This submission aims to clarify and defend three claims.*

The first is that, since the High Court ruled in McCloy's case in 2015 that political donations cannot be used to 'drown out' the voices of electors, there is no constitutional impediment to the use of caps and bans to 'maintain a level playing field' in order to ensure that each vote has equal value.

Secondly, the constitutional principle responsible for this ruling may also justify caps and bans on the use of money to *distract or manipulate* voters. Thirdly, huge savings are possible if public funds are used to inform and educate, but not for persuasion or advocacy. While the submission does not and must not limit free speech, the taxpayer should not pay the cost of persuading citizens to vote in a certain way.

Any reform of the law on political donations must comply with constitutional principles which define the legislative powers of the Commonwealth and states. In broad terms these principles recognise an implied principle of freedom of communication on political matters and, since McCloy, a distinct and in some cases competing principle of equal access to the exercise of political power. The former validates the role of donations in publicising the views of candidates and parties, while the latter limits this so as not to 'drown out' the voices of ordinary citizens.

The three cases most in point arise from NSW legislation which sought to impose limits on donations by relying on the freedom principle. There is, however, ongoing debate as to their interpretation, and over the evidence needed to satisfy complex rules spelled out by the High Court to resolve conflicts.

Contrary to a common view, and despite the unions' success, in the most recent case in January 2019 the High Court's judgment reaffirms the ruling that there is no constitutional bar to legislation just because it caps or bans political donations. Whether these are valid will depend primarily on a 'proportionality' test backed by appropriate factual evidence.

It is, however, wrong to suppose the High Court's concern for equal access to the exercise of political power (that big money should not 'drown out' the voices of ordinary citizens) is the only justification the Commission should consider. There is, for example, a case for capping donations to reduce the huge sums spent on repetitive and expensive TV ads in the final weeks of a campaign. Earlier decisions on this matter must now be seen in light of the 'egalitarian' principle of McCloy's Case.

The Commission should, in particular, support caps and bans on the use of funds to distract and manipulate public opinion in this way. It should distinguish between advocacy to persuade electors and the provision of information on the policies of parties and the qualifications of candidates. Modern communication technologies, including social media, suggest this will result in huge savings.

This will address the real problem, which is not corruption in the shadows but distortion of the electoral process in broad daylight. It arises from reciprocal expectations whereby big donors elect parties which in turn favour their interests. This symbiosis is now systemic and is at the core of the High Court's ruling in McCloy, where the majority judgment includes a sophisticated and realistic analysis of the problem.

In accordance with this analysis and in light of the above ruling this submission favours a cap on donations of $1000, with the same cap on third party donations from Australian citizens of voting age (which would help satisfy the 'proportionality' test in McCloy). It would ban donations from foreign sources, corporations, trade unions and other associations, including 'think tanks' and lobby groups such as Getup. It leaves members free to donate up to the capped limit. If constitutionally valid it would, I believe, be supported by the great majority of Australian citizens.

Whether or not the Commission recommends caps on third party funding it is essential that donations and pledges in excess of $1000 should be disclosed *at the time they are made.* No one has yet shown that this is impossible or impractical as distinct from inconvenient.

The above reforms may be the only way to prevent the rise of US-style 'Political Action Committees' which, together with extreme gerrymanders, have done so much damage to American politics.

Attachment

Introduction

The submission addresses questions which arise from the Interim Report, and in particular the Addendum to that Report which refers to section 29 (10) of the Electoral Funding Act 2018 (NSW) and the recent High Court ruling in Unions NSW & Ors v NSW(2019) HCA 1.

The Commission notes that this decision was handed down after the Interim Report was released and is relevant to several aspects of the Review into Tasmania's Electoral Act and associated laws. It therefore extended the period for consultation to 15th April, explaining:

> "The decision directly relates to the issues of capping electoral expenditure by third party campaigners (in a differentiated sense to political parties or candidates) and potentially also extends to limits on donations to third parties for the purpose of electoral expenditure. It is clear from the decision that careful analysis, research and evidence gathering is required to support and justify as reasonably necessary the formulation of legislation or policy that seeks to burden the implied freedom of political communication on governmental and political matters. As such, the addendum to the Interim Report seeks to briefly explain the impact of the High Court decision, and pose further specific consultation issues for feedback."

The aim of this attachment is to explain why the theme of the submission is an unavoidable part of consultations needed to assess proposals for reform of the Tasmanian law on political donations, and especially so in light of the recent High Court ruling in Unions NSW & Ors v NSW (2019) HCA 1.

That theme, briefly stated, is that the decision reinforces earlier rulings by the High Court that the implied constitutional principle of freedom of political communication must, in certain cases, give way to the less well known implied constitutional principle requiring equal access to the exercise of political power.

The first principle ensures that voters are able to make an informed choice, having heard all the arguments and judged them on their merits. The second ensures that their contribution to the debates, and their ability to influence voters, are not 'drowned out' by big money donors using their ability to dominate the media, including social media.

A second and related aim is to question the wisdom of ignoring a principle the High Court sees as fundamental in limiting the legislative competence of state and federal parliaments to secure the 'level playing field' needed for a genuine, free and informed choice in elections. Although the government has no specific legal duty to ensure elections are free and fair, neither does it have the power to pass laws which infringe on the freedom of political communication or on the equal access to political power.

This attachment notes below the comprehansive approach of the Interim Report. It is, however, surprising and troubling that it fails to mention problems posed by the interaction of the constitutional principles, because this is essential to understand Unions NSW & Ors NSW(2019) HCA 1 and the reasoning which explains the unions' victory in that case.

The decision in favour of the unions was possible only because the NSW Government had failed to discharge its onus of proving the implied freedom of communication was outweighed by the competing principle of equal access to the exercise of political power, in accordance with the legitimate aim of Parliament to provide what the High Court describes as a 'level playing field'.

Understood in this way, the equal access principle justifies constraints on spending used to drown out the voices of others. It works to give each vote its full value, thus maximising the degree to which each citizen is treated with equal concern and respect, that is, equal concern for their interests and equal respect for themselves as members of the same political community.

That this ideal is fundamental is re-affirmed when governments are elected after a hard fought election. The newly elected leader will promise to govern for the benefit of all Australians, not just those whose

votes were needed to secure victory.

There are, in fact, legal philosophers who argue that this 'egalitarian' ideal is the true rationale of democracy, not the 'populist' theory which says governments should do whatever a numerical majority wants, a theory whose merits are currently on display in the UK.

However that may be, the public debate on political donations has seen strong differences of opinion both in and between parties and in the community generally. It includes issues which are relevant to any reform of the law on political donations in Tasmania, but which attract little attention other than from a handful of lawyers and political theorists. This is notably the case with the issues raised by the 2019 Unions ruling.

Before looking at these issues it is useful to put them in context with a brief historical account of the movement for reform in Tasmania.

Background

In 1989 the Greens won five seats in the House of Representative and their leader, Dr. Bob Brown, signed an Accord with Labor agreeing to a more open parliamentary process, a legislative research service, parity in parliamentary staffing and a reform agenda which included equal opportunity and freedom of information.

In the same year the Edmund Rouse bribery trial highlighted the reality of corrupt donations. It led to the Carter Royal Commission and an opportunity for Brown, in the absence of moves to implement transparency provisions of the Accord, to introduce in 1990 a private member's bill for disclosure of donations larger than $100.

The Carter Report recommended clear laws to ensure all gifts to political parties, politicians and candidates be disclosed, and for annual returns in respect of the income and expenditure of parties. It also recommended spending limits be reinstated for all candidates in House of Assembly elections. Labor Minister Frances Bladel argued that this was needed to ensure no one can 'purchase a seat', and to extend the scope of the office to include the broadest range of talents in the community.

Following the election of Robin Gray in 1982 the government chose not to accept the recommendations. It did not believe the public should be burdened with election costs and saw no reason to cap or ban donations from wealthy citizens and corporations. If there was evidence of a criminal conspiracy or other form of corruption it would be dealt with by the police in the normal way, as in the Rouse case.

Why political donations remain controversial

The debate now includes a huge literature, much of it repetitive. A widely shared aim is to help the public understand the history and practice of election funding and the implications of proposals for reform.

Examples include submissions from the Tasmanian Electoral Commission and the University of Tasmania's Institute for the Study of Social Change. The Interim Report itself offers a useful and comprehensive summary of the system and practice in different states.

Few, however, would deny that the most important differences seem intractable, because they reflect differing political philosophies and the deeper concerns they rest on. These are exemplified in the views of two former prime ministers, and widely regarded as a natural difference between conservative and progressive wings of the Liberal Party.

On September 7th 2016, in an address to the National Press Club, John Howard expressed support for real-time disclosure but nothing beyond that, saying,

> "... fundamentally it is an attack on freedom of political activity and expression. If you limit donations to a small amount per head, that will inevitably result in massive increases in public funding. And political parties cannot run campaigns on nothing ....I certainly don't agree ... that we should further limit the amount that people contribute or companies contribute."

By contrast, Malcolm Turnbull, speaking to reporters on the sidelines of the 2016 Australia-ASEAN Summit, and as reported by the ABC's Sabra Lane, said,

> "I have argued that ideally donations to political parties should be limited to people who are on the electoral role, voters. And so you would exclude not simply foreigners but you would exclude corporations and you'd exclude trade unions. I have always felt that would be a good measure."

Apart from the issue of public spending, this disagreement reflects differing views on the relative importance of widely-shared values, in this case ideals of freedom (including commercial freedoms) and fairness. It is how most people, and politicians much of the time, see the conflict - they speak of the need to find 'the right balance', because no-one denies that both values are important.

The Tasmanian Labor Party

The State Labor Party proposals for reform are closer to the views of Malcolm Turnbull in their emphasis on the need for fairness. Their concerns are summarised by Shadow Attorney-General Ella Haddad:

> "Tasmanians will never know the source of more than $3 million in donations to the Liberal Party during the last election campaign.... Tasmania has some of the worst transparency laws in the nation .... Political parties only have to declare donations over $13,800 and individual candidates aren't required to declare donations at all.... This compares with the $1,000 limit in NSW, Victoria and Queensland. Labor's policy is for all parties as well as candidates to have to disclose donations above $1,000 and, like in other jurisdictions, those disclosures should be made within 14 days of receipt for ... donations from a single source to a total of the disclosure threshold or more within a financial year.... Registered third parties should also have to disclose their election spending. Until third parties are required to declare how much they spend during Tasmanian elections the public will never know who is paying for influence in the electoral process."

Greens, Independents and many of the public think this does not go far enough. They see it as dealing only with transparency to avoid corruption, and some believe it falls short even in this aim for the following reasons:

First, it leaves a gap of 14 days after which a donation can be made in the last fortnight without disclosure. There would need to be a ban on donations in the last two weeks plus to close this gap.

It also falls short because it does not include a promise made now to donate (or offer any other benefit) after the election. Promises to donate later should be treated as donations already made.

Another weakness is that, while it calls for donations to be disclosed to the TEC within 14 days, it does not require the TEC to make them public either then or at any other time. This is also true of the receipt and expenditure return, which allows a 60 day period, but imposes no duty to make this public.

It offers no solution to the problem posed by local companies which are offshoots of foreign entities. How, for instance, can one ban donations from foreign corporations, associations and other bodies, and their staff, without banning donations from the local companies they control? A similar problem arises if an Australian company decides to create subsidiaries in order to disaggregate it's funding.

Finally, it does not support real time disclosure, although no one has yet shown that this is impractical, as distinct from inconvenient and perhaps embarrassing to some donors.

While these are serious problems a major concern for critics is that Labor's policy allows third parties - including corporations, associations, business groups and wealthy individuals - to donate $100,000 each. It means a wealthy family, or a coalition of wealthy people, or a trade union or trade association, or any other lobby group eg. Getup, can raise millions to win an election.

This prospect goes to the heart of the problem of third party donations discussed in the third case ie., Unions NSW & Ors v NSW(2019) HCA 1.

The current law

The ideological difference noted between John Howard and Malcolm Turnbull has its counterpart in decisions by the High Court which require judges to decide which of two constitutional principles has

priority in a disputed case. What are these principles and where did they come from?

There are many important cases but three in particular stand out, all relatively recent and all arising from attempts by the NSW Government to impose constraints on election spending and donations. The first is Unions NSW v NSW (2013) HCA 58, where a unanimous High Court ruled that an attempt by the NSW Government to limit union donations was in breach of an implied constitutional principle of freedom of political communication, a principle recognised in 1992 but largely ignored for two decades.

The second case is McCloy v New South Wales (2015) HCA 34, which has no precedent and would have surprised constitutional lawyers at the time. The Court did two important things. First, it refined earlier case law by specifying a three-stage test to determine when a law was invalid because it was in breach of the freedom principle. (this has since been modified in Brown v Tasmania (2017) 261 CLR 328).

Secondly, the joint judgment of the majority (French CJ, Kiefel, Bell and Keane JJ) stated another implied constitutional principle, using much the same logic it had used many years earlier to establish the implied freedom of communication.

The new principle called for equal access to the exercise of political power. It led the Court to rule that NSW legislation which put caps on donations and banned donations from property developers did not impermissibly burden the implied freedom of political communication, thus defeating attempts to rely on that freedom.

The High Court was at pains to stress, as it did with the freedom principle, that the equal access principle does not confer rights on citizens or impose duties on government, but serves only to define and limit the legislative competence of the Commonwealth and state governments. It has no 'bite' until and unless a government makes laws which impede equal access to the exercise of political power.

The third case in point is Unions NSW & Ors v NSW(2019) HCA 1, the ruling which has led to an extension of the time for consultation. In a unanimous decision the High Court ruled that the implied freedom of political communication invalidated NSW laws which tried to cap third party donations. In the words of the NSW Parliamentary Research E-brief published in March, 2019,

> "On 29 January 2019, the High Court handed down its decision in Unions NSW v New South Wales, a case with implications for the 2019 State election.The case examined provisions in the Electoral Funding Act 2018, including s29(10) which reduced the monetary limit of election expenditure by third-party campaigners from over $1.2 million to $500,000 in the six months leading up to a State election. The High Court found s29(10) to be invalid as it breached the implied freedom of political communication...".

The High Court's judgment was handed down on 29 January 2019. Chief Justice Kiefel, Justices Bell and Keane concurred in a joint judgment, while Justices Gageler, Nettle, Edelman and Gordon agreed with the decision on separate grounds. The joint judgment began by explaining that the purpose of s29(10) was to 'prevent the drowning out of voices by the distorting influence of money'

It proceeded to confirm the McCloy approach by endorsing an essential part of the test it requires, that is, the test of whether the legislation in point is reasonably necessary to fulfil that purpose:

> "Where a compatible purpose is identified by those contending for the validity of a statutory provision, the court may proceed upon the assumption that it is the relevant purpose upon which validity will depend. It may be assumed that the purpose of s29(10) is legitimate and attention directed immediately to the issue which is clearly determinative of question 1, namely whether the further restrictions which s29(10) places on the freedom of political communication can be said to be reasonably necessary and for that reason justified."

In short the joint judgment ruled that the freedom principle can be outweighed by a legislative aim to prevent parties and candidates using 'the distorting influence of money' to drown out voices, thereby reaffirming the majority decision in McCloy that the implied freedom of political communication may have to give way to the implied principle of equal access to the exercise of political power.

This should not be surprising because the key feature of McCloy's case is a recognition that the real problem of political donations is not so much corruption in the shadows but a distortion of the electoral process in broad daylight. This feature has been downplayed in the literature of reform, including by some constitutional lawyers.

An exception is Professor Graeme Orr, an expert on both constitutional law and electoral law, who published an article in The Conversation on October 8, one day after the judgment was handed down. The title and opening paragraph are indicative:

> "In McCloy case High Court finally embraces political equality ahead of political freedom ....
>
> The High Court unequivocally confirmed on Wednesday that political donations may be limited - both in their size, and even in who can make them. In doing so, the judges showed signs of a welcome embrace of the ideal of political equality to temper the court's earlier fascination with political freedom."
>
> He concludes that the judges 'lined up' to redress the imbalance arising from the one-sided commitment to an ideal of freedom, reminding readers that the four justices stressed that .... "equality of opportunity to participate in the exercise of political sovereignty ... is guaranteed by the Constitution."

Summary of recent cases

It is useful to recap conclusions which follow from the three cases taken together and the initial response. The first is that, after McCloy, no one can dismiss reform proposals by claiming caps and bans are contrary to the Constitution. The second is that no one knows how courts will weigh the competing principles and make 'value' judgments as to which has priority. As the recent unions case makes clear, this must depend on the evidence and its presentation.

But this is only the beginning because if the equal access principle can triumph over the freedom principle, it must have sufficient judicial 'weight' to strike down legislation in its own name, just as the freedom principle has, and this has huge implications for the nation's political life because it means it can likewise strike down legislation which would impede access to the equal exercise of political power more generally, not just where it is in conflict with the freedom principle. So far, however, it has not ventured beyond those cases, where it was invoked to prevent unfair exploitation of that principle.

What is striking about Professor Orr's paper is the emphasis it gives to the role of this 'egalitarian' principle. In contrast with many others he sees this as crucial to the decision. It is what lawyers call the 'ratio decidendi' - the proposition for which the case stands as an authority. It is not mere 'obiter dicta' - views expressed which command respect but do not bind later courts.

Some lawyers read McCloy differently. They see it as a decision based on the rules setting out the requirements of the revised three-stage test (ie., the test which tells us if there is a breach of the freedom principle) rather than on a finding that this principle has been trumped by the equal access principle.

This appears to be the case with the account given by the NSW Parliamentary Research Service in its E-brief of March 2019 and in the summary of judgment prefacing the HCA report. Neither mentions the equal access principle or, indeed, McCloy.

While this doctrinal point may require clarification it poses no risk to the substantive role of fairness because, as the second unions case makes clear the three-stage test, and especially the 'compatibility' and 'proportionality' components of this test, are enough to prevent attempts to use the freedom of political communication in a way which compromises equal access to the exercise of political power.

A wider role for McCloy?

An important question raised by Mc Cloy is whether it can be used against more insidious forms of constraint on equal access to the reins of power. The decision was based on compelling factual evidence that it was needed to prevent distortion by '*drowning out*' the voices of ordinary citizens.

No doubt comparable evidence might show campaigns rely heavily on political donations to fund advertisements which aim *to distract attention from a government's record* on domestic and foreign policy during its term in office. This works against a 'level playing field' not by drowning out voices, but by focussing the debate elswhere eg., on crude claims of dishonesty or other moral failure.

No less important is a need to counter the *manipulation of opinion* using psychological techniques popular with commercial marketers and public relations experts. A vote may be 'free' in the sense that it is not coerced, but it may not represent the voter's objective judgment. [redacted] in the US has made this kind of media manipulation an art form unlikely to be surpassed.

McCloy offers a means to combat both these abuses because it allows Courts to take a more realistic approach - one which recognises and targets the distortion of democratic process this strategy entails. Indeed, the ability of big money to control and focus debate has been so obvious in recent years that the evidence needed to justify caps and bans would not trouble experienced lawyers. Many critics eg., say the ability to give secret donations helps explain the Tasmanian election in 2018.

Importantly, McCloy would also justify bans on donations from US style Political Action Committees before they take root. While there is no serious move to support such Committees, there is a growing belief that wealth, or access to it, is a natural and inevitable part of the game -

What rights do/should third parties have?

However that may be, it remains an open question whether the equal access principle will justify legislation banning donations from *all* non-citizens, including corporations, trade unions, business groups and other entities, because it ipso facto increases the ability of members to decide who will exercise political power.

This is, arguably, a simple matter of maths. Suppose ten wealthy people form a 'civil society' action group to advance conservative values, including a low flat tax and cuts to health, education and welfare. They book TV ads in prime time for the last few days of an election and hire an aggressive marketer and a good defamation lawyer. Under Labor's plan they have $1.2 million to influence public opinion.

This is bad enough, but if all members are registered voters then each will have the influence of an ordinary citizen *as well as* the additional political influence of a third party interest group - in this case their access to the exercise of political power rises by 10%. Multiply the number of such interest groups (across the political spectrum) by several thousand and the 'level playing field' championed by the High Court becomes a financial obstacle course, if not a public auction, if not a civil war.

This point has been obscured by a tendency on the part of major parties to lump citizens together with unions and corporations as 'third parties' and to declare, without supporting argument, that third parties 'have a right' to make donations. This device blurs the distinction between ordinary non-voting citizens and entities such as trade unions, corporate bodies, motoring associations and other social and political groups.

This is what the three member 'Expert Panel' (appointed by then NSW Premier Mike Baird in 2014) did when asked to report on 'options for the reform of political donations.' It claimed that such entities had a right to donate, but did not explain what version of democratic theory could possibly justify such a right. The assumption was that, since past practice allowed unlimited donations from unions and corporations, that fact was sufficient to confer a moral or legal 'right' to continue.

Notwithstanding this reasoning, and following a referral from the NSW Premier, the Joint Standing Committee on Electoral Matters adopted the recommendations of the Expert Panel in its June 2016 Report and concluded that third party campaigners should be allowed to spend 'a reasonable amount of money to run their campaign.' The unanswered question is why?

Saving public (and private) money

The need to encourage philanthropy is a major aim of Liberal policy and one which, together with a commitment to freedom, helps explain John Howard's passionate defence of the party's values. It goes hand in hand with a belief that ordinary citizens should not be burdened with the costs.

If we go back to first principles, however, we might ask which expenses are a legitimate use of public funds, and the obvious answer is those which are needed to communicate the policies of parties and the qualifications of candidates to the voting public, including the reasons for these policies as well as arguments against the competing policies of other parties in the contest.

We might, however, balk when asked to increase the amount multifold to pay the huge sums now required for repetitive and expensive TV ads in the final weeks of a campaign, mostly to boost ambit

and arguably a precursor to the polarisation which has done so much damage in America.

It also raises an issue which is often ignored. This is the condecension implicit in trying to persuade others to support policies which advance one's own interests. But since the vast majority of those who debate public policy will also have convictions on what is best for the community as a whole, the only question is whether the public should have to subsidise their efforts to persuade.

We could eg., draw a line between advocacy and the provision of information needed to make an informed judgment - we can and arguably should distinguish exhortation from education. This does not mean constraints on the freedom to say whatever one likes about parties, candidates and policies, at least within limits set by the law of defamation and laws to protect racial and ethnic groups against hate speech.

It means only that taxpayers should not be forced to subsidise spending which serves no valid public purpose. Those who hope to win power by such means should use their own funds (within a system of caps and bans justified by the equal access principle).

One way to achieve this is for the parliamentary research staff to calculate the cost of providing the voting public with the information parties and candidates want the public to know about their policies and qualifications, as well as their views on the policies and qualifications of competitors. This would continue with updates until the vote is held.

This would be a sensible and practical way to limit political donations which respects the principle of freedom of political communication without compromising the principle of equal access to the exercise of political power.

But the most obvious advantage is the huge savings it will make possible in election funding, mainly through modern technologies for the mass dissemination of information. It seems a better and fairer way to achieve John Howard's goal of reducing the burden on ordinary people.

It also encourages a higher standard of political conversation in the nation.

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* Submitted by Max Atkinson, former senior lecturer, dean of faculty and head of department at the University of Tasmania Law School.