THE LEGAL REGULATION OF ELECTORAL CAMPAIGN FINANCING IN AUSTRALIA: A PRELIMINARY STUDY

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Professor Ewing addresses the important question of the legal regulation of electoral campaign financing, an issue much neglected by legal scholars until now. He develops his study against the background of the Royal Commission's report into "WA Inc" and goes on to deal with the monumentally significant decision of the High Court in the Australian Capital Television case. Professor Ewing considers the arguments for increased regulation of campaign financing, examines the different methods of regulation available to legislators and assesses the current Australian laws, in particular the highly controversial Political Broadcasts and Political Disclosures Act 1991. The study confronts a central dilemma of all modern liberal democracies, namely, how do we guarantee political equality without, at the same time, undermining political liberty?

INTRODUCTION

The legal regulation of electoral campaign financing is a relatively recent development in Australia, but one which has assumed increased significance in the light of the findings and recommendations of the WA Royal Commission into Commercial Activities of Government, under the chairmanship of Mr Justice Kennedy[1] ("the WA Royal Commission"). The starting point of any treatment of this issue, however, is the New South Wales Election Funding Act 1981 which introduced not only regulation of election funding for the parties, as its short title would suggest, but also mandatory disclosure

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1. *Report of the Royal Commission into Commercial Activities of Government and Other Matters* (Chair: Judge G A Kennedy) (Perth: Government Printer, 1992).

of election contributions and expenditures.[2] This was followed in 1983 by an amendment to the Commonwealth Electoral Act 1918,[3] which introduced a framework which has been amended on several occasions since, most notably in 1991 to give effect to the recommendations of the Commonwealth Joint Standing Committee on Electoral Matters, which had reported in June 1989 on the conduct of the 1987 general election and the 1988 referendums.[4] By the beginning of 1992 there was, however, little detailed or sophisticated regulation in other States, though the Electoral Amendment (Political Finance) Bill 1991 proposed to introduce into Western Australia measures similar to those operating under Commonwealth law for federal elections. These proposals will now require substantial revision in light of the report of the WA Royal Commission.[5] It will take some time for the contents of that report to be fully and properly digested. In the meantime, it is proposed in this paper is to consider the Commonwealth legislation in this area, having regard to the monumentally important decision of the High Court in *Australian Capital Television Pty Ltd v Commonwealth of Australia* ("*Australian Capital Television Case*").[6] But before doing so it is necessary to deal with the underlying principles and the various methods available to secure campaign finance reform.

PURPOSE OF CAMPAIGN FINANCE LEGISLATION

The case for regulating electoral campaign finance derives from the principles of political equality, principles eloquently expressed in the United States Supreme Court by Chief Justice Warren who said that "representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies".[7] Apart from the right to vote, it may be argued that the

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2. (NSW) Election Funding Act 1981. For background see NSW Parliament *Report from the Joint Committee of the Legislative Council and Legislative Assembly upon Public Funding of Election Campaigns together with the minutes of proceedings and evidence* 1980 (Chair: E N Quinn).
3. (Cth) Commonwealth Electoral Legislation Amendment Act 1983 ("1983 Act").
4. Commonwealth Parliament Joint Standing Committee on Electoral Affairs *Who Pays the Piper Calls the Tune: Minimising the Risks of Funding Political Campaigns: Inquiry into the conduct of the 1987 Federal Election and 1988 Referendums, report number 4 of the Joint Standing Committee on Electoral Matters* (Canberra: AGPS, 1989).
5. Supra n 1.
6. (Unreported) High Court of Australia 30 September 1992 nos 55 and 56 of 1992.
7. *Reynolds v Sims* 377 US 533, 565 (1964).

right to political equality embraces also the right to participate in the process of government with one's fellow citizens. This would include not only a right to stand for office on equal terms with other people, but a right also to secure election on equal terms with other people. A serious difficulty, however, which lies at the very heart of liberal democracy, is how to reconcile this commitment to the principle of political equality with the reality of deep rooted economic inequality. The difficulty with the liberal vision is that while it is accepted that everyone has a right to vote and a right to stand for office, the distribution of economic resources is such that not everyone has the same opportunity to "full and effective participation" if people are free to use their economic resources for political purposes without restraint.

Yet although there may thus be a need to control campaign finances, any attempt to do so runs the risk of compromising that other great pillar of liberal democracy, namely, freedom of the individual. So while it might be argued forcefully that political equality is one of the great bedrocks of the liberal democratic tradition, it will be argued just as forcefully that political liberty is the other.[8] The difficulty which this presents in the present context is that any restrictions on campaign financing in the name of political equality will almost certainly compromise individual liberty to some extent. To compel political parties to disclose the identity of their donors may be seen by some to violate the individual's right to privacy. To restrain companies or trade unions from freely donating to political parties may be seen by some to violate both the individual and the collective right to freedom of association. Furthermore to restrict the amount of money which candidates, political parties and others may spend in the course of a campaign will inevitably be seen by some to violate the right to freedom of expression, not because of any restrictions on the content of speech, but because restraints will tend to constrain the quantity and diversity of political speech. There is thus a potentially irreconcilable conflict between equality and liberty. Unrestrained liberty will tend to undermine the right to political equality to the extent that it will permit those with greater economic resources to compete unfairly in the political market place. On the other hand, a regulatory framework designed to promote equality will tend to undermine political liberty in the sense that people will not be free to participate in the political process to the extent that they would otherwise wish.

In the light of this irreconcilable conflict, a community may have to make a decision as to where its priorities lie and decide whether economic power

8. R Dworkin "What Is Equality? Part 3: The Place of Liberty" (1987) 73 Iowa Law Rev 1.

is to be regulated or given a free rein in the political arena. In modern liberal democracies, the choice between equality and liberty is increasingly being made in favour of the latter. This is not to deny that the right to vote and the right to stand for political office will be respected in such jurisdictions. But ultimately these rights, while clearly important, may be of a rather formal nature only. The difficulty arises in the interpretation and application by the judicial branch in particular of national Bills of Rights, which are in any event institutionally predisposed to liberty above all else. The point is perhaps most forcefully demonstrated by the decision in *Buckley v Valeo*[9] where the United States Supreme Court struck down limits on candidates' campaign expenditures as violating the constitutional guarantee of free speech. In so doing, the Court said that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources".[10] Although there is not a judicially enforceable Bill of Rights on the American model in Australia, an important steer in the direction of liberty was taken by the High Court in the *Australian Capital Television Case* in which the majority effectively created an implied (but qualified) constitutional right to freedom of communication,[11] a right derived from the principles of representative government but which may be exercised by interests such as television companies which are not represented in government.

METHODS OF CAMPAIGN FINANCE REGULATION

The principal (though not the only) purpose of campaign finance legislation is to promote the goal of political equality in the sense of equality of electoral opportunity on the one hand and equality of political representation on the other. This it may do in three quite different ways. The first of these is to ensure a degree of openness or transparency in the political process by requiring the political parties and candidates to report and disclose their income and expenditure. Before any radical measures are taken by way of

9. 424 US 1 (1976).
10. Ibid, 48-49.
11. Supra n 6. An important earlier initiative was the enactment of the (Cth) Human Rights Act 1981 and subsequently the (Cth) Human Rights and Equal Opportunity Act 1986 which incorporated into federal law (though not in a manner which enables it to be directly enforced in the domestic courts) the International Covenant on Civil and Political Rights. For a full and insightful treatment of this legislation see P Bailey *Human Rights: Australia in an International Context* (Sydney: Butterworths, 1990).

legislation it is necessary to know to what extent if at all the goal of political equality is being met or undermined in practice. Effective reporting and disclosure legislation will help to reveal the extent of any financial imbalance between the parties. It will help also to identify large donations to the parties as well as the sources of these donations and may thus facilitate the monitoring of political favours for political donations.[12] Most of the jurisdictions elsewhere in the common law world which have legislated on campaign financing in recent years have some kind of reporting and disclosure requirement, though there is some variation in the frequency with which parties must disclose, with annual disclosure being the most common. As already indicated, objections have been expressed that such legislation violates the right to privacy, which finds protection in Article 17 of the International Covenant on Civil and Political Rights. Although these objections have been forcefully made from time to time, they were dismissed by the United States Supreme Court in its landmark decision in *Buckley v Valeo*,[13] though in doing so the Court said that it would be willing to uphold privacy claims (and thereby qualify the statutory duty to disclose) where mandatory disclosure would discourage donations to small parties.[14]

A second method of regulation of campaign financing is designed to respond more directly to the need to promote equality of electoral opportunity, its purpose being to ensure that those who compete in the political process, whether as candidates or political parties, have a fair opportunity to do so and if possible an opportunity to do so on equal terms with their principal rivals. There is a need to ensure in particular not only that political parties representing major strands of opinion have adequate funds to run an effective campaign, but also that no candidate or party is able to saturate the political market-place with its message to the exclusion of any other. These concerns can be met to some extent by taking steps to ensure that political parties and candidates representing major strands of opinion have sufficient means to conduct a campaign. This may require some measure of statutory intervention in the form of State aid for the parties, possibly in the form of tax incentives to encourage electors to make donations (as in Canada) or in the form of cash subventions which may take the form of annual payments (as in

12. For an eloquent justification for full disclosure of contributions, see the Report of the Royal Commission supra n 1, part II, 5-17 – 5-22.
13. Supra n 9.
14. See *Brown v Socialist Workers' 74 Campaign Committee (Ohio)* 459 US 87 (1982) where it was held that Ohio's disclosure laws were unconstitutional to the extent that they applied to the Socialist Workers' Party.

Sweden) or a reimbursement of election expenses, or a portion or percentage thereof (as also in Canada).[15] But although State support of this kind may provide parties with the means to fight a campaign, it will not necessarily guarantee that the fight will be fair if the parties are free to spend as much as they can raise from other sources. It may thus be necessary to impose restrictions on the amount of money which may be spent during the campaign period by candidates (as in the United Kingdom)[16] or by political parties and candidates (as in Canada).[17] Spending restrictions of this kind may be supplemented by, or indeed may be rejected in favour of, a specific restriction on or prohibition of particular items of expenditure. In the United Kingdom, for example, political parties and candidates are not permitted to advertise on television or radio,[18] thereby significantly reducing the potential costs of campaigns.[19]

The third method of campaign finance regulation is designed to respond directly to the need to promote equality of political representation, its purpose being to ensure that no one has the power of disproportionate access to government merely because he or she is a generous contributor to party funds. The fear is sometimes expressed, in the United States in particular, that political contributions are made "for the purpose of furthering business or private interests by facilitating access to government officials or influencing governmental decisions, and that, conversely, elected officials have tended to afford special treatment to large contributors".[20] There are a number of devices available to eliminate or reduce the risk of undue influence of this kind. It might be done by reporting and disclosure legislation in the hope that the glare of publicity will discourage the political parties from accepting large donations from disreputable sources.[21] It might be done by expenditure limits

15. See K D Ewing *The Funding of Political Parties in Britain* (Cambridge: Cambridge University, 1987) chs 7 and 8.
16. See (UK) Representation of the People Act 1983 s 76.
17. See Canada Elections Act RS 1985 c 14 (1st Supp) ss 39 (party limits), 208 (candidate limits).
18. See (UK) Broadcasting Act 1990, ss 8(2), 36. This applies only to commercial television. There is no advertising as such on the BBC. For an account of political broadcasting in Britain, see H Rawlings *Law and the Electoral Process* (London: Sweet & Maxwell, 1988) 151-166.
19. See M Pinto-Duschinsky *British Political Finance 1830-1980* (Washington DC: American Enterprise Institute for Public Policy Research, 1981).
20. *Buckley v Valeo* 519 F 2d 821, 840 (1975). See also M Nicholson "Campaign Financing and Equal Protection" (1974) 26 *Stanford Law Review* 815, 820.
21. See *Buckley v Valeo* supra n 9, 67: disclosure deters "actual corruption" and avoids the appearance of corruption by exposing large contributions and expenditures to the light of publicity.

(either generally or in an election) in an attempt to reduce advertising and other campaign costs in order to then reduce the fund-raising pressures on the parties. It might also be done by a system of public funding of the parties in order to reduce their dependence on undesirable sources and to discourage the need to solicit and accept large donations from the private sector. It is possible, however, that more radical measures may be necessary, either to restrict the amount which any donor may donate in a given year, as in the United States,[22] or to prohibit donations altogether from a particular source, as in Quebec, where only electors may make political contributions.[23] The former option (a maximum limit on the size of donations) was considered in the context of Western Australia by the WA Royal Commission, but rejected on the ground that it would be difficult to enforce and relatively easy to evade. It was also thought that choosing an appropriate maximum would be "an easy task."[24]

While there are thus three purposes of campaign finance legislation, there is also a need to ensure that the legislation is properly adhered to. Early experience in other countries, such as Canada and the United States, indicates that legislation of this kind can amount to nothing more than a collection of legal platitudes, openly flouted, but rarely enforced. The absence of effective enforcement machinery clearly undermines and indeed renders pointless any attempt to deal with the problems of electoral campaign financing by legislation.[25] In order to be effective such machinery must itself contain three vital features. The first, again, is a provision for ensuring that the parties properly report their income and expenditure. Thus, as the United States Supreme Court recognised in *Buckley v Valeo*,[26] reporting and disclosure is not only a means of control or regulation in its own right, it is also an indispensable means of policing the other forms of regulation which may be introduced. In the view of the Court, it is an essential means of gathering the data necessary to detect violations where there are statutory contribution limits.[27] The second vital feature of the enforcement machinery is the creation

22. See K D Ewing "The Legal Regulation of Campaign Financing in American Federal Elections" [1988] CLJ 370.
23. (Quebec) Election Act SQ 1989 c 1 s 87.
24. Supra n 1, part II, 5-19.
25. Early Canadian experience is documented in Report of the Committee on Election Expenses (Chair: A Barbeau) (Ottawa, 1966). For a good account of problems in the United States, see L J Sabato *PAC Power. Inside the World of Political Action Committees* (New York, 1985).
26. Supra n 9.
27. Ibid, 68.

of an independent enforcement agency to monitor compliance with the law and with powers to institute legal proceedings where necessary to deal with defaulters.[28] It is axiomatic that such an agency should be free from political control, that it should be adequately funded to enable it to perform its functions, and that its enforcement powers should not depend on securing the consent of a government official. The third vital feature of the enforcement machinery is that the sanctions and penalties for breach should be severe, reflecting the importance of the purposes which the legislation is designed to promote. Breach of campaign finance legislation is commonly met by criminal sanctions. Experience in Canada suggests, however, that this may be counter-productive, with the high burden of proof and the reluctance of judges to treat seriously violations of this kind of legislation leading to calls recently for the introduction of effective civil rather than criminal penalties.[29]

ELECTION FUNDING AND FINANCIAL DISCLOSURE IN AUSTRALIA

As already pointed out, campaign finance reform is a relatively recent development in Australia,[30] though the arrangements introduced in 1983 have now applied in three Federal elections (1984, 1987 and 1990).[31] The starting point is the procedure for the registration of political parties which, although not compulsory, is necessary if a party wishes to claim election funding. A "political party" is defined as meaning "an organisation the object or activity, or one of the objects or activities, of which is the promotion of the

28. Ontario Commission on Election Contributions and Expenses *A Comparative Survey of Election Finance Legislation* (Toronto, 1978).

29. See K D Ewing *Money, Politics and Law. A Study of Electoral Campaign Finance Reform in Canada* (Oxford: Oxford University Press, 1992) 228. See also Royal Commission on Electoral Reform and Party Financing: *Final Report* (Chair: P Lortie) (Ottawa, 1991) vol II 224-225.

30. But note that "Until 1980, Pt XVI of the Commonwealth Electoral Act 1918 had limited the electoral expenditure of candidates, but the provisions of Pt XVI 'proved to be unworkable'": *Australian Capital Television Case*, supra n 6.

31. See Australian Electoral Commission *Election Funding and Financial Disclosure: Final Report on the Operation of Part XX of the Commonwealth Electoral Act 1918 in Relation to the Elections held on 1 December 1984* (Canberra: AGPS, 1986); Australian Electoral Commission *Election Funding and Financial Disclosure Report in Relation to the Elections held on 11 July 1987* (Canberra: AGPS, 1988); Australian Electoral Commission *Election Funding and Financial Disclosure Report for the Elections for the House of Representatives and the Senate held on 24 March 1990* (Canberra: AGPS, 1991). For an account of the legislation and its operation, see E A Chaples "Public Funding of Elections in Australia" in H E Alexander (ed) *Comparative Political Finance in the 1980's* (Cambridge: Cambridge University Press, 1989).

election to the Senate or to the House of Representatives of a candidate or candidates endorsed by it".[32] Any organisation which falls within this definition must be an "eligible political party" which means that if it does not have at least one member who is also a member of the Commonwealth or a State Parliament, it must have a minimum of five hundred members.[33] In either case, the political party must also be established on the basis of a written constitution which sets out its aims.[34] These are very liberal conditions which allow for the registration of organisations which in traditional terms would be regarded as interest groups rather than political parties. Thus, in 1990, the registered parties included Australians Against Further Immigration, the Nuclear Disarmament Party, and the Pensioner Party of Australia. There were in total some 66 registered parties, these including the State branches of the main parties which were separately registered, as well as 15 separately registered political parties representing the Green movement.[35]

The 1983 Act introduced reporting and disclosure requirements into the Commonwealth electoral law, thereby responding to the need for openness and transparency in political party finances and financing.[36] As originally introduced, the duty to disclose was effectively a duty to disclose contributions received and expenditures incurred for electoral purposes only. The agents of political parties were required to disclose after polling day all donations received between the day after polling day in the previous election and the end of polling day in the current election, though this did not include any donation made on the condition that it should be used for a purpose other than an election. So far as expenditures are concerned, under the Act as originally introduced, there was a duty to disclose only expenditures incurred during the election period, a term defined to mean the period commencing on the day of the issue of the writ and ending at the expiration of polling day. Apart from the political parties, the 1983 legislation also imposed a duty on broadcasters, publishers, and so-called "third parties", that is to say, those who incur electoral expenditure without the authority of a registered political party or candidate, to submit returns of election expenses. Following the

32. See Commonwealth Electoral Act 1918 (as amended) s 4.
33. Ibid, s 123.
34. There are also restrictions on the names which may be registered. For example, the name must not exceed six words, must not be obscene, and must not be the name or acronym of another registered party. See ibid, s 129.
35. See Australian Electoral Commission *Election Funding and Financial Disclosure Reports, for the Elections for the House of Representatives and the Senate held on 24 March 1990* (Canberra: AGPS, 1991) 32-33.
36. Supra n 32, ss 303-320.

recommendation of the Parliamentary Joint Standing Committee on Electoral Matters in 1989 (in its report entitled *Who Pays the Piper Calls the Tune*), the financial disclosure requirements were modified by the Political Broadcasts and Political Disclosures Act 1991, at least as far as the political parties are concerned. This now requires the agent of each registered political party, as well as the agent of each State branch of each registered party, to submit an annual return of income and expenditure. The return must be made within eight weeks after the end of the financial year and must identify persons or organisations who donated $1 500 or more, as well as payments of $1 500 or more.

The other main plank of the 1983 legislation is the provision made for the reimbursement of candidate and party election expenses,[37] thereby responding to the need to ensure that the political parties have an adequate level of funding to fight a campaign. For this purpose, "election expenditures" are defined to mean any expenditures incurred in connection with the election campaign, whether or not incurred during the election period.[38] Under the Act, payments are not made to the national organisations of the political parties, or indeed to candidates (except in the case of those whose candidature was not endorsed by a political party), but only to State or Territory branches of registered parties[39] whose endorsed candidates secure at least four per cent of the first preference votes in the election.[40] The amount of the payment is based upon the number of first preference votes cast in favour of candidates endorsed by the respective State or Territory branches of the political parties.[41] The figure for calculating payments is index-linked, but in 1990 each House of Representatives vote was worth 91.223 cents and each Senate vote was worth 45.611 cents. In 1990, a total of $5.3 million was paid to the State and Territory branches of the Australian Labor Party ("ALP"). This compares with $4.6 million paid in total to the Liberal Party; $1.4 million to the Democrats; and $1.1 m to the National Party.[42] Under the Act the amount of the payment may not exceed actual expenditure in the election.[43] The reported expenditures of the parties at the election in 1990 were $14.7 million in the case of the ALP; $12.1 million in the case of the Liberals; $3.2 million

37. Ibid, ss 293-302.
38. Ibid, s 293. Quaere whether this includes items of election expenditure which need not be reported under the election disclosure provisions.
39. Ibid, s 295(7).
40. Ibid, s 297(1).
41. Ibid, s 294.
42. Supra n 35, 34-37.
43. Supra n 32, s 298.

in the case of the National Party; and $1.1 million in the case of the Democrats.[44]

Enforcement and administration of these provisions relating to party registration, reporting and disclosure, and election funding are the responsibility of the Australian Electoral Commission, a statutory body created under the Commonwealth Electoral Legislation Amendment Act 1983 and established in 1984 with a large range of responsibilities other than election funding and financial disclosure.[45] The members of the Commission are the chairperson, who must be a Federal Court judge, the Electoral Commissioner and one other member.[46] All three are appointed by the Governor General for a period not exceeding seven years, though each is eligible for reappointment.[47] The substantive law is such that the need for coercive powers is quite limited, particularly when the Commission is contrasted with the Federal Election Commission in the United States where there are tight restrictions on donations to parties and candidates, and the Chief Electoral Officer in Canada where there are restrictions on electoral expenditures by parties and candidates. In Australia, coercive powers are needed really only to police the reporting and disclosure requirements. Nevertheless wide powers of investigation have been granted to compel the production of documents and to compel the production of other evidence. These investigative powers are reinforced with criminal penalties, and it is also a criminal offence, for example, to fail to lodge a return after an election.[48] In practice, however, prosecution is contemplated only as a last resort, and the Commission has indicated that it prefers a conciliatory rather than a confrontational approach to enforcement, while taking seriously its duty to enforce "the legislative provisions by launching prosecution action where attempts to secure voluntary compliance fail".[49]

RESTRICTIONS ON POLITICAL BROADCASTING

The Commonwealth method of campaign finance regulation thus goes some way towards promoting political equality to the extent that it requires

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44. Supra n 35, 38-39.
45. For a full account of the Commission's responsibilities, see eg Australian Electoral Commission *Annual Report 1989-1990* (Canberra: AGPS, 1990). See also supra n 32, ss 6-17A.
46. Supra n 32, s 6.
47. Ibid, ss 6(1), 21.
48. Ibid, s 316.
49. Supra n 35, 3.

reporting and disclosure on the one hand and provides electoral funding on the other. The legislation does, however, fall short on a number of counts: first because it is silent on the question of election expenses (and thereby provides formally only a limited right of equality of electoral opportunity), and secondly, because it has little to say on the question of the right to equality of political representation, save to the extent that the disclosure of donations may serve to discourage large contributions while the election funding subsidy may help indirectly to reduce the pressure for such contributions. Both of these matters were addressed to some extent with the enactment of the Commonwealth Political Broadcasts and Political Disclosures Act 1991 ("1991 Act").[50] The main purpose of this controversial measure was to ban the broadcasting of political advertisements during an election period,[51] though it also provided that television broadcasters were to grant a period of free time to each political party which was represented in Parliament before the election and which was contesting the election with the prescribed number of candidates.[52] The legislation also gave "other political parties, groups and candidates the right to apply to the Australian Broadcasting Tribunal for the grant of free time to make ... a [broadcast]".[53] These "election broadcasts",[54] as they were referred to in the 1991 Act, were tightly controlled as to content (to contain only the head and shoulders of the speaker and no image or vocal sound other than that of the speaker),[55] the amount of time allocated to be based upon the number of first preference votes obtained by each of the political parties at the previous election.

These restraints, which have parallels in Britain, were introduced following the report of the Joint Standing Committee on Electoral Matters in 1989[56] and were justified by the government principally on two grounds, both of which relate to concerns or goals which have been identified in this paper. The first is the equality of electoral opportunity ground, in the sense that there was a perceived need to control "the burgeoning cost of political campaigning".[57] Evidence provided by the Senate Select Committee indicates that

50. For background to the enactment of this measure, see n 4.
51. (Cth) Political Broadcasts and Political Disclosures Act 1991, s 7 amending the (Cth) Broadcasting Act 1942, inserting new ss 95F-R.
52. Ibid, ss 95A-E.
53. Supra n 6, McHugh J.
54. Supra n 51, s 95G.
55. Ibid, ss 95G-H, referred to as "talking heads".
56. Supra n 4.
57. Commonwealth Parliament Senate Select Committee *Report on Political Broadcasts and Political Disclosures* (Canberra: AGPS, 1991) 5, quoting the Minister for Transport and Communications as reported in the House of Representatives on 9 May 1991.

there has been a steady increase in Federal election expenditures by candidates and parties, that the $39 million spent by the participants in 1990 represented a 52 per cent increase on the 1987 election, and that of this $39 million no less than $17.5 million (or 45 per cent of the total) was accounted for in broadcasting expenditure.[58] If costs continue to escalate there is no guarantee that the money that would be needed from the private sector would fall equally on the different parties. The other concern which can be identified in the enactment of the 1991 legislation was the equality of representation ground, in the sense that the high cost of advertising on television and radio would place pressure on political parties, increasing their dependence on corporate sector funding. This in turn increases "the potential of stark and direct corruption; the question of undue influence and its impact on the process; and the aspect of the corporate dollar dictating the political agenda".[59] The Joint Committee on Electoral Matters had reported earlier that although there was no firm evidence of corrupt practices in Australian fund-raising, it was concerned that increasing costs would add to pressure in this direction.[60]

Yet despite the apparently laudable goals of the political broadcasting restrictions of the 1991 Act, they had a very short and unhappy life, being unwanted by many on account of their perceived threat to individual liberty.[61]

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58. Ibid, 21-23.
59. Supra n 57, quoting the Minister for Administrative Services as reported in the Senate on 13 August 1991.
60. Supra n 4, 88.
61. These claims were forcefully made by the Human Rights Commission before the Bill was passed on the ground that the ban violated arts 19 (freedom of expression) and 25 (right to take part in the conduct of public affairs) of the International Covenant on Civil and Political Rights. Art 19(2) of the Covenant provides that "[e]veryone has the right to freedom of expression" and continues by providing that "this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice". The right to freedom of expression is not, however, unlimited, with art 19(3) providing in effect that restrictions may be introduced by law where necessary for the respect of the rights or reputations of others, or for the protection of national security or of public order, or public health or morals. Art 25 provides that every citizen shall have the right and the opportunity "(a) [t]o take part in the conduct of public affairs, directly or through freely chosen representatives"; and "(b) [t]o vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors". Again, however, the right is not unlimited, with art 25 prohibiting only "unreasonable" restrictions on the exercise of these rights.

    The Human Rights Commission took the view that the broadcasting ban "would clearly constitute a breach" of these obligations. So far as art 19 in particular is concerned, it was argued that the ban violated not only the rights of those wishing to impart information (broadcasters, political parties and others who might wish to encourage the electors to

It was held by the High Court in the *Australian Capital Television Case*[62] that the political broadcasting (but not the reporting and disclosure) provisions of the 1991 Act were invalid, a decision celebrated by some as a victory for free speech.[63] In reaching this conclusion the High Court had first to find a constitutional base for doing so. For, unlike the United States, Canada, and other Commonwealth countries in the common law tradition there is in Australia no express constitutional guarantee of freedom of speech which could be invoked in a case such as this to overturn the legislation passed by Parliament.[64] In a bold move, however, the court accepted that "a guarantee of freedom of expression in relation to public and political affairs must necessarily be implied from the provision which the constitution makes for a system of representative government". According to Chief Justice Mason, "the Constitution brought into existence a system of representative government for Australia in which the elected representatives exercise sovereign power on behalf of the Australian people". These "representatives are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act". Indispensable to both that accountability and responsibility is freedom of communication,

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vote or not to vote for a particular political party) but also the rights of those wishing to receive the information. It seems undeniable that the ban would have these effects and indeed much of the debate which did take place was not on the question of whether the 1991 Act restricted speech but on the question whether the restrictions could be justified under art 19(3). In a carefully reasoned report on the bill, the Human Rights Commission argued that the restrictions were too far reaching and out of all proportion to the mischief which the government had in mind. In its view, less restrictive means (such as limitations on campaign spending) could be used to safeguard the integrity of the political process and to prevent distortion by disproportionate resources being made available for advertising. (This, however, is not a very satisfactory answer to the problem, for restrictions of this kind raise equally sensitive free speech questions, with spending limits in both the United States and Canada having been struck down by the courts on just this ground.) These points are most fully developed in a letter by Brian Burdekin, Federal Human Rights Commissioner, addressed to the Attorney General, dated 9 May 1991.

62. Supra n 6.

63. The Weekend Australian 29-30 August 1992; The West Australian 29 August 1992. It is to be noted that although the court published its reasons on 30 September 1992, it had announced its decision on 28 August 1992, in time for application to the Queensland and Victorian elections.

64. For an insightful account of civil liberties and the constitution see L Zines *The High Court and the Constitution* 3rd edn (Sydney: Butterworths, 1992) 323-339. See also L Zines *Constitutional Change in the Commonwealth: the Commonwealth Lectures delivered at the University of Cambridge on 8, 15 and 22 November 1988* (Cambridge: Cambridge University Press, 1991). On freedom of expression in Australia, see eg *Davis v Commonwealth* (1988) 82 ALR 633, 657; *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633, 667-670.

at least in relation to public affairs and political discussion.[65] In the view of the Chief Justice, without such a freedom, representative government would fail to achieve its purpose, namely, government by the people through their elected representatives: government would "cease to be responsive to the needs and wishes of the people and, in that sense, would cease to be truly representative".

It is for others to assess the legitimacy of this assumption of constitutional power by the High Court, though it may be difficult to square with the "unexpressed assumption" on which the Constitution was drafted that "there was no need to incorporate a comprehensive Bill of Rights in order to protect the rights and freedoms of citizens".[66] It was accepted, however, that as in other jurisdictions, freedom of communication is not an absolute and that it may not always and necessarily prevail over competing interests of the public. If, however, any restriction is disproportionate to the attainment of the competing public interest then, in the words of the Chief Justice, "the existence of the disproportionate burden indicates that the purposes and effect of the restriction is in fact to impair freedom of communication". In this case the Chief Justice was prepared to assume that the purpose of the so-called broadcasting ban was to safeguard the integrity of the political process by reducing pressure on the parties and candidates to raise substantial sums of money, thus lessening the risk of corruption and undue influence. He was also prepared to assume that another purpose of the legislation was to terminate the advantage enjoyed by wealthy persons and groups in gaining access to use of the airwaves; indeed, he was prepared to accept that in an election campaign "the rich have an advantage over the poor". But this was not enough to save the measure which directly excluded potential participants in the electoral process from access to an extremely important mode of communication with the electorate. Here he was referring in particular to electors, individuals, groups and bodies who wish to present their views to the community by the use of television. The effect of the restriction is that these people must make do with other modes of communication which do not have the same striking impact in the short span of an election campaign when the voters are consciously making their judgments as to how they will vote. According to Justices Deane and Toohey in a joint judgment, the fact that broadcasting is expensive and that few people could afford to use it was not enough to justify "a law suppressing the freedom of communication in that

65. See J H Ely *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980) esp ch 5.

66. *Australian Capital Television Case* supra n 6, Mason CJ.

particular way".

CONCLUSION

The Australian legislation on election financing is really very limited in its scope, particularly when compared with the North American legislation in the field, in dealing only with the questions of reporting and disclosure and the partial funding of party and candidate election expenses. It is open to argument whether further intervention is necessary to promote the goals of equality of electoral opportunity on the one hand and equality of political representation on the other. Information provided by the Australian Electoral Commission indicates that the money available to fight election campaigns falls equally between the ALP and the main opposition parties,[67] though admittedly the information does not adequately reveal the relative financial position of the parties outside the election period. The 1991 amendments requiring full disclosure will, however, shed some light on this and will indicate whether spending limits of one kind or another are necessary. So far as equality of political representation is concerned, the case for spending limits is undermined by the fact that, as reported by the Joint Standing Committee on Electoral Matters in 1989,[68] there is no clear evidence at Federal level[69] showing that the need for money to meet spiralling campaign costs has induced the political parties to provide favours for money. If spending limits cannot be justified on this ground, there is even less case for meeting the goal of equality of political representation by the introduction of direct contribution limits, as for example in the United States where political action committees have been restricted to $5 000 per candidate in an attempt to reduce the risk of corruption by eliminating candidate dependence on large corporate-backed donors.[70]

Yet as recent events in Western Australia have tended to indicate, it may not necessarily be desirable to wait for "proven cases of misconduct involving political donations to justify taking preventive action",[71] given that it is in the nature of things that proof of misconduct in this area is very difficult to establish as the WA Royal Commission clearly pointed out.[72] In the

67. See Australian Electoral Commission *Election Funding and Financial Disclosure Report* supra n 35.
68. Supra n 4, 88.
69. Compare supra n 1, Part I vol 6, 26-3 - 26-4.
70. For an account of the US position, see K D Ewing "The Legal Regulation of Campaign Financing in American Federal Elections" [1988] CLJ 370.
71. Supra n 57, 18. This is precisely what the Senate Select Committee had counselled against.
72. Supra n 1, Part I vol 6, 26-4.

meantime, if the government wishes to control campaign costs in order to enhance political equality, it may have to give some attention as an alternative to the broadcasting ban to the question of a limit on total expenditures, as was suggested by the Human Rights Commission,[73] and as currently operates in Canada.[74] This option was raised in evidence before the Senate Select Committee which noted a number of objections to such a scheme without reaching any conclusions about its practicability.[75] But the experience of other countries has shown that to introduce such a restriction would be to invite further freedom of expression problems and to confront again the reality that in constitutional law liberty will always trump equality. Such restrictions have been to varying degrees struck down on free speech grounds in both the United States and Canada[76] and it is presumably only the absence of a Bill of Rights which has enabled similar provisions in Britain[77] to have survived since 1917.[78] In the United States this has been done under the First Amendment, providing a guarantee of free speech which, in the memorable words of the Supreme Court in 1976 (in a case brought by the New York Civil Liberties Union among others), "cannot properly be made to depend on a person's financial ability to engage in public discussion".[79]

It is not altogether clear how the High Court of Australia would respond to similar restrictions. But like *Buckley v Valeo*[80] (which was cited with approval by Justice McHugh in the *Australian Capital Television Case*) in the United States, and the *National Citizens' Coalition Case*[81] (which also relies to some extent on *Buckley v Valeo*) in Canada, the decision in the *Australian Capital Television Case* is an important landmark in which yet another court has signalled the triumph of liberty over equality. So much then for the contention that "[n]o theory that respects the basic assumptions which define

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73. See letter referred to, supra n 61.
74. The Canadian position is fully reviewed in Royal Commission on Electoral Reform and Party Financing, supra n 25.
75. Supra n 57, 40-41.
76. See *Buckley v Valeo* supra n 9; *National Citizens' Coalition Inc v AG for Canada* (1985) 11 DLR (4th) 481 ("*National Citizens' Coalition Case*").
77. Restrictions on candidates' expenses were introduced by the (UK) Corrupt and Illegal Practices Act 1883. Restrictions on third party election expenditures (those incurred without the consent of a candidate) were introduced by the (UK) Representation of the People Act 1917. These provisions (as amended) are now to be found in the (UK) Representation of the People Act 1983 ss 75-76.
78. Compare *R v Tronoh Mines Ltd* [1952] 1 All ER 697.
79. *Buckley v Valeo* supra n 9, 68.
80. Ibid.
81. Supra n 76.

[our political culture] could subordinate equality to liberty, conceived as normative ideals, to any degree".[82] Although it is undeniable that a strong case for freedom of communication can be built upon or derived from the need for responsible government,[83] this must surely be the responsibility of representative government. As suggested by Chief Justice Warren in a passage already quoted,[84] the concept of representative government, from which the High Court of Australia constructed a right to freedom of communication, necessarily requires that every individual should have a full and effective right to determine the composition of that government. Representative government necessarily embraces notions of political equality, including equality of electoral opportunity and equality of political representation. A government is not representative in this sense if it has secured election not because of the content but because of the volume of its message. And a government is not representative in the true sense if it is "subverted by obligations to large benefactors",[85] particularly where these benefactors represent corporate interests which, regardless of what may happen in practice, still have no legitimate claim in principle to be represented in the first place.

82. R Dworkin supra n 8, 9.
83. See especially J H Ely supra n 65.
84. *Reynolds v Sims* supra n 7.
85. *Australian Capital Television Case* supra n 6.