that

---

2 *Legislation Review Digest no. 5 of 2011* <http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/0b58a95400c19ff9ca257926001c91f1/$FILE/Digest 5.pdf>, pp 8-11 (accessed 8 January 2012).

3 *Citizens United v Federal Election Commission* 558 U.S. ____ (2010), 21 January 2010 <http://media.npr.org/documents/2010/jan/scotus_campaign_finance.pdf> (accessed 8 January 2012).

4 "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The framers of the Commonwealth Constitution decided not to replicate this, although the "religion clause" is cloned into Constitution s 119.

> marshal their power every day in Washington to drown out the voices of everyday Americans.[5]

The law that was overturned in that case restricted donations only by corporations, albeit both those for profit and those not for profit. One of the reasons why the law was overturned was that it was being outflanked by use of unincorporated organisations. The Bill, however, would affect unincorporated as well as incorporated organisations.

No provision like the First Amendment appears in the Commonwealth Constitution or the Constitution of NSW. Nor do the Commonwealth or NSW have a bill of rights.[6] However, the High Court has implied a comparable freedom into the Commonwealth Constitution and has deemed that freedom to apply to the whole of the Australian political system, including the states. It is therefore necessary to explore whether the Bill, if enacted, would be consistent with that freedom.

---

5 "Supreme Court Rips Up Campaign Finance Laws", *NPR* 21 January 2010 <http://www.npr.org/templates/story/story.php?storyId=122805666> (accessed 8 January 2012). It is reported that would-be Republican presidential candidate Newt Gingrich is spending US$3.4m on a single television advertisement attacking Romney, and this is just the beginning of the primaries: Ewan MacAskill, "Mitt Romney's 'firing people' blunder offers gift to rivals on eve of primary" *The Guardian* 10 January 2012 <http://www.guardian.co.uk/world/2012/jan/09/mitt-romney-firing-people-gaffe> (accessed 10 January 2012).

6 In Australia, bills of rights exist only in the ACT and in Victoria: Human Rights Act 2004 (ACT) and Charter of Human Rights and Responsibilities Act 2006 (Vic). Old English legislation such as the Magna Carta 1215 and the Bill of Rights 1688/1689 is recognised but not applied; if they were to be applied, that would be subject to the Commonwealth and state constitutions. Common-law rights and freedoms are restricted or extinguished so far as they conflict with clear words in legislation: *Evans v New South Wales (World Youth Day Case)* (2008) 250 ALR 33 (FCAFC).

I will try to do this in language accessible to non-lawyers. This will mean omitting not only most of the undergrowth in the maze but also many of the byways that might be followed by an enterprising lawyer. I will pay little attention to dissenting judgments or to differences of reasoning among judgments. These are very important in litigation since, because of the age of the Commonwealth Constitution (and the NSW Constitution is little younger), it means what the High Court has said that it means. Or, more exactly, it means what the High Court *may be likely to say* that it means. Moreover, what the High Court may be likely to say is highly unpredictable. The seven judges are unpredictable individually, collectively and as to what might turn out to be a majority among them.

This unpredictability means that a constitutional case is a bit of a lottery. That is one good reason to avoid constitutional litigation. Another is the cost. Constitutional cases are complex and therefore require argument at length. The expense is increased by the High Court's practice of informing all of the states and major territories that a constitutional case is coming up and inviting them to become parties, which they often do.[7] One could expect that to happen in a case on the Bill, where the issues would be relevant to all states and territories as well as to the Commonwealth.

Nevertheless, if the Bill does to the Australian Labor Party ("the ALP") what Premier Barry O'Farrell promises it will (to be considered later), the ALP will have to give serious consideration to a constitutional challenge. For the same reasons, ALP members of the NSW Parliament should try to defeat the Bill or

---

7 In the *Work Choices Case*, 2006, a record 39 counsel appeared: click to enlarge the central picture <http://www.hcourt.gov.au/about/operation> (accessed 10 January 2012).

get it amended. Minor parties and Independents, who would be unlikely to be able to afford a High Court action, may have similar interests according to how the Bill might affect them; or possibly the Bill might affect them beneficially. On the government side, the Liberal Party needs to foresee the grounds on which a challenge may be brought and consider whether to amend or replace the Bill so as to remove or reduce the likelihood of a constitutional challenge. Government pockets too are not limitless.

B. IMPLIED FREEDOM OF POLITICAL COMMUNICATION ("THE FREEDOM")

Beginning in 1992, the High Court has found in the Commonwealth Constitution ("the Constitution") an "implied freedom of political communication".[8] This freedom is both broader and narrower than the US First Amendment, so must be described for itself. I will refer to it as "the Freedom".

After some disagreements, the High Court has settled on the view that the Freedom is not to be drawn from any extra-constitutional source, such as political philosophy regarding democracy, but solely in the Constitution itself.

---

8 Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (Leichhardt, Federation Press, 5th edn 2010), ch 28. The first case was *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, followed on the same day by *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106. *Nationwide News* had been a unanimous decision, but *Australian Capital Television* was a decision by majority. After two out of the three cases on the Freedom that were decided in 1994 had been decided by a 4:3 majority, with variations among the reasonings on both sides, the High Court made an effort to stabilise the position. Its unanimous decision, in a single joint judgment, in *Australian Broadcasting Corporation v Lange* (1997) 189 CLR 520 remains the leading case on the Freedom. (The Digest unfortunately confuses *Australian Capital Television*, which was about political advertising, with *Lange*, a defamation case.)

It is found in the "text and structure" of the Constitution—that is, in specific words, understood in the light of their location within the Constitution as a whole.[9]

The main words that have been found to contain the Freedom are the words "directly chosen by the people" in Constitution sections 7 and 24. The members of the Senate (section 7) and of the House of Representatives (section 24) are to be chosen "directly" and not through any intermediary such as a US-style electoral college. And they are to be chosen by "the people", which today means Australian citizens. It does not mean that all Australian citizens must be allowed to vote: many are excluded, for example, because they are deemed to be too young. However, separately from the Freedom it has been determined that any restriction of the franchise must be rationally defensible; to put this the other way around, it must not be arbitrary.[10]

Although those words are found in the Commonwealth Constitution, the High Court has taken the view that Australia has a single political system, with a single sphere of political discussion, so that the Freedom applies throughout that system. It therefore applies not only federally but also to the states and territories and to local government. The High Court has also found the Freedom to be implicit in Constitution sections 64 and 128. Section 64 concerns appointment of federal ministers and requires that they be, or soon

---

9 *Australian Broadcasting Corporation v Lange* (1997) 189 CLR 520. On the High Court as currently constituted, the general lines of this decision would probably be followed either unanimously or by a large majority. Only one judge, I think, would contemplate removing the Freedom altogether.

10 *Roach v Electoral Commissioner* (2007) 233 CLR 162; *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

become, members of the Parliament; a person's suitability for ministerial office should be open to public debate. Section 128 provides the mechanism for changing the Constitution; a proposal for constitutional change requires freedom of communication about it.

The Freedom is does not stand alone, like a common-law freedom such as freedom of expression. It operates as a limitation upon legislative power—to begin with, upon the legislative powers of the Commonwealth Parliament as provided in the Commonwealth Constitution. Legislation that would otherwise be within power will nonetheless be beyond power if, and to the extent to which, it infringes the Freedom. The NSW Constitution provides the NSW Parliament with plenary legislative power, which includes power to legislate on the conduct of politics in NSW. That plenary legislative power is subject to any restrictions to be found in the Commonwealth Constitution, such as the reservation to the Commonwealth of certain areas on which to legislate, for example defence. No explicit element of the Commonwealth Constitution relates to the conduct of state politics. However, the Freedom has been implied and it has been held to apply to the states.

The question then is whether the Bill, if enacted, would infringe the Freedom. If it would, then to the extent of the infringement it would not have been validly enacted—it would be a nullity. Any effects of finding it to be invalid would be retrospective to the moment of its commencement.

The invalidity of a law may be of the whole law or only of some part of it, or as to some part of it not altogether but only to some extent. The High Court (a constitutional case on the Bill would soon get to the High Court) would find validity to the extent that it could do so. The Court, like the legislature, is an

organ of state. The Court would strike out ("sever") or restrictively interpret ("read down") certain provisions, in preference to striking down the whole law. But it would not strike out or read down a provision if to do so would result in a law that the Parliament evidently would not have approved (a bit like taking "not" out of the Ten Commandments); then the whole law would have to be struck down.

The implied freedom of political communication is the only freedom that has been implied into the Constitution. Attempts to persuade the High Court also to recognise implied freedoms of association and of assembly, either as dependent on the freedom of political communication or independently of it, have met with sympathy from some judges but never from a majority of the Court. Later, however, I will speculate that the Court may in 2010 have recognised a freedom of political participation.

C. WHETHER THE FREEDOM WOULD BE INFRINGED

The question of infringement of the "freedom of political communication" involves four, successive stages.

1. *Is the law otherwise within power?* If it is not, it is invalid in any case and no issue about the Freedom arises.
2. *Does the law concern "political communication"?* If it does not, no issue about the Freedom arises.

If it is found that the legislation is otherwise within power and that it concerns "political communication", then it is necessary to ask whether the Freedom is infringed. That issue involves a two-stage test (the "*Lange* test"[11]):

3. *Does the law "burden" the Freedom?* If it does not burden the Freedom, it is valid.

4. *If the law does burden the Freedom, does it do so "unduly"?* Or, putting that positively: is there a good reason for the burden? If the law does burden the Freedom unduly—or, the other way around, there is no good reason for the burden—the law is invalid.

The process may be illustrated by *Levy v Victoria (Duck Shooting Case)* (1997).[12] Levy was a campaigner against duck shooting. Seeing protesters coming (as it were), the Victorian government put through a regulation that declared certain areas at certain times to be prohibited to persons not in

---

11 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567-568. The appellant was former New Zealand Prime Minister David Lange. He claimed that the ABC had defamed him. The ABC claimed that the Freedom gave it a defence through limiting the operation of NSW statute and common law as to defamation. The Court found that NSW law as to defamation did not unduly burden the Freedom. It left open the question whether the ABC had any defence within that law, in terms of qualified privilege. However, it drew upon the idea of the Freedom to expand the common-law defence of qualified privilege. And it found that, at least with that expansion, NSW defamation law did not unduly burden the Freedom as such. (How far the Freedom may apply directly to common law, i.e. judge-made law, need not be explored here.)

12 *Levy v Victoria* (1997) 189 CLR 579 <http://www.austlii.edu.au/au/cases/cth/HCA/1997/31.html> (accessed 10 January 2012). Levy relied upon the freedom of political communication that had been implied into the Commonwealth Constitution. The Court found it unnecessary to enquire whether such a freedom should also be implied into the Constitution of Victoria, but observed that, if it were, that would make no difference. I expect that the same view would be taken as to the NSW Constitution.

possession of a game licence. Levy, who would not have been seen dead with a game licence, at one of those times entered one of those areas, named Donald, in order to protest before television cameras; he was removed and convicted. There being no doubt that he had breached the regulation, he challenged its validity, citing the Freedom.

The High Court accepted that the Freedom applies to the states (in this case Victoria) and includes symbolic communication (dead ducks to be displayed to the media), and that the regulation burdened the Freedom. However, the Court went on to accept the Victorian government's contention that the Freedom was not burdened unduly, since the regulation was justified in the interest of public safety. Therefore the regulation was valid and Levy's conviction stood.[13]

Chief Justice Brennan summed up the issues succinctly:

> Televised protests by non-verbal conduct are today a commonplace of political expression. A law which simply denied an opportunity to make such a protest about an issue relevant to the government or politics of the Commonwealth would be as offensive to the constitutionally implied freedom as a law which banned political speech-making on that issue. However, while the speaking of words is not inherently dangerous or productive of a tangible effect that might warrant prohibition or control in the public interest, non-verbal conduct may, according to its nature and effect, demand legislative or executive prohibition or control even though it conveys a political message.

---

13 The parties, as well as Levy himself and the state of Victoria, included as interveners the Commonwealth, three other states and four media organisations, while the media trade union and the Australian Press Council appeared (or filed a written submission) as *amici curiae* (friends of the court). The lawyers included 12 QCs and one SC. The interveners were required to contribute to both sides' costs.

> Bonfires may have to be banned to prevent the outbreak of bushfires, and the lighting of a bonfire does not escape such a ban by the hoisting of a political effigy as its centrepiece. A law which prohibits non-verbal conduct for a legitimate purpose other than the suppressing of its political message is unaffected by the implied freedom if the prohibition is appropriate and adapted to the fulfilment of that purpose. Such a law prohibiting or controlling the non-verbal conduct, if it be reasonable in extent, does not offend the constitutional implication.[14]

Whether the Freedom is burdened unduly is sometimes formulated in American terms, as here with Brennan CJ, asking whether the law is a means "appropriate and adapted" to some legitimate end. At other times, terminology drawn from German and European law, as to whether the law is a means "proportionate" to some legitimate end. Thus far, fortunately, the two expressions have not been thought to have different meanings. Some judges prefer to speak of "proportionality" simply because it is more pronounceable (in English) and I will go along with that.

The burden must be proportionate (or appropriate and adapted) to some "legitimate end". What will count as a legitimate end (or purpose), and what will count as proportionate (or appropriate and adapted) means toward that end, are matters for considerable and unpredictable judicial discretion.

Gleeson CJ in *Roach* and Kiefel J dissenting in *Rowe* (cases to be discussed later) drew attention to the difficulty and perhaps inappropriateness of trying to identify disproportionality at large, without the guidance of a bill of rights. I think that Kiefel was even too sanguine about the success in Germany in

---

14 *Levy* at 595.

referring to a bill of rights for criteria of disproportionality. One can expect Kiefel J to pursue this issue.

All that does seem plain about proportionality is that the test is actually negative: given that the issue is whether a law should be struck down or read down, the test is whether the means provided for in the law is disproportionate (or not appropriate and adapted) to the legitimate end.

D. SCOPE OF THE FREEDOM

Before entering into the four-stage process with regard to the Bill, I will make a few observations on the scope of the Freedom, although it will be unnecessary to explore all of its boundaries.

The Freedom applies not only to "speech", as in the US First Amendment, but more generally to "communication". The High Court has preferred that expression in order to avoid the problem of how far the US First Amendment can apply to "symbolic" communication. As is seen in *Levy*, symbolic communication is included in the Australian Freedom. While symbolic communication does not appear to be in issue here, it may be relevant here that the communication in "political communication" does not have to be verbal.

Having referred to "communication", the High Court has restricted the Freedom to communication that is "political". Consistently with its concentration upon "text and structure", it has not defined "political". Rather, it has been left to any challenger to show that the communication is sufficiently connected with the words "chosen by the people" as they appear in the context of parliamentary elections.

The High Court has specified only a few things:

1. The communication will be "political" if it is between electors and their elected representatives or electoral candidates.

2. The communication will be "political" if it is between electors.

3. That is enough to make it "political", but its importance is to "each member of the Australian community"[15]—including not only individuals but also corporations and other bodies and groups.

4. The protection of these kinds of communication is not confined to periods of election or constitutional referendum; the process of choice by the people depends upon there being ongoing political discussion.

5. The protection is not confined to communication about matters that are currently before any parliament or proposed to be brought before any parliament, but extends to any matter that could come before a parliament.[16]

Since any matter at all might come before a parliament, what is important to delimiting the category "political" is less the content or subject of the communication than who the communication is between. But it is difficult to imagine any issue of social importance where communication about it within Australia would not involve people who are electors.[17]

---

15 *Lange* at 571 (the Court).

16 Or a territory assembly or a local council.

17 I will refer to "electors", which even among un-incarcerated adults is not quite the same as the category "citizens". Some citizens residing overseas are not electors, and some

It is, however, uncertain whether the expression "political communication" is to be read as a single phrase or by taking each word separately and then combining the result. The practice of the High Court appears to have been to take it as a single phrase. That may mean that the Freedom is confined to "communication of information and opinions about matters relating to [...] government".[18]

Ultimately, defining the Freedom involves the High Court in a difficult balancing act. In the name of democracy—the system of popular choice that is provided in and based in the Constitution—the Court must be both vigilant as to the integrity of that system and respectful of the people's wishes expressed through parliamentary decision.

E. DOES THE BILL INFRINGE THE FREEDOM?

I turn now to the four-stage question as to whether the Bill, if enacted, would infringe the Freedom.

1. **Q: Is the law otherwise within power?** (If it is not, it is invalid in any case and no issue about the Freedom arises.)

   A: Yes. The NSW Parliament has plenary legislative power, subject to any restrictions in the Commonwealth Constitution, and—aside from the Freedom—the Commonwealth Constitution contains no relevant restriction.

Australian-resident British nationals who have not become Australian citizens are electors. But these differences do not appear to matter here.

18 *Nationwide News Pty Ltd v Wills* (1992) 17 CLR 1 at 73 (Deane and Toohey JJ).

2. **Q: Does the law concern "political communication"?** (If it does not, no issue about the Freedom arises.)

This question might be divided:

Qa: Is the subject matter of the legislation "political" in the sense of the Freedom?

Aa: Yes. Donations to political parties are obviously "political" in that sense.

Qb: Is the subject matter of the legislation "communication" in the sense of the Freedom?

Ab: Uncertain. To make a donation is to communicate something, but it is not to communicate information or opinion about an issue. (Likewise with expenditure.)

In *Lange*, the High Court adopted this formulation:

> [...] this Court should now declare that each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia.[19]

However, the Court was there discussing not the Freedom but the extent of the common law's qualified privilege in defamation. It might be argued that the Court was not restricting the category "communication" to this scope but only considering the category

---

19 *Lange* at 571 (the Court).

"communication" to the extent relevant to delimiting the common-law defence of qualified privilege in defamation.[20]

The "communication" protected in the Freedom, therefore, need not be verbal, and its content may be information or opinions.[21] Whether its content may be wider than than, and especially whether it can include transfer of money, is neither ruled in nor ruled out.

It might then be argued that the Freedom extends beyond actual communication to necessary means of that communication. It can be accepted that funding of political communication is necessary to the constitutional choice "by the people". Then the Freedom's protection of the communication of political information and opinions might extend to the means of funding that communication. An extension from content to means (or from "message" to "medium") was accepted in the first Freedom case, *Australian Capital Television* (1992),[22] where legislation that banned political advertising on television (means) was found to infringe the Freedom. However, it was observed that a good reason for a burden upon the Freedom need not be as strong where the burden only affects means.[23] However, in 2004 the High Court divided over whether information printed on

---

20 The same could be said of the later Freedom cases that deal with defamation: *Roberts v Bass* (2002) 212 CLR 1 (HCA); *Fraser v Holmes* (2009) 253 ALR 538 (NSWCA).

21 Or "information, ideas and opinions": *Levy* at 622 (McHugh J).

22 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106.

23 *Australian Capital Television v Commonwealth* at 143 (Mason CJ).

a ballot paper constituted political communication by the candidates or parties so identified.[24]

If it were to be accepted that the Freedom applies to political donations, nevertheless that would not necessarily bring the Freedom to bear upon the Bill's provisions as to donations. It would still have to be shown that political communication would be burdened if there were no donations *from organisations*. And the Bill assumes the contrary. Legally, it is then "game on" regarding the facts of political funding.[25]

A: Uncertain.

The question has been put with regard to the expressions "political" and "communication" separately, but it does not seem likely that the answer would be different if the question were to be put with regard to "political communication" as a phrase.

If the answer to Question 2 were to be "No", then the Freedom would not apply and the Bill would be valid.

---

24 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181. Nonetheless, the Court was unanimous that, even if there was a burden upon the Freedom, the Freedom was not unduly infringed since the burden consisted only of a technical requirement that created no serious disadvantage.

25 The Bill does not mention public funding. Thus it assumes that public funding will continue, without increase, as provided in the principal act: Election Funding, Expenditure and Disclosures Act 1981 (NSW) Part 5. It may be noted, however, that the Bill relates to all donations to political parties and not just to donations for the purpose of an election. Any reduction of donations as a result of the Bill therefore could not simply be balanced by an increase in public funding of election campaigns. It might, moreover, be difficult and undesirable for a party to link private donations closely to election expenditure.

However, if the answer to Question 2 were to be "Yes", then:

3. **Q: Does the law "burden" the Freedom?** (If it does not burden the Freedom, it is valid.)

   A: Yes. The applicable criterion is not the legal effect of the law, i.e. its effect in altering anyone's rights or duties, but its practical effect.[26] The probable practical effect would be a tendency to reduce the income of political parties, which in turn would reduce their capacity to engage in political communication. I say "tendency" because it might be that individual donations would increase so as to make up the shortfall, but that could not be predicted to happen and I would think it unlikely to happen to the ALP.[27]

4. **Q: If the law does burden the Freedom, does it do so "unduly"?** Or, putting that positively: is there a good reason for the burden? (If the law does burden the Freedom unduly—or, the other way around, there is no good reason for the burden—the law is invalid.)

   The question need be addressed only in either its negative form or its positive form. I will address it in its positive form: **given that the Freedom is burdened, is there a good reason for the burden?**

---

26 *Cole v Whitfield* (1988) 165 CLR 360 (HCA); *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 56-57 [151] (Gummow and Bell JJ).

27 For information, one might consider the extent to which President Obama's election was financed through small individual contributions.

Perhaps the reasons for the Bill that were provided when it was introduced will be good reasons for this purpose. Introducing the Bill to the Parliament on 12 September 2011, Premier Barry O'Farrell said:

> I have long held the view that the best way to restore confidence in the State's electoral system and system of public administration is to restrict donations to individuals who are on the electoral rol[l].
>
> These are the very people who have a stake in the system. Unions, third-party interest groups, industrial organisations, corporations, overseas citizens and non-residents are not entitled to vote—our laws do not give them the right to vote—and therefore they should not be able to donate. They do not have a stake in the system and they should not be able to influence that system. Under our changes there will [be] a ban on corporate and other donations to political parties. This ban will extend to industrial organisations, peak industry groups and third-party interest groups. So the days of unions hitting their members for fees, which—when they are not being used for other things—are then passed on to support the Labor Party in election campaigns at State and Federal levels, are over.
>
> [...] We are determined to rid this State of the damaging and unwanted reputation that individuals and groups can gain undue influence and favourable treatment through their donations. If people want to buy a government decision they ought to go to some other part of Australia and look for a Labor government. We are also going to close the loophole whereby Labor's caps on political expenditure by political parties did not include spending by affiliated organisations.

> This loophole meant that 22 unions affiliated with the Australian Labor Party were treated like non-affiliated organisations and each was given the ability to spend $1.05 million, or a total of $23 million between them, to support the Labor Party. Under our new laws the electoral communications expenditure of a political party and its affiliated organisations will be limited to $100,000 for each seat it contests. No longer will we have a situation where a party reaches its spending cap only to have a union or a business come in with additional funding. Under our law, the cap will be the cap for all. These new changes will apply at both State and local council elections and we will continue to urge the Federal Government to follow suit so that we have tight, uniform political donation laws across the country. We promised to clean up the State's electoral funding laws, the political donation laws, and we are delivering.[28]

There seem to be three reasons here:

1. To restore public confidence in the state's electoral system. Well, nothing could be wrong with that. It is also in line with the previous government's amendments to the principal act that banned donations from property developers and from the liquor, tobacco and gaming industries.[29] Those were indeed responses to diminishing public confidence. However, this reason does not

---

28 *Legislative Assembly Hansard*, 12 September 2011. When introducing the Bill in the Legislative Council, proposer Mick Gallacher did not make a speech: *Legislative Council Hansard*, 12 October 2011; the Bill has yet to receive a second reading in the Legislative Council.

29 Election Funding, Expenditure and Disclosures Act 1981 (NSW) Division 4A.

connect specifically with any provision of the Bill but, rather, is ancillary to the other two reasons.

2. To exclude non-voters from influencing the electoral system through donations. So far as this applies to individuals who are not eligible to be on the electoral roll or to foreign organisations, it is surely a good reason.[30] However, it seems unlikely that anybody would mount a challenge to this aspect, given especially that such a challenge would probably look bad to voters.

3. The main reason, considering Premier O'Farrell's emphasis on it, is a "level playing field" argument. Premier O'Farrell openly and vigorously directs that argument against trade union funding of the ALP. The Bill if enacted would, and is intended to, cruel the income of the ALP in NSW. Because NSW is a major state, the effect would also be national. The ALP would therefore be likely to consider a challenge to the Bill if enacted (one cannot legally challenge a bill before it is enacted).

   A "level playing field" argument is of course good in itself. The question is then whether the Bill would actually achieve a levelling of the playing field. If it would not, then with regard to its donations provisions there might not be a good reason for a

---

30 Britain already has a provision of this kind: Political Parties, Elections and Referendums Act 2000 (UK), s 54 <http://www.legislation.gov.uk/ukpga/2000/41/contents> (accessed 8 January 2012). However, this act permits donations from corporations and trade unions.

burden upon the Freedom and then those provisions would be invalid.

Premier O'Farrell logically separates the second and third of these reasons, but they are not reflected separately in the Bill. The Bill would prohibit donations by anybody who is not on the electoral roll. That would simultaneously prohibit donations from individuals who are non-voters and from organisations. A weakness in the third reason would therefore affect all of the donations element of the Bill.

It is not a weakness in the third reason, simply that the ALP would be seriously affected (I will assume that Premier O'Farrell is correct in that). That could, as Premier O'Farrell asserts, just be a levelling of the playing field. Nor, I think, would there be a sufficient weakness if it just happened that the ALP would suffer more than the Liberal Party (the only comparable party in NSW). That might just be a consequence, unfortunate for the ALP, of the type of funding that it receives—or, perhaps, of a type of funding that it does not often receive, i.e. funding from wealthy individuals. That sort of consequence might be justified as a cost of the levelling, outweighed by the public benefits of the levelling.

There could, however, be a fatal weakness in the third reason if the cost to the ALP were to be disproportionate to the public benefits of the levelling. The cost to the ALP could be disproportionate if the result

were to cripple the ALP as an effective political force.[31] The disproportion would be greater if the impact upon the ALP were to be substantially more serious than the impact upon other parties and especially its main opponent, the Liberal Party. And in that case greater still, given that for the foreseeable future the relative advantage would be to the party in government and, through it, to the government of the day.

F. IMPLIED FREEDOM OF POLITICAL PARTICIPATION

It seems arguable that through some recent cases, separately from the Freedom although on the same bases, the High Court has developed what might be called a "freedom of political participation".

In *Roach v Electoral Commissioner* (2007),[32] an act amending the Commonwealth Electoral Act denied the vote in federal elections to all convicted prisoners—instead of, as previously, only to prisoners serving a sentence of three years or more.[33] Proceeding mainly from the words "directly chosen by the people" in Constitution sections 7 and 24, a 4:2 majority of the High Court found that those words indicate (Gleeson CJ

---

31 I have to say "could" rather than "would", because there is no doubt a range of views as to whether such a development would be deplorable. If it were argued that, for all the ALP's faults, democratic politics requires the availability not only of a party to form a government but also of a party to form an effective opposition, then it still would not follow that the ALP must be that party. I am not in a position to discuss the effect of the Bill upon minor parties or Independents.

32 *Vicki Lee Roach v Electoral Commissioner and Commonwealth* (2007) 233 CLR 162; Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006 (Cth).

33 Only prisoners serving a sentence; it did not apply to prisoners on remand.

thought that today they require) the provision of universal adult suffrage. Exceptions to universal suffrage can be made only with "substantial reason" (although there was disagreement among the majority as to whether the test should be that of proportionality). Accepting that being a serious offender could constitute such a reason, the majority observed that nevertheless there was an absence of rational connection between denying the vote to *all* convicted prisoners and any reason why they should be denied the vote. Somebody might be imprisoned in one area merely because there was a shortage of non-custodial facilities. Somebody might serve a short sentence (such as six months, and there have been proposals to abolish such short sentences) while with no evident difference someone else might get off with a fine. Or someone who is poor might be imprisoned for non-payment of a fine. And short custodial sentences in areas where non-custodial facilities are sparse are more likely to be served by Indigenous people. Accordingly, the relation between imprisonment and denial of the vote was merely "arbitrary". Therefore, there being no good reason to deny the vote to all convicted prisoners without exception, to that extent the legislation was invalid.[34]

In *Roach*, Gleeson CJ went so far as to hold that, understanding these words today, they provide a constitutional right to vote.[35] However, the other three members of the majority (Gummow, Kirby and Crennan JJ), denied this and decided the case in terms of the Freedom.[36]

---

34 The majority added, for the sake of public certainty, that the effect of the decision was to restore the Commonwealth Electoral Act in its previous form: Commonwealth Electoral Act 1918 (Cth) s 93(8AA).

35 *Roach* at 174 [7].

36 *Roach* at 199-200 [86].

Rowe v Electoral Commissioner (2010)[37] concerned the part of the same legislation that amended the Commonwealth Electoral Act 1918 with the effect of reducing the opportunity for people who were not on the electoral roll to remedy their situation once an election had been called, so as to be able to vote in that election. Again proceeding mainly from the words "directly chosen by the people" in Constitution sections 7 and 24, a 4:3 majority of the High Court found that the amendment was invalid. The stated reasons for the amendment had been that it would both combat the future possibility of electoral fraud and also emphasise that it was the voter's responsibility to enrol in a timely way. However, no current evidence of fraud was provided and the Australian Electoral Commission stated that it had been able to handle late enrolments satisfactorily. In that light, the majority found that the effect of depriving some people of the vote was disproportionate to these aims.

In similar spirit to Gleeson CJ in *Roach*, although in more limited language, in *Rowe* French CJ referred repeatedly to a constitutional "mandate" of a democratic electoral system. The other members of the majority (Gummow, Bell and Crennan JJ) neither adopted that language nor spoke of rights; nor, however, did they (at least clearly) rely upon the freedom of political communication.

It is significant that the High Court treated as irrelevant, by not mentioning, the evident possibility (in my view) that both amendments were designed to exclude from the vote people—the Indigenous, the poor and the young—who were more likely to vote left than to vote right. Such a motive may be a

37 *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

reason for the legislation, and the legislation will not be invalid because of it, but it will not count among reasons that can be legally considered.

The majority in *Rowe* might be said to have established an implied *freedom of political participation*, found in the same places and in the same way (by attention to "text and structure") as the implied freedom of political communication yet independent of it.

Such appears to be the direction of the law, so far as it has a direction. That said, there are major difficulties with the decisions in *Roach* and *Rowe*, and particularly with the judgments of Chief Justices Gleeson and French. As some of the dissenters pointed out, it is risky and arguably illegitimate to re-interpret the Constitution in a supposed light of the electorate's "common understanding" of its task[38] or in the light of current statutes.[39] There is also a gap between the Constitution's provision *that there be* choice "by the people", even if interpreted as a "mandate" for the Commonwealth Parliament[40] (and, presumably, the state parliaments for themselves) to establish means of choice, and providing means by which an individual or an organisation is to *participate in* that choice. The Constitution says that there has to be choice and what positions are to be filled, but it does not say how that choice is to be made. History is a weak guide, given the denial of the vote originally to most

---

38 *Rowe* at 18 [18]-[19] (French CJ).

39 In Australia a parliament cannot legislate to change a constitution; but arguably a constitution may be interpreted in the light of a consistent body of legislation (such as anti-discrimination laws), taken to reflect common understandings among the people.

40 Constitution ss 9 and 29-31.

women and until 1962 to Aborigines.[41] More specifically to the point in hand: one cannot rely upon some "common understanding" where, currently, there is extensive disagreement among elected representatives.

Roach and *Rowe*, however, are the current law. They were about political participation by individuals as voters. But, at least in federal and state elections, most candidates—and almost all of those who have any serious hope of being elected—are put forward by political parties. Political parties, moreover, are the principal political apparatuses of both government and opposition. Constitution sections 7, 24 and 64 (if not also s 128) therefore may be said to be bases for a freedom of political participation by "the people" not only as individual voters but also through and in relation to political parties.

In that light, it may be argued that the Bill if enacted:

- would burden a freedom of political participation with regard to political parties, by tending to reduce the incomes of all political parties;
- would do so disproportionately through its exceptional impact upon the income of the ALP in NSW (and possibly other parties); and therefore
- would be invalid at least as to its provisions regarding political donations.

G. IMPLIED FREEDOM OF POLITICAL ASSOCIATION

Another possible path, which would relate specifically to political parties and other political organisations, would be for the High Court to recognise an implied freedom of political association. While a general freedom of

41 Even now, Constitution s 25 permits a state to deny the vote, in both state and federal elections, on the ground of the person's "race".

association has had occasional judicial support, a freedom only of *political* association could more readily be based in the "text and structure" of the Constitution—that is, again, centrally in the words "chosen by the people".

H. CONSTITUTION SECTION 109 OVERRIDE

The constitutional risks of the Bill are not confined to the possibility of a challenge in the High Court. If the Bill were to be enacted, one can anticipate that the federal government (if still Labor) would quickly legislate to override it using Constitution section 109.

Section 109 provides that, if a state law that would otherwise be valid is "inconsistent" with a Commonwealth law, the state law is invalid to the extent of the inconsistency.[42] The inconsistency does not have to arise accidentally—the Commonwealth can "manufacture" it by passing a law with which the state law will be inconsistent.[43] In the present case this would not require a wholly new act; it could and probably would be done by legislating to amend the Commonwealth Electoral Act 1918.

The Opposition, of course, would be likely to accuse Labor of selfishly protecting its own coffers, and of course Labor would be likely to reply that it would not have to protect its coffers if they had not been so selfishly attacked. Yet Labor could take higher ground than that. It could include the measure in

---

42 By a strange doctrine that the High Court adopted back in the days when it was more solicitous of states' interests, a law that is invalid for inconsistency is not simply void as would normally be the case. It is deemed to be merely "inoperative", able to rise from its grave if the federal legislation is changed (i.e. amended or repealed) so as to remove the inconsistency.

43 Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (Leichhardt, Federation Press, 5th edn 2010), ch 8. The concept of "inconsistency" is not simple; it is not just logical contradiction but in various ways has a practical element.

a bill to amend the Commonwealth Electoral Act with a raft of reforms that across the political spectrum have been seen as overdue.[44] It would also be an opportunity for Labor to introduce changes that would work to its own benefit.

The NSW government might respond that such legislation would unduly interfere with the capacity of NSW to operate as a state. However, while such an argument remains available,[45] the High Court has been increasingly reluctant to accept it.[46] It seems unlikely to succeed after the High Court has already settled on the view that there is a single Australian political system.

I. COMMENCEMENT BY PROCLAMATION OR UPON ASSENT

The Digest raises a separate point, which could be resolved with a simple amendment of the Bill. The principal act was to commence, as to its preliminary part, upon receiving the assent; the other parts were to follow on such days "as may be appointed by the Governor" and then notified by proclamation published in the Gazette.[47] This procedure was followed.[48]

The Bill, in contrast, is to commence solely upon proclamation (clause 2). The Digest notes that there may be an issue here as to whether this is an

---

44 See further Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* (Leichhardt, Federation P., 2010), ch 11 "Political Money".

45 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

46 Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (Leichhardt, Federation Press, 5th edn 2010), pp 1104-1132.

47 Election Funding, Expenditure and Disclosures Act 1981 (NSW) s 2.

48 The act was assented to on 2 June 1981, when the preliminary part commenced. Other parts were commenced by proclamation in the Gazette during July and August 1981.

inappropriate delegation of legislative power.[49] It is content only to note this, although the form in which it does so, and the fact that it also does so with regard to other bills, appears to indicate an ongoing concern at this practice.

The Constitution of NSW provides:

> **8A Assent to Bills**
>
> (1) Except as otherwise provided by this Act, every Bill:
>
> (a) shall be presented to the Governor for Her Majesty's assent after its passage through the Legislative Council and the Legislative Assembly, and
>
> (b) shall become an Act of the Legislature when it is assented to by the Governor in the name and on behalf of Her Majesty.
>
> (2) Nothing in subsection (1) (b) precludes Her Majesty from assenting to a Bill while Her Majesty is personally present in the State.[50]

The words "except as otherwise provided" refer only to subsection (2) and to cases of disagreement between the houses of the Parliament, when agreement of the Legislative Council may be dispensed with (sections 5A and 5B). The rest of section 8A is clear: every bill shall be presented to the Governor for the assent and shall become law upon receiving the assent.

The present Bill would be presented for the assent and, upon receiving the assent, would become law. It would then be up to ministers, no doubt in this case the Premier, to advise the Governor when to proclaim its commencement. That advice could be delayed for as long as the government may wish and perhaps never given at all. Yet—unless the government stated

---

49 Legislation Review Act 1987 (NSW) s 8A(1)(b)(iv).

50 Constitution Act 1902 (NSW) s 8A.

its intentions, which it need not do—from the moment when the Bill has left the Parliament[51] all other political parties would be seriously hampered in planning their income, therefore their expenditure and therefore their activities. The party in government, in contrast, would be able to plan all of these in full knowledge of when, if ever, the new law would commence.

Ministerial advice to the Governor is not ordinarily justiciable and probably never. There is a judicial tendency to whittle down the sphere of the non-justiciable.[52] But I think that a court will be reluctant to look at ministerial advice on a legislative process and would prefer to leave the matter to the parliament.

I do not suggest that Premier O'Farrell intends to abuse the power regarding proclamation. It is also judicially settled that the possibility that a power may be abused is not a reason to question the validity of the power, since any power at all could be abused. But the possibility of abuse of this power is evident and the consequences for democracy could be serious. Accordingly, I would recommend that the provision be amended so that the whole Bill would commence upon receiving the assent.[53]

---

51 That is, has been passed by both houses or has been subject to the disagreement procedure in Constitution Act 1902 (NSW) s 5A, dispensing with agreement of the Legislative Council.

52 For example, making administrative appointments in the name of the Governor-General, the Governor or the territory Administrator will not provide such protection.

53 An amended text of the principal act could be readied as soon as the bill had left the Parliament. Delay in publication should not be a problem—NSW has a very good legislation database: <http://www.legislation.nsw.gov.au>.