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## Party rules: The regulatory ‘gap’

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As we noted in Chapter 1, the regulation of political parties is relatively new to Australian politics. However, it is now an area of constant change and debate. This is illustrated by the numerous legislative developments taking place at federal and State and Territory levels concerning party financing, registration, ballot access and candidate selection. These developments are analysed in chapters throughout this book and present both opportunities and potential pitfalls for legislators—and even for courts. When courts adopt, review or apply regulations, they are faced with a complex of normative principles as to the appropriate role of political parties in modern representative democracies and their relationship to citizens and the state.

This pattern of development, and the fact that debates over the purpose and effect of regulation are often revisited, suggests a disjuncture between what we seek from party regulation and what is actually achieved. Our contributors have explored this regulatory gap from different perspectives: examining how political parties are viewed and regulated as agents of civil society, as participants in elections and as parliamentary actors. In this conclusion, we consider the nature and causes of this regulatory gap, drawing on evidence presented in the chapters and placing it in an international context.

As the chapters in the book show, there are a number of reasons for the regulatory gap. The first arises because of the tension between different democratic principles and the fact that regulatory regimes may serve competing democratic aims. An example would be regulation that facilitates the formation of a diverse array of political parties and their access to the ballot paper versus regulation that restricts competition to create a more meaningful choice for voters. The second reason for the regulatory gap stems from changing social expectations concerning the role and place of political parties in representative democracy. As we noted in Chapter 1, the popularity of parties as measured by party memberships has declined enormously and citizens place relatively little trust in these political institutions. Attempting to reduce the reliance of political parties on private money so as to remove perceptions of 'undue influence', while overcoming voters' resistance to 'paying' for political parties with their taxes, nicely illustrates the regulatory challenges involved in balancing these expectations. The final reason for the regulatory gap has to do with the partisan nature of lawmaking and the fact that parties control the lawmaking process; democratic ideals will never be met because the interests of parties and individual legislators inevitably get in the way. We argue that it is only by acknowledging the key traits of party regulation that we can begin to develop strategies for closing the regulatory gap.

## Regulation as a normative exercise: Balancing competing principles

One of the main areas of agreement among scholars studying party regulation is that the law ought to reflect democratic values that are accepted by the community. In line with such democratic values, any regulatory regime should also be built on the basis of transparency. But what are the democratic values that should be enshrined in party regulation, how can they be expressed/analysed and what are the main areas of agreement/disagreement?

For the most part, the values underlying party regulation have become widely accepted, not only internationally, but also in Australia. They include freedom of political association, freedom of political expression, fair and healthy competition between political

parties, broad participation and the right of individuals to choose freely between parties in a pluralist party system. The last principle is spelled out, for example, in the *Inter-American Democratic Charter* adopted by the Organization of American States in 2001, which includes 'a pluralistic system of political parties and organizations' as one of the 'essential elements of representative democracy' (Article 3). The right of individuals to choose freely between political parties appears to entail the existence of a legally acknowledged party system that is not only pluralist but also competitive, with parties able to compete on a level playing field in terms of access to public and private resources and to the media. Pippa Norris has summarised these requirements as the existence in elections of a 'choice of competing parties and candidates, without repression of opposition parties or undue bias in the distribution of campaign resources or media access'.<sup>1</sup> Other requirements of free voter choice—in addition to access to party messages—might include access to information about who is funding the party, requiring transparency about party finances.

One normative framework within which party regulation can be situated is the International Institute for Democracy and Electoral Assistance (International IDEA) state of democracy assessment framework (as used in the Australian Democratic Audit). This framework is based on two basic principles—popular control of government and political equality—that are further distilled into a series of values that can be institutionalised to a greater or lesser degree in democratic systems: participation, authorisation, representation, accountability, transparency, responsiveness and solidarity.<sup>2</sup> Using the normative perspective provided by the quality of democracy framework, we can consider how existing party regulation promotes or detracts from political equality and how equality might be better achieved through different institutional designs. In Chapter 1, we looked at how one aspect of the equality principle—equal opportunity to serve as a political representative—has been incorporated into party regulation internationally by the adoption of legislated candidate

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1 Pippa Norris (2004) *Electoral Engineering: Voting Rules and Political Behaviour*, Cambridge: Cambridge University Press, p. 4.

2 Marian Sawer, Norman Abjorensen and Phil Larkin (2009) *Australia: The State of Democracy*, Sydney: The Federation Press, pp. 3–4.

quotas. In Australia, however, there are no constitutional or legislated candidate quotas and the centre-right parties have also been opposed to introducing them at the party level.

The Democratic Audit of Australia spelled out two additional basic principles: those of civil liberties and human rights and the deliberative democracy principle of the quality of public debate and discussion.<sup>3</sup> The reason for spelling out these additional principles, which theoretically should be encompassed by the principles of political equality and popular control of government, was, first, that governments were using electoral majorities based on equal voting rights to justify curtailing parliamentary deliberation, silencing public criticism and infringing civil liberties. Second, insofar as political parties can be seen as sites for political participation rather than simply for electoral competition, there is a strong normative argument that the democratic values surrounding the quality of debate and discussion should also apply to these arenas.

These four principles are reflected in different ways in the work of Australian experts on electoral and party regulation. For example, in a report prepared for the New South Wales (NSW) Electoral Commission, Joo-Cheong Tham argues that political finance legislation should reflect the following principles: protect the integrity of representative government (including preventing corruption); promote fairness in politics; support political parties to discharge their democratic functions; and respect political freedoms (in particular, freedom of political expression and freedom of political association).<sup>4</sup> The liberal values that Orr sees as underlying the law of politics are liberty, equality and integrity and, at the systemic level, the republican ideals of participation and deliberation.<sup>5</sup>

While it is one thing to identify the values that should underpin party regulation from a theoretical standpoint, it is another to implement them through party regulation or even to ensure that the principles

3 *ibid.*, pp. 3–4, 13.

4 Joo-Cheong Tham (2012) *Establishing a Sustainable Framework for Election Funding and Spending Laws in New South Wales*, A Report Prepared for the NSW Electoral Commission, Sydney, November, pp. 17–18. See also Joo-Cheong Tham (2003) 'Campaign Finance Reform in Australia: Some Reasons for Reform', in Graeme Orr, Bryan Mercurio and George Williams (eds) (2003) *Realising Democracy: Electoral Law in Australia*, Sydney: The Federation Press, p. 119.

5 Graeme Orr (2010) *The Law of Politics in Australia: Elections, Parties and Money in Australia*, Sydney: The Federation Press, p. 12.

behind particular legislative instruments are transparent. Each of these overarching values carries practical implications and distinct policy prescriptions. The liberty principle suggests caution against overregulation of political parties, which may impinge on freedom of association. The equality principle may suggest provision of free airtime for political broadcasts or the equitable allocation of paid time, as against the advantage provided by wealthy supporters in countries that allow paid political advertising. The integrity principle pushes 'in the direction of transparent party affairs and finances, broad powers for electoral authorities and courts to enforce the law and maintain accountability'.<sup>6</sup> The ideals of participation and deliberation might warrant public support for political parties insofar as their organisation conforms to these values.

What is evident, however, is that some of these principles may conflict. For example, public funding for political parties in the interests of equality, integrity or support for deliberative democracy might run counter to the principle of popular control of government because of public opposition to politicians and political parties having 'their snouts in the trough'. Regulatory measures to encourage participation in party politics by supporting a particular organisational form (for example, the democratic selection of candidates, as currently required by Queensland electoral legislation) could conceivably impede parties' freedom of association. Requirements for parties to have a large number of members could be viewed as restricting the ability of citizens to participate in electoral activities of a party of their choice, rather than as protecting voters from ballot papers the size of a tablecloth. Trying to reconcile competing principles is no easy task, particularly when different members of the community have different views on the desirability of each. The first step, however, is to acknowledge that such conflicts exist. Prioritising some principles over others may be necessary, but this discussion should ideally take place with reference to community attitudes about political parties and their evolving role in modern representative democracies (see below).

Democratic disagreements have often been left to the courts to arbitrate. For example, as shown in the chapters by Jennifer Rayner and Graeme Orr, there is a potential conflict among the principles

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6 *ibid.*, p. 12.

underpinning campaign finance regulation. Promoting the integrity of elections and a level playing field by capping or banning donations can fall foul of freedoms of political expression—a position that has typically been taken by the US Supreme Court. In contrast, the Canadian Supreme Court has held that some restrictions are needed to ensure equal opportunity for participation in political discourse and to prevent wealthy voices from drowning out others.<sup>7</sup> In the United Kingdom, the House of Lords has upheld the UK prohibition on paid political advertising, arguing that the ban is necessary to maintain a level playing field and to prevent ‘well-endowed interests’ from using ‘the power of the purse to give enhanced prominence to their views’.<sup>8</sup> A majority of European countries, including the United Kingdom, Ireland and the Scandinavian countries, have never allowed paid political advertising, on the grounds of the advantage it gives to deep pockets; instead, they allocate free airtime to political parties in accordance with an equity formula. Money talks, but in most comparable democracies there is regulation to prevent it monopolising the conversation in elections.

As Gauja noted in her chapter, the Australian High Court’s decision in *Unions NSW* did little to illuminate the relationship between anticorruption provisions and implied constitutional freedoms. However, its decision in *McCloy v NSW* in late 2015 was unequivocal in balancing the implied freedom of political communication with a constitutional principle of political equality.<sup>9</sup> In this judgement, the High Court upheld the validity of caps on political donations and of legislative measures that prohibited property developers from making political donations and restricted indirect campaign contributions. As outlined in Chapter 1, and covered in more detail

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7 For the most recent example of the position taken by the US Supreme Court, see *McCutcheon v FEC* (2014) No. 12-536. For the position adopted by the Canadian Supreme Court on the limiting of third-party advertising, see *Harper v Canada* (2004). Canada has bans on corporate donations and caps on individual donations and candidate, party and third-party expenditure.

8 The House of Lords. 2008. UKHL 15, 12 March. In 2013, the European Court of Human Rights determined that although the ban was an interference with freedom of expression, it served the legitimate purpose of preserving the impartiality of broadcasting on public interest matters and thereby protecting the democratic process. *Case of Animal Defenders International v The United Kingdom*, available at: [hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-119244#{"itemid":\["001-119244"\]}](http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-119244#{).

9 *McCloy v New South Wales* [2015] HCA 34. Graeme Orr (2015) ‘In McCloy Case, High Court Finally Embraces Political Equality ahead of Political Freedom’, *The Conversation*, 8 October, available at: [theconversation.com/in-mccloy-case-high-court-finally-embraces-political-equality-ahead-of-political-freedom-48746](http://theconversation.com/in-mccloy-case-high-court-finally-embraces-political-equality-ahead-of-political-freedom-48746).

in the chapters by Jennifer Rayner and Graeme Orr, for the past two elections, NSW legislation has restricted donations to political parties to a maximum of \$5,000 per annum and donations to individual candidates to \$2,000. NSW also prohibits donations from property developers and from alcohol, tobacco and gambling interests.

The case challenging the NSW donation caps and the ban on donations by property developers was brought by a former Newcastle mayor and property developer Jeff McCloy. It stemmed from the ongoing investigation by the NSW Independent Commission Against Corruption (ICAC) into political finance and corruption in NSW and its findings that McCloy made unlawful donations to Liberal Party candidates (indeed, McCloy described himself as a 'walking ATM'). McCloy argued that the provisions of the NSW Act burdened the freedom of political communication by restricting the funds available to political parties and candidates to meet the cost of their political communication activities. He further asserted that the restrictions hampered his ability to gain access, and make representations, to politicians and political parties. McCloy submitted, as donors, he and other property developers were 'entitled to "build and assert political power"'.<sup>10</sup>

The High Court rejected this view. In fact, it strongly asserted that 'guaranteeing the ability of a few to make large political donations in order to secure access to those in power' was antithetical to the underlying constitutional principle of political equality.<sup>11</sup> This moved the Australian High Court much closer to the political equality or fairness positions adopted in jurisdictions such as Canada and the United Kingdom. While the court accepted that the NSW legislation indirectly burdened the freedom of political communication by restricting the funds that were available to political parties and candidates, it declared that these burdens were permissible as they were a legitimate means of pursuing the goal of electoral integrity and removing the risk and perception of corruption and undue influence from NSW politics. The court undertook a balancing exercise to determine whether the restrictions imposed by the law were

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<sup>10</sup> *McCloy*, at [25].

<sup>11</sup> *ibid.*, at [28].

proportionate to its overall aim and, in the process, it paid particular attention to expert reports and evidence of the pervasiveness and impact of political corruption in NSW. It found:

The provisions do not affect the ability of any person to communicate with another about matters of politics and government nor to seek access to or to influence politicians in ways other than those involving the payment of substantial sums of money ... By reducing the funds available to election campaigns there may be some restriction on communication by political parties and candidates to the public. On the other hand, the public interest in removing the risk and perception of corruption is evident. These are provisions which support and enhance equality of access to government, and the system of representative government which the freedom protects. The restriction on the freedom is more than balanced by the benefits sought to be achieved.<sup>12</sup>

The High Court's decision in *McCloy* provides some certainty that political finance regulation—specifically, caps on donations to political parties and the prohibition of donations from property developers and alcohol, gaming and tobacco interests—will not fall foul of the Australian Constitution provided the restrictions are suitable, reasonably necessary and adequate in their balance. Insofar as constitutional uncertainty has acted as a barrier to party finance law reform and harmonisation across the Australian States and Territories, this decision may well provide the necessary clarification to allow other jurisdictions to move in the same direction as NSW. In July 2015, NSW Premier Mike Baird indicated that he would place the issue of national campaign finance reform on the agenda for the next Council of Australian Governments (COAG) meeting.<sup>13</sup> However, no substantive discussion has yet occurred.

In the international arena, perhaps because of such conflicting values over the right of money to speak, there is little agreement on international standards of party regulation and political finance. This is in marked contrast with the extent of soft regulation or

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<sup>12</sup> *ibid.*, at [93].

<sup>13</sup> Sean Nicholls (2015) 'Political Leaders Urged to Unite in Overhaul of National Donations Laws', *Sydney Morning Herald*, 28 July.

international standard-setting on the conduct of democratic elections.<sup>14</sup> For example, while it is generally accepted that political parties are one mechanism through which citizens exercise their freedoms of political expression and communication, there is far less agreement when it comes to the level of support that parties should receive from the state or be allowed to receive from private corporations. Transnational bodies such as International IDEA recommend a balance of public and private funding and it is generally argued that it is desirable for the latter to be in the form of small donations encouraged by tax credits—too small to buy policy influence. Digital platforms make this kind of crowd-sourcing relatively easy. Yet, where the balance is to be struck between public and private funding is subject to continuing debate. While acknowledging the competing and often conflicting principles that underpin party regulation is the first step in closing the regulatory gap, reaching agreement on which to emphasise is a more difficult task.

## Regulation and the role of political parties in representative democracy

One way to move forward would be to recognise and better integrate community attitudes about the role and place of political parties in representative democracies into the process of adopting party regulation. As we have seen in this book, it is widely agreed that political parties should perform a number of key functions in representative democracies. We can follow Young and Tham in categorising these as the representative function, offering electoral choice through the presentation of policy platforms and leaders that cater to the different preferences of the electorate; an agenda-setting function in stimulating ideas for Australian democracy through policy development and research; a participation function in providing a vehicle for political participation; and last, a governance function

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14 Anika Gauja (2014) *The Legal Regulation of Political Parties: Is There a Global Normative Standard?*, Working Paper prepared for the Electoral Integrity Project Lunchtime Research Seminar Series, Sydney: University of Sydney; Pippa Norris, Richard W. Frank and Ferran Martínez i Coma (2013) 'Assessing the Quality of Elections', *Journal of Democracy* 24(4): 130.

through elected parliamentarians.<sup>15</sup> The governance function includes both the formation of governments and the holding of governments to account through effective opposition. These functions can also be described, in Kay Lawson's term, as 'linkages', which include campaign, participatory, ideological, representative and policy elements.<sup>16</sup>

However, as we have seen, the extent to which political parties are capable of performing these functions in modern democracies is in doubt. The 2010 Australian Election Study showed that less than one-third of voters had confidence in Australian political parties even though more than two-thirds believed that political parties were essential to make democracy work.<sup>17</sup> Many now believe that political parties are in terminal decline, with young people in particular feeling disengaged from conventional forms of political participation. Scholars point to rapidly declining party memberships, centralisation of party decision-making (reducing their function as conduits for ground-up policy formation), decreasing levels of strong partisanship, increasing distrust in or apathy about parties, policy convergence (perhaps feeding less strong attachment to parties) and the rise of alternative sites for political participation.<sup>18</sup> As mentioned in Chapter 1, in Australia, the online campaigning organisation GetUp! claims more members (over 1 million in 2016) than all the political parties put together. People are much more likely to sign an electronic petition, engage in a consumer boycott or even attend a demonstration than to join a political party. In addition to alternative sites for political participation, there are also alternative vehicles for interest or policy representation. In between elections, citizens are likely to be represented in the policy process by community-based peak bodies, representing their interests as, for example, consumers, pensioners or users of government services.<sup>19</sup> While for some these developments herald the decline of party-based politics, for others, the rise of such

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15 Sally Young and Joo-Cheong Tham (2006) *Political Finance in Australia: A Skewed and Secret System*, Report No. 7, Melbourne: Democratic Audit of Australia, p. 2, available at: [apo.org.au/research/political-finance-australia-skewed-and-secret-system-0](http://apo.org.au/research/political-finance-australia-skewed-and-secret-system-0).

16 See Russell J. Dalton, David Farrell and Ian McAllister (2011) *Political Parties and Democratic Linkage: How Parties Organize Democracy*, Oxford: Oxford University Press, pp. 6–9.

17 Aaron Martin (2014) 'The Party is Not Over: Explaining Attitudes towards Political Parties in Australia', *International Journal of Public Opinion Research* 26(1): 1–17.

18 Dalton et al., *Political Parties and Democratic Linkage*, pp. 9–14; Ian Marsh (ed.) (2006) *Political Parties in Transition?*, Sydney: The Federation Press.

19 Marian Sawyer and Gianni Zappalà (2001) *Speaking for the People: Representation in Australian Politics*, Melbourne: Melbourne University Press.

diverse forms of participation and critical citizens may in fact be a sign of deeper democratic engagement. Given these trends, do our expectations regarding the regulation of political parties (particularly the extent to which their activities should be supported by the state) need to change?

If political parties are not the preferred or most frequently used form of policy representation or political engagement, why should they be privileged in terms of public funding and support for their political role? Political parties receive a wide range of public benefits as well as tax deductibility for private donations, without the detailed forms of accountability required from other kinds of representative bodies in return for such benefits. Community-based peak bodies, such as the Australian Council of Social Service or Women With Disabilities Australia, play an extremely important representative role in the democratic system, being responsible for speaking on behalf of relevant sections of the community at all times, not just at elections. Such non-governmental organisations also perform other vital democratic functions, creating space for public deliberation and serving as schools of democratic practice. However, the public funding and charitable and deductible gift recipient status of these bodies are never as secure as the equivalent benefits for political parties, even for minor parties outside the party cartel. The perils for non-governmental organisations of advocacy critical of government policy continue, despite High Court confirmation of the compatibility of public advocacy and charitable status (in the *Aid/Watch* case)<sup>20</sup> and its statutory confirmation in the *Charities Act 2013* (Cth). The Gillard Government also enacted the *Not-for-Profit Sector Freedom to Advocate Act* in 2013 in an attempt to ensure that government funding contracts did not include 'gag' clauses. In 2014, however, the new Abbott Government started removing clauses from Commonwealth funding agreements that guaranteed the right to engage in public advocacy and to criticise government.

One answer to the question of the privileged status of political parties with regard to public resources is that, unlike other non-governmental organisations, political parties combine policy agenda-setting and advocacy with governance functions. The last include, at different

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20 *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42.

times, not only contesting elections and being a party of government but also being a party of opposition, undertaking legislative review and executive scrutiny. In other words, the principle has been established that because political parties are needed for healthy electoral competition and parliamentary opposition, they deserve public support. For example, the Australian Department of Foreign Affairs and Trade lists the ‘key democratic principles and practices in Australia’ as including ‘equitably resourced and respected opposition parties’.<sup>21</sup> There has been little of that ‘principled commitment to voluntarism’, which has been described as underpinning UK reticence to public funding—the idea that ‘the taxpayer should not be obliged to fund parties with whom he does not agree’.<sup>22</sup> One can argue that even parties with which one does not agree perform an important function in holding governments to account. Nonetheless, the view that political parties merit support does not extend to licensing the appropriation of state resources provided for another purpose—resources such as parliamentary allowances. Some also find it difficult to accept that public funding can be earned by parties that promote racial division, contrary to official policies to promote racial harmony.

Apart from the issues involved in the funding of political opposition, the governance functions that political parties perform also create significant challenges. The regulation of party funding in Australia relies primarily on disclosure regimes. However, while the level of the disclosure thresholds and their timing/frequency are important subjects of debate, a serious concern is also the *types* of activities that are covered (or not covered) by disclosure provisions. In Australia, significant sums of money can be hidden from public view because they are not classified as ‘donations’.<sup>23</sup> This includes the practice of selling access to senior party figures such as ministers and shadow ministers through dinner tickets and paid places at receptions.

Each of the major political parties has, or has had, one or more ‘associated entities’ that coordinate these fundraising activities on behalf of the party—for example, the Liberal Party’s North Sydney Forum, the Millennium Forum and the 500 Club. On the Labor side of

21 Department of Foreign Affairs and Trade (DFAT) (2008) *About Australia: Democratic Rights and Freedoms*, Canberra: Government of Australia.

22 Justin Fisher (2009) ‘Hayden Phillips and Jack Straw: The Continuation of British Exceptionalism in Party Finance?’, *Parliamentary Affairs* 62(2): 306.

23 Sawyer et al., *Australia*, p. 141.

politics, these organisations include Progressive Business, the Chifley Forum and Labor Holdings. For example, the NSW Labor Party's Chifley Forum offers members 'the opportunity to connect with senior figures in government, business and the community'. The forum's website claims that by joining as a member, individuals and businesses 'will be invited to attend exclusive events where you can build relationships with current and future Labor leaders'.<sup>24</sup> The activities of the Liberal Party's Free Enterprise Foundation came under scrutiny in ICAC, where it was alleged that the foundation was used to 'launder' political donations from prohibited donors in the lead-up to the 2011 state election.<sup>25</sup> In March 2015, the NSW Electoral Commission decided to withhold \$4.4 million in public funding from the Liberal Party on the basis that it failed to disclose the identity of major donors during the 2011 campaign.<sup>26</sup> Until the donors are reported, the Liberal Party will also not be eligible for any future funding under the NSW scheme. In September 2016, following satisfactory disclosure by the party of the relevant donations, the Election Commission released this funding, minus \$586,992 (the value of donations deemed to be unlawful).<sup>27</sup>

These types of political contributions fall into what political scientist Iain McMenamin calls 'reciprocal exchanges'.<sup>28</sup> A discrete exchange is 'explicit and simultaneous'; however, a reciprocal exchange involves a degree of uncertainty and the part of each actor is performed separately. Such an exchange might be thought of as relationship building, without any expectation of immediate favours or direct action. These exchanges favour politicians, who cannot 'afford a perception that their political support can be bought', and donors, who may classify them as a tax deductible 'business expense' rather than having to declare them as a political donation.<sup>29</sup> Donation caps or

24 NSW Labor (2015) *Chifley Forum*, Sydney: NSW Labor.

25 Kerry Schott, Andrew Tink and John Watkins (2014) *Political Donations Final Report. Volume 1*, Sydney: NSW Department of Premier and Cabinet.

26 NSW Electoral Commission (2016) 'Liberal Party of Australia (NSW Division) Ineligible for Further Public Funding', Statement by Chairperson, NSW Electoral Commission, 23 March, Sydney, available at: [elections.nsw.gov.au/about\\_us/work\\_of\\_the\\_commission/statements\\_issued\\_by\\_the\\_chair\\_of\\_the\\_commission](http://elections.nsw.gov.au/about_us/work_of_the_commission/statements_issued_by_the_chair_of_the_commission).

27 NSW Electoral Commission (2016) 'Statement by Chairperson', NSW Electoral Commission, 22 September, Sydney: NSW Electoral Commission, available at: [elections.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0020/224363/22\\_September\\_2016\\_-\\_Liberal\\_Party\\_of\\_Australia\\_NSW\\_Division.pdf](http://elections.nsw.gov.au/__data/assets/pdf_file/0020/224363/22_September_2016_-_Liberal_Party_of_Australia_NSW_Division.pdf).

28 Iain McMenamin (2013) *If Money Talks, What Does It Say?*, Oxford: Oxford University Press.

29 *ibid.*, p. 12; Sawyer et al., *Australia*, p. 141.

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bans may limit discrete donations, such as those referred to above in the discussion of the *McCloy* decision, but when this occurs, reciprocal arrangements become more common.

While it is clear that these forums and fundraising organisations trade on the promise of granting access to politicians, whether or not they constitute a type of corrupt and distorting activity is contentious. In 2009, then Queensland Premier Anna Bligh placed a ban on State Labor parliamentarians attending fundraising events with business organisations. Even if the practice of selling access were within the law, Bligh argued, the negative perceptions such fundraising practices created were detrimental for the reputations of both political parties and representative democracy more generally:

All political parties in Australia engage in these sorts of activities and my concern is the more exclusive they become, the more elite they seem, the more expensive they become, the more that ordinary people start to feel that they don't have the same level of access to their elected representatives as people with a lot of money in their pockets and I don't think that's a good thing for democracy.<sup>30</sup>

Party regulation must therefore reflect these two realities: on the one hand, political parties are privileged political actors, regarded as entitled to public funding despite criticism of government; on the other, they fail to attract citizens to their organisations or to adhere to standards of democratic governance. This failure raises the contentious questions of whether and how the internal organisation of political parties should be resourced and regulated to facilitate democratic participation. Another contentious question is whether regulation should be extended to the 'cash for access' practices referred to above, whereby political parties provide unmediated and unequal access to political power in exchange for money.

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30 Cited in 'Queensland Premier Anna Bligh Says Political Donations Should be Capped', *News.com.au*, 4 July 2010, available at: [news.com.au/national/queensland-premier-anna-bligh-says-political-donations-should-be-capped/story-e6frfkp9-1225887598269](http://news.com.au/national/queensland-premier-anna-bligh-says-political-donations-should-be-capped/story-e6frfkp9-1225887598269). Also see Brian Costar (2011) 'Equality, Liberty and Integrity and the Regulation of Campaign Finance', in Joo-Cheong Tham, Brian Costar and Graeme Orr (eds) *Electoral Democracy: Australian Prospects*, Melbourne: Melbourne University Press.

## The partisan nature of party regulation

We have introduced some of the underlying values and current challenges for party regulation in Australia. Scholars generally agree that the legal regulation of political parties should be underpinned by the principles of participation, deliberation, integrity, equality and liberty. However, they also acknowledge a conflict between some of these principles and the policy recommendations that flow from them. Nonetheless, perhaps the most challenging aspect of party regulation is the partisan nature of lawmaking itself, and the inbuilt imperative for legislators—as party representatives—to enact laws that serve their party's interests.

The inability of systems of party regulation to achieve their stated aims or meet democratic ideals occurs both because underlying principles may be in conflict and because the design of electoral systems and the legislation governing their operation is initiated, developed, debated and passed by the parties themselves. Electoral oversight committees of parliament tend to issue both majority and minority reports, along party lines. And although Australian electoral commissions have considerable autonomy in conducting elections, they have no such autonomy with regard to establishing the regulatory framework. So while these electoral management bodies are able to perform functions of party regulation in a neutral way, they lack the independence to establish a framework more in accordance with international standards.<sup>31</sup> Hence, there is an opportunity for governing parties to reinforce pre-existing patterns of dominance or to privilege their own position in the design of regulatory regimes.<sup>32</sup> For example, it is sobering that recent political finance laws, which were held to be unconstitutional by the High Court in the *Unions NSW* decision<sup>33</sup>—in part because of their discriminatory impact on the Australian Labor

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31 Norm Kelly (2012) *Directions in Australian Electoral Reform: Professionalism and Partisanship in Electoral Management*, Canberra: ANU E Press, p. 153, available at: [press.anu.edu.au/titles/directions-in-australian-electoral-reform/](http://press.anu.edu.au/titles/directions-in-australian-electoral-reform/). Electoral management bodies have not even been able to eliminate the practice of political parties sending out postal vote applications, despite the otherwise nonpartisan nature of Australian electoral administration.

32 Anika Gauja (2010) *Political Parties and Elections: Legislating for Representative Democracy*, Farnham: Ashgate, p. 7.

33 *Unions NSW v New South Wales* (2013) HCA 58.

Party (ALP)—were legislated by a newly elected Liberal Government. This illustrates how electoral legislation tends to protect incumbency advantage.

As we have seen, incumbency advantage may cover a spectrum from advantaging a governing party, advantaging major parties or advantaging both major and minor parliamentary parties to advantaging all parties and Independents in parliament as against challengers. How such partisan interests are expressed in electoral and parliamentary regulation very much depends on the balance of power within the legislature. On rare occasions, a sitting Independent may call for the reform of incumbency advantage in elections—for example, by stopping parliamentary entitlements the moment an election is called.<sup>34</sup> Australia has been remarkably relaxed about the use of such entitlements for electioneering, including the printing of postal vote applications and how-to-vote cards. In other comparable democracies such as the United States, the United Kingdom and New Zealand, legislators/parliamentarians are not allowed to use their printing and postage entitlements for party-political purposes.<sup>35</sup> While the use of parliamentary allowances for campaign purposes might seem to be a clear-cut incumbency advantage, the allowances may also be used to assist non-sitting candidates from within the same party.

In recent years, studies of party organisation and electoral reform more generally have been concerned with how regulation may serve to protect incumbency advantage, and this has also been noted by legal scholars.<sup>36</sup> In some cases, legislation may blatantly favour both the ideology and the interests of the governing party. However, as noted, regulation may also privilege the interests of all political parties represented in the legislature over new entrants into electoral competition or other political actors. Notwithstanding the content of the law, an equally important aspect of the regulation of political

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34 Peter Andren MP (2004) *Level Democratic Playing Field: You Must be Joking*, Discussion Paper, November, Melbourne: Democratic Audit of Australia, available at: [apo.org.au/files/Resource/andrenpaper.pdf](http://apo.org.au/files/Resource/andrenpaper.pdf).

35 Australian National Audit Office (ANAO) (2009–10) *Administration of Parliamentarians' Entitlements by the Department of Finance and Deregulation*, Report No. 3, Canberra: ANAO, available at: [anao.gov.au/uploads/documents/2009-10\\_ANAO\\_Audit\\_Report\\_3\\_.pdf](http://anao.gov.au/uploads/documents/2009-10_ANAO_Audit_Report_3_.pdf).

36 See, for example, James Bennett (2009) *Stifling Political Competition*, New York: Springer; Colin Feasby (2007) 'Constitutional Questions about Canada's New Political Finance Regime', *Osgoode Hall Law Journal* 45: 513–70; Michael Kang (2005) 'The Hydraulics and Politics of Party Regulation', *Iowa Law Review* 91: 131–87.

parties is the process by which the law is formulated. Opportunities for regulatory reform should encourage consultation and engagement between practitioners, experts and academics (from a range of disciplinary backgrounds, including political scientists, legal scholars and political theorists). Ideally, legislation should be based not simply on bipartisan or even multiparty support, but also on respect for electoral actors beyond the existing parliamentary parties. A good example of such an approach was the establishment of an independent and bipartisan 'Panel of Experts', which examined options for political donation reform in NSW in 2014. Led by Dr Kerry Schott (a high-profile company director), Andrew Tink (a former Liberal Shadow Attorney-General) and John Watkins (a former NSW Labor Deputy Premier), the panel consulted extensively with academics and public interest groups in producing its recommendations for reform.

## Final remarks

Throughout this book, we have explored the gap between what is wanted from political party regulation and what is actually achieved. Our authors have done this by looking at several overlapping arenas: the role of parties as agents of civil society; as participants in elections; and as actors in parliamentary politics. The analysis of party regulation in each of these arenas has been underpinned by two broad themes. The first is *the rationale for party regulation* and how it corresponds with the role of parties in democracy and democratic governance. The second is the *politics of party regulation*—how partisan interests, democratic norms and policy diffusion shape regulation. A related consideration is the role of the judiciary and international standard-setting and electoral management bodies in regulating parties.

An important concern is whether the regulation of organisational structures, as agents of civil society, can promote internal democracy and community engagement and, more specifically, whether the regulation of candidate selection processes and legislative recruitment can encourage diversity without sacrificing internal democracy. We have also questioned why political parties should be subject to less regulation of their internal governance than non-governmental

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organisations that perform vital representative roles in our democratic system and why the public funding of the latter should be so precarious.<sup>37</sup>

Regardless of the regulatory regimes that are introduced, it seems that political parties will be as quick to find loopholes as are large corporations seeking to minimise their taxation. While the interests of shareholders may be the reason given for the latter, for political parties, the interest will always be in maintaining their electoral competitiveness. Ideally, consensus on a central democratic value such as political equality would mean that regulation was unnecessary—parties would agree, for example, that if receiving public money they would refrain from private money. Because this kind of consensus is absent, we do need regulation to prioritise democratic principles such as political equality and to promote a level playing field. However, because the norms underpinning party regulation are contested, often on partisan grounds, we must expect that there will always be a gap between what is desired and what is achieved.

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37 See further, comparing the light-touch regulation of publicly funded parties with the policing of trade union internal democracy, Graeme Orr (2001) 'Overseeing the Gatekeepers: Should the Preselection of Political Candidates be Regulated', *Public Law Review* 12(2): 89–94.

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