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HIGH COURT CHALLENGES AND THE LIMITS OF POLITICAL FINANCE LAW

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I have been asked to talk about two High Court Challenges dealing with important matters of electoral law.

I will make quick mention only of the first. It is a challenge brought by three Queensland unions to a law of that State which requires a ballot of members of an industrial organisation to approve any expenditure by it of over \$10,000 for a political purpose in pursuit of a political object.

This challenge is still in its early stages. A writ of summons has been filed, but no directions hearing has been held, and so no hearing date has been set.

What is clear is that the requirement for a ballot will be subject to constitutional attack on the basis that it interferes with the freedom of political communication implied from the Australian Constitution. It will be argued that the requirement for a ballot infringes such communication because of the cost and time involved, and the chilling effect on such communication that the requirement for such a ballot engenders.

The second case raises a similar set of issues. It is a challenge by Unions NSW and other associated unions to a NSW statute which contains a range of restrictions on electoral expenditure and the making and receiving of political donations. The case will be heard in the High Court on 5 November 2013.

The NSW statute is at least in part a response to long-standing concerns that Australia’s system of political finance is broken. The spiralling costs of electronic campaigning and direct mail have created an arms race as parties seek to outdo each other in fundraising.

The result has been practices that undermine the democratic process, such as selling access to ministers and the appearance, if not the reality, that donations are given in return for influence upon policy.

As far back as 1989, a report entitled *Who Pays the Piper Calls the Tune* by Federal Parliament’s Joint Standing Committee on Electoral Matters expressed grave concerns about the escalating costs of election campaigning. It found even then that the democratic process was unduly dependent on corporate donations and that, ‘while there is no firm evidence of corrupt practice in Australian political fundraising, the substantial increase in the cost pressures of campaigning create the potential for such practices.’ Decades on, such problems are apparent in the media on a regular basis.

Election Funding, Expenditure and Disclosures Act 1981 (NSW)

The system needed to change, and reform in NSW began in 1981 when Premier Neville Wran championed the Election Funding Bill, saying that it ‘removes the risk of parties selling favours and declares to the world that the great political parties of NSW are not for sale’. It is fair to say that this law never lived up to expectations.

Labor brought about further reforms in 2010 to the *Election Funding, Expenditure and Disclosures Act 1981* (NSW). These restricted the donations that can be made each year by a person or organisation to:

- \$5,000 for political parties;

- \$2,000 for candidates; and
- \$2,000 for third-party campaigners.

The law introduced the concept of a ‘third-party campaigner’ as an entity or person other than a party or candidate that spends more than \$2,000 on electoral communication. This definition captures a wide range of organisations, from unions through to environmental bodies.

Labor also introduced caps on electoral communication expenditure for people and organisations campaigning in State elections for things such as:

- advertisements in radio, television, the internet, cinemas, newspapers, billboards, posters, how-to-votes and any other printed election material;
- the distribution of electoral material;
- internet, stationery, telephone, postage, electronic transmissions;
- employment of staff for election campaigns; and
- office accommodation for any such staff and candidates.

The cap for the 2015 State election for a party that endorses candidates for election to the Upper House and Assembly is \$111,200 multiplied by the number of electoral districts in which a candidate is so endorsed. A party that endorses candidates in all 93 electorates has a cap of \$10,341,600.

The expenditure cap for a registered third-party campaigner is \$1,166,600.

There are penalties for breaching these rules relating to donations and expenditure. In the case of a party, the penalty is \$22,000, or \$11,000 for an individual.

Other aspects of the law also require the disclosure of donations and electoral communication expenditure, and ban donations by the tobacco industry, pubs and clubs and property developers.

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

On coming to office in NSW in 2011, the Coalition brought about further changes that fundamentally reshape how NSW political parties raise and spend money. These changes also have a dramatic effect on third-party campaigners. They were passed through the upper house of the NSW Parliament the support of Greens members.

The new law:

- prohibits political donations to a party, elected member, group, candidate or third party campaigner other than from an individual enrolled on the NSW or federal Electoral roll;
- bans annual or other subscriptions paid by industrial organisation to a political party for affiliation with that party;
- aggregates electoral communication expenditure incurred by a party with any electoral communication expenditure incurred by an affiliated organisation of that party; and
- removes from the cap on electoral communication expenditure any money not incurred for the dominant purpose of promoting or opposing a party or the election of a candidate or candidates or influencing voting at an election.

A challenge is being mounted to this law by Unions NSW because the biggest effect will be on unions that affiliate with the ALP. The law treats affiliation fees paid by organisations to political parties as donations, and so makes them unlawful.

Severing the financial relationship between the NSW ALP and its union affiliates will have a major effect on both. The Australian Labor Party was formed in the 19th century as the political arm of the union movement and unions have always supported the ALP financially. The affiliation fees paid by unions which are affiliated with the NSW Branch of the ALP currently amount to approximately \$1.4 million per annum. Of the 60 unions in NSW, 22 are affiliated with the ALP.

The 2012 law cuts to the heart of this relationship. If unions cannot pay to affiliate with the NSW ALP, how will they support the party's activities and how will they justify their role within the organisation?

The law also limits the ability of unions to support the NSW ALP's political objectives by spending their own money on campaigns like that against changes to workers compensation or occupational health and safety laws. It does this by including the amount that affiliated bodies spend on electoral communication under the party's expenditure cap.

This eliminates any capacity for affiliated unions to support the ALP through separate electoral expenditure. On the other hand, unions not affiliated with the ALP are not subject to any such limitation.

This impact explains why the focus of the challenge in the High Court will be on the provisions of the legislation which restrict the making of political donations to electors and require the aggregation of electoral expenditure across political parties and their affiliates.

The ban on donations from corporations will of course also have a major impact not just on unions, but on a range of third-party campaigners.

The High Court challenge

Laws of this kind are often challenged in other nations, especially the United States. It is far more difficult to do so in Australia because there is very limited protection for freedom of speech and participation in the political process.

Australia also has little or no protection in its Constitution for the rights of people to take collective action through bodies such as unions.

What the High Court has done is to hold that a freedom of political communication can be implied from the Australian Constitution. It reached this conclusion in 1992 in *Australian Capital Television v Commonwealth* when it struck down Part IIID of the *Political Broadcasts and Political Disclosures Act 1991* (Cth).

Section 95B imposed a blanket prohibition on political advertisements on radio or television during federal election periods. There were similar bans for Territory elections under s 95C and for State and local government elections under s 95D. Exceptions to the ban were made for policy launches, news and current affairs items, talkback radio programs and advertisements for charities which did not 'explicitly advocate' a vote for one candidate or party. A scheme of 'free time' for political advertising was created. Of the total time available, 90% was reserved for parties represented in the previous Parliament who were fielding a minimum number of candidates.

The High Court held, with Brennan and Dawson JJ dissenting, that Part IID was invalid because it infringed a constitutionally guaranteed freedom of political communication. The reasoning of Mason CJ was typical of the majority. He found that the law would favour:

the established political parties and their candidates without securing compensating advantages or benefits for others who wish to participate in the electoral process or in the political debate which is an integral part of that process.

As since stated in *Lange v Australian Broadcasting Corporation*, the process of determining whether legislation is invalid because it infringes the implied freedom of political communication is as follows:

1. does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?
2. if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people?

It is far from clear how the High Court would decide any challenge to the 2012 NSW political finance law. No such case has before come to the High Court, and the High Court also includes new judges who have yet to decide any matter on the implied freedom.

There is certainly a strong foundation to mount the case. It is arguable that the ban on donations and the rules relating to affiliation are a direct burden upon the ability of people to communicate about government and political matters. It is also possible to argue that this burden is far from reasonable because it is discriminatory in its impact on one side of politics in having an especially severe effect upon the union movement and the ALP.

On the other hand, there are also some major challenges to this line of reasoning:

- the implied freedom of political communication primarily relates to federal elections, and its operation with regard to State laws and State elections is less clear. The High Court has recognised that it can impact at the State level, but is yet to determine how it might do so specifically in NSW in this context; and
- there is also the question of whether the freedom protects donations made by corporations, rather than individuals on electoral roll, and whether donations themselves can amount to political communication.

The link between money and political communication has been recognised by the Supreme Court of the United States in *Buckley v Valeo* in 1976:

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

The United States Supreme Court took this line of reasoning further in 2010 in *Citizens United v Federal Election Commission*. It held there that the US Constitution prohibits restrictions on independent political expenditure by corporations and unions.

We have yet to see whether this line of reasoning will be followed in Australia.

It is certainly arguable that the donation of money can express a preference for an ideological or party position, and thereby contribute to the body of information that informs the choice made by electoral laws in accordance with the Constitution. A prohibition on making monetary contributions to political parties could thus burden freedom of communication about government or political matters.

All up, there is a sound case to be put to the High Court that this law is unconstitutional.

It is one thing though to recognise a sound constitutional argument, another to say that the High Court will accept it. The implied freedom of political communication has been the subject of heated academic and media commentary since it was first discovered in 1992.

What is often missed though, is that the freedom has not proven to be a significant impediment since that time on the development of Australian electoral law. In fact, the freedom has not been applied by the High Court to strike down any statute since 30 September 1992, the day the freedom was first recognised by a majority of the High Court in *Australian Capital Television v Commonwealth*.

Other recent High Court decisions dealing with voting, in particular the *Roach* and *Rowe* cases, might suggest a more robust approach on the part of the High Court, but it would still be a brave person indeed who would predict with any degree of confidence that the NSW statute will be struck down by the court.

If nothing else, I think that there is a real prospect of the court not even engaging with the issues of political finance and the implied freedom of political communication.

The court might resolve the matter on another basis entirely, such as by finding that the NSW statute is invalid due to inconsistency with the commonwealth electoral act. Or, it might be held that the implied freedom does not apply with any force to State statutes of this kind dealing particularly with matters of State electoral law. In either case, the Court might duck the more difficult issue of the extent to which donations and expenditure are themselves protected forms of communication under the Constitution.