

## Would the High Court allow a ban on political donations?

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*Wendy Hu*

*Research Associate, The newDemocracy Foundation  
wendym.hu@gmail.com*

*This paper draws lessons from newDemocracy's experiences operating various citizens' juries in Australia and international examples from our partners in the Democracy R&D Network.*

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## Would the High Court allow a ban on political donations?

### ***What is the question?***

Would a ban on political donations by the NSW Parliament be held constitutionally invalid for infringing the implied freedom of political communication?

### ***The usual answers***

Australia does not have an express guarantee of free speech in the *Commonwealth Constitution*. Instead, the High Court has acknowledged in various decisions since 1992 that there is an *implied* freedom of political communication. The guarantee exists to ensure that Australians can exercise a free and informed choice as electors. As such, restrictions on political donations in State elections have been the subject of numerous constitutional challenges in the High Court.<sup>1</sup>

The implied freedom has generally offered weak protection. Caps on political donations, the prohibition of indirect campaign contributions and the prohibition of certain groups to make political donations have withstood High Court challenges. However, there is skepticism surrounding the validity of a complete ban. Such reservations are best understood by referring any proposed law to the three-step test<sup>2</sup>.

First, does the law effectively burden the freedom in its terms, operation or effect? This will clearly be answered as “yes”. Banning political donations restricts the amount of information conveyed to voters through advertising.

Second, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative government (“compatibility test”)? Preventing corruption is widely accepted as a legitimate purpose. Three types have been acknowledged by the High Court. First, *clientelism* where an elected official acts in the interests of the donor whom they have become financially dependent on, rather than the public interest. Second, *preferential access* where payment tends to result in increased access to the elected official. Third, *war-chest corruption* where the best funded candidates and/or parties drown out other voices in political discourse through advertising and communications.<sup>3</sup> Implicit in the second step is the importance of a level playing field. An “equality of opportunity”<sup>4</sup> to participate in the democratic process must be maintained.

Third, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government? This involves inquiries as to whether the law is suitable, necessary and adequate in its balance (“proportionality test”). Many argue this would be answered as “no”. More specifically, that a complete ban is unnecessary because there is a “reasonably practicable”, “obvious and compelling alternative”. Current restrictions could be tightened. The political donations cap may be further lowered and the prohibition on property developers be extended to other groups. Other measures may also

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<sup>1</sup> Recent cases include *Unions NSW v NSW (No 1)* (2013) 252 CLR 530, *McCloy v NSW* (2015) 257 CLR 178, *Unions NSW v NSW (No 2)* 264 CLR 595 and *Spence v Queensland* (2019) 268 CLR 355.

<sup>2</sup> As set out in *McCloy* and modified in *Brown v Tasmania* (2017) 261 CLR 328.

<sup>3</sup> *McCloy*.

<sup>4</sup> *McCloy*.

be introduced. These include spending limits on candidates and/or parties,<sup>5</sup> banning political TV advertisements<sup>6</sup>, truth in political advertising laws,<sup>7</sup> a cap on political advertising expenditure and boosting public funding for not-for-profit organisations that represent diffuse interests.<sup>8</sup>

### What is the alternative?

*A referendum is not possible...*

The implied freedom of political communication arises from the text and structure of the *Commonwealth Constitution*, particularly sections 7, 24 and 128. Sections 7 and 24 require Senators and Representatives be directly chosen by the people and establishes a system of representative government. Section 128 provides that a proposed constitutional amendment must be submitted to voters at a referendum. It operates as a freedom from government restraint rather than an individual right. **Because it is not explicitly mentioned in the *Commonwealth Constitution*, it is not alterable by a referendum.** It is possible for a referendum to be held to insert a clause into the *Commonwealth Constitution* explicitly permitting a complete ban on political donations, though it is unlikely a referendum would be held by the Commonwealth.

Instead, parties must convince the High Court that an impugned law does not contradict precedent and overextend the judicial interpretation of the freedom of political communication.

*Nevertheless, the High Court could find a complete ban valid*

Property developers have been deemed a special group that poses a particularly high risk of corruption. The profits of property developers are largely dependent on government decisions, for example, on land zoning and development.<sup>9</sup> On the other hand, third-party campaigners, such as trade unions, were not put in the special category.<sup>10</sup> The discriminatory application of laws which aim to privilege certain voices over others has been of concern to the High Court.<sup>11</sup> A complete ban would not pose such difficulties as all voices will have equal standing.

Judicial analysis has tended to focus on the *reality* of undue influence and corruption of the government. But preventing such *perceptions* is an equally legitimate purpose.<sup>12</sup> Professor

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<sup>5</sup> OECD (2016) *Financing Democracy: Funding of Political Parties and Election Campaigns and The Risk of Policy Capture*. Paris: OECD Public Governance Reviews, OECD Publishing (<http://dx.doi.org/10.1787/9789264249455-En>)

<sup>6</sup> *Communications Act 2003* (UK), UK Advertising Standards Authority (2014).

<sup>7</sup> *Commonwealth Electoral Amendment (Stop the Lies) Bill 2021*.

<sup>8</sup> <https://grattan.edu.au/wp-content/uploads/2018/09/908-Who-s-in-the-room-Access-and-influence-in-Australian-politics.pdf>.

<sup>9</sup> *McCloy; Spence v Queensland*.

<sup>10</sup> *Unions NSW v NSW (No 2)*.

<sup>11</sup> Particularly to former Justice Patrick Keane.

<sup>12</sup> "It is not just actual corruption that is the issue; even the perception of corruption can damage trust in the political system": Dr Yee-Fui Ng, Submission 11 to the Senate Select Committee into the Political Influence of Donations, p 2

([https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Political\\_Influence\\_of\\_Donations/PoliticalDonations/Report\\_1](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Political_Influence_of_Donations/PoliticalDonations/Report_1)).

George Williams criticised the *Unions NSW v NSW (No 2)* decision for being “strikingly at odds with public debate”.<sup>13</sup> The High Court has been reticent to acknowledge the longstanding recognition by our community that our campaign financing system is broken. The deliberations of a citizens’ assembly could provide concrete evidence of how the public observe the culture of decision-making by government. The High Court has only been able to speculate on perceptions up until now.

*The role of citizens’ assemblies in constitutional challenges is untested but appears highly appropriate*

A citizens’ assembly is a body of citizens chosen by democratic lottery and formed to deliberate on an important issue or issues over a period of time.<sup>14</sup> They have been used to great success in many jurisdictions, notably in Ireland, and on issues of government and constitutional reform.<sup>15</sup>

Across the globe, public authorities are increasingly using these processes to involve citizens more directly in solving some of the most pressing policy challenges. They give ideal amounts of time and information to a group of citizens and facilitate their deliberation on an issue. This leads to finding common ground on a set of recommendations that balance difficult trade-offs.

If given the task of advising Parliament on political donations, an assembly would subject its final recommendations to the three-step test. A representative mix of the population would be providing reasoning and evidence for why their recommendations are constitutionally sound.

As a result of this, proposals by citizens’ assemblies may be viewed *more* favourably by the High Court than proposals by major political parties. Political parties have an inherent interest in ensuring that their re-election chances are not hurt, even if they are committed to government integrity reform.

Ordinary citizens do not have the competing motivation of cementing their own power. And, since the corrupting influence of donations is a major cause of the erosion of trust in our political system<sup>16</sup>, citizens’ assemblies can be powerful tools for its repair.<sup>17</sup>

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<sup>13</sup> <https://www.smh.com.au/opinion/writing-was-on-the-wall-for-political-donations-law-20131218-2zkk0.html>.

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[https://newdemocracy.com.au/wp-content/uploads/2017/05/docs\\_researchnotes\\_2017\\_May\\_nDF\\_RN\\_20170508\\_FormsOfMiniPublics.pdf](https://newdemocracy.com.au/wp-content/uploads/2017/05/docs_researchnotes_2017_May_nDF_RN_20170508_FormsOfMiniPublics.pdf).

<sup>15</sup>

[https://www.aph.gov.au/About\\_Parliament/Senate/Powers\\_practice\\_n\\_procedures/pops/pop46/citizensassemblies](https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/pops/pop46/citizensassemblies);

<https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780199567843.001.0001/acprof-9780199567843>.

<sup>16</sup> <https://grattan.edu.au/wp-content/uploads/2018/03/902-a-crisis-of-trust.pdf>;

<https://theconversation.com/australians-think-our-politicians-are-corrupt-but-where-is-the-evidence-101822>.

<sup>17</sup> <https://www.economist.com/leaders/2020/09/17/politicians-should-take-citizens-assemblies-seriously>;

[https://newdemocracy.com.au/wp-content/uploads/2017/05/docs\\_researchnotes\\_2018\\_June\\_nDF\\_RN\\_20180505\\_IrishCCandPMOffice.pdf.pdf](https://newdemocracy.com.au/wp-content/uploads/2017/05/docs_researchnotes_2018_June_nDF_RN_20180505_IrishCCandPMOffice.pdf.pdf); <https://newdemocracy.com.au/wp->

***What process offers the best chance of success?***

If a citizens' assembly did recommend a complete ban of political donations in NSW, what would be required of the process to give it the best opportunity of success in an eventual High Court challenge?

First, there needs to be robust evidence of the corrupting influence of political donations. Evidence has traditionally been supplied by an Expert Panel Report. Additionally, a citizen's assembly process canvassing a breadth of expert sources and enabling participants to express their perceptions of the state of politics can be expected to meet this requirement. Evidence should focus on the general corrupting influence of political donations and the inadequacy of the current cap.

Second, the citizens' assembly needs to be well-designed and rigorous. Professor George Williams comments that the High Court is likely to scrutinise how representative participants are of NSW, how questions are framed, what expert opinions are presented and the environment in which deliberations occur.

Third, the citizens' assembly must address concerns about infringing the implied freedom of political communication with reference to the three-step test. The recommendations proposed by the body should specifically address issues of compatibility and proportionality. In particular, allowing for equal participation in, and access to, the electoral sphere.<sup>18</sup>

Fourth, the citizens' assembly should propose suitable alternatives to the current system. The High Court will more likely accept a complete ban if other methods of political speech are available as donations are seen as important to marshalling community support.

Fifth, there must be an opportunity for the wider public to contribute to the process. To ensure the full diversity of voices are accounted for, those not selected by democratic lottery should have an avenue to express their opinions. This may look like having an open public submissions like parliamentary committees or wider community engagement methodologies.

Lastly, there must be bipartisan political support for the process and the final recommendations. Findings by a citizens' assembly will have greater legitimacy in the eyes of the High Court if endorsed by both the Government and Opposition.

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[content/uploads/2017/08/docs\\_researchnotes\\_2017\\_August\\_nDF\\_RN\\_20170808\\_BenefitsoftheJury\\_Model.pdf](#).

<sup>18</sup> Also known as the 'level playing field' principle.