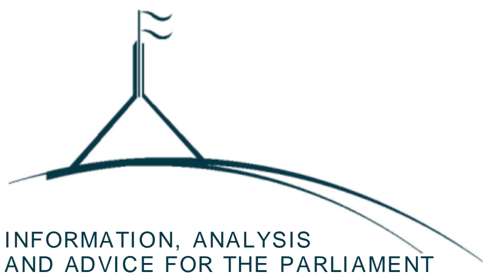

INFORMATION AND RESEARCH SERVICES

Research Paper
No. 21 2001–02

Australia's Political Parties: More Regulation?

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ISSN 1328-7478

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Published by the Department of the Parliamentary Library, 2002

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Australia's Political Parties: More Regulation?

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25 June 2002

Acknowledgments

This is to acknowledge the help given by Zac Dadic, Ian Holland, Rob Lundie, Cathy Madden, Sarah Miskin, Michael Priestley and Mark Tapley in producing this paper.

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Contents

Major Issues i
Introduction 1
On the Edge of the Political System 1
  Constitutional Position 1
  Parties and the Law 2
  Party Freedom 2
Forces for Change 3
  Constitutional Recognition 3
  A Change in the Legal View 4
  Public Funding of Elections 6
  Their own Worst Enemy? 7
Parties in other Liberal Democracies 9
  Parties and the Maintenance of the Democratic State 9
  Intra-Party Democracy 10
  The Receipt of Public Money 12
Should Australian Parties be made more Accountable? 13
  A Minimalist Approach—the Australian Electoral Commission View 14
  Broadening the Scope? 15
Possible Changes? 16
  A Need to Alter Party Constitutions? 16
  Party Pre-Selections 18
    The Importance of the Process 18
    Party Primaries? 19
    Electoral Commission/Office Involvement? 19
The Queensland Reforms 20

Party Constitutions 21
Pre-Selection Ballots 22
How-to-Vote Cards 22
In Summary 23
Endnotes 23
Bibliography 29

Major Issues

For much of their history, Australia's parties have been private bodies, effectively acting free from any type of redress from their members.

The private aspect of parties has provided no means for aggrieved party members to challenge their parties' actions in court. A pivotal 1934 High Court case reinforced the view that their rules did not form a contract that was enforceable, and as a matter of law it was held that party members had no personal interest in a party's assets. The parties therefore asserted their freedom to act without any type of external oversight.

Today, however, various factors suggest that they should have a greater level of accountability to the Australian people. It is now much harder to sustain the case that parties are private bodies, in some way beyond the law:

- of great importance is the fact that several recent courts cases have thrown doubt on the extra-legal nature of parties
- parties now have a constitutional presence, as well as a presence in legislation
- in addition, the establishment of public electoral funding has produced legislative changes which have seen the first serious parliamentary 'interference' in party operations
- some observers believe parties' own tough internal behaviour has helped produce a loss of support in the wider community, and
- there has been a shift in society towards expecting more accountability and transparency in our institutions.

Not all political systems have allowed the same degree of freedom to their political parties, and many Western democracies moved to adopt regulatory arrangements well before it became an issue in Australia. Such nations:

- have seen parties as public organisations which have not only a responsibility to their members for their actions, but also to the wider community
- have placed close-checking requirements on parties if they received public funding

- believe parties have a role to preserve the democratic nature of the state within which they operate, and
- see parties as having a responsibility to implement democratic practices within their own internal operations.

The question therefore arises: does more need to be done to make parties accountable to the Australian public, let alone to their own members?

Some observers believe it is inevitable that Australia's parties will be brought within a tighter legislative framework. Such views have been expressed by both Queensland's Shepherdson inquiry into electoral rorting practices, and the Commonwealth Parliament's inquiry into electoral roll integrity conducted by the Joint Standing Committee on Electoral Matters.

Suggestions for change in Australia include:

- reform of party constitutions
- tighter public funding rules
- democratisation of preselection procedures, and
- oversight of preselection ballots by electoral commissions/offices.

In 2002 Queensland has acted to make the most significant Australian changes to date. One impact of this might be to put even greater pressure upon other legislatures to implement similar changes.

Australian parties may well be facing a watershed in their history.

Introduction

For much of their history, Australia's political parties have been private bodies, effectively acting beyond the law and free from any type of redress from their members. Although stories of doubtful intra-party practices are part of Australia's political folklore, effectively they have been able to run their own affairs free from any type of regulation by outside bodies. Today, however, a growing public awareness of, and disquiet over, party activities has led some observers to wonder if this privileged status should be curtailed as they cope with a society in which there is 'an increasing emphasis on the external world of the party'.[1] Some have begun to argue that parties should be made more accountable for their actions, particularly due to the entrenchment of public funding in Commonwealth, New South Wales and Queensland elections.[2] This was certainly the view expressed by the Commonwealth Parliament's Joint Standing Committee on Electoral Matters in its May 2001 report into the integrity of the electoral roll:

> Although Australian parties have been firmly of the view that they are private bodies that run their own affairs, it is clear that this status has altered subtly in recent years. A number of legislative and legal factors have combined to suggest that the position of political parties within the Australian polity is altering. This has opened up the question of whether there should be a formalisation of their place in the political system.[3]

This paper gives some background to the question of whether the Australian community should have greater control over parties. It explores whether parties in this country can continue to expect to enjoy the status of private organisations, whether they should be brought under some type of public control, as is the position in a number of other liberal democracies, and whether they should be forced to be more answerable to their members. It concludes by noting that with the Queensland Parliament having been prepared to introduce some legislative changes in 2002, this might well turn out to be a watershed for political parties in this country, for now that such changes have been made in one jurisdiction, it might be difficult to withstand calls for change in others.[4]

On the Edge of the Political System

Constitutional Position

For much of our political history, parties have been regarded as constitutionally non-existent—'curiously private organisations' was how Reid and Forrest put it in their history of the Commonwealth Parliament.[5] None of the colonial/State constitutions gave them any

recognition, nor did the Commonwealth Constitution. A symbol of the way in which parties were officially regarded was the fact that for many years official Australian election results gave voting figures as if all candidates were independents, treating the parties as electorally non-existent. When payment of members of parliament was introduced by the various parliaments, the party leaders received a loading above the base salary, but this was due to their holding the positions of Prime Minister, Premier or Leader of the Opposition, rather than because they were leaders of their respective parties. This remains the case.

Parties and the Law

This private aspect of parties provided no means for aggrieved party members to challenge their parties' actions in court. Challenges to pre-selection, for example, were typically dealt with by internal, private appeal mechanisms. This was encouraged by the reluctance of courts of law to intervene in party disputes, on the grounds that parties, being privately organised voluntary organisations, did not come within the jurisdiction of the court system. In a Parliamentary Library Research Paper published in 1995–6, academic lawyer, John Forbes noted that over the years there were two technical legal reasons for this state of affairs:

- as parties were unincorporated non-profit societies, courts believed that their rules did not form a contract that was enforceable, and
- it was the view of the legal system that party members had no personal stake in a party's assets, due to the party 'being devoted to a broad social agenda and not to the personal enjoyment of the members'.[6]

Such views were long buttressed by the 1934 High Court decision of *Cameron v Hogan*. In a case brought by former Victorian Premier, Edmund Hogan, seeking redress for his expulsion from the ALP, the Court dismissed Hogan's case, noting that:

> The organization [i.e. ALP] is a political machine designed to secure social and political changes. It furnishes its members with no civil right or proprietary interest suitable for protection by injunction.[7]

The *Cameron* decision was long considered the major protection for the continuing informal status of the parties.

Party Freedom

The parties built on this long-term lack of constitutional or legal status by asserting their freedom to act without any type of external oversight. The operation of preselection processes, the administration of party conferences and the administration of party funds, for example, were all subject only to the parties' own rules and regulations. Although party members had internal means of challenging acts by fellow-members, the parties were not

prepared to concede their having any recourse to any outside avenues for redress of grievances. The ALP's official website contains the words of a 1955 statement by the ALP National Conference that are still official party policy:

> This Conference resolves that as a general principle it cannot concede the right of any member of the Party to initiate legal proceedings for the purpose of establishing the constitutional behaviour of the Labor Movement. We emphasise that, with a few isolated exceptions, the history of our Party discloses that we have functioned on a basis of complete determination in accordance with our own rules and our own interpretation of them. We insist we must continue to create our own procedures, taking care of our own business without the introduction of lawyers and law courts.[8]

Such a view is probably regarded sympathetically within the Liberal and National Parties, and is very much in line with party attitudes in a number of other liberal democracies. In his study of such parties, Alan Ware of Oxford University has noted that:

> The idea that they [i.e. political parties] should be controlled, or even influenced, by the state is contrary to the liberal idea of competition of ideas, leaders, and policies.[9]

In Canada in the early 1990s, the Royal Commission on Electoral Reform and Party Financing acknowledged that for much of their history Canada's parties enjoyed the status of private organisations, and suggested that they should remain so 'for very good reasons'. The Commission was of the view that citizens had 'the right to associate freely for political purposes', and that any legislation to control parties must therefore 'be careful not to invade their internal affairs or jeopardize the right of individuals to associate freely'.[10]

For many years, therefore, Australian parties were largely free to operate as they wished.

Forces for Change

Despite this history of party freedom, it can be argued that changes in Australian society have gradually pushed the political parties towards a position where it makes no sense to continue to argue that they are private bodies, responsible only to themselves. Various factors suggest that there is now a requirement for them to have a greater degree of accountability to the Australian people.

Constitutional Recognition

Despite efforts to regard them as extra-constitutional, the parties have gradually become constitutional entities, a development that began as long ago as the war of 1914–18. In their eagerness to guarantee that overseas service personnel could vote despite the ongoing hostilities, the parties supported the *Commonwealth Electoral (War-time) Act 1917*. This ensured the overseas service vote, but to deal with the problem of voters not knowing the candidates' names, voters were required to specify that their vote be allocated to 'Ministerial' or 'Opposition' parties.[11] Although this Act had been repealed within two years, parties had clearly been given a legislative presence. Since then they have been

recognised in other pieces of legislation, including the *Commonwealth Electoral Act 1918* and the *Broadcasting Act 1942*. In 1977 the parties also gained a reference in the Commonwealth Constitution, when an amendment to s. 15 provided that a vacating Senator who had been elected as an endorsed candidate of 'a particular political party', must be replaced by 'a member of that party'.

The significance of such changes over the years has been that they have effectively made it much harder to sustain the case that parties are private bodies, in some way beyond the law. As a New South Wales Parliament briefing paper puts it:

> The shift away from the private, self-regulating status of political parties has increased their susceptibility to scrutiny and challenge.[12]

Senator Andrew Murray (AD) is one who claims the argument that parties are private organisations is now fallacious. To begin with, he points to the fact of their receiving public funding, which now requires an unaccustomed accountability from them, which is likely to become more demanding (see below pp. 6–8). Apart from this, though, Senator Murray is of the view that the great power of parties simply demands that they be open to scrutiny, for the 'private organisation' argument, even were it an accurate representation of their position, no longer justifies freedom from regulation by the state.[13]

There has been a smattering of interest in the States in the question of whether or not this should change. In 1996 the Western Australian Commission on Government looked at whether political parties should be referred to in the Western Australian Constitution. After acknowledging that the question would necessitate 'much debate and detailed analysis', it eventually avoided the issue by making no recommendation at all.[14] In Queensland the Constitutional Review Commission's Issues Paper (2000) also wondered if the importance of political parties in the political process should be recognised in the Queensland Constitution. It invited interested members of the public to comment on how that recognition might be given. Like the Western Australians, the Queensland inquiry avoided the question by stating that the issue of constitutional recognition was one 'whose time has not yet come in Australia'.[15] Both of these Commissions were acknowledging the power of the tradition that Australia's parties were long considered private bodies, with constitutional status neither granted, nor sought.

A Change in the Legal View

The *Cameron v Hogan* judgement (see above pp. 2–3) was not considered sound law by judges or academic lawyers, due to what was regarded as its 'unsoundness' on the place of private bodies before the law.[16] Essentially, the judgment painted a picture of parties that bore little relationship to their actual position in Australian society. Deirdre O'Connor of Macquarie Law School has been one lawyer who pointed to the judges' over-fastidious desire to avoid any suggestion of partisan bias which, in fact, took them down the wrong path in the *Cameron* case:

> A so-called 'proper' desire to avoid the identification of the judiciary with partisan politics coupled with a reluctance to say so, was resolved by [the High Court] characterising the Australian Labor Party as an informal meeting of friends.[17]

According to the critics, then, the *Cameron v Hogan* judgment bore no relationship to the reality of party organisation, and it has been claimed that in the years following, many judges dealt with the problems it posed by 'by quickly ignoring its existence'.[18] It has therefore always been an uncertain platform upon which the parties have based their defence against 'interference' by the state and individual citizens.

This was eventually seen when the protection that parties believed they were given by *Cameron v Hogan* seemed to be undermined in the 1993 Queensland Supreme Court case of *Baldwin v Everingham.* This dealt with a dispute over a Liberal Party preselection contest. The plaintiff asserted that the party's procedures had flouted the Liberal Party constitution, but the defendant relied on *Cameron v Hogan* to support the view that the Court should not intervene in such an internal party matter.[19] Mr Justice Dowsett was therefore forced to consider whether *Cameron v Hogan* did or did not apply to this case. In looking at the question, he analysed Justice Isaacs' view in the 1917 *Edgar and Walker v Meade* case, wherein Isaacs had stated that a private member of a body registered under legislation had the right to take that body to court for the redress of grievances.[20] Dowsett concluded that it was the fact of statutory recognition of trade unions in that case that was central to the earlier decision. This led him to conclude that, 'disputes concerning the rules of political parties registered under the *Commonwealth Electoral Act* are now also justiciable':

> This conclusion differs from the conclusion in *Cameron v. Hogan* not because changing policy considerations dictate a different result, but rather because the Commonwealth Parliament, in conferring legislative recognition upon political parties has taken them beyond the ambit of mere voluntary associations.[21]

The *Baldwin* judgment has since been given judicial support by two South Australian cases. Former Labor member of the South Australian House of Assembly, Ralph Clarke, twice took his party to court in the 1990s to challenge internal party decisions, winning on each occasion. Speaking in judgement on the first case, Mr Justice Mullighan spoke approvingly of the *Baldwin* decision, further putting a nail in the coffin of *Cameron v Hogan*:

> It may be seen that the South Australian Legislature has given statutory recognition to political parties in this State with the same consequence as discussed in *Edgar v Meade* and *Baldwin v Everingham.* They are not in the same position as a 'voluntary club'.[22]

Not all party members are upset by this apparent shift in legal status. Former New South Wales Labor MLA, Rodney Cavalier, sees the most valuable outcome of the Clarke cases as being 'the proof to the ALP in the rest of Australia that the law does apply to the processes of the ALP'.[23]

The consequence of this is that it seems likely that parties will find themselves increasingly required to defend themselves in court over matters once considered part of their private

operations. Indeed, in recent years they have found it increasingly difficult to withstand calls for greater accountability.[24]

Public Funding of Elections

One important alteration in the relationship of Australian parties to the electorate came with the introduction of public electoral funding and financial disclosure. This first occurred in 1981 in New South Wales, was followed in 1984 for Commonwealth elections, and ten years later for Queensland elections.[25] With these changes the argument that parties are private bodies became harder to sustain, for the receipt of public funds inevitably put a focus on how such funds were used by the recipients. Members of these three parliaments appreciated this point, and the respective electoral legislation was altered in an effort to guarantee the proper use of such funds. The 'private body' view of parties became steadily more unrealistic. When the question of public funding had been investigated in United Kingdom in 1976, the Houghton Committee noted the dangers this posed to party independence in that country. The committee believed that there was every likelihood that the state would begin to 'interfere' in party matters if public funding were introduced: '… if the state helps to pay the piper, the state may want to call some part of the tune'.[26] In New South Wales, early Liberal opposition to public funding was based in part on a similar fear that public funding could pose a threat to the freedom of association long enjoyed by the parties in this country.[27]

Such fears were justified. Where parties once benefited from the freedom which came from their legislative non-existence, the introduction of public funding produced legislative changes which began to see parliamentary 'interference' in their operations. This mirrored what had occurred in Western Europe, where parties in countries like Belgium and Norway have become obliged to account for what has been done with money received from the state.[28] In Australia an example of such 'interference' was in the way that the *Commonwealth Electoral Act 1918* now made various prescriptive references to parties. Most strikingly, the legislation even defined a 'political party' for the purposes of the Act, as:

> … an organisation the object or activity, or one of the objects or activities, of which is the promotion of the election to the Senate or to the House of Representatives of a candidate or candidates endorsed by it (s. 4).

Today, then, parties are obliged to abide by certain requirements if public funding is to be received. In national elections:

- To be eligible for such funding, a political party must:
  - *either have at least one member of the Commonwealth Parliament, a parliament of a State, or one of the Legislative Assemblies of the Northern Territory or the Australian Capital Territory, or have at least 500 members, and*

- *be established on the basis of a written constitution that sets out the party's aims (s 123 (1)).*

- Legislative definitions even extend to members of political parties, who are defined as persons who are formal members of specific political parties (or related political parties). They must also be entitled to be enrolled under the *Commonwealth Electoral Act 1918* (s. 123 (3)).

- An application for registration of a political party must give the name of the party, the preferred abbreviation (if desired) of that name, give the details of the registered officer of the party, state whether or not the party wishes to receive public moneys, and include a copy of the party's constitution (s. 126 (2)).

- The Australian Electoral Commission (AEC) has discretion to refuse an application for registration if the party's name is believed to infringe certain requirements. These include the number of words in the title (a maximum of six), a belief that the name is obscene, or the similarity of the name to the name of another registered political party (s. 129).

- Parties can be deregistered voluntarily (s. 135). A registered political party can also be deregistered if it has not endorsed an electoral candidate for more than four years, or if four years have elapsed since the last election for which the party endorsed a candidate. For a 'parliamentary' party, deregistration can occur when it has ceased to be a parliamentary party and the party has fewer than 500 members (s. 136 (1)). Deregistration can also occur on other grounds, including amalgamation of the party with another, or if the original registration was obtained 'by fraud or misrepresentation' (s. 137 (1)). The Register of Political Parties is open for public inspection, without a fee being required, and

- The names of all parties that fulfil the registration requirements of the legislation are included on the Register of Political Parties that is maintained by the AEC (s. 125).

The New South Wales and Queensland electoral legislation also has similar legislative provisions that have helped alter the place of parties within those constitutional systems.[29]

The impact, therefore, is that the carrot of public funding has been used, however inadvertently, to alter the place of parties in the Australian constitutional system. Former Labor Member of the House of Representatives, Les Scott, believes that these are reasonable requirements. He has stated that because parties receive public funding, they should be required to have 'rules and procedures that make them accountable' to the Australian public.[30]

Their own Worst Enemy?

Parties perhaps need to be alert to dangers posed by a decline in public support for their activities, both inside and outside parliament. In many democratic societies the level of public support has reportedly fallen to a record low.[31] This is confirmed in the case of

Australia, where it has been claimed by Professor Ian McAllister of the Australian National University that one in three voters believe politicians use public office to line their pockets, and even fewer believe that their political leaders have 'a high moral code'.[32] Discussions in the Labor Party since the 2001 Commonwealth election have linked such matters to the decline in party memberships: 'For those without political ambitions who simply wish to make a contribution, rank-and-file membership of the ALP is profoundly unappealing', was the observation of Lindsay Tanner MP.[33]

Some observers of Australia's parties have made quite sombre warnings about the threat they pose to the very health of the political system. In Victoria, for instance, former Labor Member of the Legislative Assembly, Ken Coghill, has claimed that party preselections in his State 'have severe weaknesses which threaten the health of our democracy'.[34] In his report into electoral fraud in Queensland, Mr Justice Shepherdson maintained that voters are entitled to expect 'that in any political party the procedures whereby that party chooses or selects its candidates will be transparently fair and not affected by fraud or coercion'.[35] As Prime Minister John Howard put it in 2001:

> More and more people in Australia are looking to have representatives who resonate and connect with their local communities. They are becoming increasingly impatient with political parties and political movements who believe they can move candidates around as though they were pieces on a chessboard.[36]

At the end of the day, it may be that the major parties' loss of support in the general community may force them to accept change. Ralph Clarke is one public figure who has expressed his concern over the alienation of people from the political process, an alienation that the lack of democratic forms within parties probably exacerbates. He has stated that if Parliament does not act to break down the 'closed shop' nature of the political parties this will 'only further widen the alienation between the Parliament and its institutions and the average Australian citizen'.[37] Parties seem to act as if stories of branch-stacking, of memberships being paid, of false addresses, of people able to vote in pre-selections though resident overseas, as if they are of no consequence to ordinary voters. For example, research conducted in New South Wales indicated that half of a survey of New South Wales MPs did not think that members of the public have a sustained interest in politicians' ethics.[38] As indicated though, it is likely that this view ignores changing attitudes in the wider society.

Election results during the 1990s indicate a falling off in support for the major parties in both Commonwealth and State elections, a development that is said to be strongly related to an increased voter disillusionment with the major parties.[39] Parties run the danger that eventually sufficient voters will reject their message and begin electing people who come from outside the major party ranks. Although in all elections between 1949 and 2001 only 14 such MPs have been elected to the Commonwealth Parliament, 12 of these successes have occurred since 1990. In 2001 the 'country independent' push was very much related to rural communities' resentments towards their treatment by the major parties, and the election of Tony Windsor in New England no doubt reflected his strong anti-party stance

in the New South Wales State electorate of Tamworth since his first election to the New South Wales Parliament in 1990. The election of such 'outsiders' has been seen even more starkly in State elections in recent years, and is a reminder of political commentator Antony Green's assertion that 'the weak link in Australian democracy' is 'the unrepresentative nature of political parties and the unregulated conduct of their internal affairs'.[40]

Parties in other Liberal Democracies

The position in Australia is very different from many other liberal democracies.

Not all political systems have allowed the same degree of freedom to their political parties, for since the 1960s many Western democracies have moved to adopt arrangements designed to regulate party activities. Ware has investigated the changing place of parties in liberal democracies and has concluded that:

> On balance, the pressures of electoral competition are probably forcing parties to modify their procedures to make them more 'responsive' than they have been, but these pressures are by no means uniform.[41]

Some nations, in fact, see parties as public organisations which have not only a responsibility to their members for their actions, but also to the wider community.[42] Various nations illustrate this in three main ways:

- parties' role in the nation
- intra-party democracy, and
- requirements for the receipt of public money.

Parties and the Maintenance of the Democratic State

Some constitutions describe parties as occupying a positive place in the nation, seeing their guaranteed presence as enhancing its democratic nature. The Constitution of France states that 'Political parties and groups shall be instrumental in the exercise of the suffrage'.[43] In the case of Spain, parties are described as expressing 'democratic pluralism', of assisting in 'the formulation and manifestation of the popular will', and of being 'a basic instrument for political participation'.[44] The Israeli Constitution describes 'the function' of parties as being to give expression to the will of the people and to seek political ends 'in a democratic manner'.[45] The Basic Law of the Federal Republic of Germany states that, 'The political parties participate in the forming of the political will of the people', and guarantees that they 'may be freely established'.[46]

The reverse of this is to proscribe activities and policies that might threaten the nation's existence. The German Basic Law, drafted within four years of the end of the war of 1939–45, is quite categoric:

> Parties which by reason of their aims or the conduct of their adherents seek to impair or do away with the free democratic basic order or threaten the existence of the Federal Republic of Germany shall be unconstitutional.[47]

In Portugal, the principal of freedom of association includes 'the right to establish and join political associations and parties', but this has its limits. Parties cannot use names connected with any religion or church, nor may they use emblems that might be mistaken for national or religious symbols.[48] In Israel, the right to found and maintain a party is protected, but such protection is forfeited if the party opposes the existence of the State of Israel as 'the state of the Jewish people', negates the democratic nature of the State of Israel, or incites citizens to racism.[49] In the Netherlands, the executive has the power to ban extremist parties without recourse to the Supreme Court.[50] The Swedish Instrument of Government guarantees freedom of association, though that may be restricted for bodies 'whose activities are of a military or a quasi-military nature, or [which] constitute persecution of a population group of particular race, colour, or ethnic origin'.[51]

Despite the Canadian Royal Commission's uncertainty cited above (p. 3), it actually went on to acknowledge the changing nature of the party–polity relationship in that country. There was no doubt that political parties were responsible for 'a number of critical functions in the electoral process', and therefore they 'constitute an integral part of democratic governance'. Interestingly, the conclusion drawn by the Royal Commission was that:

> For certain purposes, then, parties deserve special acknowledgement in law and must be subject to some public regulations.[52]

Even in Britain, so long determined to maintain the stance that parties were private bodies beyond the reach of statute, the Blair Government's efforts to modernise the British constitution have seen an effort to bring parties under some type of control. An important raison d'etre for the Registration of Political Parties Act 1998 (UK), was the need to register parties in order that lists of their candidates could be officially included on the proportional representation ballot papers. This was initially a voluntary provision, but the Political Parties, Elections and Referendums Act 2000 (UK) made it compulsory.[53]

Intra-Party Democracy

A different, though clearly related, approach is to focus on intra-party activities. In many countries there is a constitutional prescription that parties' internal operations be transparent, and in accordance with the general democratic mores of the nation. In Germany, parties' internal organization 'must conform to democratic principles', and they have to publicly account for the source of their funds and other assets, as well as for the

use of such funds.[54] A Portuguese party 'must be governed by the principles of transparency, democratic organization and management and the participation of all of its members'.[55] In both Finland and Spain, parties' internal structures and operation must be democratic.[56]

In some systems there is a requirement for the registration of parties, usually with a requirement to give evidence of a reasonable number of members. Most notably, only registered parties can win seats in the Swedish Riksdag, and even then only if they receive a fixed percentage of the popular vote.[57] As noted below, (pp. 12–13), party registration is often linked to the question of public funding. In Norway, however, there is a requirement for party registration irrespective of any question of public funding. An application for party registration:

> must be supported by the minute book of the constituting meeting, the names and signatures of those elected to the party's central committee, and the signatures of at least 3000 electors who declare they wish the organization to be registered as a party.[58]

Sweden may well be moving towards making political parties even more accountable for their activities. In 2000 the Commission on Swedish Democracy reported on a wide range of matters that impacted upon democracy in Sweden. These included such questions as civics education, the means citizens have of seeking redress against government decisions, and the need for more opportunities for open fora for citizens to express their views. The Commission also considered the part played by political parties, which were described as having a 'key role' in representative democracy. The Commission believed that this role was based on:

- parties' role in constituting 'links between citizens and political power'
- their role in 'balancing various interests', and
- their assumption of responsibility for the structure of political power.[59]

The Commission's conclusion was severe, however. Swedish parties, it believed, demonstrate 'an inadequate capacity' to adapt to political change, and point to an increasing difficulty in attracting citizens. The Commission pointed to a need for parties to adapt for the good of Swedish democracy; it concluded that in order to reinforce representative democracy, the parties must develop both ideas and working forms that match the needs and requirements of citizens.[60]

If any legislation were to be introduced in Australia, the work of Dan Avnon of the Hebrew University of Jerusalem warns that protection is probably as important as control:

- continuity of the democratic features of the political system must be ensured
- the state must not be given excessive powers of intervention in the development of parties that express different ideas from those in power

- a legal framework for the resolution of intra-party disputes should be created, and
- the legitimate activities of parties should be defined—particularly if they received public funding.[61]

If rules are legally enforceable, this removes some of the devices that party elites use to block newer participants from exerting too great an influence upon party matters:

> … when those who are being excluded have recourse to law, and especially when the state itself is responsible for overseeing aspects of the selection process, the discretion of elites in being able to exclude unwanted newcomers is much reduced.[62]

In various countries that have moved to put some controls upon parties' internal operations, there is a realisation that not only must candidates be attractive to voters, but they must also be seen as coming from a system that is not obviously unfair. This, in turn, has had the effect of modifying the behaviour of party elites.

The Receipt of Public Money

The third main area in which regulations are placed on parties relates to the receipt of public money. Many countries have established partial public funding of parties, recognising that political parties play a public interest role; they make an essential contribution to political contestability and the decentralised expression of diverse values and interests. Public funding is seen as reducing the scope for private interests to 'buy influence', and also helping reinforce limits on spending, because of the electorate's resistance to excessive public expenditure. Among the nations that have introduced some level of public funding have been Austria, Belgium, Canada, Finland, Germany, Italy, Norway, Spain, Sweden and the United States. A great deal of party organisation and activity is influenced by regulations imposed by state bodies as a consequence of the introduction of public funding of parties, particularly tied in with electoral activity.[63] Typically, the introduction of a system of public funding leads to alterations in the law relating to parties—such requirements as lists of members, lodging of party constitutions and details of how money is accounted for. In many countries this has become so important a part of the relationship between party and society that opponents of public funding have suggested that the obligation to publish party accounts and meet with other regulations has changed the relationship to such an extent that it has given the state power to interfere in the internal activities of parties, something that would have once been regarded as inconceivable in a democratic state.[64]

In some countries public funding comes with no controls placed on how the funding is spent. In others, though, efforts are made to prescribe how parties may spend such money. In Ireland, for example, the relevant legislation[65] provides that public funding may be used by the qualified parties only in relation to:

- general administration of the party
- research, education and training
- policy formulation, and
- coordination of the activities of branches and members of the party.

The funding is also deemed to include the provision for the parties to spend it on the promotion of participation by women and young persons in political activity. It is not permitted to apply the funding to offset expenses incurred at elections.

Irish qualified parties must account for their use of their funding annually. This is done by the Appropriate Officer of each party providing an Exchequer Expenditure Statement to the Public Offices Commission which details the amount of the funding and how it was utilised during the period in question. A Public Auditor is required to audit the Statement and that Auditor's report is submitted with the Statement to the Commission. The material is made available by the Commission at its offices for public inspection and copying.

Should Australian Parties be made more Accountable?

The earlier discussion showed that legislative requirements relating to public funding already place a number of non-negotiable requirements upon the major parties in two States and in relation to Commonwealth elections. In this, Australia has simply put in place the type of legislative provisions that can be found in systems of public funding in other countries. The question, though, is whether more needs to be done to make parties accountable to the Australian public. In describing Australian parties as 'self-governing fiefdoms', Antony Green, has stated that there is a need for them to be brought within 'a sensible legal framework', while former Commonwealth MP, Gary Johns, believes that such a development is inevitable.[66]

In South Australia, Ralph Clarke has spoken of the need for 'a proper legislative framework governing our political parties'. He believes, for example, that the *Commonwealth Electoral Act 1918* should state that the rules of parties that receive public funds should provide for 'their democratic control by their members'.[67] The views of such political figures have been accepted by at least one editorial writer, who has attacked the 'ridiculous anachronism' that parties are not governed by any laws specifically designed to deal with them. The public has 'a real interest' in the organisation and practices of political parties, 'because taxes raised from the public are handed over to political parties to subsidise their electoral operations'. It is, therefore, time that laws were passed providing for, among other matters, 'proper, public, financial accounting'.[68]

A Minimalist Approach—the Australian Electoral Commission View

The Joint Standing Committee on Electoral Matters has referred to what it calls the 'minimalist view' on this matter, that seems to underline the attitude of the Australian Electoral Commission (AEC).[69] Evidence given by the AEC to the Committee suggests that the existing system of party control found in the *Commonwealth Electoral Act 1918* is essentially sound. If there are any problems, they are small, and their eradication is simply a matter of modifying the existing arrangements so as to tighten the party registration requirements. Such a view notes that proposals announced by the Liberal and Labor parties to introduce internal pre-selection reforms in Queensland, 'suggest that it is not the federal electoral system that requires major reform'.[70] The Commission's cautious view would also seem to favour the parties being left alone to get their houses in order by their own, unaided, efforts. As we shall see below, (pp. 20–1), this may well be influenced by the AEC's concern about the possible undermining of its reputation for evenhandness were it expected to take any part in administering a tighter legislative control over the parties.

This is not to suggest that the AEC sees the present arrangements as without flaw, believing that there are a number of areas where improvements can be made. For example, in a submission to the inquiry into the 1998 Commonwealth election by the Joint Standing Committee on Electoral Matters, it noted that party constitutions tend to be scant, giving insufficient information on the internal functioning of the political parties. Information on what constitutes a member, let alone the terms and conditions of membership, are felt to be generally inadequate. If there is to be any point in parties lodging such documents, it seems to follow that they should be more informative, both for party members and for the general community.[71]

The AEC has stated that the *Commonwealth Electoral Act 1918* should be amended to make political party membership status clearer. This is particularly important as party numbers are crucial to a political party's registration, but they also are important in regard to the power to deregister a party. The AEC therefore has recommended the addition of further requirements:

- a person must be accepted as a member by the party's own rules
- a member must have joined a party (or renewed membership) within the previous twelve months, and
- he or she must have paid an annual membership fee of at least $5.[72]

Of lesser magnitude, perhaps, is the AEC suggestion that parties be charged a $500 fee for registration. This would help cover AEC advertising costs and it might discourage frivolous applications. The Joint Standing Committee on Electoral Matters has agreed with the principle of an application fee, but has suggested that it should bear more relationship to what a registration really costs the AEC. It might be 'more realistic' to charge about $5000. The

levying of such a charge would be akin to many other government charges, such as the fee required for the lodgment of a trade mark application with the Trade Marks Office.[73]

On balance, AEC sees a need only for moderate changes to those parts of the electoral law that deal with parties.

Broadening the Scope?

Others, however, believe the present arrangements, while important in themselves, do not go far enough in what they see as the necessary democratising of political parties in this country. For such observers, a key principle that needs to be accepted is that parties can no longer realistically be considered as private bodies, performing, as they do, a key role in the public affairs of the nation—they are part of the formal structure. Former Australian Electoral Commissioner, Professor Colin Hughes, for example, has gone much further than the AEC, making various recommendations that attempt to lock parties into the legal system in a more obvious fashion. He favours a strong approach.[74]

Hughes notes that there are benefits for parties that register under the *Commonwealth Electoral Act 1918.* He asserts that this should be used to force parties to take steps towards making their internal processes fair and transparent. Therefore, parties—at the very least—should be required to submit their pre-selection rules to the registering authority. Such rules should state quite clearly the party's own procedures for the gaining of party membership. They should also make quite clear how the keeping of membership lists is conducted.

Hughes has no truck with the 'parties as private bodies' defence used against the opening up of parties. He says that the *Commonwealth Electoral Act 1918* should be amended to make it quite clear that 'departure from the party's own rules would allow an application to the courts' by aggrieved party members, as well as 'the opportunity to overturn the outcome if deficiencies are proven'. Hughes then shows how the parties should be forced to change their ways:

> A party that does not wish to meet these requirements could operate as a cadre party and select its parliamentary candidates by a committee or indeed the nomination of a single leader, but they would not then be able to pretend to follow democratic practices. Neither would they be able to receive public funding or display a party label on the ballot paper.[75]

Hughes is adamant that such a change would be an improvement on the current arrangements:

> In some recent controversial episodes the present system of registration appears to have a minimal link with democratic standards, but there is no reason why a better system should not.[76]

Of the parties, only the Australian Democrats have made any attempt to run on this issue. They focus on the fact that although parties are central to Australian democracy, there is little public accountability for their internal processes. Because the parties are now publicly funded in national elections;

> … the public has a right to know the ways in which parties receive and spend their funds.

Further:

> … the public influence and purpose of political parties demand that they be open to public accountability.[77]

Possible Changes?

A Need to Alter Party Constitutions?

A constitution is an important management tool in any large public organisation, and the parties can all point to the fact that their constitutional documents spell out democratic processes. If a constitution is to work, however, there must be a reasonably good alignment between its provisions and the practices of the organisation involved. Too large a contrast between the provisions claimed in the constitution and actual practice can lead to cynicism and a crisis of authority. The Canadian Royal Commission on Electoral Reform and Party Financing cited earlier noted that there is a great danger of this occurring if party practices essentially remain hidden from the public gaze. [78] Gary Johns has noted that the closed nature of electoral competition, combined with the public status of parties, implies that 'their internal affairs should be conducted democratically'. This is not guaranteed at present.[79]

This can be seen in Australia in the debate over the so-called '60–40 rule' which gives unions a majority of votes at most ALP state conferences. Although it can be argued that this has more to do with factional interests than union dominance,[80] it is the apparently undemocratic and anachronistic nature of the rule that is said to hurt the party:

> While I do not intend to single out my own party for criticism, it is clear that unions—honourable contributors to Labor history and policy—exercise disproportionate influence through the 60:40 rule and through their affiliated membership, many of whom have no direct connection with the party. One vote, one value—the prime condition for a democracy—is not observed in the party's rules …[81]

The Australian Democrats discussed one-vote-one-value in their dissenting report to the Joint Standing Committee on Electoral Matters' inquiry into the 1998 election, claiming that when instituted within parties it would mean that all members' votes would be equal, and it would do away with undemocratic internal party ballots.[82] Three years later the Joint Standing Committee on Electoral Matters made a similar recommendation despite strong opposition from Labor members who saw this as a simply a partisan attack.[83]

Some observers see a change in the nature, or the use of, a party's constitution as a way of making party affairs more transparent. There could be more emphasis on requiring that party practices match the words of the party constitutions so as to ensure that public perceptions match party rhetoric. In Canada, for instance, the Royal Commission on Electoral Reform and Party Financing recommended that parties have constitutions:

> … that promote democratic values and practices in their internal affairs and that are consistent with the spirit and intent of the *Canadian Charter of Rights and Freedoms*.[84]

The Australian Democrats are the only Australian party to make a sustained critique of the place of parties in the Australian political system. They have stated that registration provisions should require that the Australian Electoral Commission take into account the extent to which, and the manner in which, a party's constitution provides for the following matters:

- the aims of the party
- the qualifications for membership of the party
- the rights and obligations of members of the party, including voting rights
- the method of choosing office bearers
- the obligations and duties of office bearers
- the procedures for selecting candidates to represent the party at elections
- the number and nature of any party committees
- the powers and composition of any party committees and the method for selecting members
- the use of secret ballots in party decision-making and the decision-making processes generally
- the method of selection party employees
- procedures for convening and conducting meetings, including provisions for a quorum, chair and voting
- the requirement for an annual general meeting
- the documentation for and of meetings
- the rights of members to request a ballot

- the rules governing the use of proxies
- the period of notice required for resolutions or any particular class of resolution
- provision for the inspection of minutes and correspondence
- the mechanism for changing the constitution, and
- the procedures for resolving disputes.[85]

The Australian Democrats have stated that the AEC 'must refuse' a party's registration application, if 'the constitution of the party does not sufficiently provide for the affairs of the party to be conducted in an open, democratic and accountable manner'.[86]

The problem here, however, is that parties will not necessarily seek to do so voluntarily. Gary Johns has suggested that a compromise between the need for parties to be more transparent, and their desire to retain their privacy, would be to use the party constitution as a pledge of faith. What he calls a 'reasonable compromise' would be, as part of the registration process, to make party constitutions available to the public:

> If the parties' candidate selection rules were, as a condition of funding, to be made available to the public so that voters may judge for themselves the fairness of the processes, then the parties would, insofar at their formal practices are concerned, be more likely to comply with basic democratic standards.[87]

Party Pre-Selections

The Importance of the Process

One obvious focus for public concern about political parties lies with the way in which party pre-selections are conducted—the so-called Labor 'electoral rorts' in Townsville[88] and the Liberal pre-selection controversies in the division of Ryan during 2000–01[89] are a reminder of that. Professor Hughes has commented that party ballots 'have brought and continue to bring discredit on the parliamentary electoral process'.[90] With so many House of Representatives and Senate seats considered safe for either the Coalition or the ALP, the pre-selection of the candidate for the party likely to win a particular seat is the crucial election, and with careers at stake, party members can play fast and loose with the party arrangements. Some people have suggested that the step from fraudulent enrolments for influencing party pre-selections to fraudulent enrolments for influencing Commonwealth or State elections is a small one.[91] Former South Australian Premier and member of the Commonwealth Parliament, Steele Hall, is one who has spoken of the need for 'an ethical system of candidate selection'.[92]

An example of what can be done comes from New Zealand, where the Electoral Acts 1989–1995 requires that registered parties 'follow democratic procedures in candidate selection'. Every registered party is required to ensure that provision is made for all

members to participate equally in the selection of candidates representing the party for election as members of Parliament.[93]

The German Federal Electoral Law is far more prescriptive. Article 21 deals specifically with the selection of party candidates. Article 21 (1) states that a person can be named as a candidate for a party in a constituency[94] only if he or she has been selected for this purpose in a properly-constituted assembly of party members. The appropriate assembly is defined. Article 21 (3) specifies that candidate selection shall be by secret ballot. It also sets the period that must elapse after the start of a new Bundestag before such an assembly can be held—though this becomes inoperative if a Bundestag term ends prematurely.

Technically, changes such as these would be easy to implement in Australia.

Party Primaries?

Coghill has noted the problems with party preselections, including the fact that very few people actually vote in many such ballots, yet winning candidates often end up with a parliamentary seat. Not only are such preselections unrepresentative, but they are easily manipulated by party powerbrokers. He talks of a 'fracturing of the relationship between politicians and citizens' that is swinging many voters to minor parties, and worries about the threat they pose to Australian democracy.[95]

Coghill wonders if Australia should look for alternative arrangements, and he has floated the idea of party preselections being replaced by party primaries as run in the United States of America—something spoken of by Wayne Swan MP (ALP) as well.[96] Instead of a party's candidate being chosen by intra-party processes, this would be done by a public vote. He believes this would introduce a process whereby voters would be able to vote in the party preselection process as well as in a general election. Although he notes the problems in America with the great cost of such primaries, he thinks this is a practical weakness that could be overcome. The overall benefit, though could be immense, and he states that Australia 'should explore the possibility of extending democracy to allow … voters to affect the selection of political party candidates to public office'.[97] In support of this Rowena Johns' research for the New South Wales Parliament suggests that primaries are an improvement on party ballots due to their being 'more democratic', and she has suggested that it 'should remove much of the incentive for branch-stacking.[98]

Electoral Commission/Office Involvement?

Another option would be to remove power over party pre-selections from the parties altogether. Ought the various electoral commissions and electoral offices conduct party pre-selection ballots? This suggestion has been made in the Shepherdson Inquiry report[99], and at least one newspaper editorial has suggested that such a responsibility be made mandatory for the AEC.[100] Professor Hughes has also made the suggestion in regard to Commonwealth elections, though he modified it by proposing that if a party preferred, the relevant State electoral body could run internal ballots, rather than the AEC.[101] Senator

Andrew Murray has claimed that such a change could 'help secure an authentic ballot', as well as bring about public assurance that the pre-selection process 'was not some private, corrupt, dishonest, and rigged intra-party affair, and that the successful candidate got up fairly'.[102] The Senator's party recommended this to the 1998 Joint Standing Committee on Electoral Matters inquiry into the 1998 Commonwealth election, calling for:

> All important ballot procedures within political parties to be overseen by the AEC to ensure proper electoral practices are adhered to.[103]

Although such a change could be seen as analogous to the long-standing practice of the AEC conducting union or Aboriginal and Torres Strait Islander Commission elections, the AEC is less than enthusiastic about such a prospect for Commonwealth elections. It has noted, perhaps disingenuously, that this would involve 'substantial' establishment and running costs, that would have to be 'specially resourced'. Rather more significantly, its worry seems to be that no matter how carefully the Commission acted in such matters, there would be an ever-present danger of this being seen as the Commission compromising its hard-earned reputation for neutrality:

> AEC involvement in the preselection of candidates for elections conducted by the AEC could be seen as compromising [its] political neutrality.[104]

Despite the AEC's unease on this, the May 2001 Joint Standing Committee on Electoral Matters inquiry into the integrity of the electoral roll seemed to believe the benefits for Australian society might outweigh the Commission's concern. It therefore made a recommendation which left the door open for AEC involvement:

> That the Australian Electoral Commission allow political parties to use its services to conduct internal party ballots. Such services should be provided on a cost recovery basis.[105]

The Queensland Reforms

A month before the 2001 election Queensland Premier Peter Beattie made a public commitment that if his Government were to be returned he would implement reforms that would bring Queensland parties under tighter legislative control. This was said to be in response to 'political and community concerns' that had been highlighted in the reports of three separate inquiries;[106] *The prevention of electoral fraud*, a Legal, Constitutional and Administrative Committee report tabled in the Queensland Parliament on 14 November 2000; *The Shepherdson Inquiry*, tabled in the Queensland Parliament on 1 May 2001; and *User friendly, not abuser friendly*, the Commonwealth Parliament's Joint Standing Committee on Electoral Matters report tabled in the Commonwealth Parliament on 18 June 2001. Despite the massive victory of the Government in the February election which might have persuaded the Premier to push this promise aside, new legislation was introduced on 6 March 2002, was debated and passed without division on 16 April, and became law three days later.

On the face of it, this legislation takes the legislative control of parties in this country much further than ever before. Unlike the Commonwealth, New South Wales and earlier Queensland legislation, the *Electoral and Other Acts Amendment Act 2002* (Qld) enters the areas of protection of the democratic state and the matter of intra-party democracy referred to earlier as a feature of some overseas legislation, (see above, pp. 10–12). This has taken the legislative control of Queensland parties beyond the provision for the simple registration of parties as a requirement for public funding. The most significant changes are found in relation to:

- party constitutions
- preselection ballots, and
- how-to-vote cards.

Party Constitutions

The Commonwealth and New South Wales legislation require the lodging of a party's constitution (however described) or rules and platform. There is no attempt to proscribe what, if any, must be provided for in such a constitution. By comparison, the new Queensland legislation goes much further than simply demanding the lodging of the party constitution.

The tone of the Queensland document is struck by the name of the new section (s. 73A) that was inserted into the *Electoral Act 1992*—'complying constitution'. A 'complying constitution' is one that meets certain obligatory legislative requirements. The most significant are the following:

- the procedure for amending the constitution (s. 73A (1) (b))
- party membership rules, which must include:
  - *a rule stating the procedure for accepting members*
  - *a rule stating the procedure for ending a membership*
  - *a rule prohibiting membership of any person who has been convicted of a 'disqualifying electoral offence' in the previous ten years; and*
  - *a rule prohibiting a person from continuing as a member if the person has been convicted of a 'disqualifying electoral offence'. (s. 73A (1) (c) (i–iv))*
- a statement of how the party manages its internal affairs; this must include a statement about the party's structure and dispute resolution procedures (s. 73A (1) (d))

- the rules for selection of both party office-bearers and party candidates—the latter to include local government as well as parliamentary candidates (s. 73A (1) (e))
- a rule requiring that a preselection ballot must satisfy 'the general principles of free and democratic elections' (s. 73A (1) (f))
- the 'general principles of free and democratic elections' as they would apply to a preselection ballot are then defined in s. 73A (2). Among the requirements are:
- only members of the party who are eligible to vote under the party's constitution may vote (2 (b))
- each member has only a single vote (2 (c))
- voting must be by secret ballot (2 (d)), and
- a member 'must not be improperly influenced in voting' (2 (e)).

Pre-Selection Ballots

One of the most controversial aspects of party behaviour relates to the way in which party pre-selection ballots are conducted.

Part 8A of the Queensland legislation, headed 'Commission oversight of preselection ballots', breaks further new ground in its use of the Queensland Electoral Commission (QEC). Essentially the QEC is given oversight responsibilities regarding party preselections, including the power to audit cases, to conduct inquiries and to advise the minister of any pre-selection ballot in which a person voted in contravention of either the model procedures established by regulation, or the party's official constitution. A copy of the regulation prescribing model procedures for the conduct of a preselection ballot must be given by the QEC to each registered political party. The regulation was duly gazetted on 31 May 2002.[107]

How-to-Vote Cards

How-to-vote cards have also been an aspect of elections that have been largely left alone by the legislators, despite occasional stories such as that involving payments by a Labor MP to the Australian Democrats during the 1996 Commonwealth election.[108]

At least seven days before polling day the person authorising a how-to-vote card must lodge with the Queensland Electoral Commission the required number of cards. There must also be lodged a statutory declaration relating to 'any financial contribution received from another registered political party or another candidate … in relation to the production of the how-to-vote card'. The declaration must state who the financial contribution was received from—or on behalf of—and the nature and amount of the contribution (s. 161B (1), (2)). The Commission is obliged to reject a how-to-vote card that does not comply

with the legislation (s. 161B (3)). How-to-vote cards that have not been rejected must be made available for public inspection at no charge, and must be available for inspection at each polling place on polling day (s. 161B (4), (5)). Rejected cards may not be distributed on polling day, and if such a card is distributed it may be confiscated by the Commission (s. 161B (7), (8)).

In Summary

Australian political parties may well be facing a time of change. They have to date functioned very much as private bodies, but public demand may be forcing them to be more directly accountable for their activities than could once have been envisaged. Academic lawyer, Graeme Orr believes that we can expect 'a continuing trend to juridify the once purely political realm of party machinations'.[109] There are two basic matters for parties to address; should they be brought under greater community control, and if so, how might such control be implemented? On the first of these, the fight might well be lost. On the second, the dilemma of how this might be done is not so easily judged. Nearly forty years ago the question was posed in the USA:

> … it seems impossible to create procedural devices which would protect against abuse and yet permit the requisite degree of autonomy [of political parties].[110]

The Queensland Parliament has been prepared to make an attempt in 2002, and this might well turn out to be a watershed for political parties in this country, for once such changes are made in one Australian jurisdiction, it can be difficult to withstand calls for change in others.

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