

A Case Against Uniform Political Contribution Limits

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I INTRODUCTION

Significant changes to Australia's political finance regime are imminent. The parliaments of two of its most populous states, New South Wales¹ and Victoria,² are currently conducting inquiries into political funding with an eye towards recommending changes to regulation. They have been joined by the newly elected federal Labor government which has embarked on a process of public consultation that will involve a comprehensive review of Australia's political finance regulation.³

In this unfolding debate, supply-side measures seem to be commanding the most support amongst the reform-minded,⁴ in particular, restrictions on political contributions. In a response to the Wollongong City Council scandal, the New South Wales Premier Morris Iemma has advanced the radical proposal of completely banning political contributions in favour of a system of complete public funding.⁵ Following not too far behind, his predecessor, Bob Carr has advocated banning political contributions from organizations like trade unions and companies and only allowing those made by individuals. Proposals of this kind, in fact, have support across the political spectrum. The current Liberal Party shadow treasurer, Malcolm Turnbull,⁶ and the NSW Greens⁷ have similar positions. Amongst academics too, there is strong support for restricting or banning contributions from organizations. For instance, influenced by the Canadian model of regulation, a submission by the Democratic Audit of Australia to the New South Wales inquiry into political funding has called for a ban on organizations making contributions while only allowing limited individual donations.⁸

¹ The website of this inquiry is <http://www.parliament.nsw.gov.au/prod/parlament/committee.nsf/0/A87852213B83634ECA25730C00174AF9> (accessed on 22 May 2008).

² The website of this inquiry is <http://www.parliament.vic.gov.au/emc/Inquiry%20into%20Political%20Donations%20and%20Disclosure/default.htm> (accessed on 22 May 2008).

³ For details, see Senator John Faulkner, Special Minister of State, 'Electoral Reform', media release, 28 March 2008 (available at http://www.smos.gov.au/media/2008/mr_062008.html; accessed on 14 May 2008)

⁴ For instance, the federal minister in charge of this area, Senator John Faulkner, has flagged the prospect on banning contributions from lobbyists, property tycoons and tobacco companies, see Katherine Murphy, 'Political donors to face new limitations', *The Age*, 17 May 2008 (available at <http://www.theage.com.au/news/national/political-donors-to-face-new-limitations/2008/05/16/1210765176377.html>; accessed on 22 May 2008).

⁵ See Karl Bitar, NSW ALP Secretary, *Submission to NSW Inquiry into Electoral and Political Party Funding* (March 2008) (available at [http://www.parliament.nsw.gov.au/prod/parlament/committee.nsf/0/5e44ee94d5799e04ca25741d00031357/\\$FILE/Submission%20107a.pdf](http://www.parliament.nsw.gov.au/prod/parlament/committee.nsf/0/5e44ee94d5799e04ca25741d00031357/$FILE/Submission%20107a.pdf); accessed on 22 May 2008).

⁶ Malcolm Turnbull, *Submission to the Joint Standing Committee on Electoral Matters Inquiry into the 2004 Federal Election* (2005).

⁷ See [http://www.parliament.nsw.gov.au/prod/parlament/committee.nsf/0/dfc9200362cf2c4aca257402000e38aa/\\$FILE/080303%20corrected%20hearing%20transcript.pdf](http://www.parliament.nsw.gov.au/prod/parlament/committee.nsf/0/dfc9200362cf2c4aca257402000e38aa/$FILE/080303%20corrected%20hearing%20transcript.pdf) (accessed on 22 May 2008).

⁸ New South Wales Parliament's Inquiry into Electoral and Political Party Funding, *Public Hearings Transcript: 3 March 2008*, 33 (available at

The paper responds to the risk that such measures will become an article of faith amongst reformers. A common feature of these proposals is that restrictions on political contributions will apply equally to all types of organizations; in this sense, they are uniform contribution limits.⁹ In particular, there will be no differentiation between money from commercial corporations and trade union money. This reveals a fundamental flaw in the case for uniform contribution limits: a false equation of corporate and trade union contributions. There are other difficulties with the push for uniform contribution limits: it is misdirected at ‘trade union bosses’; adoption of uniform contribution limits will produce anomalies and give rise to an unjustified limitation on the freedom of political association.

II FALSE EQUATION OF CORPORATE AND TRADE UNION CONTRIBUTIONS

The appeal of uniform contribution limits lies in its apparent fairness. As the argument goes, ‘(i)f big business is to be prevented from bankrolling political parties in return for favourable policies, surely the same rule must apply to unions’.¹⁰ Why should trade unions be allowed to freely donate, especially to the Australian Labor Party (ALP), while business donations are largely prohibited? After all, shouldn’t the interests of labour and capital be fairly represented in the political arena? These claims, however, falsely equate corporate and trade union money. Being often informed by a notion of balance between capital and labour,¹¹ they seem also influenced by the pluralist assumption of ‘equality amongst groups’.¹² As the logic goes, if unions and business are already equal in political power then fairness is maintained by having measures that treat them in a similar way.¹³ These understandings of balance, however, neglect the *greater capacity of business to influence*

[http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/dfc9200362cf2c4aca257402000e38aa/\\$FILE/080303%20corrected%20hearing%20transcript.pdf](http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/dfc9200362cf2c4aca257402000e38aa/$FILE/080303%20corrected%20hearing%20transcript.pdf); accessed on 22 May 2008).

⁹ They contrast with tailored limits on organisational contributions, see, for example, The Power Inquiry, *Power to the People: An Independent Inquiry into Britain’s Democracy* (2006) 210-1 (copy on file with author).

¹⁰ Janet Albrechtsen, ‘End the stench of political donations’, *The Australian*, 24 February 2008 (available at http://blogs.theaustralian.news.com.au/janetalbrechtsen/index.php/theaustralian/comments/end_the_stench_of_political_donations/; accessed on 25 February 2008)

¹¹ For the notion of balance informing US restrictions on union and corporate political speech, see David J Sousa, ‘“No Balance in the Equities”: Union Power in the Making and Unmaking of the Campaign Finance Regime’ (1999) 13 *Studies in American Political Development* 374. For a good analysis of the constitutional issues relating to these restrictions, see John Bolton, ‘Constitutional Limitations on Restricting Corporate and Union Political Speech’ (1980) 22 *Arizona Law Review* 373.

¹² Charles Lindblom, *Politics and Markets: The World’s Political-Economic Systems* (1977) 141.

¹³ It has been observed that US restrictions on union and corporate political speech have been influenced by ‘the pluralists’ concern for the maintenance of a democratic balance among interest groups’: Sousa, above n 11, 377. A classic text on pluralism is Robert Dahl, *A Preface to Democratic Theory* (1965). For a trenchant Marxist critique, see Ralph Miliband, *The State in Capitalist Society: The Analysis of the Western System of Power* (1969).

*politics through money*¹⁴ as ‘great aggregations of wealth’.¹⁵ To illustrate, in 1995/96 to 1997/98, for instance, a total of \$29 million was given by business to the major parties.¹⁶ Compare this with the total capitalisation of companies listed on the Australian Stock Exchange in 1998, an astronomical \$536.2 billion.¹⁷

Moreover, the wealth of business influences politics not only through direct contributions to parties but also through its ownership of the means of production, distribution and exchange. It is such power that gives rise to what Lindblom rightly described as the ‘privileged position of business’.¹⁸ Such a position means that business have tremendous power in the market *and* in the political sphere. The latter results from political representatives being heavily reliant on the decisions on business for their own electoral success.¹⁹ As Lindblom has observed, ‘(b)usinessmen cannot be left knocking at the doors of the political systems, they must be invited in’.²⁰ Unions collectively do not enjoy parity of influence except in exceptional circumstances. So much can be seen by comparing the respective ability of business and unions to withhold their main asset: the freedom of business to withdraw their capital is largely unfettered while the ability of union members to withdraw their labour is severely constrained.²¹ With such imbalance between business and trade unions especially heightened in an era of economic globalisation, the equation between corporate and trade union money holds out a specious kind of equality where unequals are treated in an identical fashion.

Another crucial difference between corporate and trade union money stems from the ALP being a labour party with trade unions as members.²² As members of State and Territory branches of the ALP, affiliated trade unions are guaranteed 50% representation at State and Territory conferences²³ that, among others, determines State and Territory branch policies and elects State party officials and delegates to National Conference.²⁴

¹⁴ See generally Lindblom, above n 12, 198-9.

¹⁵ Elihu Root quoted in *U S v U A W* 353 US 572 (1956).

¹⁶ Ian Ramsay, Geof Stapledon and Joel Vernon, ‘Political Donations by Australian Companies’ (2001) 29 *Federal Law Review* 179, 201.

¹⁷ *Ibid* 204 quoting Australian Stock Exchange data.

¹⁸ Lindblom, above n 12, Chapter 13.

¹⁹ It can be added that trade union officials are also dependent on the decisions of business for their ability to maintain the support of their membership with the welfare of their constituency profoundly shaped by the decisions of business on how to use and deploy its capital.

²⁰ Lindblom, above n 12, 175.

²¹ *Ibid* 175-7. For current restrictions on the industrial action, see *Workplace Relations Act 1996* (Cth) Part 9.

²² See generally John Warhurst, ‘The Labor Party’ in Andrew Parkin et al (eds), *Government, Politics, Power and Policy in Australia* (1993) Chapter 8. For the different meanings of party membership, see discussion in Maurice Duverger, *Political Parties: Their Organization and Activity in the Modern State* (Barbara and Robert North trans, first published 1954, 2nd ed, 1959) [trans of: *Les Partis Politiques*] 61-89; Jean Blondel, *Political Parties: A Genuine Case for Discontent?* (1978) 145-8.

²³ See, for example, Rules of Australian Labor Party (NSW Branch) cl B.25(a), B.26; Rules of Australian Labor Party Victorian Branch cl 6.3.2.

²⁴ See, for example, Rules of Australian Labor Party (NSW Branch) cl B.2; Rules of Australian Labor Party Victorian Branch cl 6.2.

The latter functions as ‘the supreme governing authority of the Party’²⁵ and elects members of the National Executive, ‘the chief administrative authority’ of the party.²⁶ The bulk of the money²⁷ that trade unions provide to the ALP cannot be separated from their participation as members within the party: *trade union affiliation fees are membership fees*.

Being membership fees, they implicate freedom of political association at its core: the ability to form a party and act in association as party.²⁸ In other words, trade union affiliation fees draw in the principle of respecting the nature and diversity of party structures.²⁹ By comparison, even if corporate contributions were seen as a form of political association, it cannot be said that it implicates the freedom of political association as profoundly as membership fees paid by trade unions. Another point of difference relates to transparency. Membership subscriptions, whether by individuals or groups need to be accompanied by an open declaration that the member supports the party’s Constitution, policies and principles.³⁰ With corporate contributions, on the other hand, such principled support is not required. There is also transparency due to the formalisation of influence wielded by members. The NSW ALP’s Constitution, for example, sets up a Labor Advisory Council whose role ‘is to provide a formal consultative mechanism between the Party and the union movement in NSW’.³¹ Corporate money, however, tends to work its influence in much more informal ways and, indeed, we are reminded by Duverger that these contributions are usually ‘cloaked in great discretion’.³²

The difficulties with this false equation become apparent when analysing the problem of corruption as undue influence. The risk of such corruption arises because substantial political contributions tend to create a conflict between public duty and the financial interests of the party or candidate³³ and, therefore, the possibility that holders of public office will give an undue weight to the interests of their financiers, rather than deciding matters in the public interest.³⁴ Such corruption occurs when corporate financiers are able to wield informal influence within the party simply by virtue of the money they have contributed. Most clearly, it exists with the purchase and sale of access and influence. For instance, when businesses become sponsors of the NSW Liberal Party’s Millennium Forum, their influence through this organization is secured principally because they paid

²⁵ National Constitution of the ALP cl 5(b).

²⁶ Ibid cl 7(a).

²⁷ Some trade unions also provide money to the ALP separately.

²⁸ K D Ewing, *Trade Unions, the Labour Party and Political Funding: The next step: reform with restraint* (2002) para 3.4.

²⁹ K D Ewing, *The Cost of Democracy: Party Funding in Modern British Politics* (2007) 37.

³⁰ See, for example, National Constitution of the ALP cl 5.

³¹ Rules of the Australian Labor Party (NSW) 2005-2006 cl Q.2.

³² Duverger, above n 22, xxxiv.

³³ Daniel Lowenstein, ‘On Campaign Finance Reform: The Root of All Evil is Deeply Rooted’ (1989) 18 *Hofstra Law Review* 301, 323-9.

³⁴ Charles Beitz, ‘Political Finance in the United States: A Survey of Research’ (1984) 95(1) *Ethics* 129, 137.

sponsorship fees amounting to thousands of dollars.³⁵ By paying such fees, these companies are then able to exercise influence in clandestine circumstances, for example, through 'off the record' briefings.³⁶ This is an emphatic instance of what Walzer characterises as a 'blocked exchange' where money is used to buy political power.³⁷

Compare this with the influence of trade unions that accompanies their affiliation fees: such influence is exercised as members of the ALP with greater transparency relating to the objectives and modes of influence. There will be times, of course, when trade union officials informally leverage the fees paid by their unions to secure policy outcomes and also times when ALP party officials secretly alter the content of party policy because of the party's structural dependence on unions funds. In such situations, there will be corruption as undue influence with dependence on unions funds conflicting with the public functions of the ALP. Arguably, however, these situations are not typical of trade union participation within the ALP. What is perhaps more characteristic is the 'publicness' of such activity: affiliated trade unions seek to advance through the ALP their understanding of what is in the 'public interest' with a view to putting that conception of the public interest to the electorate. It is through this process of public deliberation and advocacy that affiliation fees are paid to the ALP. There is something terribly odd about characterising such a situation as giving rise to undue influence or, more specifically, a conflict between public interest and private interest, when it is the meaning of 'public interest' that is being debated and contested.

Underlying this analysis is the view that the presence of undue influence in this context cannot be concluded merely from the fact that political influence *accompanies* the payment of money. Otherwise individual members of parties would be guilty of undue influence simply by exercising their membership rights. Whether influence is undue depends on three other issues: 1) To what extent did such influence result from the payment of money? 2) What is the level of transparency attending such influence? 3) To what degree was such influence directed at a public articulation of the 'public interest'? The thrust of this analysis also means that if wealthy individuals and commercial corporations affiliate as members of a party or spend large sums on political advertising, there is unlikely to be corruption as undue influence; as with trade union membership of the ALP, money is being openly devoted to advancing a particular conception of the 'public interest'. This does not, however, mean that such funding receives a clean bill of health. Whilst the problem of corruption is less pressing, the threat to political equality remains. Because of the greater capacity of business to influence politics through money, the 'public interest' risk being shaped through its disproportionate wealth. The simple truth is that the financial involvement of business in politics, whether through political contributions,

³⁵ Liberal Party of Australia, New South Wales, *Millennium Forum* (2008) <<http://www.millenniumforum.com.au/first.htm>> at 21 May 2008.

³⁶ The website of the organization promises sponsors "'Off the Record" briefings that will keep you up to date with important political and economic developments that impact on your business': *ibid.*

³⁷ Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (1983) 100.

spending on ads or lobbying, always poses this risk regardless of the prospect of corruption.

III MISDIRECTED AT 'TRADE UNION BOSSES'

Uniform contribution limits will have a severe impact upon the trade union-ALP link by either prohibiting or severely limiting the amount of money that trade unions can contribute to the ALP. By banning or at least reducing significantly the flow of trade union affiliation fees to the ALP, such measures will most likely weaken the relationship that the trade union movement has with the ALP. This has, in fact, been welcomed by those discontented with the power wielded by 'trade union bosses' within the ALP. For example, former NSW Premier, Bob Carr, has endorsed his successor's call for banning organisational contributions on the basis that unions will not be able to affiliate to the ALP on a collective basis and instead will have to secure the consent of their members on an individual basis.³⁸

There are, in fact, three main complaints bundled up in the epithet, 'trade union bosses', that should be disentangled. The first can be dispensed with quickly. It is the claim that 'trade union bosses' or more kindly, the ALP's link to trade unions is making the ALP unelectable or at least preventing it from becoming 'the natural party of federal government'.³⁹ Even if so, this is a matter for the ALP and the voters to decide and not one for regulation, let alone uniform contribution limits.

There are, however, two other complaints that warrant greater examination: one relating to internal party democracy and the other to trade union democracy. It has been argued that the ALP is organised in 'a most undemocratic way'⁴⁰ because affiliated trade unions exercise 'a grossly out-of-proportion, even extraordinary, influence over policy formulation'.⁴¹ This lack of proportion is said to arise because the level of power trade union delegates exercise within the ALP is not justified by the level of union density: how can it be right that trade unions have 50% of delegates in ALP conferences when less than one-fifth of the workforce is unionised?⁴² This argument, however, turns on a fallacious use of the term, 'undemocratic'. It is true that parties have a representative function in that *parties or the party system as a whole* should represent the diversity of opinion within a society. This is, however, not the same as saying that *a single party* should seek to represent the entire spectrum of this opinion.⁴³ Not only is this practically impossible but

³⁸ Editors, 'Limit political donations: Carr', *The Australian*, 4 May 2008 (available at <http://www.theaustralian.news.com.au/story/0,25197,23643124-2702,00.html> at 21 May 2008).

³⁹ Mark Aarons, 'The Unions and Labor' in Robert Manne (ed), *Dear Mr Rudd: Ideas for A Better Australia* (2008) 86, 91.

⁴⁰ Ibid 88.

⁴¹ Ibid 88.

⁴² In 2007, union density stood at 19% of the Australian workforce: Australian Bureau of Statistics, *Employee Earnings, Benefits and Trade Union Membership, Australia, August 2007* (cat. no. 6310.0).

⁴³ See text below accompanying n 66.

paradoxically parties discharge their representative function by representing different sections of society. It is the cumulative effect of such sectional representation that stamps a party system as representative. In this context, characterising the manner in which ALP organised as being undemocratic simply because its membership base is not wholly representative of the Australian public is somewhat perverse.

It is also perverse for a different reason: reducing trade union influence will not necessarily revitalise the internal democracy of the ALP.⁴⁴ So much can be seen through a rough depiction of the power relations within the ALP by the table below. The party elite comprises the parliamentary leadership, the members of parliament and their staff;⁴⁵ the union leadership (including union delegates) and the party officials and bureaucrats. The rank and file, on the other hand, can be said to consist of the party members.

Party elite	Union leadership	Parliamentary leadership	Party officials and bureaucracy
Rank and file	Party members		

These relations can be analysed according to horizontal and vertical dimensions. Reducing the influence of the union leadership does not mean that power will flow vertically to the rank and file. In the context of shrinking party membership within the ALP,⁴⁶ it is far more likely that power will be redistributed horizontally to others remaining within the party elite. Where the ‘party in public office’, the parliamentary leadership, is already ascendant over ‘party on the ground’ as well as ‘party central office’,⁴⁷ it is a fair bet that the parliamentary leadership will be a key beneficiary of this redistribution of power. A similar conclusion results when one casts an eye to power relations beyond the party. Looking at the ‘material constitution’⁴⁸ of the ALP, that is, its relationship with class forces, diminishing the influence of trade unions will likely mean a corresponding empowerment of business interests but not of the rank and file. Moreover, with the ALP in power at all levels of government, the power of the government bureaucracy needs to be factored in with its influence likely to increase as sources of countervailing power like trade unions weaken in strength.

⁴⁴ This point is made well by Bolton: Bolton, above n 11, 417.

⁴⁵ This would include political advisers; some of which has been criticised as exercising ‘power without responsibility’: Anne Tiernan, *Power Without Responsibility* (2007). Tiernan’s study was focussed on ministerial advisers.

⁴⁶ For figures, see Gary Johns, ‘Party organisation and resources: Membership, funding and staffing’ in Ian Marsh (ed), *Political Parties in Transition?* (2006) 46, 47; Ian Ward, ‘Cartel parties and election campaigns’ in Ian Marsh (ed), *Political Parties in Transition?* (2006) 70, 73-5.

⁴⁷ Ward, *ibid*, 70, 72, 85-8.

⁴⁸ Tom Bramble and Rick Kuhn, ‘The Transformation of the Australian Labor Party’, Joint Social Sciences Public Lecture 8 June 2007, ANU, available at <http://dspace.anu.edu.au/handle/1885/45410>; accessed on 6 May 2008).

Underlying all this is a risk of throwing the baby out with the bath water. While it is true that the internal democracy of the ALP is undermined in some cases by trade unions because of their oligarchical tendencies, the answer is not to excise trade unions from the life of the party. Collective organizations like trade unions play a necessary, though at times problematic, role in empowering citizens. The ambivalent character of such organizations is well captured by Michels. He is, of course, famous for his iron law of oligarchy: ‘Who says organization, says oligarchy’.⁴⁹ He is perhaps less well-known for his observation that ‘(o)rganization . . . is the weapon of the weak in their struggle with the strong’.⁵⁰ Within the ALP, collective organizations like trade unions allow individual members to band together to secure a voice that they would not have otherwise. While they do give rise to the risk of oligarchy within the organizations themselves, functioning well they provide ‘effective internal polyarchal controls’⁵¹ that counter the oligarchical tendencies of the party. By severely diminishing the role of trade unions within the ALP, uniform contribution limits will ironically increase the oligarchical tendencies within the party.

The other complaint in relation to ‘trade union bosses’ concerns trade union democracy. Aarons has argued that because ‘individual unionists have no practical say in whether they are affiliated to the ALP and whether a proportion of their membership fees pay for this (and) . . . in how their union’s votes will be cast’, there is ‘not a democratic expression of the union membership’s wishes’.⁵² This criticism, however, is doubly misconceived. First, under any system of representative governance, most decisions are made by representatives without the direct say of their constituencies. It is this feature that contrasts representative government from systems based on direct democracy and, indeed, this is exactly how the Australian system of parliamentary representation is supposed to work. The key question in such contexts is not whether members have a direct say but whether the representatives are effectively accountable to their constituencies, in this case, trade union delegates to their members. The real problem here is one of ‘union oligarchies’⁵³ that are insulated from effective membership control; a point that may gain some support from the voting record of union members.⁵⁴ Yet, and this brings us to the second misconception, uniform contribution limits will do little to

⁴⁹ Robert Michels, *Political Parties: A Sociological Study of the Oligarchical Tendencies of Modern Democracy* (1962) 365. Michels’ iron law is better understood as point to the ‘oligarchical tendencies’ of organizations. The title of the last part of Michels’ book is, in fact, ‘Synthesis: The Oligarchical Tendencies of Organizations’: *ibid.*

⁵⁰ *Ibid.* 61. Schattscheider has similarly observed that ‘(p)eople do not usually become formidable to governments until they are organised’: E E Schattscheider, *Party Government* (1942) 28.

⁵¹ Lindblom, above n 12, 141.

⁵² Aarons, above n 39, 89.

⁵³ Andrew Parkin, ‘Party Organisation and Machine Politics: the ALP in Perspective’ in Andrew Parkin and John Warhurst (eds), *Machine Politics in the ALP* (1983) 15, 22.

⁵⁴ Only 63% of union members from 1966 to 2004 voted for the ALP: Andrew Leigh, ‘How Do Unionists Vote? Estimating the Causal Impact of Union Membership on Voting Behaviour from 1966 to 2004’ (2006) 41(4) *Australian Journal of Political Science* 537.

meaningfully address this problem.⁵⁵ At best, what they do is carve out certain decisions from the remit of trade union oligarchies while still leaving the oligarchies intact. Indeed, an argument based on trade union democracy can be mounted against uniform contribution limits: why shouldn't trade unions be allowed to make political contributions if these decisions are made democratically?

IV ANOMALIES OF UNIFORM CONTRIBUTION LIMITS

By limiting or even banning contributions from organizations, uniform contribution limits threaten to produce two striking anomalies. Presumably, parties will still be allowed to have State and Territory-based branches with intra-party transfers exempted from contribution limits. If so, collective affiliation based on geographical areas will still be allowed. But if collective affiliation is permitted on this basis, why limit collective affiliation based on ideological grounds (e.g. environmental groups seeking to affiliate to the Greens) or those based on occupation or class (e.g. farmers' groups seeking to affiliate to the National Party)?

If uniform limits applying to party contributions are enacted without limits on contributions to third parties and their spending then money will very well flow on to third party activity.⁵⁶ This would express a preference for pressure group politics over party politics as it will strongly encourage political groups to engage in independent third-party activity. Such a preference may favour issue politics over broader and more inclusive forms of politics that are more likely to emerge through the interest-aggregation performed by political parties.⁵⁷ It may also to shift politics away from electoral politics to parliamentary politics, what parties do in parliament, and policy politics, what a party in office does in relation to executive action.⁵⁸ In doing so, the challenge of accountability becomes more acute as the control of popular sovereignty is much weaker in relation to parliamentary and policy politics.⁵⁹

⁵⁵ Aarons has argued that problems with 'trade union bosses' requires review of the funding provided by trade unions to the ALP: Mark Aarons, 'Rein in union strongmen's ALP power', *The Australian*, 18 March 2008 (available at <http://www.theaustralian.news.com.au/story/0,25197,23391595-7583,00.html>; accessed on 19 May 2008)

⁵⁶ See Samuel Issacharoff and Pamela Karlan, 'The Hydraulics of Campaign Finance Reform' (1999) 77 *Texas Law Review* 1705, 1714-5.

⁵⁷ See also Ewing, above n 28, para 4.6-4.7. This is not to deny that the Australian Labor Party is already influenced by pressure group politics. For a case-study, see Philip Mendes, 'Labourists and the welfare lobby: the relationship between the Federal Labor Party and the Australian Council of Social Service (ACOSS)' (2004) 39(1) *Australian Journal of Political Science* 145.

⁵⁸ For the distinction between electoral, parliamentary and policy politics, see Ian Marsh, *Beyond the Two Party System: Political Representation, Economic Competitiveness and Australian Politics* (1995) 35-43.

⁵⁹ See discussion in Schattscheider, above n 50, Chapter 8.

IV UNJUSTIFIED LIMITATION OF FREEDOM OF POLITICAL ASSOCIATION

In political systems dominated by parties, freedom of political association crucially includes the freedom to associate in parties. The better view is to see such freedom not as being based on an intrinsic right of parties to be free from state regulation but anchored in the functions they perform in a democratic society.⁶⁰ It may be said here that the only function that parties perform are as vehicles to gain political power. This is true but only a partial truth. What it obscures are the various public functions that parties perform by engaging in contests to secure political power. Foremost, parties play a *representative* function. A healthy party-system should represent the diverse strands of opinion existing in Australia. This system would offer genuine electoral choice, such that the party platforms cater to the different preferences of Australian voters. Second, parties perform an *agenda-setting* function in stimulating and generating ideas for Australian politics. The richness of ideas informing Australian politics will depend heavily on how vigorous the parties are in promoting new ideas and in particular, the priority they place on policy development and research. Third, parties perform a *participatory* function, as they offer a vehicle for political participation through membership, meetings and engagement in the development of party policy. Both the agenda-setting and participatory functions indicate how parties play a central role in facilitating democratic deliberation.⁶¹ Fourth, parties perform a *governance* function. This function largely relates to parties who succeed in having elected representatives. These parties determine the pool of people who govern through their recruitment and pre-selection processes. They also participate in the act of governing. This is clearly the case with the party elected to government and also equally true of other parliamentary parties as they are involved in the law-making process and scrutinise the actions of the executive government.⁶²

The *principle of pluralism* is implicit in all of these functions. Party politics should provide citizens with different ways to engage in political activity and to be represented. Party policies and programmes should also offer clear and meaningful choices. For such pluralism to exist, parties will necessarily be based on diverse structures. Some parties, such as the Liberal Party⁶³ and the National Party⁶⁴, may restrict themselves to individual memberships and are, in this way, *direct parties*. Others like the Australian Labor Party⁶⁵ and the NSW Greens⁶⁶ allow both individual membership and collective membership of

⁶⁰ For a rejection of a rights-based approach to freedom of party association and a preference for a functional analysis, see Samuel Issacharoff, 'Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition' (2001) 101 *Columbia Law Review* 274.

⁶¹ For Blondel, these functions would be characterise as the representative and mobilising aims of parties: Blondel, above n 22, 21-4.

⁶² For similar functions ascribed to political parties, see Karl-Heinz Nassmacher, 'Introduction' in Reginald Austin and Maja Tjenstrom (eds), *Funding of Parties and Election Campaigns* (2003) 2.

⁶³ See, for example, Constitution and Regulations of the Liberal Party of Australia (NSW) cl 2.1.

⁶⁴ See, for example, Constitution and Rules of the National Party of Australia (NSW) cl 2.

⁶⁵ See, for example, Rules of the Australian Labor Party (NSW) 2005-2006 cl A.2-A.3

⁶⁶ Constitution of the Greens (NSW) cl 2.1.

groups and are therefore, *mixed parties*. The Constitution of the Federal National Party also allows it to be a mixed party as organizations can become associations of the party where there is no State branch.⁶⁷ Some parties like the NSW Shooters Party fall somewhere in the middle: membership is formally restricted to individuals⁶⁸, while close links are maintained with various groups.⁶⁹ In these situations, such groups, while not members of the party, act as *ancillary organizations*.⁷⁰ Such diversity of party structures should be respected, because it is one of the main ways in which the pluralism of Australian politics is sustained.⁷¹

The principle of pluralism points to the need to respect freedom of party association, the ability of citizens to band together in political parties and to organise their parties as they see fit. Pluralism cannot be sustained without parties have meaningful autonomy in organising their affairs. Respecting freedom of party association does not, however, mean that such freedom is absolute. Indeed, the functions of the parties themselves may furnish reasons for limiting such freedom. For instance, parties cannot properly discharge their participatory functions if their membership rolls have been corrupted; a problem that may require state intervention.

When viewed from this perspective, the impact of uniform contributions limits on the freedom of party association is quite severe. Such measures, while not directly banning indirect parties, generally make them unviable unless such parties are able to secure sufficient public funding.⁷² The specific impact on the unions-ALP relationship can be illustrated through typology developed by Bodah, Coates and Ludlam. According to these authors, there are two dimensions to union-party linkages, formal organisational

⁶⁷ Constitution of the National Party of Australia (Cth) cl 71.

⁶⁸ Constitution of The Shooters Party (NSW) By-law (2).

⁶⁹ In the case of the Shooters Party, this is made clear by its Constitution, which states that one of its aims is ‘(t)o exert a discipline through shooting organizations and clubs and within the non-affiliated shooting community, to curb the lawless and dangerous element; and to help shooters understand that they hold the future of their sport in their own hands by their standards of conduct’: Constitution of The Shooters Party (NSW) cl 2(g) (emphasis added). In relation to the 2003 State Election, The Shooters Party received thousands of dollars in contributions from various hunting and pistol clubs including the Federation of Hunting Clubs Inc., Singleton Hunting Club, St Ives Pistol Club, Illawarra Pistol Club and the NSW Amateur Pistol Association: Election Funding Authority (NSW), *Details of Political Contributions of More than \$1,500 Received by Parties that Endorsed a Group and by Independent Group at the Legislative Council* 2003 (2003) <http://www.efa.nsw.gov.au/_data/assets/pdf_file/0008/30140/2003PartyContributions.pdf> at 5 February 2008.

⁷⁰ For fuller explanations of direct and indirect party structures, see Duverger, above n 22, 6-17.

⁷¹ For fuller discussion, see Ewing, above n 29, 35-8.

⁷² This seems to be the position in relation to Canadian New Democratic Party that still allows trade unions to affiliate on a collective basis: see Harold Jansen and Lisa Young, ‘Solidarity Forever? The NDP, Organised Labour, and the Changing Face of Party Finance in Canada’, Paper presented to the Annual Meeting of the Canadian Political Science Association, London, Ontario, 2-4 June 2005 (available at <http://www.partyfinance.ca/publications/OrganizedLabour.pdf> at 21 May 2008). See also discussion in Ewing, above n 29, 220-1.

integration and level of policy-making influence, thereby giving rise to four types of linkages:

- external lobbying type, i.e. no formal organisational integration between unions and parties with unions have no or little influence in party policy-making;
- internal lobbying type, i.e. no formal organization integration but unions regularly consulted in policy-making;
- union/party bonding type, i.e. unions occupy important party positions but do not enjoy domination of party policy-making; and
- union dominance model, i.e. unions occupy important party positions and dominate party policy-making⁷³

By making organization integration between the ALP and unions much less viable, the menu of options is effectively restricted to the external/internal lobbying types. As a consequence, the representative and participatory functions of the ALP and, quite possibly, also its agenda-setting function will be impaired.

Is there a compelling justification for such a severe incursion into the freedom of the ALP to organise itself as it sees fit? It is exceedingly difficult to see one. Preventing corruption as undue influence founders upon a false equation of corporate and trade union money.⁷⁴ As the previous discussion has argued, complaints of ‘trade union bosses’ are misdirected as uniform contribution limits will neither enhance internal party democracy nor invigorate trade union democracy.⁷⁵ Absent any compelling justification, it is hard to escape the conclusion that uniform contribution limit represent an unjustified limitation on freedom of party association.

V CONCLUSION

This paper has presented arguments that are negative in character; arguments amounting to a case against uniform contribution limits. A question may linger: if uniform contribution limits are not justified, how do we deal with corruption as undue influence that arises through corporate contributions? The answer, it seems to me, would involve a mix of measures. Demand-side measures like spending limits are most crucial as it is clear that unsavoury practices in selling access and influence is largely driven by the perceived need to match the spending of competing parties in the context of rising campaigning costs. Focussed measures directed at situations giving rise to serious conflicts of interest should be supported including bans on contributions from companies and persons

⁷³ Matthew Bodah, Steve Ludlam and David Coates, ‘The Development of an Anglo-American Model of Trade Union and Political Party Relations’ (2003) 28(2) *Labor Studies Journal* 45, 46; see also Steve Ludlam, Matthew Bodah and David Coates, ‘Trajectories of solidarity: changing union-party linkages in the UK and the USA’ (2002) 4(2) *British Journal of Politics and International Relations* 222, 233-241. For an application of the typology to the Australian context, see Gerard Griffin, Chris Nyland and Anne O’Rourke, ‘Trade Unions, the Australian Labor Party and the Trade-Labour Rights Debate’ (2004) 39(1) *Australian Journal of Political Science* 89.

⁷⁴ See discussion above accompanying nn 33-37.

⁷⁵ See discussion above accompanying nn 40-54.

holding or tendering for government contracts and more onerous disclosure obligations when public officials make decisions affecting their financiers. We should also look to increasing the accountability of company directors to share-holders for their decisions to make political contributions by requiring that share-holders periodically authorise such contributions.⁷⁶ We may also consider enhancing self-regulation, for instance, voluntary party policies that detail the maximum amounts that will be received and also the permissible categories of contributors.⁷⁷

⁷⁶ For elaboration on these various measures, see Sally Young and Joo-Cheong Tham, *Political Finance in Australia: A Secret and Skewed System* (2006) Chapter 6 (available at http://democratic.audit.anu.edu.au/papers/focussed_audits/20061121_youngthamfin.pdf; accessed on 23 May 2008).

⁷⁷ Ewing, above n 29, 230-2. See also Ewing, above n 28, para 5.4-5.5.