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**PROHIBITING CORPORATE FELON POLITICAL SPENDING: IS IT  
POSSIBLE?**

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## Abstract

This working paper examines the different legal impediments faced in introducing laws in Australia that would prohibit a corporation that has pled guilty to, or been convicted of, a felony from making any expenditure, directly or indirectly, in any political campaign for federal office.

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## Introduction

In Australia, convicted human felons are prohibited from voting in elections.<sup>1</sup> Yet corporations, when convicted of a criminal offence, do not experience any similar form of political disenfranchisement.

One proposal to try and remedy this imbalance has been to prohibit corporations that have pled guilty to, or been convicted of, a felony from making any expenditure, directly or indirectly, in any political campaign for federal office.<sup>2</sup> Since corporations cannot vote in elections, their ability to contribute to the political process is through donations and other expenditure.<sup>3</sup> There is a widely held view that corporations are driven by profit-maximisation when they make donations,<sup>4</sup> and that these corporations expect to receive a “favourable treatment” from their political beneficiaries.<sup>5</sup> Similarly to how humans can use their vote to incentivise particular outcomes from politicians, corporations can use donations to shape the political landscape. It follows from this analogy that the corporate equivalent punishment of a human been stripped of their vote would be for a corporation to be banned from political spending.

However, it is unclear whether such a law would be viable. This working paper will explore the legal impediments faced by introducing such a law in Australia, and to determine if such a law would be viable under current Australian law.

## The current legal regime

Before addressing the substantive issue, it is important to understand the campaign finance legal regime in Australia, and the role of corporations within them.

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<sup>1</sup> See *Commonwealth Electoral Act 1918* (Cth), s 93(8AA).

<sup>2</sup> See, eg, Keith Ellison, ‘Rep. Ellison Introduces Protect Democracy from Criminal Corporations Act’ (Press Release, 21 January 2015) <<http://ellison.house.gov/media-center/press-releases/rep-ellison-introduces-protect-democracy-from-criminal-corporations-act>>. There has also been numerous proposals to ban corporate political donations outright: see, eg, Joint Select Committee on Electoral Matters, Parliament of Australia, *The 2013 Federal Election: Report on the conduct of the 2013 election and matters related thereto* (2015) 165.

<sup>3</sup> See Domenico Cucinotta, ‘The cost of political donation reform: a burden on the implied freedom of political communication – Unions NSW and others v State of New South Wales’ (2013) 25(1) *Bond Law Review* 70, 92.

<sup>4</sup> Ian Ramsay, Geoff Stapleton & Joel Vernon, ‘Political Donations by Australian Companies’ (2001) 20(2) *Federal Law Review* 177, 190.

<sup>5</sup> Justin Fisher, ‘Why Do Companies Make Donations to Political Parties?’ (1994) 42 *Political Studies* 690, cited in Ramsay, Stapleton & Vernon, ‘Political Donations by Australian Companies’ (2001) 20(2) *Federal Law Review* 177, 179.

In contrast to other jurisdictions, the campaign finance federal legal regime in Australia is “very limited in its scope.”<sup>6</sup> There is no single legislative provision in Australia governing corporate political donations,<sup>7</sup> and at present there are virtually no restrictions on how much a corporation can donate to political campaigns.<sup>8</sup> Similarly, there is no restriction on campaign expenditure by corporations.<sup>9</sup>

There are only two “pillars” to the current Australian regime: disclosure and public funding.<sup>10</sup> The public funding component relates to financing of political parties with government funds, and it is irrelevant to this working paper. Disclosure focuses primarily on political candidates and parties, and requires them to disclose donations after they reach a certain threshold.<sup>11</sup> There are also disclosure requirements on donors (including corporations) to make annual disclosure of their political donations if they exceed the threshold,<sup>12</sup> and disclosure of political donations received by any third-party organisation (including corporations) that makes political expenditure of more than \$10,000 in a given year.<sup>13</sup> Whether these disclosure requirements are actually complied with are unclear, as there have been few instances in the past decade where people or organisations have been prosecuted for breach of the disclosure requirements.<sup>14</sup> Even if the disclosure requirements were complied with, they are recognised as a relatively weak form of accountability for corporations and political campaigns.<sup>15</sup>

## The proposal

In order to judge the legal viability of a law to prohibit political spending by corporate felons, there must be some form of legislative proposal that can be judged against the existing legal landscape in Australia. A hypothetical legislative proposal shall be used for the purposes of this working paper, and shall be henceforth referred to as

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<sup>6</sup> K D Ewing, ‘The Legal Regulation of Electoral Campaign Financing in Australia: A Preliminary Study’ (1992) 22 *Western Australian Law Review* 239, 254.

<sup>7</sup> Ian Ramsay, Geoff Stapleton & Joel Vernon, ‘Political Donations by Australian Companies’ (2001) 20(2) *Federal Law Review* 177, 182. The *Corporations Act 2001* (Cth) also does not contain any disclosure rules specifically aimed at political donations.

<sup>8</sup> Anthony Gray and Nicky Jones, ‘To Give and to Receive: The Australian Government’s Proposed Electoral Finance Reforms’ (2009) 28(2) *The University of Tasmania Law Review* 182, 183. See also Graeme Orr, ‘The Currency of Democracy: Campaign Finance Law in Australia’ (2003) 26(1) *UNSW Law Review* 1, 14.

<sup>9</sup> There is also currently no federal restriction on campaign expenditure by political candidates and parties. However, there was previously an expenditure cap on election candidates from 1901 to 1980 federally: Anthony Gray and Nicky Jones, ‘To Give and to Receive: The Australian Government’s Proposed Electoral Finance Reforms’ (2009) 28(2) *The University of Tasmania Law Review* 182, 193. This will be discussed in further detail later in the working paper.

<sup>10</sup> Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* (The Federation Press, 2010) 239.

<sup>11</sup> The federal system requires annual disclosure of receipts, payments and indebtedness by registered political parties when the individual receipts are over \$11,200: see *Commonwealth Electoral Act 1918* (Cth), s 314AB.

<sup>12</sup> Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* (The Federation Press, 2010) 243.

<sup>13</sup> *Commonwealth Electoral Act 1918* (Cth), s 314AEB.

<sup>14</sup> Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* (The Federation Press, 2010) 245-6.

<sup>15</sup> Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* (The Federation Press, 2010) 239.

‘Proposal X’. The ‘Protect Democracy from Criminal Corporations Act’,<sup>16</sup> introduced early last year in the U.S. House of Representatives, provides a good template for Proposal X. Like that Bill, Proposal X will be designed to completely ban political donations and independent expenditure by corporate felons. Possible alternatives – such as limiting donations and expenditures at some non-zero amount – may enable the proposal to better overcome challenges to its validity, but it would complicate the overall symbolic impact of the law. Nonetheless, for the sake of comprehensiveness, instances where such an alternative would have an effect on Proposal X’s legality will be discussed when they arise.

Proposal X will address both political donations and independent expenditure on political matters. Political donations are where a donation is made to a candidate or political party for them to spend on their campaign. Independent expenditure on political matters is any expenditure that expressly advocates for the election or defeat of a clearly identified candidate and is not coordinated with any candidate or political party. For Proposal X to be practically viable, it must address both of these matters. Imposing one without the other would make any law toothless. This is demonstrated by how in the United States of America (U.S.) direct donations from corporations to political campaigns have been banned, yet this has not thwarted the influence corporations have had over the political process.<sup>17</sup> This is what some refer to as the “problem of the ‘hydraulics of campaign finance’ – money is fluid and tends to find its own level.”<sup>18</sup> The only means by which the ‘water’ can be stopped is to block every ‘crack’ and ‘crevasse’ – ban both donations and independent expenditure.

Proposal X will take the form of a proposed federal law, therefore the subsequent legal issues they may arise will relate to it being a federal law. The reason for this is twofold. Firstly, it would be an overly complex and time-consuming exercise to examine the legal impediments faced by the proposal in all of the different jurisdictions in Australia. Secondly, federal law in Australia has a pivotal impact on the development of campaign finance law,<sup>19</sup> therefore the federal law is the best place for a proposal like this to be put forward.

To summarise, Proposal X will:

- Prohibit a corporation that has pled guilty to, or been convicted of, a felony from making any expenditure, directly or indirectly, in any political campaign for federal office;
- Address both political donations and independent political expenditure by corporate felons; and
- Be a federal law.

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<sup>16</sup> Protect Democracy from Criminal Corporations Act, HR 450, 114<sup>th</sup> Congress (2015).

<sup>17</sup> Corporate political spending has increased in every U.S. federal cycle since 1996, and tripled from 2008 to 2012: Douglas M Spencer & Abby K Wood, ‘*Citizens United*, States Divided: An Empirical Analysis of Independent Political Spending’ 89 *Indiana Law Journal* 315, 316.

<sup>18</sup> Graeme Orr, ‘The Currency of Democracy: Campaign Finance Law in Australia’ (2003) 26(1) *UNSW Law Review* 1, 24.

<sup>19</sup> In Australia, federal regulation provides the central platform for debates over campaign finance: Graeme Orr, ‘The Currency of Democracy: Campaign Finance Law in Australia’ (2003) 26(1) *UNSW Law Review* 1, 4.

Since this working paper will focus on the legal issues arising from the broader concepts of this legislative proposal, it is unnecessary to outline the precise wording of provisions within Proposal X.

### **Constitutional issues**

The major legal issues posed by implementing Proposal X in Australia emanate from the *Commonwealth Constitution*, and in particular, the implied freedom of political communication.<sup>20</sup> There are two parts of Proposal X that could be argued to contravene the implied freedom of political communication. They are as follows:

- Attempting to ban corporate felons from making political donations; and
- Attempting to ban those felons from making independent political expenditure.

This working paper will address each part in turn.

### **Banning donations and the implied freedom of political communication**

Unlike other countries, Australia currently has no federal limit or ban on direct donations between corporations and political campaigns or parties.<sup>21</sup> Although imposing donation caps in Australia would be constitutionally “unexceptionable” for the same reasons as they are permissible in other countries like the U.S.,<sup>22</sup> a ban on *all* donations may be constitutionally “suspect” as prohibiting smaller donations could be said to infringe the freedom of political association (which is an element of the freedom of political communication).<sup>23</sup> Therefore, it is necessary to outline how one could overcome a challenge to the validity of a ban on political donations by criminal corporations on the basis that it infringes the freedom of political communication.

From the outset, it is necessary to state that Australia does not have an explicit right to free political speech, as is the case in other Western countries. Instead, Australia has a limited implied freedom of political communication necessary to support representative democracy.<sup>24</sup> This affects how the legal question is framed. The High Court in *Lange v Australian Broadcasting Corporation* set down a two-limb test to be used when determining whether a law is invalid because it impermissibly burdens the implied freedom of political communication.<sup>25</sup> The test (known as the ‘*Lange* test’) was slightly reformulated in *Coleman v Power*,<sup>26</sup> and was most recently restated in

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<sup>20</sup> The constitutional freedom of political communication does not take the form of a provision in the *Commonwealth Constitution*, but has rather been interpreted by the High Court in a series of cases, starting with *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, to be an implied freedom emanating from the structure and provisions of the *Commonwealth Constitution*.

<sup>21</sup> However, there are donations limits or bans in several state jurisdictions. See, eg, *Electoral Act 1992* (Qld) ss 250-266.

<sup>22</sup> Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* (The Federation Press, 2010) 246.

<sup>23</sup> Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* (The Federation Press, 2010) 243. See also K D Ewing, ‘The Legal Regulation of Electoral Campaign Financing in Australia: A Preliminary Study’ (1992) 22 *Western Australian Law Review* 239, 241.

<sup>24</sup> Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* (The Federation Press, 2010) 243.

<sup>25</sup> (1997) 192 CLR 520.

<sup>26</sup> (2004) 209 ALR 182.

*Monis v R.*<sup>27</sup> The now settled questions to be asked when a law is said to have infringed the implied limitation are:

1. Does the law effectively burden freedom of communication about government or political matters in its terms, operation or effect?
2. If the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s128 of the Constitution for submitting a proposed amendment to the Constitution to the informed decision of the people?<sup>28</sup>

If the second question is answered negatively, then the law will be invalid because it impermissibly burdens the implied freedom of political communication.

In regards to whether banning political donations from criminal corporations burdens the freedom of communication (thereby satisfying the first limb of the *Lange* test), one looks to *Unions NSW v NSW*,<sup>29</sup> a recent High Court decision and the first case in Australia dealing with the validity of political donation legislation.<sup>30</sup> The case concerned whether a NSW law that blanket banned corporations from making political donations impermissibly burdened the implied freedom of political communication. The majority did not find it necessary to consider whether the act of political donation is a form of communication;<sup>31</sup> instead, they determined that the law effectively burdened the freedom by limiting the funds that would be available to a political party to make political communication.<sup>32</sup> The same inference can be drawn in regards to a proposed ban on donations by corporate felons. Even though the extent of a corporate felon donation ban would have less of an impact on the funding available to political parties for political communication than a blanket corporate donation ban, the extent of the burden is not a matter of inquiry for the first limb of the *Lange* test.<sup>33</sup> The Court only needs to find that there is a burden on the freedom,<sup>34</sup> which is the case here. Therefore, it is conceded that a ban on corporate felon donations would satisfy the first limb of the *Lange* test.

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<sup>27</sup> (2013) 249 CLR 92.

<sup>28</sup> *Monis v R* (2013) 249 CLR 92, [61].

<sup>29</sup> (2013) HCA 58.

<sup>30</sup> Domenico Cucinotta, 'The cost of political donation reform: a burden on the implied freedom of political communication – Unions NSW and others v State of New South Wales' (2013) 25(1) *Bond Law Review* 70, 72.

<sup>31</sup> Keane J was the only justice of the Court to consider whether the act of a donation could be considered to be political communication under Australian law. He held that the fundamental difference between the nature of the rights arising under the First Amendment and the implied freedom demonstrates how an entirely different analysis is needed and how, in his view, the question of whether a donation is communication is unnecessary to determine the validity of the law being challenged: Domenico Cucinotta, 'Case Note: The fight for the right to make donations to political parties: Unions NSW V NSW (2013) HCA 58' (2013) 25(2) *Bond Law Review* 209, 219

<sup>32</sup> Domenico Cucinotta, 'Case Note: The fight for the right to make donations to political parties: Unions NSW V NSW (2013) HCA 58' (2013) 25(2) *Bond Law Review* 209, 216-7.

<sup>33</sup> Domenico Cucinotta, 'Case Note: The fight for the right to make donations to political parties: Unions NSW V NSW (2013) HCA 58' (2013) 25(2) *Bond Law Review* 209, 217.

<sup>34</sup> Domenico Cucinotta, 'Case Note: The fight for the right to make donations to political parties: Unions NSW V NSW (2013) HCA 58' (2013) 25(2) *Bond Law Review* 209, 217.

There are two components to the second limb of the *Lange* test: whether the law serves a legitimate end, and whether the law is reasonably appropriate and adapted to achieve that legitimate end. The legitimate end being pursued by Proposal X in Australia is to lessen the risk of corruption or undue influence in the political process by criminal actors. A similar end has been identified by the High Court as a legitimate end,<sup>35</sup> including in an instance where the law in question related to political donations.<sup>36</sup> Based on this precedent, the proposal to ban corporate felon political donations would be considered a ‘legitimate end’. The real controversy concerns whether the proposed ban is reasonably appropriate and adapted to achieving this legitimate end.

The proposed ban on corporate felon donations is a more selective ban than the blanket ban that was invalidated in *Unions NSW v NSW*. Since a selective ban is more narrowly tailored than a blanket ban, it is easier to establish that a selective ban is more reasonably proportionate to a legitimate policy end.<sup>37</sup> Furthermore, there are a number of selective donation bans in Australian state jurisdictions that have not been invalidated by the courts, most notably a 2009 NSW law that made it illegal for a property developer (or anyone on their behalf) to make any donations or loan to a New South Wales registered party or candidate.<sup>38</sup> In *Unions NSW v NSW*, the Court compared this selective ban to the blanket ban being challenged, and accepted the selective ban was “directed toward an identified source of influence and corruption and, without explicitly saying so, hinted that this kind of tailored response would likely be valid.”<sup>39</sup> If anything, the proposed ban in Proposal X is even more narrowly tailored than the 2009 NSW law; the NSW law banned a whole industry from making donations on the basis that the industry was more predisposed towards corrupting the political process, whilst the proposed ban in Proposal X only bans donations from corporations that have pled guilty to, or been convicted of, a felony. If a ban broader than that being proposed has been held to be reasonably adapted and appropriate to achieve the legitimate end, it is fair to assume that the proposed ban in Proposal X would similarly satisfy this limb of the *Lange* test.

However, the matter is not as straightforward as it would seem. In *Unions NSW v NSW*, the Court held that the challenged ban was not reasonably adapted and appropriate to achieving the legitimate end because there was an “absence of evidence purpose” in the blanket ban.<sup>40</sup> The lack of an identified source of corruption or threat

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<sup>35</sup> See, eg, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106

<sup>36</sup> See *Unions NSW v NSW* [2013] HCA 58, [49].

<sup>37</sup> Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* (The Federation Press, 2010) 247.

<sup>38</sup> *Election Funding and Disclosures Amendment (Property Developers Prohibition) Act 2009* (NSW). A challenge to the validity of the 2009 NSW law was recently dismissed by the High Court: see *McCloy v New South Wales* [2015] HCA 34.

<sup>39</sup> Domenico Cucinotta, ‘Case Note: The fight for the right to make donations to political parties: *Unions NSW v NSW* (2013) HCA 58’ (2013) 25(2) *Bond Law Review* 209, 217. However, the Joint Select Committee on Electoral Matters commented in its recent report on the 2013 federal election that the constitutionality of “restrictions on donations from classes of donor is still an uncertain element in Australia and should be carefully considered before any action is taken”: Joint Select Committee on Electoral Matters, Parliament of Australia, *The 2013 Federal Election: Report on the conduct of the 2013 election and matters related thereto* (2015) 146 [6.58].

<sup>40</sup> *Unions NSW v NSW* (2013) HCA 58, [52].

to the integrity of the NSW Parliament was decisive in the court's decision.<sup>41</sup> Merely proclaiming, as the Minister did in his Second Reading speech for the ban challenged in *Unions NSW v NSW*, that the "measures in this bill are designed to rid this State of both the risk and the perception of corruption and undue influence" is not enough.<sup>42</sup> By contrast, the 2009 NSW property developer ban was developed in response to the well-reported history of property developer influence linked to political donations in New South Wales.<sup>43</sup> It would appear that the courts are only willing to uphold a selective ban like the 2009 NSW law if it can be demonstrated that it addresses an identifiable (and not hypothetical) corruption problem. Unfortunately, there is not the same level of reported corruption arising from corporate felons, as there was from NSW property developers in the late 2000s.

However, the proposed corporate felon ban differs from the 2009 law in an important way: the proposed ban only applies to corporations that pled guilty to, or been convicted of, a felony. The 2009 law applied to a whole industry on the basis that there had been corruption by members of that industry; it is likely that there were some innocent property developers who had no intention of abusing the political donation process who now are stripped of their ability to make such donations by the 2009 law. It could be suggested that the courts previously required compelling evidence to uphold selective bans on whole industries because they did not want to exclude innocent members of those industries from representative democracy unless there was a compelling reason to do so. This would be in keeping with the reasoning in *Unions NSW v NSW*. Unlike the 2009 law, the proposed ban in Proposal X would not disenfranchise innocent parties; only corporations that had pled guilty to, or been convicted of, a felony. There is no innocent party here; corporations would be aware that if they committed a felony, they would lose their ability to make political donations. Therefore, there is a strong argument that the felony requirement is a valid substitute for the compelling evidence the courts previously required in selective ban cases.

Drawing an analogy with human felons further strengthens this argument. Under Australian federal law, human felons serving a sentence of three or more years are prohibited from voting,<sup>44</sup> and this law has survived High Court challenge in *Roach v Electoral Commissioner*.<sup>45</sup> In that case, the Court adopted a similar legal analysis to uphold the pre-existing three-year voting ban on human felons to that involved in the second limb of the *Lange* test: that the prohibition was capable of achieving a

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<sup>41</sup> Domenico Cucinotta, 'Case Note: The fight for the right to make donations to political parties: *Unions NSW v NSW* (2013) HCA 58' (2013) 25(2) *Bond Law Review* 209, 220.

<sup>42</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 15 February 2012 (Michael Gallacher, Minister for Police and Emergency Services, Minister for the Hunter, and Vice- President of the Executive Council), cited in Domenico Cucinotta, 'The cost of political donation reform: a burden on the implied freedom of political communication – *Unions NSW and others v State of New South Wales*' (2013) 25(1) *Bond Law Review* 70, 70-71.

<sup>43</sup> See, eg, John Hatton, Planning in NSW is out of control (2 November 2009) Sydney Morning Herald (online) <<http://www.theage.com.au/opinion/politics/planning-in-nsw-is-out-of-control-20091102-hrt0.html>>.

<sup>44</sup> *Commonwealth Electoral Act 1918* (Cth), s 93(8AA).

<sup>45</sup> (2007) 233 CLR 162. However, in this case, the High Court invalidated a federal blanket ban on prisoner voting that had been introduced in 2006.

legitimate end and was proportionate to that aim.<sup>46</sup> Therefore, if one were to transfer the same reasoning to the proposed ban on corporate felons, it would be difficult to argue that the proposed ban was not reasonably adapted and appropriate to achieve its legitimate end. It is equally difficult to argue that prohibiting a small number of corporations (those who had pled guilty or who been convicted of a felony) from making political donations would seriously undermine the system of representative and responsible government; if anything the two complement each other as the prohibition helps ensure that representative democracy is not corrupted.

Another factor worth raising is the implementation of the proposed corporate felon political donation ban in the context of Australian corporations law. Most of the penalties under Australian corporations law are civil penalty provisions, as reformers thought that corporations who contravene the *Corporations Act 2001* (Cth) “should not be branded as criminals unless they act dishonestly.”<sup>47</sup> Subsequently, most criminal penalties for corporations require dishonest conduct. The only penalty for corporations for offending these provisions is a pecuniary fine, which is the same as a penalty under a civil provision.<sup>48</sup> Therefore, having another criminal penalty, such as prohibition on political donations, would strengthen such criminal provisions by indicating that there is a further punishment involved in a criminal corporate offence other than the stigma associated with being convicted of a criminal, rather than civil, offence. Although by no means decisive, this is a matter of public policy that a court could consider that favours upholding this component of Proposal X.

Although it is unclear how the High Court would respond to a corporate felon political donation ban,<sup>49</sup> the aforementioned arguments provide a solid basis for overcoming any challenge to the proposed law. In previous political communication cases, the Court has demonstrated “apparent deference to the legislature”,<sup>50</sup> and little interest in micro-managing electoral law.<sup>51</sup> This would further strengthen the chances of the proposed ban surviving a constitutional challenge. Therefore, it is likely, that if framed correctly, a ban on corporate felons from making political donations would be upheld.

### **Banning independent political expenditure and the implied freedom of political expenditure**

Unlike political donations, there is no federal case law in Australia on independent political expenditure by third parties. Therefore, it is “difficult” to predict how the

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<sup>46</sup> Lisa Hill and Cornella Koch, ‘The Voting Rights of Incarcerated Australian Citizens’ (2011) 46(2) *Australian Journal of Political Science* 213, 214-5. See also Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* (The Federation Press, 2010) 50.

<sup>47</sup> Robert P Austin and Ian M Ramsay, *Ford, Austin and Ramsay’s Principles of Corporations Law* (LexisNexis Butterworths, 16<sup>th</sup> ed, 2013) 99.

<sup>48</sup> Ralph Simmonds, ‘The Enforcement of Corporations Law and Securities Regulation in Australia: A Framework for Analysis and Reform’ (1995) 25 *Western Australian Law Review* 49, 58.

<sup>49</sup> K D Ewing, ‘The Legal Regulation of Electoral Campaign Financing in Australia: A Preliminary Study’ (1992) 22 *Western Australian Law Review* 239, 255.

<sup>50</sup> Leanne Griffiths, ‘The Implied Freedom of Political Communication: The State of the Law Post *Coleman and Mulholland*’ (2005) 12 *James Cook University Law Review* 93, 108, citing *Mulholland v Australian Electoral Commission* (2004) 209 ALR 582 (Heydon J).

<sup>51</sup> Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* (The Federation Press, 2010) 258.

courts would approach a ban on independent political expenditure by corporate felons.<sup>52</sup> However, unlike political donations, there is a history of constraints on expenditure by political participants in Australia, as well as currently existing constraints on participants at a state level.

Although today there is no federal limit on how much can be spent on politics,<sup>53</sup> from 1902 to 1980 the federal electoral regulation system included expenditure limits on political participants.<sup>54</sup> However, these limits were mostly unworkable, as they were designed to apply to candidates rather than political parties, and were only increased once to account for inflation. Although the limits focused on political candidates, third parties were also required to furnish returns if they spent any funds or incurred any expense for a political participant.<sup>55</sup> Following a series of cases in Tasmania where the State's Supreme Court took breaches of the expenditure cap seriously,<sup>56</sup> the expenditure limits were repealed at a federal level. However, they continue to exist at varying degrees at a state level.<sup>57</sup>

The question then posed is whether re-introducing a form of expenditure limit that is subject to a narrower group (corporate felons) but stronger in its constraint (raising the limit to an outright ban) would infringe the implied freedom of political communication. It would be argued by opponents of the proposed ban that it contravenes the implied freedom "not because of any restrictions on the content of speech, but because [the] restraints will tend to constrain the quantity and diversity of political speech."<sup>58</sup> Again, it is necessary to ascertain whether the proposed ban would satisfy the *Lange* test.

For the same reasons outlined when examining banning donations, the proposed ban on independent expenditure would satisfy the first limb of the *Lange* test. Similarly, the legitimate end for a proposed expenditure ban is the same as it was for a proposed donation ban – anticorruption - therefore the analysis earlier is equally applicable here. Again, the controversy concerns whether the ban is reasonably appropriate and adapted to serve its legitimate end. It would be appropriate to draw on the arguments outlined earlier in this working paper on this issue. However, there are four further arguments that can be made in regards to an expenditure ban that would strengthen the case for the proposed ban being upheld.

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<sup>52</sup> Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* (The Federation Press, 2010) 257.

<sup>53</sup> Anthony Gray and Nicky Jones, 'To Give and to Receive: The Australian Government's Proposed Electoral Finance Reforms' (2009) 28(2) *The University of Tasmania Law Review* 182, 193.

<sup>54</sup> Deborah Z Cass and Sonia Burrows, 'Commonwealth Regulation of Campaign Finance – Public Funding, Disclosure and Expenditure Limits' (2000) 22(4) *Sydney Law Review* 447, 484.

<sup>55</sup> Deborah Z Cass and Sonia Burrows, 'Commonwealth Regulation of Campaign Finance – Public Funding, Disclosure and Expenditure Limits' (2000) 22(4) *Sydney Law Review* 447, 485.

<sup>56</sup> See, eg, *Re Electoral Act* [1979] Tas R 282; *Attorney-General v Liberal Party of Australia, Tasmanian Division* [1982] Tas R 60.

<sup>57</sup> In New South Wales and ACT, there is an expenditure cap on both political parties and third parties (such as corporations and unions). Tasmania also has an expenditure cap on political candidates, but in relation to its highly localised Legislative Council elections, which suit the candidate-centric focus of the original expenditure limitation model.

<sup>58</sup> K D Ewing, 'The Legal Regulation of Electoral Campaign Financing in Australia: A Preliminary Study' (1992) 22 *Western Australian Law Review* 239, 241.

Firstly, from 1902 to 1980, there existed a political expenditure limit in Australia. Yet, over this period, it was not legally challenged. This suggests “either a degree of myopia of the legal fraternity, or the constitutional validity of [the] provision.”<sup>59</sup> Furthermore, the limitation was introduced almost contemporaneously with the Commonwealth Constitution, which would suggest “that if there was any conflict between the two instruments the legislators at the time, and indeed the legal fraternity at large, did not recognise it.”<sup>60</sup> Although the historical argument is worth noting, it is by no means decisive as the proposed reintroduction of an expenditure limit in the form of a ban on independent expenditure by a corporate felon differs substantially from the form unchallenged for the first eighty years of the Commonwealth.

Secondly, there are currently political expenditure limits on third parties (such as corporations) in New South Wales,<sup>61</sup> and the ACT.<sup>62</sup> These limits were introduced in 2011 and 2012 respectively, and over that period they have not been subject to a successful legal challenge (by contrast, other campaign finance laws introduced at the same time have since been invalidated by the courts).<sup>63</sup> The fact that these laws have not been invalidated again could suggest that they are constitutionally permissible. The NSW and ACT laws are even more relevant to arguing for the permissibility of a ban than the previous federal expenditure limits for two reasons: firstly, they are current (not past) laws, and secondly, they apply to third parties like corporations whilst the previous federal expenditure limits only applied to candidates. However, the comparative argument again only works to a limited extent, because the NSW and ACT laws differ from what it is on offer in Proposal X.

Thirdly, it has been implicitly accepted by members of the High Court that expenditure limits (and by extension, expenditure bans) are not, on their face, constitutionally impermissible. For example, in *Australian Capital Television v Commonwealth*, Justice McHugh suggested that spending limits might have been a more proportionate response than the regulation of election advertising that was invalidated in that case.<sup>64</sup> This would not have been put forward as a suggestion if such a proposal were constitutionally impermissible. Similarly, in the same case, Justice Brennan accepted a “species” of the argument that expenditure constraints may be necessary to ensure the integrity of representative government.<sup>65</sup> On this basis, it would appear expenditure limits as a concept are constitutionally permissible; whether a specific limit is permissible depends on the exact specifics of the proposed limit, namely whether it is proportionate.<sup>66</sup> This is for determination when

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<sup>59</sup> Deborah Z Cass and Sonia Burrows, ‘Commonwealth Regulation of Campaign Finance – Public Funding, Disclosure and Expenditure Limits’ (2000) 22(4) *Sydney Law Review* 447, 487.

<sup>60</sup> Deborah Z Cass and Sonia Burrows, ‘Commonwealth Regulation of Campaign Finance – Public Funding, Disclosure and Expenditure Limits’ (2000) 22(4) *Sydney Law Review* 447, 487.

<sup>61</sup> *Election Funding, Expenditure and Disclosure Act 1981* (NSW), s 95F(10).

<sup>62</sup> *Electoral Act 1992* (ACT), s 206G.

<sup>63</sup> For example, ss 95G(6) and 96D of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) were invalidated by the High Court in *Unions NSW v NSW* [2013] HCA 58.

<sup>64</sup> (1992) 177 CLR 106, 234-5.

<sup>65</sup> Deborah Z Cass and Sonia Burrows, ‘Commonwealth Regulation of Campaign Finance – Public Funding, Disclosure and Expenditure Limits’ (2000) 22(4) *Sydney Law Review* 447, 487, citing *Australian Capital Television v Commonwealth* (1992) 177 CLR 106 (Brennan J).

<sup>66</sup> See Joo-Cheong Tham & David Grove, ‘Public Funding and Expenditure Regulation of Australian Political Parties: Some Reflections’ (2004) 32 *Federal Law Review* 397, 421-2.

considering the second limb of the *Lange* test, and the arguments used above in relation to a direct ban on donations would be applicable here.

The fourth, and perhaps most important, argument is that a distinction should not be drawn between political expenditure limits and political donation limits. There is such an artificial distinction in the U.S., created by the decision in *Buckley v Valeo*,<sup>67</sup> and reaffirmed consistently in the forty years since.<sup>68</sup> This distinction has proven to be the decisive factor in the U.S. courts consistently upholding donation limits but invalidating expenditure limits. Its consistent adherence in case law makes arguing to remove the distinction in the U.S. unviable.

However, since this distinction has not been addressed by Australian courts, it would be valuable to argue that such a distinction should not be made in Australia; rather, expenditure limits should be treated the same as donation limits. This argument could be made on the basis that both measures end up producing the same impact; a limit on the amount that political participants can spend on politics, usually in the form of political communication. The effect of limiting donations will, indirectly, end up curbing total political expenditure.<sup>69</sup> A similar line of reasoning was used in the High Court in *Unions NSW v NSW* to hold that the laws in question had burdened political communication.

If the Australian courts can be prevented from venturing down the same path as the U.S. in regards to this distinction, it is unlikely to treat the two measures as substantially different. This would, in effect, mean that the chances of a proposed ban on political expenditure by corporate felons being upheld would be similar to that a proposed ban on political bans. Therefore, if the Australian courts do not draw a distinction between expenditure limits and donation limits as the U.S. courts have, it is just as likely that a ban on independent political expenditure by corporate felons would be upheld as a ban on corporate felons making political donations.

### **Other legal issues**

There are other potential legal issues that Proposal X may face. However, these issues are not as significant as the constitutional issues, and they relate to the particulars of the proposal, namely the proposal's scope. In particular, these issues relate to the certainty of the scope rather than the breadth, and the issues themselves are one of legal ambiguity.

One legal issue that may arise from the proposal's scope is how the proposal would work in instances where corporations have made settlement agreements to avoid criminal prosecution. These agreements basically involve corporations paying

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<sup>67</sup> 424 U.S. 1 (1976).

<sup>68</sup> Most recently by a plurality opinion of the Supreme Court in *McCutcheon v. Federal Election Commission* 134 S. Ct. 1434 (2014). However, in the same case, Justice Thomas wrote a opinion that agreed with the plurality opinion on the outcome, but not as to the distinction between donations and expenditure. He maintained that differing treatment of donations and expenditures denigrates free speech, and therefore should be overruled. The opinion further observed that although the plurality purported not to overrule *Buckley v. Vaelo*, it nonetheless "continues to chip away at its footings": *McCutcheon v. Federal Election Commission* 134 S. Ct. 1434 (2014) 1464.

<sup>69</sup> Anthony Gray and Nicky Jones, 'To Give and to Receive: The Australian Government's Proposed Electoral Finance Reforms' (2009) 28(2) *The University of Tasmania Law Review* 182, 208.

monetary penalties to the government and admitting no guilt, in exchange for the government dropping the charges.<sup>70</sup> The use of such agreements has greatly increased in recent years.<sup>71</sup> The increasing prominence of these agreements in corporate criminal law would require Proposal X to address its applicability to corporations that have made such settlements, or there is a significant risk that Proposal X would become legally uncertain on this point.

Another issue is how the proposal would apply to trade unions. Considering the prominence of political expenditure by unions in Australia, this will undoubtedly be an issue of legal (and political) contention if such a proposal was to go forward. Since unions are covered by different legislation to corporations,<sup>72</sup> it would be necessary to draft Proposal X in a manner that clarifies whether it applies to unions. Again, failing to do so would likely create legal uncertainty.

It is desirable that the Proposal X is not legally uncertain in regards to its scope; such uncertainty could undermine its overall effectiveness and could make it subject to unnecessary litigation. The legal uncertainty of both of the aforementioned issues of scope could be resolved by the manner in which Proposal X is drafted, by ensuring that the proposal directly and explicitly addresses these questions. Whether Proposal X applies in either circumstance will have no bearing on its legality. Therefore, the breadth of the scope in both instances is a question of public policy, which is beyond this working paper's focus.

## **Conclusion**

The major legal issues posed by implementing Proposal X in Australia emanate from the *Commonwealth Constitution*, particularly the implied freedom of political communication. There are other legal issues posed by implementing the proposal, but they are not as significant and mostly relate to the particulars of the proposal, namely its scope. These problems can be addressed during the drafting stage of the proposal.

Overall, there is a reasonable chance that Proposal X can overcome the constitutional issues it faces. It is likely, that if framed correctly, a ban on corporate felons from making political donations would be upheld. In addition, if the Australian courts do not draw a distinction between expenditure limits and donation limits as the U.S. courts have, it is just as likely that a ban on independent political expenditure by corporate felons would be upheld as a ban on corporate felons making political donations. To conclude, Proposal X has a strong chance of overcoming the major legal issues posed by the *Commonwealth Constitution* so it is likely to be upheld as a valid law, if introduced.

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<sup>70</sup> See Leonard Orland, *The Transformation of Corporate Criminal Law*, 1 Brook. J. Corp. Fin. & Com. L. 45, 53-55 (2006).

<sup>71</sup> See Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 Am. Crim. L. Rev. 1095, 1137 (2006).

<sup>72</sup> Andrew Stewart, *Stewart's Guide to Employment Law* (The Federation Press, 5<sup>th</sup> ed, 2015) 15-17.

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