DEALING IN VOTES:
ELECTORAL BRIbery
AND ITS
REGULATION IN AUSTRALIA

Graeme David Orr
BA LLB (Hons) LLM (Merit) Grad Cert Higher Ed
Griffith Law School, Griffith University

Submitted in fulfilment of the requirements of the degree of
Doctor of Philosophy
October 2004
Abstract

Electoral bribery, in formal legal terms, is both a potentially serious offence and, in theory, guaranteed grounds for a candidate losing their seat on a (civil) election petition. Bribery, in the electoral context, is essentially the wrongful inducement through an undue benefit designed to influence electoral conduct. It can be committed by the mere offer to give or receive such a benefit.

To the early 20th century, bribery was by and largely conceived of as the crude and quite literal buying of votes, through money or treating. Such practices bedevilled UK elections for several centuries. They appear to have grown out of cultural, possibly feudal expectations of reciprocity, and alongside the outright buying of seats, at a time when seats in Parliament became entrees to power rather than burdens of service. They reached their peak in the 19th century, as the franchise began to expand and modern notions of democracy came into being. This precipitated a ‘war’ on corruption, whose chief institutional weapons came to be: a mass, secret-ballot franchise; independent election judges; concerns over the cost of electioneering and consequent expenditure limitations; and the professionalisation of campaigning with the rise of centralised parties.

This war left a paradigm of bribery in the legal mindframe as individualised transactions directly buying votes. In the more egalitarian climate of late colonial Australia, such vote-buying was less of a problem, although there is evidence of it being a regionalised concern, linked in part to cultural factors such as alcohol consumption and wagering. Despite the lessons of late Victorian England – that vote-buyers tried to hide or diffuse the practice through, eg, employment, payment for conveyances and ‘charity’ – it seemed assumed in Australia for most of the 20th century that electoral bribery was dead.

However campaign practices are ever-evolving in the face of social, technological and electoral system changes. Mass electorates and new media technologies for example
placed the focus of electioneering on advertising and media influence; a more plural society invested power in lobby-groups; and preferences came to determine the outcome of Australian elections. Politics, ever the art of deal-making, has thrown up a variety of deals, not between politicians and electors, but between politicians and other political actors, in which electoral support is traded. Examples of these include preference deals, ‘dummy’ candidates, inducements and payments between campaigns and candidates, (sometimes secret) policy for electoral support trades with lobby groups or the media, media endorsed candidates and a variety of parliamentary deals such as appointments for electoral advantage.

If electoral bribery law were taken too literally, even obviously unobjectionable arrangements such as a direct preference swap might be impugned. This could gut the political realm of its freedom. Whilst there is no ‘magic bullet’ (such as secrecy/openness) which can be added to the elements of the formal definition of electoral bribery to perfect it, it is necessary to attend to the idea of ‘political currency’ to permit the realm of politics its independence. That is, there are certain goods in politics, such as preferences, which can naturally be traded for each other. Applying this reasoning, the emerging practice of ‘vote-swapping’ between electors is not to be equated with the selling of votes.

Outside the formal interpretation of bribery as a legal offence, it also serves as a powerful rhetorical device in contemporary discussions of electioneering. In particular, as a pejorative to describe pork-barrelling and public policy/expenditure ‘bribes’. Indeed in a 1988 New South Wales case, an MP was unseated for excessive largesse on the eve of an election using government grants. The reasons why the law usually permits such activity under the exemption for public policy declarations and action open up consideration of the nature of metaphorical ‘vote-buying’. Electors seem to abhor such vote-buying and yet respond positively to it. The tendency for the secret ballot to leave electors unaccountable for their voting choices is an explanation for this.

Theorists, particularly from the US, have sought comprehensive, normative explanations and delineations of electoral bribery. These raise interesting questions
about the electoral ‘market’ and its impact on governance, whether the ballot has an 
uncommodifiable essence, and notions of political equality. We can speculate as to 
the degree to which elections should be matters of pure self-interest as opposed to 
exercises in expression and ideology, and whether electoral bribery, crude or 
metaphorical, encourages disengagement.

Ultimately, however, an understanding of electoral bribery is a matter for a detailed 
attention to the actual interplay of law and electoral politics, as it has evolved in a 
changing social and institutional framework, rather than for comprehensive normative 
prescriptions.

Electoral bribery in most cases is not reducible to a moral judgement about an abstract 
notion of corruption, as the common law has always recognised. Nor are narrow, 
modern notions of corruption as the misuse of public positions for private gain much 
use when we are dealing with electoral politics, where ambition is an inextricable part 
of electoral competition. However attending to the idea of both candidacy and the 
ballet as ‘offices’ offers the possibility of civilising electoral conduct without 
denuding electoral politics of its political nature.
Statement of Originality and Currency

This thesis is my own work.

This work has not previously been submitted for a degree or diploma at any university.

To the best of my knowledge and belief, this thesis contains no material previously published or written by another person except where due reference is made in the thesis.

I received no assistance in the pursuit of the research and preparation of the thesis aside from comments from my supervisors on draft chapters and suggestions for references to consider.

During the course of this thesis, I explored in short scope some of the ideas and cases discussed in this thesis in ‘Dealing in Votes: Regulating Electoral Bribery’, ch 10 in Graeme Orr et al (eds), Realising Democracy: Electoral Law in Australia (2003) 130. That chapter however was not used as the basis for any part of this thesis.

This thesis was updated in minor respects after its submission to take into account ongoing developments in the law/politics of electoral bribery; it states the law as known to me as at the end of 2004.

__________________________
Graeme Orr


**Appreciation**

I extend appreciation to my supervisors, initially Professor Patrick Weller and Shaun McVeigh, later Professor John Dewar and Shaun. Electoral law is a small but emerging speciality in Australia; any errors or misstatements here are entirely mine. I am particularly indebted to Shaun for his ability to capture overarching questions relating to genre and method, and better still, communicate them in a supportive way to colleagues like myself.

My faculty and university provided considerable assistance through my part-time candidature, in particular enabling some work to be done through two periods of sabbatical. I am especially grateful for the chance, in the first of these periods, to revisit and explore the labyrinthine collections of United Kingdom material in the various law libraries of the University of London system. I also acknowledge the generosity of the Electoral Commission, Queensland for opening its in-house library to me.

Particular thanks go to supportive colleagues, not least Dr Mary Keyes who in beating me to completion showed me part-time theses by full time law teachers were possible after all, and spurred me on.

A coterie of academics here and abroad in the field of electoral regulation have provided me with influences and inspiration on issues such as electioneering law and conduct, campaign finance and conceptions of electoral fairness which, although not at the heart of electoral bribery per se, nonetheless form questions and work cited throughout this thesis. They are really too numerous to list; fortunately they know who they are.

Most of all my gratefulness belongs with my wife (Dr) Genevieve Dingle. Having achieved a much more arduous doctorate in a much more useful realm (clinical
psychology), Gen has given herself to me, our baby Madeleine and, as I write, an *enfant en ventre sa mere* (to borrow the Law French). Without her I would be little.

I dedicate this thesis to my father, Ray, and late mother, Helen. They, and the events of 1972-5 sowed my interest in the significance and possibility of electoral politics very early; even more preciously they encouraged and supported my education in every way imaginable.
# Table of Contents

## Chapter One. Introduction: Dealing in Votes

The Issue and its Relevance ........................................... 1

‘Corrupt’ Conduct, ‘Buying’ Support and the Notion of Office ............ 7

Thesis Structure, Method and Coverage ................................... 11

A Note on Terminology ........................................................ 19

## Chapter Two. Suppressing Vote-Buying: the Historical Struggle against Electoral Bribery

Chapter Coverage and Purpose ............................................. 22

Regulation to the Early Modern Era ......................................... 26

A Brief History to the First Reform Act (1832) .......................... 26

Legislative Responses of the mid 19th Century ......................... 38

Failure or First Step? The Reform Act of 1832 .................... 38

The Corrupt Practices Prevention Act 1854 ......................... 40

Fine-Tuning the Corrupt Practices Prevention Act ............ 42

The Noose Tightens – the Modernising of Electoral Law from 1868 ...... 42

Lessons from the Case Law .............................................. 42

The Influence of Procedure ............................................. 46

The Common Law of Elections ........................................... 48

Statutory Reform in the War on Corruption ............................ 50

The Second Reform Act: The Representation of the People

*Act 1867* ................................................................. 50

The Parliamentary Elections Act 1868 .............................. 51

The Ballot Act of 1872 .................................................. 52

The Corrupt and Illegal Practices Prevention Act 1883 . 53

Reform in the Period 1884-1918 ..................................... 54

Acts Disfranchising Boroughs .......................................... 54

Forms of Electoral Bribery in Victorian and Edwardian England:

Lessons from the Case Law ............................................. 55

Outright Vote-Buying .................................................. 55
Chapter Three. The Australian Experience of Electoral Bribery: Evolution and

Historical Case Law ........................................ 78

Chapter Coverage and Purpose ................................ 78

The Inaugural Commonwealth Provisions and their Colonial Sources .. 81

Candidature – Temporal Scope .................................. 86

Exemption for Statements of ‘Public’ Policy or Action ........... 87

Treating, Wagering and Licensed Premises: Wowserism or

Electoral Purity? .................................................. 89

Penalties, Judicial Power, Agency and the Muddle of the

‘Common Law of Elections’ ...................................... 97

Expenditure Limits – a Further Legislative Containment? ....... 104

A Ban on Personally Seeking Votes? Hysteria and Aesthetics

in Campaign Regulation ......................................... 106

The Current Commonwealth Provisions ............................. 107

Legal Mushrooms – Anti-Bribery Provisions which Came and

Went in 20th Century Commonwealth Law ............... 113

Case Law on Direct Vote-Buying in 20th Century Australia ........ 118

To Unseat or not Unseat: Chanter v Blackwood .......... 119
Chapter Four. The Australian Experience of Electoral Bribery: Dealing in Electoral Support

Chapter Coverage and Purpose ................................. 131
Dealing in Preferences ........................................... 133

Preferential Voting: its Operation in Australian Elections
........................................................................... 133

Why Preference Deals are Central to Contemporary Campaigning
........................................................................... 137

Varieties of Preference Arrangements and Deals .............. 140
Horse-Trading: Policy for Preferences ............................. 144
Tangible Benefits and Intra-Party Support for Preference Deals ...

The Garland Case of 1975-6 ........................................ 148
The Wayne Swan Case: More Cash for ‘Rival’ Candidates ..... 152

Making Sense of Preference Deals ................................. 155
‘Dummy Candidates’ as Siphons for Preferences, and the Payment of
Campaign Expenses .............................................. 157

Lobbyists, Power-Brokers and Electoral Bribery ................. 161
Mundingburra: Buying a Lobby Group’s Electoral Support .... 162
The Media as Power-Broker or Bully: the Law/Jones/Flint Affair 169

Media Generated Candidates? Bribery or Political Entertainment in the ‘Vote
For Me’ Programme ................................................. 179

Conclusion .............................................................. 186

Chapter Five. The Australian Experience of Electoral Bribery: Parliamentary Deals and the Currency of Politics ................................. 188

Chapter Coverage and Purpose ................................. 188
Parliamentary Deal-Making and the Law of Bribery ............ 189

The Rouse Bribery Case: $$ to Cross the Floor ............... 191
Chapter Six. The Australian Experience of Electoral Bribery: Metaphorical Vote-Buying and Public Resources ........................................... 214
Chapter Coverage and Purpose ........................................... 214
Pork-Barrelling and Bribery .................................................. 218
Scott v Martin verus Bowering and Wells .............................. 218
The ‘Sports Rorts’ Affair ......................................................... 226
Tax Bribes – a Sine Qua Non of the Modern Campaign? .......... 229
Campaign Promises and Electoral Bribery Law in the US: Brown v Hartlage ................................................................. 235
Vote-buying and Political Marketing: the Cost of Selling Politics ..237
The Spoils of Office ................................................................. 240
The General Misuse of Public Resources for Electoral Advantage . 240
The Cost of Free and Fair Elections ........................................ 244
Metaphorical Bribery, the Secret Ballot and Civic Republicanism .... 246
Conclusion ........................................................................ 251

Chapter Seven. What’s Wrong (and Right) with Electoral Bribery? ...... 254
Chapter Coverage and Purpose ........................................... 254
A Taxonomy of Theoretical Perspectives on Electoral Bribery ........ 256
Buying Electoral Support: Systemic Effects and Distortions .......... 258
1. Cost Burdens Distorting Electoral Competition, Advantaging Wealthy Players and Incumbents ......................... 258
Chapter One

Introduction: Dealing in Votes

THE ISSUE AND ITS RELEVANCE

This thesis is a study of electoral bribery and its regulation in Australian politics. In formal legal terms, electoral bribery is a most serious political offence: under ss 326 and 362(1) of the Commonwealth Electoral Act 1918 (Cth), even a single attempt (ie a briberous offer) by a candidate will void her election. Electoral bribery invokes a variety of concepts, from corruption of office, to the trafficking in a market of electoral support. Since at one level politics is irreducibly about deal-making and modern elections a competition for votes, then the concept of electoral bribery will never be far from the surface, raising questions about the legitimacy of electioneering practices and the conduct of politics.

The concept itself, however, is protean, since at its heart is a deceptively simple formula. Bribery is the wrongful offering or seeking of benefits to influence a decision; in this context, to influence decisions about electoral support. The simplicity of this formula however masks its complexity. The contours of the key elements are shifting. What ‘benefits’ qualify: for example, how tangible must they be? How diffuse can the offer be: for example, what of promises to the electorate at large rather than specific voters or potential supporters? What type or level of influence is sufficient: for example, what of offers to those who are already supporters, or promises that serve dual purposes? And above all, how undue must the attempted transaction be: for example, what level of mismatch between benefit and support renders an exchange wrongful, or what degree of exemption is there for public promises and policy declarations, as opposed to deals done in private and secret arrangements?
At first glance, to legal eyes, the term ‘electoral bribery’ may seem a little passé. It evokes images of the outright purchasing of individual votes in the Victorian and pre-Victorian eras, so lampooned by Hogarth in his ‘Election Series’. Understood that way, the law hasn’t been applied to parliamentary elections in Australia for over a century.

According to Colin Hughes, this presents a legal dilemma. He claims the law is ‘largely obsolete’, having been developed in earlier centuries to deal with the scourge of vote-buying in smaller electorates and at a time of open polling, rather than secret balloting in a mass electorate. Yet as Hughes recognises, ‘the need for legal prohibitions of some sort remains’, as the intensity of electoral competition and variety of benefits governments are able to confer have, if anything, increased.

It would be surprising if it were otherwise, on at least two grounds. One is that bribery is a very old concept, albeit one that is not culturally or historically invariant. It survives for the simple reason that, as long as there are values that are not reducible to a totally free market and a belief that political conduct is regulable, there will be at least implicit limits placed on what types of exchanges and influences are acceptable.

Another is that the practice of politics is always transforming itself in the face of both social and technological change, and reform in the legal framework in which elections operate. Between the Victorian era and today, electoral politics has adapted to a litany of significant shifts. From relatively small constituencies to a mass electorate. From stump speech electioneering to professionalised political marketing. From a print monopoly in an age of illiteracy to an ‘information’ age dominated by broadcast media. From part-time amateur politicians to political life as a career specialisation. From parties as evanescent factions gathered around personalities to entrenched party

---

1 See Appendix Two for his illustrations of ‘An Election Entertainment’ (ie treating) and ‘Canvassing for Votes’ (ie outright bribery).

2 Indeed as we shall see in Chapter Three, the last reported case alleging discrete electoral bribery at a parliamentary election in Australia involved a risible claim that the distribution of books of matches was tantamount to the giving of a benefit to sway a vote: Woodward v Maltby [1959] VR 794.

machines. From a limited franchise through open polling to a universal franchise through the secret ballot. From first-past-the-post voting to complex forms of preferential voting and preference deals. From dependent electors to a very individualised society. From a hustings culture where treating was a part of social reciprocation as much as a form of vote-buying to a prosperous, consumerist electorate. From small government in an age of charity to big government in an age of subsidies. From an ostensibly homogenous society to a plural society where lobby groups and the media are significant electoral players.

Unsurprisingly, in the face of such changes, the dynamics and forms of electioneering have changed significantly. But certain fundamentals abide, since electoral politics in the 19th century and the 21st century share a central feature: the competition for votes. This was not always the case. Parliamentary service was not always a desirable occupation, nor was it always understood as something to be won by appealing to the interests of the electors, as opposed to being a role in government, an office concerned with advising on or participating in decision-making, whose status was akin to a form of personal property, and which could be bought or sold outright.

It is in that conception of electioneering as a competition for votes that we find the problematic notion of electoral bribery nested. As long as there is such competition, questions will be raised about the limits of influences on decisions about electoral support. Unacceptable influences can come in several forms. There is the use of physical threats or violence; and the abuse of fiduciary relationships (ie relationships of subordination and trust). The former, once labelled ‘intimidation’ by electoral lawyers, is now rare, in Australia at least. The latter, labelled ‘undue influence’, may or may not be a problem for some people, but by its nature is individualised.4

4 Commonwealth Electoral Act 1918-1983 (Cth) ss 158-9 ‘Undue influence’ (covering threats of violence or disadvantage). The faith that elections in Australia are free from threats of violence is evident in the fact that that section was repealed; the offence is now left to the general criminal law, or subsumed into a much vaguer prohibition in s 327, ‘Interference with political liberty, etc’. Similarly, concerns with undue influence in fiduciary relationships (which once, eg, haunted politicking by clerics) have dissolved into proscriptions directed at those with some particular power in relation to elections specifically, eg s 325 ‘Officers not to influence vote’, s 325A ‘Influencing votes of hospital patients, etc.’
In contrast, the use of incentives to sway votes or threats to withdraw electoral support to obtain advantages are probably inescapable aspects of the idea of self-interested electoral competition and of politics as the art of deal-making. Also by definition, bribery, being an exchange, is something for which both politicians and citizens are responsible: unlike intimidation or undue influence, bribery is rarely a question of someone in power abusing a victim. A study of electoral bribery requires us not merely to scrutinise politicians, but to consider the role of all who make decisions about electoral support—whether as citizens, or as members of lobby groups, corporations or the media.

Although its particular manifestations are time and culture specific, electoral bribery and the buying of electoral support are international phenomena. This thesis, as a descriptive exercise of modern practices may be directed almost entirely at electoral politics in Australia, but the issues raised are of contemporary relevance to the regulation of any electoral democracy. As the following illustrations show, sometimes these practices may seem like curiosities; but they can also have serious consequences for electoral integrity and outcomes and even human life:

- Local government electors in Germany were forced to new elections in 2004 when a mayoral candidate was found to have committed briberous treating with free beer and sausages.  
- The distribution of free saris at an Indian electoral rally in 2004 created a fatal stampede of supplicant electors.
- A US judge was also convicted in 2003 of federal offences for vote-buying in his 1998 judicial election. This followed allegations in 2002 of electors expecting money or drugs for their votes, and an election being suspended for

---

5 Anon, ‘Free Beer and Sausages could have Rigged Election’, *Ananova*, 27/3/2004  

<http://news.bbc.co.uk/go/pr/fr/-/2/hi/south_asia/3623042.stm>

<http://www.kentucky.com/mld/kentucky/7219113.htm>
suspected vote-buying scheme involving absentee voters in US county elections.\(^8\) (Both cases occurred in Kentucky).

- Local election reports from Brazil in 2003 documented practices of offering sterilisation, via cash or arranging medical appointments for tubal ligations, to female electors in return for their votes.\(^9\)

- A Kuwaiti candidate was barred from standing at parliamentary elections in 2003 after pledging to pay more than $15 000 each to 1000 voters in his constituency.\(^10\)

- Israel’s governing Likud Party was the subject of allegations in 2002, from party-insiders, that some candidates for internal pre-selections had offered bribes to members in exchange for their support.\(^11\)

- 10 Thai Senators were sacked for offering illegal electoral inducements in 2001.\(^12\)

- International and internal criticism was raised in 1997 against Singapore Prime Minister Goh Chok Tong’s electioneering promise (or threat) that voters who elected opposition candidates would lose out on community programmes and benefits.\(^13\)

- A court unseated the Rarotonga (Cook Islands) government in 1978 because of the Cook Island Party’s practice of ‘flying-in’ electors from New Zealand as a form of electoral bribery using public resources.\(^14\)

---


\(^12\) Peter Alford, ‘Senators Sacked for Buying Votes’, *The Australian*, 14/3/2001, 8.


This sample of events should also remind readers in western or ‘developed’ democracies not to assume that the crude buying of votes, whether from individuals or en masse is dead and buried, nor that it is only a problem for younger or less economically developed polities. Such activities have more to do with the size of the electorate concerned, the intensity of competition and the forms of electioneering permitted by institution and culture, as with any electoral ethics determined by either economic development or liberal-democratic values. Indeed, the prevalence of allegations and proven instances of vote-buying in deliberations of institutions such as the International Olympic Committee,\(^ {15} \) the International Whaling Commission,\(^ {16} \) and the Federation International de Football Associations, indicates that bribery, even in its most venal forms, can be a concern for the conduct of voting wherever it occurs.

In the Australian context, it is true, concern about crude vote-buying, at parliamentary elections at least, is minimal. The most common use of the term ‘bribery’ in relation to elections as we shall see in Chapter Six, is metaphorical rather than legal: that is, the concept is imported into debate about the propriety, rather than strict legality, of conduct such as pork-barrelling and the offering of tax ‘bribes’ and similar subsidies.

A particular contribution of this thesis however is the uncovering and categorisation of a variety of political practices that lie somewhere between crude and metaphorical vote-buying, and which implicate electoral bribery law in the sense of raising sharp questions about its application. Discussed in detail in Chapters Four and Five, these include practices such as preference arrangements, funding ‘dummy’ and media-sponsored candidates, deals between political actors and lobby-groups and the media, vote-swapping, and parliamentary deals with an eye to electoral advantage.


‘CORRUPT’ CONDUCT, ‘BUYING’ SUPPORT AND THE NOTION OF OFFICE

Electoral bribery is usually labelled a species of political corruption, with little thought for what corruption might be, or what is being corrupted. In the layman’s imagination, ‘corruption’ is rife in public office in Australia, a surprising finding perhaps best explained by cynicism or resentment of or exclusion from wealth and power. In legal and political discourse, however, modern notions of corruption tend to be rather formalistic, if not narrow. They assume a sharp divide between public duty and private interest. Arising from this dichotomy, a fairly narrow focus is adopted to configure corruption as an abuse of power or responsibility for personal, typically pecuniary gain. This sense of corruption is distinctly bureaucratic. It works in tandem with models of good governance built on liberalist assumptions and public choice arguments about the importance of protecting public resources or power from self-interested capture. Its ultimate manifestation is a cross-cultural regulatory project that seeks, ultimately, to breed in public functionaries an ethos that separates them (their interests, personality or self) from the office they hold, by ‘professionalising’ public service. It does so through a mixture of prohibitions and rules prescribing the limits of interactions between holders of public power and those with whom they deal, programmes to educate such public officials to conceive of their roles in terms of a set of ethical ‘dos’ and ‘don’ts’, and incentives to reduce graft (eg increasing public servant remuneration to counter any economic imperative to seek bribes).

---

17 Electors apparently believe that ‘corruption … such as bribe-taking’ is very or quite widespread amongst politicians, and only 7.3% that it ‘hardly happens at all’. Such corruption is imagined to be even worse in the public service: Clive Bean, David Gow and Ian McAlister, Australian Election Study, 2001: User’s Guide for the Machine Readable Data File (ANU, SSDA Study No 1048) 10.


19 I think in particular of the work of Transparency International.
This conception of corruption only makes sense in relation to electoral bribery if we were to focus on the position of the elector, whose public role (in this line of reasoning) is abdicated if she or he ‘sells’ their ballot. But even if a portrait of the venal elector succumbing to temptation were valid as the chief visual metaphor to explain electoral bribery, it would be odd, within even the narrow terms of a public/private distinction, to ignore the question of the (mis)use of political power involved by the politician concerned.

To augment this understanding, a vague supplementary idea seems to be implied into the equation. That is the notion of ‘buying’ (and ‘selling’) electoral support, with its implication of the obtaining of something undeserved. Where this lack of desert stems from is hard to pin-point. Perhaps it may be founded in a civic republican ideal that those who campaign for office should attempt to advocate a sense of a community or national interest, rather than focus their appeals on individual self-interest. Or perhaps it may arise from a sense that the ballot ought be impervious to commodification; that offering benefits as lures to exercise it in their favour permits politicians to distort a political relationship into a market relationship.

Corruption in the modern sense of a public/private divide however occludes much older understandings. In Buchan’s terms, the older strains of thought:

… construe corruption as a loss of virtue. Such understandings of corruption often imbibe assumptions expressed within Aristotelian physics in which corruption denoted the decay or degeneration of physical bodies. The ‘moral physics’ of corruption thus denoted a degeneration or perversion consisting in a personal or collective falling away from virtue. Such notions of corruption raised serious political questions about the health of the body politic.20

In this older conception, walls are not raised between the public and the private, or the office and its holder. Nor is corruption seen primarily as a threat to technocratic governance, a matter for more or more specific regulations to put blinkers on

20 Buchan, above n 18, 1.
individuals to ensure they separate self-interest from public interest in accordance with a legal norm. Rather, corruption is seen as a manifestation of a kind of disease, both moral and practical, reflected in excesses of behaviour whose wrongfulness does not reside in being transactions in defiance of a division or public and private, but in the extent that they are a symptom of a larger malaise in the body politic, understood not as a realm of public service separate from other aspects of social life, but as part of an organic whole.

The natural law roots of this mode of thinking are not something I wish to press here. However I do invite the reader, in coming to this thesis, to broaden any assumption they may bring that corruption is purely a question of legal firewalls to separate public from private interest. There are two reasons for asking this.

The primary reason is because this thesis addresses debates about electoral bribery as debates about electoral conduct. In that sense, it is a study of political virtue. Not virtue in a grand sense, but one rooted in the context of electoral behaviour as shaped by electoral culture and institutions peculiar to particular times. Second, it would be a mistake to seek to transplant assumptions about public versus private interests from a technocratic vision of ‘good governance’ into the definition of the law. Indeed the law of electoral bribery is resistant to this, as it eschews any appeal to an overarching normative perspective of corruption. The offence of electoral bribery has never required a finding of corruption in a free-standing sense. ‘Corruption’ is not an additional element in the legal definition, it is simply a short-hand to describe the sense of impropriety attaching to a judgment that the benefit and influence involved are undue.

To take this approach is not a form of legal conjuring, although it may seem to defer the question of ‘corruption’ to the vague formulation ‘undue’. This criticism could

---

21 For the most thorough-going account of how conceptions of political corruption and virtue grow out of particular socio-economic and cultural histories, see JGA Pocock, The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition (1975), especially chs XIV and XV (‘The Eighteenth Century Debate: Virtue, Passion and Commerce’ and ‘The Americanization of Virtue: Corruption, Constitution and Frontier’).
also be applied to any definition of corruption tied to a notion of ‘the public interest’, whose contestability, as Barry Hindess argues, would leave disputes about the meaning of such corruption as the ‘normal condition … of democratic politics’ and subsuming efforts to identify corruption into an endless debate about political ideals.\footnote{Barry Hindess, \textit{Corruption and Democracy in Australia} (Democratic Audit of Australia: Report No 3, 2004) viii, 3-7.} In contrast to the importation of normative barriers, such as a public/private divide, the legal approach of deferring the question to a context specific notion of ‘undue’ benefits and influences may be more practical. For example, under the public/private conception, a politician who say used her electorate allowance to curry favour with voters with alcoholic refreshments at a campaign meeting would be guilty of briberous treating (for which the political penalty is strict – unseating). Understood as the use of public status and resources to obtain a private, electoral benefit, the action would breach the technocratic definition of corruption on both fronts. Understood as a question of ‘due’ conduct to be judged in its context, however, the action would hardly be seen as so inappropriate as to warrant legal censure. Compared to the waste of resources by incumbents generally to sway support, and the customary status of alcohol as a token, a prevalent gesture rather than a significant benefit, the event would not register as briberous treating, let alone as a symptom of decay in the body politic. Wowsers might argue that the event offended their sense of propriety or virtue, but the question of the ‘undueness’ of the benefit or influence, and ultimately of the electioneering conduct, has to be weighed objectively, within the overall political culture, and not from a partial perspective injected into that culture.

By calling for a broader, more contextualised and conduct-oriented appreciation of the idea of ‘corruption’ than given to us by the public office versus private gain dichotomy, however, I do not mean to jettison the notion of ‘office’ altogether, as will become clearer in the final chapter. On the contrary, Jeffrey Minson’s attempt to ‘hold on to’ the notion of political office is a useful perspective from which to understand the issue.\footnote{Jeffrey Minson, ‘Holding on to Office’, in David Burchell and Andrew Leigh (eds), \textit{The Prince’s New Clothes: Why do Australians Dislike their Politicians?} (2002) 127.} He posits the idea of office not as an ideal, a source of strict
moral or ethical values by which to construct a code of political conduct; rather he sees it as a practical role, to be performed. The point of invoking a notion of office (which otherwise may seem arcane in a time when politics and public service are construed as professions) is not the impossible dream of a super-virtuous race of political actors, but to use it as a platform for civilising the exercise of power and responsibility attached to such roles. A conception of office based on grand moral ethics risks making unrealistic assumptions about the degree to which, say, self-interest could be expunged from electoral politics. A list of misdemeanours applied to such office-holders may do no more than breed formalistic compliance. Rather, the question of office may direct us to a sense of a civil ethic to support the larger ideal of democracy as ‘community self-rule’.24

THESIS STRUCTURE, METHOD AND COVERAGE

This thesis addresses the question of how the concept of ‘electoral bribery’ continues to evolve and operate in the law and practice of electoral conduct in Australia. In doing so, it traverses both historical and contemporary considerations, as well as the theoretical literature about vote-buying, from a perspective informed by the detail and dynamics of electoral law and electioneering in Australia. The historical developments are considered in Chapters Two and Three, the former dealing with the United Kingdom inheritance, and the latter with the evolution of the concept in the colonial and 20th century statutory law in Australia. Contemporary manifestations of and discourse about the buying of electoral support in Australia are then uncovered and analysed in Chapters Three to Six.

The thesis is not an exercise in abstract theorising, although it will traverse in Chapter Seven the (largely American) literature on electoral bribery as a theoretical and normative construct. I have not undertaken an upfront ‘literature review’ for three reasons. First, there is precious little scholarship of the kind undertaken in this thesis to review. From an Australian perspective there are only the short article by Colin

24 Ibid, 137-8.
Chapter 1: Introduction

Hughes, mentioned above, a several decades old black-letter account of the law relating generally to ‘Electoral Corruption and Malpractice’ by Paul (now Justice) Finn, and a short chapter by me. Indeed there is precious little contemporary legal literature from other common law legal systems or, for that matter, comparable electoral cultures.

Second, the nature of the theoretical literature leaves it best suited to discussion at the end of a thesis, rather than the beginning: its abstract nature can only really be rendered intelligible, for anyone concerned with legal and political practice, after the reader has been immersed in a series of concrete examples and discussions about the various ways electoral support may be ‘bought’.

Thirdly, and perhaps most significantly, the American literature is rooted in normative reasoning, drawn from law and economics, or theories of liberal equality or essentialism. Its concern – ie the theorising, from elementary principles, of a comprehensive account of what sorts of ‘buying’ of electoral support is good or bad – is not the concern of this thesis. Rather, here, I seek to give a detailed account and organisation of the development of a set of electoral practices in their historical and institutional contexts.

The primary method of the thesis, therefore, is legal exposition and critique. One foundation of this is the analysis of cases, although by that term I do not simply mean judicial doctrine. Many of the ‘cases’ are not legal judgments in the form of a judicial opinion, but specific political controversies and chronicled from reports of the media and inquiries, and brought to light and analysed here for the first time from a legal perspective.

25 Hughes, above n 3.
A second foundation is a thorough exploration of the evolution of the statutory prohibitions on electoral bribery, informed by parliamentary debates, and the interplay between cases controversies, political practice and the legislation.

First British case law and legislation on electoral bribery, and secondary literature on that is analysed in Chapter Two. In a connected, historical study, the case law and statutory evolution in the Australian colonial and federal jurisdictions is then given in Chapter Three. From this base, Chapters Four to Six widen discussion to contemporary controversies and discourse, for which the chief source are media reports and commentary. Finally, an account of theoretical perspectives is given in Chapter Seven.

The method of this thesis fits within the camp of historical jurisprudence; it is not a work of political philosophy or constitutional law theory. The intention behind this approach is to remain attentive to the detail of electoral politics as it evolves, in its cultural and institutional context, and to examine over time how a legal concept such as ‘electoral bribery’ interacts with, and is mutually shaped by, electoral conduct and norms. The underlying assumption I make is that law’s job in this realm is both to offer a language of formal judgment about electoral conduct, but also to act as a backdrop for debates about the propriety of such conduct. It is not the ambition of the law of electoral bribery to instantiate a universal morality of idealised electoral conduct. Nor is it capable of distillation by law reformers into a set of sub-rules, such as a neat code of campaign practice.

In its coverage, the thesis comprises six substantive chapters, which follow this introduction.

Chapter Two paints an account of the history of the war on crude vote-buying and treating within the context of the evolution of Westminster parliamentary democracy. It does so for two reasons. First, since Australian electoral law and practice, although diverting in important ways in both its earlier embrace of egalitarian values and innovations from UK traditions, nevertheless grew out of this inheritance. And
second, because it was in this battle that the paradigm of bribery as the direct purchasing of individual votes came to ossify in the common law mindframe, even as the law grappled with questions such as the appropriateness of indirect benefits (such as conveyances to the polls) or charitable largesse by sitting members (analogous to modern day pork-barrelling). The chapter traces both the cultural and institutional factors that led to the rise, and then fall, of the culture of crude bribery and treating, and in particular to the factors that combined in its suppression: the secret ballot, the growth of a mass franchise and the professionalization of parties, law enforcement through the petitioning of independent election courts, and concern over the cost of elections and need for limits on electoral expenditure.

Chapter Three continues the historical portion of the thesis, shifting attention to the evolution of the definition, proscription and consequences of electoral bribery under Australia’s *Commonwealth Electoral Acts*. Since that Act in its initial form borrowed heavily from existing colonial regimes (especially South Australian and Western Australia) these sources are also discussed. Whilst bribery, corrupt wagering and treating and the use of licensed premises for election purposes were a concern, at least in some regions of the colonies, the general picture within the new Federation was that large-scale buying of electoral support had either not migrated to Australia, or had found less purchase in a more egalitarian climate. The genesis of the pivotal legal exemption for public policy promises or action is also traced. Lacunas in the law, such as uncertainty over the status of the ‘common law of elections’ and the legal consequences of bribery are discussed. The case law and concerns as reflected in parliamentary debates and inquiries during the 20th century are surveyed, but although electoral bribery, in statutory terms, becomes drafted to include all manner of benefits and all manner of electoral support, the general picture is of electoral bribery as a dormant issue through at least the first three-quarters of last century, and of only ad hoc interest in it from both regulator (eg the Australian Electoral Commission (AEC)) and regulated (ie politicians) alike.

Chapters Four to Six uncover a litany of contemporary controversies, however, which destabilise the complacent assumption that electoral bribery had ceased to be a concept of legal or political significance. Chapter Four and Five examine and typify
several categories of political deals, typically hidden from public scrutiny, which implicate bribery law. The first concern preference deals, ie arrangements between rival candidates and parties over how they will recommend or direct preference votes, which are crucial to electoral outcomes in Australia’s preferential voting systems. Such deals range from simple preference swaps between simpatico parties to, in cases such as those which engulfed the careers of federal front-benchers such as Victor Garland and Wayne Swan, the gift of cash to rival campaigns, allegedly to influence preference decisions. Also discussed are payments of campaign expenditures and the phenomenon of ‘dummy candidates’ (itself a product of preferential voting) in the context of the question of electoral bribery in the form of inducements to candidature. Unlike politician-to-voter bribery, which constitutes a vertical relationship, these deals are ‘horizontal’, in that they take place between political actors exercising similar roles.

Second are a collection of instances illustrating the problem of the trading of electoral support between lobby groups, the media, and parties and candidates. Cases examined include the Queensland Criminal Justice Commission’s inquiries into deals between the major parties and groups such as the Sporting Shooters’ Association and the Queensland Police Union, prior to the tightly contested Mundingburra elections of the mid 1990s. The inquiry laid bare the often secretive accommodation of policy demands in return for campaign support. At the centrepiece of this inquiry was the difficult question of how tangible or personal a benefit had to be. Another notable case is the imbroglio over the alleged threat by influential broadcaster Alan Jones to withdraw his electoral support from Prime Minister Howard if an appointment favourable to Jones was not made. Whilst the case foundered behind a mist of denials and accusations, it illustrates a problem not dissimilar to the Mundingburra cases, namely where robust lobbying ends and the undue trading of electoral support for particular benefits begins. Finally, Chapter Four considers the implications of the new phenomenon of the media endorsing and funding candidates for ‘info-tainment’ value, illustrated by the 2004 ‘Vote for Me’ television programme. The rules of this programme raise serious questions about the legal prohibition on making payments to induce candidatures.
Chapter Five broadens discussion from questions of direct electoral support, to consider parliamentary deals with briderous flavour undertaken for electoral advantage (or its equivalent, such as winning a majority in parliament). It thus continues the theme of Chapter Four, being deals between relative equals. Cases discussed include the conviction of Sir Edmund Rouse for attempting to bribe a Labor MLA to sustain a Tasmanian Liberal government, which had just lost its electoral majority. This is contrasted with the Gair and Metherell affairs, which involved the gifting of ambassadorial or statutory appointments on politically inconvenient parliamentarians to secure electoral advantage, but over which no legal wrongdoing was ultimately found. The analysis then turns to ‘king-making’, including deals in which Speakerships and even the Prime Ministership, have been bartered. Again, such deals, if attracting some political opprobrium, are shown not to have been considered legally corrupt.

The thesis then seeks to rationalise the legal line drawing examined in Chapters Four and Five. That is, an account as to why some deals (such as parliamentary seats for parliamentary support, or policy concessions for preference support) are deemed legally acceptable. It finds explanatory force in the concept of ‘political currency’, a term I develop to embrace the idea that politics as a particular sphere of activity must encompass an acceptance of certain trades or barters provided that what is exchanged is fungible, within political understandings. Such exchanges are not impugnable as briberous conduct, because they don’t truly involve a ‘purchase’. The notion of political currency is then employed to make sense of and support the emerging practice of ‘vote-swapping’ – another form of horizontal electoral deal, but this time involving voters-to-voters rather than political actors-to-political actors.

Chapter Six returns to ‘vote-buying’ on the vertical axis of politicians-to-electors, but from the perspective of what I call ‘metaphorical’ vote-buying rather than the traditional perspective of the crude purchasing of individual votes. That is, the subject of study is the attempt to sway votes through the promise or giving of benefits to a section of the public, ostensibly as part of the processes of government. Such campaigning has in fact been the subject of several bribery cases in Australia, most notably the Port Stephens election petition of 1988 (Scott v Martin), which saw the
unseating of an MLA for egregious pork-barrelling on election eve. That much-criticised case is analysed in distinction to another, virtually unknown local government election case from 1978, where such electioneering was held to be lawful. As an example of executive government largesse, the ‘Sports Rorts’ affair is then analysed, as too are famous examples of tax ‘bribes’, in particular the 1977 ‘Fistful of Dollars’ campaign. In doing so, the functional similarities between these activities and crude vote-buying are explored, and the formal case for their exemption from legal judgment, as public policy promises or action, is explained and critiqued.

The purpose of Chapter Six is not simply to analyse such cases on their own terms, but to explore the antipathy to such conduct reflected in the widespread use, by commentators and the public alike, of the concept of electoral ‘bribe’ as a rhetorical device to cast doubt on the desirability of such conduct. A key to understanding this pejorative is found in the concern that such ‘bribes’ involve the partisan application of public resources for electoral gain (compared to private moneys in traditional vote-buying). This concern is linked to broader issues involving the way modern politics is marketed, and more particularly with the ‘spoils of office’, including incumbency benefits. Misuse of such advantages generates twin concerns with fair electoral competition and the cost of elections, concerns which have been long present in electoral law, including the bribery ‘war’ of the 19th century. Chapter Six then ends by turning the debate away from political misbehaviour, and back to electors themselves: it is somewhat hypocritical for citizens to condemn metaphorical ‘bribes’ yet to perpetuate them by rewarding campaigns which focus on them. An account of this is found in civic republican analysis of the secret ballot. Ironically, given the secret ballot was a sine qua non in the suppression of crude vote-buying, it is seen to be one factor in the modern configuration of the ballot as a measure of hip-pocket self-interest.

Finally, Chapter Seven establishes a taxonomy of normative arguments about what is wrong (or acceptable) with buying electoral support. It does so, as earlier mentioned, through a critical review of the largely American theoretical literature. These arguments are ordered into two broad classifications, and seven sub-classifications:
Systemic Effects and Distortions (ie governance harms)
1. Cost burdens distorting electoral competition, advantaging wealthy players and incumbents.
2. Distortion of electoral competition: a preferential focus on (or exploitation of) ‘target’ groups.

Transformative Effects on the Nature of the Vote and Being an Elector (ie per se harms)
4. Corruption of the vote as vote: an inalienable right is commodified. Parallels with ‘political currency’.
5. Promotion of insincere electoral behaviour: electoral support is ‘marketised’, diluting expressive and ideological aspects.
6. Corruption of public office: the ballot as a public duty or trust.
7. Distorting, by ‘transactionalising’, the relationship of representative and represented.

None of these classifications however is found to do the work its authors hope for it, namely to offer a comprehensive normative account of what we find intuitively wrong with electoral bribery that is also capable of clarifying the delimitation of its legal prohibition.

New perspectives within these frameworks are nonetheless suggested. These are the relationship of ‘commodification’ to the more specific concept of ‘political currency’ developed in Chapters Four and Five. A second strand of new thought is the dangers that an excessive ‘transactionalisation’ of electoral decisions may present: one danger is to alternative, less instrumental frameworks of electoral choice, the other is the pragmatic ideal of an engaged electorate.

Further, some illumination is drawn from applying Minson’s idea of political office as a question of the civility of conduct, to the specific question of the relationship of
elector to politician, a relationship properly understood as between two political offices, the ballot being itself a political role.

The thesis concludes by situating itself in the tradition of intermediate analysis at the cusp of law and politics as practical, not theoretical endeavours. The law’s calling, in the case of electoral bribery, is thus identified as both a site for formal judgment (ie legal condemnation of wrongful conduct) and as a backdrop for serious debate about the ethical desirability of electoral conduct.

A NOTE ON TERMINOLOGY

This thesis is not an exercise in jargon, and wherever necessary (especially in Chapter Four which covers preference deals) I have included explanation of electoral concepts such as preferential voting, which may be unfamiliar to readers, especially those not steeped in the Australian system.

However there are several terms and neologisms in the thesis whose scope and meaning might usefully be clarified, up front. The first, unsurprisingly, is electoral bribery itself. People often speak of bribery in politics or involving parliamentarians, as a generic category. In doing so, the unexpressed paradigm is typically the bribery of politicians; for instance paying parliamentarians to take up a cause, as in the Westminster ‘cash for questions’ scandals of the mid to late 1990s, or the use of political donations to buy leverage and access to Ministers and party policy apparatuses, as in debates about campaign finance.

Electoral bribery, by contrast, typically involves action by politicians, rather than bribery of them. (The distinction is between the offeror of the benefit – who is usually seeking electoral support – the ‘briber’ – and the offeree, whose support is usually being sought – the ‘bribee’). Bribery of politicians may be a much more pressing problem, but it is already the subject of voluminous research and practical attention. It is not discussed in this thesis, except in two respects. One is to isolate cases of bribery and parliamentary deals to gain an electoral benefit or advantage –
these are discussed in Chapter Five. The other is the recognition, made in Chapter Six, that issues such as campaign finance connect with electoral bribery and the misuse of incumbency benefits in a broad concern about the nature of electioneering and the cost of elections.

Electoral bribery itself is often conceived in alternative forms. One is the direct purchasing of individual votes, the paradigm of the Victorian and pre-Victorian eras, whether through money or treats. I label this ‘crude’, ‘direct’ or ‘traditional’ vote-buying in this thesis. Other notably US authors, as we shall see in Chapter Seven, sometimes refer to this as ‘retail’ vote-buying, ‘vote-trafficking’ or even ‘core’ vote-buying.

The counterpart to such vote-buying is often conceived of as promises to a mass of electors, usually involving pork-barrelling. This I have labelled ‘metaphorical’ electoral bribery, to highlight the fact that it does not directly implicate the law, but that the offence is used metaphorically in debates about the desirability of such electioneering. It is the focus of Chapter Six. Some US authors instead use terms such as ‘wholesale’ vote-buying or ‘non-core’ vote-buying.

I have avoided the distinction between ‘retail’ and ‘wholesale’ for three reasons. One, it suggests a comprehensive duality, when in fact, as I identify in Chapters Four and Five, there are a host of other practices, like preference deals, which do not neatly fit such a duality. The second is that, whilst colourful, a term like ‘retail’ is likely to mislead: the mass-marketing of modern politics through, for instance the selling of metaphorical tax ‘bribes’ could just as well attract the appellation ‘retail’ as does the idea that gifting an individual elector a tangible benefit is the retail purchase of his vote. Finally, since this thesis is an historical survey of cases and developments, rather than an a priori conceptualisation of electoral bribery, terms such as ‘traditional’ help act as markers of the shift in practices under study.
Chapter Two

Suppressing Vote-Buying: the Historical Struggle against Electoral Bribery

CHAPTER COVERAGE AND PURPOSE

This chapter will give an overview of the development of electoral bribery regulation in the United Kingdom (UK), to 1918. After a short account of classical conceptions of bribery and voting, and a potted tour of key moments in the evolution of the ideal of ‘free’ elections in the British Isles through the 13th-18th centuries, the bulk of the chapter centres on the post-Reform era of the reign of Queen Victoria. ‘Reform’ here refers to the so-called Great Reform Bill of 1832. This era witnessed a long running war on electoral bribery.

The period also defines itself because it encapsulates many important moments in the evolution of a liberal, democratic electoral law. Between 1832 and 1918, the UK franchise evolved, admittedly in fits and struggles, into a universal franchise, finally made whole with the extension of votes to women at the end of the first world war. By that time the familiar landscape of party politics spectrum had become entrenched,

28 References in this chapter are to UK Acts, unless otherwise noted. In general, I will refer to the UK as a whole jurisdiction, partly because the Parliament at Westminster was multi-national (including all of Ireland), but also because whilst separate electoral legislation for England and Wales, Scotland and Ireland, was the norm, the essential fabric of these statutes was similar and the reach of the committees and courts involved was UK-wide. Virtually all of the secondary material is written from a lens fixed in England. But it should be borne in mind that some regional writing downplays the role of bribery at UK elections outside England: eg Michael Dyer, Men of Property and Intelligence: The Scottish Electoral System Prior to 1884 (1996) 156, claims that the Liberal hegemony, combined with the 1832 franchise extension, rendered specific legislation against electoral manipulation ‘hardly relevant’.

29 The terminology of ‘war’ is self-consciously modern, including all the ironies of the modern usage – a war against an abstract entity, a long-running war without a clear beginning or end. Nineteenth century reformers, when they felt the need for rhetoric, were more inclined to talk of a fight or perhaps a battle against distinct forms of corruption.
the regime regulating British elections was recognisably modern, and a major struggle to suppress corruption in the form of bribing of individual voters through money, treats and other tangible benefits, had been fought and won. But the end-date is somewhat conventional. In truth, by 1911, the specialist electoral law reports of O’Malley and Hardcastle, themselves a manifestation of the judicial front of the battle against corrupt practices, were all but exhausted.30 Indeed, although once a fixture of elections, petitions centring on serious allegations of bribery petered out a little earlier. The last case revealing general, ie extensive, bribing occurred in 1906.31

Any attempt to cover such a broad sweep of time, which incorporated numerous fundamental and at times tumultuous shifts in the rules of elections, and indeed in the evolution of the very purpose of Parliament itself, carries with it the risk of over-simplification. The chapter therefore avoids cross-generational generalisations, and instead seeks to root itself firmly in descriptiveness, seeking to understand the electoral conduct in question on its own terms, where possible by attention to the detail and nuance of electoral histories. The chief concern is not however to rehash such history for its own sake, but to understand how legal penalties and consequences came to attach to some electoral conduct, and examine the formation and contours of that doctrine, both statutory and common law.

The purpose of this chapter is to ask two questions of this history. Both have contemporary relevance.

The first is to understand how the law came to conceive of electoral bribery as paradigmatically the direct purchasing of votes. This is of contemporary interest

30 There is a seventh and final volume after 1911, but it contains only three cases, all from 1923-1929.
31 Borough of Worcester (1906) 5 O’M & H 212 (respondent admitting general bribery by agents at 213). William B Gwyn, Democracy and the Cost of Politics in Britain (1962) 90 n 1, attributes the case to Worcester having a ‘long tradition of bribery … [n]aturally habits died … slowly.’ Joseph King, Electoral Reform: An Inquiry into our System of Parliamentary Representation (1908) 128-129 also cites general bribery in early 20th century municipal election petitions at Dover and Shrewsbury, attributing its persistence to certain small constituencies clinging to old traditions, and industrial deprivation in some areas.
since the law we inherit was forged by this mindset. Since the law, in terms of its enforcement if not its influence on political discourse, has been relatively dormant in the 20th century, in terms of formal precedent, we are left with a jurisprudence rooted in the 19th century, a different electoral age in terms of techniques of electioneering and jostling for political support.

The second concern is to discover what drove the legal response to such electioneering (ie what made it a ‘mischief’), what that response consisted of, and to place that response in the context of the various factors responsible for the decline in vote-trading both as an actual and as a politically acceptable practice. The lesson is that whilst often a sub-ordinate force in social regulation, law reform, when conditions are right, can play a significant part in channelling behaviour and re-routing conduct. In particular, litigious enforcement of the law, and its black-letter development by the judiciary, was an important deterrent element, both in ‘shaming’ those caught, and enabling ambiguous legal principles to become honed in a way that speaks more clearly to political actors.

In addressing these two issues, the chapter makes several findings.

One is that the law’s central focus was on vote-buying in the crude sense of direct purchases of ballots. On that front it took a strongly prohibitionist position, which ultimately prevailed. But the law struggled with porous definitions, for example about what transactions, promises and largesse would amount to sufficiently direct consideration to be briberous. It also had to grapple with concerns about how harshly it ought to respond. Electoral bribery was not merely an aspect of the micro-regulation of campaign practices, but was an offence that criminalised a consensual transaction, and an offence with serious ramifications for the reputation of individual candidates and the broader political system. The law, particularly when its enforcement was left to Parliament, remained inadequate to the task for many centuries. The advent of a much tighter statutory regulation, coupled with the transfer of jurisdiction to common law judges, led to a more concerted and successful enforcement regime. But even then, the law confronted difficulties of balancing rights and outcomes, and different electoral values.
A second finding is that it is easy to overstate the role of the law in suppressing the trade in individual votes. Certainly the law played an important part - for example, the advent of a revolutionary voting technology, the secret ballot, was an important regulatory deterrence. But socio-political factors, such as the extension of a mass franchise, a more professional political ethic, and the general rise in living standards, all provided the underlying conditions in which legal norms which had for centuries been relatively impotent, were able to be effectively implemented. In short, the law found traction, but only as part of a constellation of deeper forces.

A third is that a key driver of the legal and administrative crackdown was not an abstract moralising or political philosophy. Rather, factors internal to and contingent to the practice of electoral politics were vital drivers. Not least amongst these was the growing cost of elections where vote-buying was rife and a realisation that electoral competition as a result was unfair as between aspirants for office. Another was the ability of legal and political discourse to create a collective sense of shame: not from a sense that bribery was a heinous form of corruption, but a more modest and diffuse sense that politics could be better, particularly as new appreciations of the power relations (and imbalances) in society came to be. When those forces coalesce, the panoply of law and government was able to become part of a broader movement that helped redirect the tenor of electoral politics and its practice.

This chapter is written not from the perspective of an historian wishing to understand the past on its own terms, but that of the student of contemporary law, wishing to glean such lessons from an earlier age of legal activity as might shed the light of the past on the problems of the present. We must be careful to keep in mind the reminder of one scholar of early English electoral politics that ‘politics is environmentally specific … tied to its historical period and its local context’\(^{32}\). But in one

---

\(^{32}\) Mark A Kishlansky, *Parliamentary Selection: Social and Political Choice in Early Modern England* (1986) ix. Kishlansky, having pre-emptorily dismissed the Marxist idea that electoral politics follows patterns ordained by the lines of class, emphasises the importance of an historically and culturally specific account of electoral politics in opposition to naïve liberal assumptions that humans are *zoon politikon*, with an instinctive affinity for democratic electoral process.
fundamental sense, politics and more particularly electoral politics works in accordance with a single dynamic across eras: it is a competition for official power, its attainment and maintenance. When elections are used as a tool in allocating such offices, certain pressures and incentives exist for politicians, candidates and voters, even if they are manifested, in times of different social, technological and economic development, in different ways.

Bribery, then, whilst being temporally and culturally specific in its particular manifestations, is an issue for all electoral systems to the extent that they seek to underpin some notion of free and fair electoral competition. This is not an essentialising claim based on modern ideals of democracy, but a reflection on the fact that voting in elections, whatever the culture influences and pressures on the actors, can be distilled to the act of choosing between rival representative options. The perennial tendencies to conceive of voting as a transaction, and of politics to be played out as an exercise in deal-making, render timeless the question of where to draw the ethical and legal lines of what amounts to inappropriate electoral influence and conduct, even if the prominence of the question, the methods of influence used and the answers to the question vary over time.

REGULATION TO THE EARLY MODERN ERA (1868)

A Brief History to the First Reform Act (1832)

Bribery is an ancient affair. What we would today approximate as ‘bribery’ in elections was of concern long before the parliamentary era, as Judge Noonan’s study, *Bribery: the Intellectual History of a Moral Idea* explains. Noonan describes the Ciceronian statute prohibiting *ambitus*, the indiscriminate distribution of largesse to the public, such as paying people to throng to a candidate, or open treating. This was a culturally specific, somewhat limited notion of bribery, however, and would not

---

33 Of course not all electoral processes seek to achieve this. Some are shams (mere masks to legitimate decisions made elsewhere); some are pure ritual; some are economic rather than democratic (e.g. voting in public company ballots).

necessarily accord with contemporary notions of the width of corruption as a failure of individual office-holders to respect a public-private divide. *Ambitus* aside, “[p]olitical loyalty in exchange for favours from the powerful … was the essence of the republican system.” 35 That is, political support in return for rewards was an element in binding the body politic together, and not necessarily a threat to its health except when excessive venality prevailed. In any event, the absence of any stigma attaching to the recipient of *ambitus*, rendered the statute, in Noonan’s view, to be ultimately unenforceable.

Nonetheless, that moral conflict could arise between what we would now recognise as market practices and individual ambition and greed on the one hand, and a more elevated sense of the public good and public duty on the other, and in so doing present a live issue for early ‘public law’, is apparent in this fragment from an Augustinian dialogue:

> [S]uppose [a] people becomes gradually depraved. They come to prefer private interests to the public good. Votes are bought and sold. Corrupted by those who covet honors, they hand over power to wicked and profligate men.36

Augustine’s claim is that whilst a principle of electoral participation is just or proper, it cannot be an absolute or eternal - we would say ‘inalienable’ - right. Of present interest is that in reasoning to this controversial end, he invokes a widespread and fundamental corruption of the voting process to justify suspending democracy itself. The vote is not an individual right in the modern sense, for it only exists to serve a higher goal, namely the exercise of public power in the public good. To render the argument that democracy must sometimes be curtailed to protect itself from itself plausible, he invokes the spectre of widespread electoral bribery as an example of an ultimate form of corruption of the body politic.37

---

35 Noonan, ibid, 40. My emphasis.


37 Augustine’s argument is echoed much later in UK statutes disenfranchising constituencies in which widespread electoral bribery had prevailed; although the motives in the UK disenfranchisements are as
Similarly, Rousseau sees vote-buying as a cancer likely to be fatal to the body politic. In his discussion of the Roman Comitia, he champions, along with Cicero, the ideal of open, as opposed to secret voting, because its simple morality contributes to what we today would call civic republicanism and deliberative democracy. But (unlike Cicero) he believes the open voting ideal to be far from an absolute. If the body politic was corrupted, it needed to be governed by rules befitting a sick, rather than a healthy state:

This [ie voting aloud] was a good method as long as honest prevailed among the citizens and everyone was ashamed to give his vote to an unjust cause or an unworthy candidate. But when the people grew corrupt and votes were bought, became expedient for the ballot to be cast in secret, so that the buyers of votes might be restrained by mistrust of the sellers, and scoundrels given the chance of not being traitors also.\(^{38}\)

Noonan’s study highlights the moral aspects of the development of sanctions on bribery.\(^{39}\) In his account, theology precedes the law, in drawing distinctions between certain types of ‘gift-taking’ and the sin - or corruption - of ‘bribery’. He claims that this distinction crystallised in English well before it did in other modern European languages, in the development of a pejorative term - ‘bribery’ - to distinguish an ambiguity in the latin term *munera*. The ambiguity lay between tokens of honour and esteem designed to reinforce ritual bonds of reciprocity, and corrupt purchasing, typically by a patron of an official. Bribery came in the common law mindset to be seen as a ‘princely kind of thieving’,\(^{40}\) whence the etymology of the English usage (the word ‘bribe’ being coined in our language to describe this specific kind of corrupt transaction,\(^{41}\) by adopting the French word that had meant ‘to beg’.)\(^{42}\) It was much deterrence and punishment of a corrupted community, as the avoidance of a tainted Parliament. On the mass disenfranchisement of particular boroughs, see the table in the text, below n 38.

---


\(^{39}\) Noonan, above n 34, especially chs 1, 2 and 11.

\(^{40}\) Ibid, 314.

\(^{41}\) Ibid, 313-317.
a sin committed by the venal. In its definition in the early modern common law’s imagination, it involved an agreement or understanding to receive consideration to influence one bound to act without view to private emolument.\textsuperscript{43} Not surprisingly, the common law came to denote it as a crime, with particular attention to the corruptibility of judicial office, but extending to elections.\textsuperscript{44}

Legislation, in turn, echoed the conceit of the common law’s ‘declaratory theory’ (ie the idea that the law is announced oracularly, as if pre-existing, rather than created contemporarily). Thus, Coke claimed that the Parliament of 1405, in declaring that elections should be ‘freely and indifferently’ made ‘notwithstanding any Request or Commandment to the contrary’, was merely declaring old custom and principle.\textsuperscript{45} Similarly, albeit four hundred years later, an Act of George III against electoral bribery purported merely to be a matter of fine-tuning a time-honoured prohibition. Its preamble declared ‘such Gifts or Promifes are contrary to the ancient Ufage, Right and Freedom of Elections...’\textsuperscript{46}

Parliamentary elections evolved initially as a rudimentary method of selecting - and in some ways co-opting - Knights to take part in ad hoc, but generally annual, advisory assemblies. From their earliest inception, there was undoubtedly concern with the notion of ‘Free Elections’: if a memorial is needed, there is the famous commandment of 1275 that ‘There fhall be no Difturbance of Free Elections’:\textsuperscript{47} For some centuries, this notion of electoral freedom was chiefly concerned with improper

\textsuperscript{42} See entries for ‘bribe’ in Ernest Weekley, An Etymological Dictionary of Modern English, (first published 1921, 1967 ed); and the Oxford English Dictionary. The metaphor of begging neatly suggests two quite different settings: a necessitous person may sell what little power they have to a stronger party for a bribe, just as the mendicant beggar is at the mercy of those with resources; conversely, where the bribed party is not in need, her soliciting or accepting a bribe is an act of gluttony, hinted at in the image of a beggar gorging himself when he has the chance.

\textsuperscript{43} R v Vaughan (1769) 4 Burr 2494 (per Lord Glenbervie).

\textsuperscript{44} Samuel Warren, The Law and Practice of Election Committees (1853) 423-428.

\textsuperscript{45} Coke, 4 Inst 10. The statute in question was 7 Henry IV, c 15 on ‘The Manner of the Election of Knights of Shires for a Parliament’.

\textsuperscript{46} 49 George III, c 118.

\textsuperscript{47} 3 Edward I, c 5.
force or fraud in the ‘return’ of members on the writs filed by the Sheriffs in Chancery. That is, whilst outright buying of votes may have been technically a crime at common law, the primary threat to free elections in the middle ages was not bribery, but the simpler means of stealing an election by falsifying the count or return.

Hence, as the seminal work on English electoral law in the middle ages shows, the focus of legislation to the 1500s was on defining the franchise and purifying electoral administration, rather than conduct by candidates for contested elections. For example, concerns in the 15th century of widespread voting by unqualified electors voting, led to a statute of 1429 that placed most of the burden on the Sheriffs, who acted, in effect, as returning officers. After that Act, they risked a £100 fine and one year’s gaol, if they made an ‘undue’ return. The courts (here the Justices of the Assizes) were thus involved in ultimate oversight of free elections, but so too was Chancery. After all the election writs were returned to Chancery, and hence petitions and Crown objections to returns were inevitably sometimes resolved in that office. The House of Commons however moved to claim an exclusive power to resolve disputes about electoral irregularities, something it achieved by the early 17th century. Parliament, as both a legislative and a quasi-judicial entity became, for a time, the chief forum for policing free elections.

As far as electioneering went, Rogers on Elections notes, treating in the form of feasts, grog and entertainments - and the expense it generated - loomed larger than outright bribery as a problem of corrupt influence in the latter half of the 17th century. In turn, the House adopted an explicit Treating Resolution in 1677.

---

50 8 Henry VI, c 7.
51 For a brief account of the growth of ‘electoral jurisdiction’ and the tugs-of-war between these forums, see Orr and Williams, above n 48, 55-59.
It is important to understand the public culture and norms that bred pre-Reform electoral culture. Hirst’s account of elections in the early Stuart era (covering the 1620s-1640s) highlights not so much the role of bribery and treating in campaigning but of ritual, and of landlord-tenant influence.\(^{53}\) The latter would today be classed as ‘undue influence’. But at the time, leaving aside some tenderness where threats were involved, such influence to a large extent merely reinforced expectations rooted in feudal traditions:

Tenants were certainly expected to comply with their landlord’s wishes. Instances of confidence on the part of the latter are too common, indeed almost universal, to be cited, and must be presumed to have had a basis in actuality, in that deference was forthcoming [if not always guaranteed].\(^{54}\)

It was not until 1695 that the first statutory attack on electoral bribery was enacted. However, by then the concern with bribery as a source of unfairness and excessive expenditure, and as a form of corruption of the ideal of ‘free election’ must have been widespread, as the Act’s preamble declared:

Whereas grievous complaints are made … of undue elections of members to parliament, by excessive and exorbitant expences, contrary to the laws, and in violations of the freedom due to the elections of representatives … to the great scandal of the kingdom, dishonourable, and may be destructive to the constitution of parliaments: wherefore … that all elections of members to parliament may be hereafter freely and indifferently made without charge or expence; be it enacted …\(^{55}\)

This Act went on to unseat anyone elected to parliament who had directly or indirectly, by themselves or at their charge, presented or promised to any person

---

\(^{53}\) Derek Hirst, *The Representative of the People? Voters and Voting in England under the Early Stuarts* (1975) 112-122:

\(^{54}\) Ibid, 113.

\(^{55}\) 7 & 8 William III, c 4.
having voice at the election any gift, reward, money, food, drink or entertainment in order to be elected.

Why had that which had been treated as a nuisance, to be left to the generic common law of bribery, become a matter for legislative intervention? As the status and power of Parliament grew through the 17th century, so too did the lengths potential Parliamentarians would go to secure a seat.\(^{56}\) In turn, the cost of elections rose, and became a concern not just to the pockets of members but an institutional concern as electoral competition affected the constitution of Parliament in the sense that as Parliament’s power grew, so too did its need to attract able (and not simply the wealthiest) members. As earlier noted, Parliament, in flexing its muscles against the royal executive, successfully asserted in the early Stuart period a right to be, effectively, the sole arbiter of challenges to the qualifications of its members.\(^{57}\) Potentially a crime, in procedural terms revelations of electoral bribery were not confined to election petitions before parliamentary committees. But since criminal law enforcement was less streamlined and bureaucratic than today, it is not surprising that through parliamentary consideration of complaints of undue elections, bribery became more than an ad hoc concern left to the common law and individual complaints, but a matter for specific legislation.

Grave rhetoric in the preamble of the Act of 1695 notwithstanding, there is a danger, especially from a 21st century vantage point, in overstating or at least misconceiving the issue of electoral corruption. O’Gorman, surveying electoral practice and finance in Hanoverian England (1734-1832) adopts a revisionist tone in rejecting what he sees as unduly simplistic, modern images of venality in pre-Reform elections. Whilst admitting that most of the money spent on campaigning went to voters, he doubts that such distributions should be seen as a token of widespread corruption of electoral choice, which he would define as acts that swayed electors to go against their natural

\(^{56}\) Without giving a date, Seymour observes that ‘Venality and corruption in English elections date from the time when the acquisition of seats in the House of Commons first became an object of ambition to men of birth and wealth’: Charles Seymour, *Electoral Reform in England and Wales: the Development and Operation of the Parliamentary Franchise, 1832-1885* (1915) 165-6.

\(^{57}\) Orr and Williams, above n 48, 56-59.
interest. Rather, in understanding the contemporary tolerance to practices later seen not merely as base, but corrosive of the very fabric of public life, he argues two claims:

First, many of the payments and donations which accompanied electoral activity … were regarded as legitimate concomitants of natural interest: they were intended to compliment, reward, and flatter the faithful not to change opinions and disturb settled loyalties…. Second, contemporaries were able to manifest a greater sense of discrimination between different types of electoral generosity than most historians…

None of these activities necessarily represents a genuine corruption of the individual elector or of his conscience (although taken to extremes and divorced from natural interests, of course, they sometimes could). Rather they signify the natural operation of influence and paternalism in an electoral context. Money can thus be regarded as a means of exchange by which patrons attempted to exert their influence over the electors and by which electors endeavoured to negotiate with their patrons.\(^{58}\)

We might of course doubt the suggestion that ordinary electors were as equally empowered as their ‘patrons’ by the growing transactionalisation of elections, but reading O’Gorman with Hirst reminds us of that liberal constructs, such as the individual elector abstracted from pre-existing influences, are anachronistic at best. O’Gorman’s warning is to avoid hindsight-bias, in particular to avoid mapping twentieth century notions of ‘democracy’ on events occurring in times or places built upon different conceptions of freedom or public interest. In similar vein, another scholar of Hanoverian elections downplays claims that 18\(^{th}\) century elections were merely a matter of ‘canvassing the respectable and corrupting the rest’, arguing that outright bribery and excessive treating were less influential than patronage.\(^{59}\)

---


To O’Gorman’s apologia must be added the factors of ritual, and even entertainment. Pre-Reform elections were much more public, if not tribal events, than they are in today’s more atomised society. Treating can be understood in terms of reciprocation of loyalties, played out in the festivity of the pre-reform election as a public event. Indeed elections – which after all are competitions, usually between men – have always had an air of sport about them. This ‘grandee’ spirit was later captured in a rhetorical line attributed to the Duke of Norfolk:

[What greater enjoyment can there be in life than to stand a contested election for Yorkshire, and to win it by one?]

But these cultural realisations, whilst useful in placing electoral conduct in conduct, also invite the question of why Parliament would move, however slowly, to rein in electoral bribery and treating? After all, existing parliamentarians were elected in a culture where largesse and treating were not uncommon, and some of them must have owed their places to having been better resourced or better at it than any rivals. Why would they have sought to change the ground-rules? Their motivations were probably mixed:

- concern with political propriety – a need to draw some limits around practices which, as noted above, had troubled philosophers of public affairs since classical times;
- concern with appearance - as notions of propriety evolved it may have been important to be seen to be addressing the worst excesses of behaviour that, if nothing else, proved

60  Indeed even contemporary elections, admittedly somewhat drabber and more technocratic, can and ought be understood through a ritual dimension: Graeme Orr, ‘The Ritual and Aesthetic in Electoral Law’ (2004) 33 Federal Law Rev, forthcoming. After all they are formal events, which aim to help bind societies in part through the process itself (and not simply as instruments for, eg, power sharing and legitimating governance). However in earlier times, the ritual element, in the sense of public display, seems more obvious to modern eyes.

61  Quoted in Joseph Grego, A History of Parliamentary Elections and Electioneering from the Stuarts to Queen Victoria (1892) 324.
fodder for the satirists of the time who dominated political commentary;
- to temper undue competition; and
- to rein in excessive expenditure – whilst the expense of elections enables a wealthy elite to monopolise them, it also always threatens an escalation, or ‘arms race’, that could impoverish all candidates.

Good intentions were never enough, however. In 1729, Parliament declared that earlier laws, including the Act of 1695, had proved to ‘have not been sufficient to prevent corrupt and illegal practices in the election of members’. Such practices were ‘so great an evil’ that all electors before polling were required to take an oath or affirmation stating that they had not received any money, employment, gift, reward, or promise or security of such, in order that they may give their vote. The solemnity of an oath was meant to prick the conscience; it was a procedural gesture at the moment of polling, to remind the elector of the existence and gravity of the law against vote-selling. Electors who defied the spirit or letter of that oath, by asking or receiving any money or other reward, by way of gift or loan (including employment) to give or forbear from giving their votes, were deemed by the Act to be guilty of a serious offence. The penalty was the forfeiture of £500 and permanent disablement from voting or holding office - a form of partial civil death.

In 1809, these laws were augmented, still being considered inadequate to fight corrupt electoral practices, which were, it was reiterated ‘contrary to the ancient Usage, Right and Freedom of Elections, and contrary to the Laws and Constitution of [the] Realm’. The practices caught by the 1809 Act were the bribing of people other than returning officers and voters, to procure a candidate’s return. Penalties were correspondingly even more severe: loss of the seat and £1 000 fine to His Majesty.

---

62 2 George II, c 24, s 1. Remnants of such oaths survived until very recently: Constitution Act Amendment Act 1958-2002 (Vic) s 189 empowered a returning officer to require intending voters to declare that they have not been bribed; refusal resulted in disenfranchisement. A scrutineer could also require the declaration to be administered.

63 49 George III, c 118, s 3.
Bribery, in small or ‘close’ boroughs, however, represented just one means by which wealth could buy its way into Parliament in the 18th century. A ‘closed’ or ‘pocket’ borough was purchasable in itself. These boroughs existed pursuant to the proprietary based franchise, in certain under-populated or shrunken constituencies. If only the landed had the vote, members of the aristocracy or those who bought into significant landholdings, could hold a borough as part of their estate.

At the turn of the 19th century, then, we find gentlemen of note reflecting openly in their diaries and memoirs on the cost of obtaining a seat. For example, a real estate advertisement of the time for a parcel of tythes in the Parish of Saint Stephens openly listed the existence of a borough, with attendant Parliamentary voting rights, as one of the ‘desirable circumstances attending this property’. In another example, the second Baron Vernon, in a codicil to his will, bequeathed to a son, ‘£5000 towards the purchase of a seat in Parliament…’. These vignettes illustrate two points. First, Parliamentary service, which had in earlier times been seen as a burden, was now particularly attractive both for its status and its power. Second, there was a relatively open market in seats themselves, suggesting that although vote-buying was at least nominally prohibited, in part as a control on the cost of elections, paradoxically perhaps a more controlled market existed in the purchasing of seats themselves.

Today we baulk at the arrogance of the idea of buying one’s way into representative office. But to put these sales in context, it should be remembered that, at the time, access to many professions involved paying a premium, rather than selection on merit. On its face, the combination of giving extra weight to the county franchise and the existence of a market in boroughs may have been a legacy of an agrarian-feudal

65 Aspinall and Smith, ibid, 241 (document 172 - advertisement in the Star, 18/5/1795).
66 Ibid (document 171 – extract from Vernon’s will, 18/11/1809).
attitude to land and power. Yet although a preference for the landed interest is an identifiably Tory concern, ‘rotten’/pocket/close *boroughs*, as the name suggests, were not quintessentially a rural phenomena - they could equally exist in urban as well as regional areas. As a general rule, county seats returned country gentlemen of local connection and the seats in the new industrial towns returned commercial men of local connection. Of course there was a push to broaden representation and Parliament’s skill-base to include the rising professional class. But, ever the evolutionaries, UK parliamentarians found it was possible to adapt existing ways to the new goal. Baron Hawkesbury, in counselling caution on Reform, argued for the retention of some close boroughs precisely because it permitted professional men to buy their way into Parliament.68 There was a need for a guaranteed voice for professionals, both so their expertise or opinions would be part of the law-making process and that the emerging class interests they represented would be heard, which transcended any later and singular, egalitarian idea of representation and accountability to a universal electorate in a geographical constituency.

**Legislative Responses of the mid 19th Century**

**Failure or First Step? The Reform Act of 1832**

In 1832, after decades of contention and compromise, the first (‘Great’) Reform Act was legislated.69 By expanding the franchise and redistributing constituencies more equitably, the Act was expected not just to modernise and democratise Parliament, but also to address problems of corrupt electoral practices. Yet electoral corruption in the

---


68 Aspinall and Smith, above n 64, 246-249 (document 176 - debate in the House of Commons, 7/5/1793).

69 Actually three mirror statutes: *An Act to amend the Representation of the People in England and Wales 1832* (2 William IV c 45); *An Act to amend the Representation of the People in Scotland 1832* (2 & 3 William IV c 45); and *An Act to amend the Representation of the People in Ireland 1832* (2 & 3 William IV c 88).
wake of these reforms, far from declining, ‘probably increased’.\textsuperscript{70} As Charles Seymour wrote in his study \textit{Electoral Reform in England and Wales}, ‘It is almost impossible to overstate the importance of corrupt practices during the generation which succeeded … the Reform Act of 1832’\textsuperscript{71}

Seymour cites a somewhat paradoxical effect of the opening up of the franchise to most occupiers by the 1832 legislation. With an attendant rise in the number and importance of boroughs with relatively significant voting populations, the ambitious rich, fuelled by expectations that they could buy their way into Parliament, now had ‘to purchase, not the borough itself, but the voters’\textsuperscript{72}. That is, under the earlier proprietary based franchise where only the landed had the vote, and where closed or pocket boroughs were prominent, the aristocracy held their boroughs as part of their estates, and a wealthy gentleman need only buy the borough to secure a seat. The widening of the franchise meant that proprietors needed to buy the votes of their electors to ensure their return.

This applied particularly to the new landlords, unsure of the loyalty of their tenants. But it extended to some from well-established lineages, native to an area, although they would tend to conceive or disguise their patronage as part of an ongoing process of give and take, akin to that expected of the benevolent lord of the manor to his tenants. Burn reiterates this view, claiming that the 1832 Act, in increasing the importance of the electoral process, but achieving an inadequate redistribution, left a considerable number of small and bribable boroughs of between 500-1000 electors. In this range, effective bribery was feasible since the cost was containable.\textsuperscript{73} But

\textsuperscript{70} WL Burn, ‘Electoral Corruption in the Nineteenth Century’ (1951) 4 \textit{Parliamentary Affairs} 437, 437.

\textsuperscript{71} Seymour, above n 56, 193, citing contemporary sources. Seymour at 171 notes however that it is impossible to know whether corrupt practices actually increased after the \textit{Reform Act}, or whether they merely became more notorious due to a more balanced state of the parties, a greater tendency of defeated candidates to cry ‘robbed’ and/or a growing awareness of the value of political propriety.

\textsuperscript{72} Ibid, 196.

\textsuperscript{73} Burn, above n 70, 437.
although the amount needed per election was not unlimited, over time the amount of money passing corruptly in such boroughs grew to be quite dramatic.\(^{74}\)

By the 1850s, it was clear that the first Reform Act had not reduced electoral bribery. In saying this, one commentator claims that the 1832 reforms may not have increased the total amount that was corruptly spent, but rather dispersed it over more electors and more constituencies,\(^{75}\) in a consequence that if true, we might dub, echoing Eva Etzioni-Halevy, the democratisation of electoral corruption.\(^{76}\) If this dispersal view is correct, then the Act’s immediate, positive effects against corruption were relatively limited. Certain administrative measures probably had some dampening effect: restricting the poll to two days somewhat restrained the festival atmosphere - and consequent treating - which longer voting periods encouraged; dividing the counties and providing several polling places within each division decentralised voting and made it more difficult for any one candidate to administer and monitor a comprehensive system of bribery, especially with the reduction in the number of voting days; and disenfranchising many distant out-voters in the boroughs had some effect, since that group had grown to expect treating, accommodation, and money for conveyance and inconvenience in payment for their efforts in voting in constituencies with which they may otherwise have had little regular contact. The dispersal view is echoed in Lord Melbourne’s claim that ‘It was immaterial to the candidate whether he paid two thousand pounds to one owner or to two hundred vendors for the seat … [although] public decency was less infringed in the former case than in the latter’.\(^ {77}\)

These views suggest two interesting hypotheses. One, of descriptive interest, is that the total amount that might be poured into the purchasing of legislative power in any polity may have its own natural upper limit: tinkering with the system of regulation may not necessarily reduce the total spent in pursuit of such power, so much as

\(^{74}\) In St Albans, for instance, with only 500 voters, the amount attributed to bribery alone in elections between 1832 and 1852 was £24 000 - an average of £4 000 per general election. See United Kingdom, Report of the Commissioners appointed to inquire into the existence of bribery in the borough of St Albans, Parliamentary Paper # 1431 (1852).

\(^{75}\) Michael Brock, The Great Reform Act (1993) 327.

\(^{76}\) Eva Etzioni-Halevy, Political Manipulation and Administrative Power (1979) 38.
channel it into different forms, whether corrupt or otherwise. The second, of normative interest, is whether the flattening out of corruption, so that a greater breadth of society can ‘benefit’ from partaking of it, is less corrupt than its concentration. This may be a controversial proposition: would we ordinarily think a citizenry where everyone was involved in receiving kick-backs was more decent or democratic than one where only the wealthy received them, albeit on a grander scale?

The Corrupt Practices Prevention Act 1854

Conceding that previous legislation to prevent corrupt electoral practices had failed, the Act of 1854 set out an exhaustive definition of electoral bribery, which was to survive for several generations. It prohibited the giving, lending or offering of money or valuable consideration to a voter, and the giving, procuring or offering of any office or employment to a voter, if done beforehand as an inducement, or afterwards as a reward, for voting or not voting. Such offences were misdemeanours. A guilty party was liable to forfeit £100, together with the legal costs of its recovery, to anyone who sued for it. It also prohibited the making of any loan, gift or similar agreement for procuring the return of a candidate, or any voters’ vote, and the advancing of money for such purposes. Voters and those who received money on behalf of such bribery were also guilty of a misdemeanour, although the amount liable to forfeiture was a lesser £10.

Corrupt treating was defined to mean corruptly causing to be provided any food, entertainment or provisions. ‘Corrupt’ did not import some abstract notion of a heinous mens rea: here it merely meant action with intent to influence or reward. Offenders were liable to forfeit £50, plus costs, to any prosecutor. Voters who were

77 Lord Melbourne, cited in Brock, above n 75, 328 n 51.
78 Corrupt Practices Prevention Act 1854 (17 & 18 Victoria, c 102).
79 Corrupt Practices Prevention Act 1854, s 2.
80 Corrupt Practices Prevention Act 1854, s 3.
treated were to have their votes nullified. The mere giving of food or drink to a voter because they were polling, on nomination or polling day was forbidden, whether corrupt or not, although the fine of 40s reflected the lesser status of this stricter offence.

The system focused on private enforcement. This was not uncommon, either for the age, or in the history of electoral regulation. Contested (as opposed to unopposed) elections were hotly fought. As a result, it was felt that enforcement of the law against offenders could be left primarily in the hands of the voters, candidates or factions in the area concerned, since they had both a political and financial incentive to police the law. Many infringements would be difficult for public authorities to detect, especially given the myriad briberous ‘transactions’ spread across the country, yet concentrated into a short period of campaigning. Whilst this was not meant to eliminate the state’s role, especially where egregious offences and the enforcement of disqualifications were concerned, it also suited an electoral bureaucracy wary of becoming engaged in politically contentious allegations. To this day, the enforcement of electoral law is a curious mix of private and administrative action in a public law arena.

In additions, the 1854 Act required the appointment of election auditors for every constituency, through whom all bills incurred by candidates were to be channelled for payment. They were also were required to account for all elections expenses and payments. A system of collating and publishing the expenses incurred at each campaign, for public inspection, was also instituted. Electoral law thus began to tackle the problem of the corrupted cost of electioneering at both the quasi-criminal and administrative level.

Fine-tuning the Corrupt Practices Prevention Act

---

81 Voting was by open polling (an oral declaration of preference, recorded in a ‘poll’ book) until the secret ballot was adopted in 1872. Even after that time, the UK system used numbered - and hence traceable ballots - something generally eschewed in Australia.

82 This is an approach UK electoral law has persevered with to this day; Australia however largely abandoned attempts to regulate election spending in 1981.
The 1854 Act had a sunrise clause, and thus required continuance and reconsideration four year’s later. An 1858 Act continued the Act for another session and added provisions prohibiting outright the payment of travelling expenses to voters, but allowing that candidates could provide free conveyances. The effect of this was to largely suppress the outright payment of fares to outlying voters. It might have been reasoned that canvassers would only promise or reimburse a fare if they were certain the elector was already a strong supporter (otherwise they were potentially aiding their opponent by ‘getting out’ his vote). However all such payments were seen as problematic, given the potential for excessive overpayments, and even payments of exact fares could be an unlawful inducement, eg when promised to an uninterested elector who simply valued a free journey to the market town where polling typically was held. Further, such payments had in places become yet another customary expense that inflated the cost of elections. In 1867, the definition was extended to include corrupt payment of rates.

THE NOOSE TIGHTENS - THE MODERNISING OF ELECTORAL LAW

FROM 1868

Lessons from the Case Law

As part of this study, I surveyed electoral petitions challenging 198 separate constituency elections at boroughs and counties in UK Parliamentary elections between 1869 and 1929, reported in the specialist series, O’Malley and Hardecastle’s Reports of the Decisions of the Judges for the Trial of Election Petitions in Great Britain and Ireland pursuant to the Parliamentary Elections Act, 1868. As earlier
noticed, the key period in question is around 40 years, as the last successful, reported UK case involving bribery was in 1906. The period is seminal as it:

(a) saw the juridification of electoral law, with the investiture of electoral jurisdiction in the judges of the Court of Common Pleas. Previously jurisdiction was exercised by a Committee of the House of Commons;

(b) was a period of enormous electoral reform, leading ultimately to the democratisation of Parliamentary elections with universal suffrage on the basis of one secret ballot per adult;

(c) opened at a time when electoral bribery, in all its traditional manifestations, was flourishing; and

(d) closed at a time when electoral bribery in its traditional forms was virtually non-existent.

That six, thick volumes could be filled, primarily with contested bribery cases, speaks something of the nature of the problem and the measures adopted against it. The apparent popularity of petitioning may in part just have been the product of increasing electoral competition. To paraphrase Jennings’ observation from 1960, a general election historically was not necessarily an occasion for most electors to go the poll. Until the first Reform Act of 1832, contested elections were not the norm; even until the late 1860s, not all general elections involved a majority of seats being contested. But this is not to say that bribery was any more or less of a problem when fewer seats were contested. Indeed competition may in practice have been deterred by the high cost of electioneering, and practices that distorted any sense of fair play (of which bribery was but one manifestation) were no encouragement to fair competition.

---

Common Pleas whose judges were invested with the electoral jurisdiction: see Parliamentary Elections Act 1868 (31 & 32 Victoria, c 125), s 5.

Borough of Worcester (1906) 5 O’M & H 212.

That is, the Court of Common Pleas at Westminster, and at Dublin, whose judges were invested with jurisdiction over petitions ‘complaining of an undue Return or undue Election of a Member to serve in Parliament’: see Parliamentary Elections Act 1868 (31 & 32 Victoria, c 125), s 5.

In well over two thirds of the reported cases, some allegation of corrupt practices in the form of bribery or treating of voters was raised, and at least put to the evidence.\textsuperscript{89} The claims varied in magnitude and severity, and are usually intertwined with other allegations, including payments for conveyances (later, after the 1883 Act, illegal practices involving unlawful payments and false accounts were commonly plead as well).

In a much smaller number of cases, especially earlier on, but surviving more obviously in the Irish seats, serious allegations of undue influence and intimidation (chiefly by mobs and watchers, although spiritual undue influence by Catholic clergy is also a feature) are also made, and usually substantiated. This reminds us that electoral bribery can be grouped more broadly, with intimidation and undue influence, as a species of a broader genus of improper electoral influence.\textsuperscript{90} Attention outside the bribery cases also tended to turn to the scrutiny of disputed votes, and polling errors, after the 1872 Ballot Act, and to knowingly false statements about candidates, after the 1895 Act. The early 20\textsuperscript{th} century cases are not without their proven pecuniary bribes by agents (eg the \textit{Maidstone} petition of 1906)\textsuperscript{91} and evidence of the vestiges of sporadic bribing by people lacking legal agency at the fringes of campaigns (eg the \textit{Dorsetshire, East} petition of 1910).\textsuperscript{92} However bribery in the form of vote-buying with monetary gifts was obviously on the wane at the turn of the century. By the time we reach the 1920s, petitions are very few and far between, and electoral bribery of the traditional sort appears to have died.

Impressions based on the reported cases are reinforced by general statistics collected by the Parliamentary Research Services. Between 1832 and the 1868 election, 105

\textsuperscript{89} Approximately 45 of the cases contain no or no seriously pressed allegations of bribery or treating. That bribery and treating were commonplace pleas is reflected in the reporters adopting this headnote shorthand: ‘The petition made the usual allegations of corrupt practices and did/did not pray the seat.’

\textsuperscript{90} Aside from reminding us that we can find commonalities in the various forms of inappropriate electoral behaviour that exist to advance the ‘free and fair’ elections value, hatching this new classification doesn’t shed much light on bribery as a species of transaction, and hence the thesis will not explore the law concerning undue influence and intimidation at elections.

\textsuperscript{91} Borough of Maidstone (1906) 5 O’M & H 200.

\textsuperscript{92} Eastern Division of Dorsetshire (1910) 6 O’M & H 22.
elections or by-elections were voided, all but 11 of these for corrupt practices; there were a further 42 undue elections in that period, where elected members were unseated and another candidate declared elected on a scrutiny, and only three of those were for reasons other than corrupt practices. Between 1868 and 1923, 93 elections or by-elections were voided, all but six of those for corrupt and illegal practices; there were a further 10 undue elections where a rival candidate was declared elected, only 1 of those for other than corrupt or illegal practices. However only two of those voided, and none of those declared undue, occurred after 1910. And in the 64 years between 1923 and 1987, there were no void elections, and only three undue elections, none of which were for corrupt or illegal practices.

Legal process across the 19th century generated far more successful petitions than unsuccessful ones. Petitions of course were self-selected and invariably brought by unsuccessful candidates or their supporters. The parties to the actions were generally wealthy enough to sustain litigation, there not yet being a Labourite influx of working-class candidates. However the stakes were high, and a petitioner without clean hands risked a recriminatory case from a member who otherwise might feel little urge to sue. But whatever the costs and uncertainties, the legal process clearly played a role in the reform process. Indeed it generated its own momentum in this period: each new finding of bribery or treating gave impetus to later petitioners, just as each new Act went further in defining and redefining corrupt, then illegal practices.

It would be wrong however to assume that every commentator, let alone every political actor, joined the increasingly zealous bandwagon of the law’s war on electoral bribery. One pamphleteer counselled against conceiving of it as a criminal offence, preferring the label ‘political offence’. Given that ‘free trade’ was otherwise ‘a principle of universal application’, this author asked why people would ‘affect a fastidious indignation at a political offence that poverty makes venial?’ 93 Undoubtedly this echoed a descriptive truth. For many poorer voters, ‘the franchise was an economic asset’. 94 Whilst such a view could not prevail when the more

93 PE, Electoral Corruption and Remedy (1870) 3-4.
radical reformers were gaining momentum for the enfranchisement of all classes, when the promise of the ballot was still fresh, it could at the same time represent something of personal and class value to optimists (symbolic equality, as well as a means to representation) yet also be seen as a tradable commodity by others.

The Influence of Procedure

The case law is essentially civil in nature; criminal prosecutions were unusual and rarely reported. Some petitions were doubtless speculative or primarily politically - or spitefully - motivated. As bribery became a matter of political as well as legal ‘shame’, of course it became a legal and rhetorical allegation capable of being abused. By the same token, as noted, many cases involved counter-petitions - ie recriminatory claims of electoral corruption by the respondent against the petitioner. As part of the purge, the drowning member was encouraged to pull his tormentors in with him.

There was also potential mismatch between expectation and reality. Once established, the elections court, being a common law court was still at the mercy of the parties’ definition of the case and remained non-inquisitive in practice, even though it was at the centre of the task of cleansing electoral practice. The cost of civil proceedings must have acted as a deterrent to many good claims. One of the few non-adversarial provisions was that once lodged, no petition could be withdrawn without the consent of the court. The justification for this was to prevent collusion between the parties (or the petitioner and another) to suppress evidence. The judges applied the practice of requiring both sides to personally depose an affidavit that there

---

95 This remains the case today in electoral law where such proceedings, even only for fines, are unusual.

96 King, above n 31, 131, describes 19th century petitioning as ‘a most difficult, costly and uncertain means of securing justice against offenders’.

97 The problem was not new: the Commons’ Committees which tried earlier election petitions had been empowered in 1842, by 5 & 6 Victoria, c 102, to investigate any withdrawal of charges of bribery, and report on whether the withdrawal was the result of any collusion to avoid discovery of bribery.
was nothing corrupt in a petition’s withdrawal. One common problem occurred when respondent admitted to some corrupt practices and conceded the seat, having seen the strength of the evidence against them, seeking in effect to withdraw from the case. Successful petitioners in such cases felt little inclination to continue with the evidence, but who was to pay the cost of such continuation, and what value could be placed on evidence that would not be tested by cross-examination? Further, there was often the problem of people who had been implicated by evidence but not called by either party, who might wish to give their own testimony to seek to clear their reputation. Later this question became acute when the court acquired the power to give, in effect, indemnities or clearances in cases of relatively minor or trivial offences.

There were also well-understood difficulties in finding, bringing to court, and having believed, personal testimony by those involved in bribery. This led to a practice of petitioners’ paying witnesses for their statements: in itself a potential form of bribery that may have perverted the evidence in some cases, but which was tolerated and even condoned by the judges. Once in court, the witness, usually a bribee, could be reluctant or even hostile to the petitioner, given that he was being required to admit to involvement in a corrupt act, and was faced with cross-examination by counsel for the candidate accused of bribing him. The balance of probabilities, especially when adjusted upwards on a sliding scale reflecting the gravity of the allegations, was not an easy test to satisfy with witnesses whose credit could be so easily impugned.

Conversely, allegations of bribery were sometimes ‘tacked on’ to allegations of less serious corruption, such as treating or other electoral misadventures, such as personation or miscounting. This could occur as an intimidatory tactic, or to lessen the respondent in the eyes of the court or public on the assumption that ‘must sticks’. Or it could occur as a pleading ruse, akin to an evidentiary fishing-trip, in the hope that the period between petitioning and trial would flush out evidence to support suspicions of serious corruption.
The Common Law of Elections

The ‘common law of elections’ continued to evolve in this period. Here ‘common law’ is understood as a body of principles generated by both courts and the earlier Parliamentary Committee system. The common law provided the possibility of voiding elections in cases of general bribery, intimidation or undue influence, on the principle that an election that was not free was invalid. Whilst in such a case, proving agency to the elected (indeed to any particular) candidate was not a hurdle, it had to be established that the corruption was so widespread as to have potentially affected the election or, if the majority was large, so widespread or systematic that it could be said, on the whole, that the election was not free. In truth, such common law principles were not autonomous from statute law, but were intertwined with it. Indeed the very notion of ‘free’ elections, vague as it is, had been most famously enunciated in legislation, viz the Statute of Westminster of 1275.

The case law – enormously active in the latter half of the 19th century - thus served both to develop common law principles in the sense of ‘judge made law’ (at least after 1868 when Election Judges took over from Parliamentary Committees to resolve disputed returns) but also to flesh out the principles inherent in statutes or laid down by Parliamentary Committees.

Like all case law, the common law oscillated, at times without clear resolution, between competing values and positions, even though the danger of conflicting precedents was (and remains) greater in electoral law than in normal case law. Disputed returns have to be decided in a hurry, and there was and remains no obvious avenue of appeal from them.

---

98 This two-prong test came to be generalised to all instances where the ‘errors’ in the election were related to corruption or serious illegality on the part of the respondent candidate or agent, in the most famous common law case, Woodward v Sarsons (1875) 10 LR CP 733.
99 For discussion of these rules as to expedition and finality, see Orr and Williams, above n 48, 78-87. Courts of Disputed Returns decisions are invariably declared to be ‘final and conclusive and without appeal’: eg Commonwealth Electoral Act 1918 (Cth) s 368. State court decisions in Australia however may in fact be subject to appeal thanks to Constitution, s 73; but that has not been widely appreciated, and hence not tested.
One important example of an impasse in the case law – which as we will see in Chapter Three cropped up to haunt the High Court of Australia in its first outing in electoral law - concerned whether a single act of bribery by a successful candidate or his agent rendered his election void. In one case, Baron Martin held that odd and isolated (ie not cumulated) instances of bribery would not in themselves upset a candidate’s election. To hold otherwise might bring the law into contempt and ridicule. Martin B decided this in the context of a tiny sum (2s 6d) relative to the other allegations in the case before him. Yet in the same year, in clear contradiction to this pragmatism, Willes J reasoned that whenever done by a candidate or agent, an act of bribery was ‘an illegality of such a gross character and so difficult to trace’ that the candidate was disqualified. To hold otherwise would reduce the deterrence value of the prohibition, but worse, since bribery was hard to uncover, there could be little reassurance that the election had not been widely tainted by corruption. Baron Channell preferred this puristic approach a year later.

In practice and over time, the common law of elections, although a useful supplement when statute ran out or remedies seemed unclear, became secondary to the primary consideration - whether the election was void for corrupt practices according to the contemporary statute law. The common law of elections thus became focused on the more recognisable practice of judicial interpretation of statutory codes. It is time, then, to survey the legislation that governed the period in question.

100 See discussion of Chanter v Blackwood No 1 (1903) 1 CLR 39, in Chapter Three below, text at nn 332-5.
101 Borough of Salford (1869) 1 O’M & H 132, 142.
102 Borough of Blackburn (1869) 1 O’M & H 198, 202-3.
103 Borough of Shrewsbury (1870) 1 O’M & H 36, 37. It also received support in a Tasmanian Full Court in 1891, in a case involving several bribes and briborous wagers, but specifically in relation to a bribe of half a sovereign under cover of a thank-you for a gift of a dozen or so fresh fish: Brighton Election Petition; Mugalston v Dillon (1891) 13 ALT 44 at 46 (per the Chief Justice). See also discussion in Chapter Three below, text at nn 221-2, 230-2.
Statutory Reform in the War on Corruption

The Second Reform Act: The Representation of the People Act 1867

The central reform of this Act was to further extend the male franchise. In boroughs (electorates within cities and built up towns) there were to be two categories of voters, much flatter than before: rate-paying occupiers, and £10 tenants. In the rural and semi rural county electorates, another twofold category of voters was created: £5 property owners, and rate-paying occupiers. These significant further extensions of the franchise ultimately helped render large-scale bribery less practical or cost-effective.

Although in retrospect it appears as if electoral reform advanced inexorably towards the egalitarian milestone of the universal franchise (only achieved in the UK in 1918), the lessons of the legislative history and of the various movements for reform, make it clear that such advances were often hesitant, generally hard won, and inevitably compromised. Smith, in a history of the Second Reform Bill of 1867 concludes that it...

---

104 The Representation of the People Act 1867 (30 & 31 Victoria, c 102). The coterminous Acts for the rest of the UK were: The Representation of the People (Scotland) Act 1868 (31 & 32 Victoria, c. 48) and The Representation of the People (Ireland) Act 1868 (31 & 32 Victoria, c. 49).

105 Thus s 3 provided that any adult male in sole occupation of a dwelling house for the year past, who had paid his (poor) rate, could register and vote for that borough. Section 4 gave the vote to all adult males who had been sole tenants, in occupation for the year past, of any dwelling house lodgings worth not less than £10 annually (unfurnished value). In Scotland the occupation franchise for burghs was worded to cover inhabitant occupiers (whether as owner or tenants) provided they had paid their poor rates (The Representation of the People Act (Scotland) 1868, s 3). In Ireland the occupation franchise for boroughs was worded so that the rateable value of the property had to be £4 (Representation of the People Act (Ireland) 1868, s 3).

106 Thus s 5 provided that any adult male who owned, whether by freehold, copyhold or life tenure, or was entitled under a lease of at least 60 years, to an estate worth not less than £5 annually, could register to vote. Section 6 extended the county vote to any adult male who had, for the year past, occupied land (as owner or tenant, no matter what the term) worth not less than £12 annually, and who had paid his poor rates on such land. In Scotland the rate-paying occupiers’ franchise for counties required the tenancy to be worth £14 annually (The Representation of the People Act (Scotland) 1868, s 6).
‘survived because a majority of the members of both Houses … dared not throw it out. They did not want it, they did not like it, they feared what it might do, but they passed it’. It survived largely because of mass agitation at the failure of earlier attempts at franchise extension, Disraeli’s tactical calculation that a Conservative sponsored bill would entrench his leadership and humiliate Gladstone, and a growing recognition that although some might still dream of containing the artisan franchise, such dreams were fantasy.\textsuperscript{107}

\textit{The Parliamentary Elections Act 1868} \textsuperscript{108}

As part of the package of reforms of which the Second Reform Act was the lynch-pin, \textit{The Parliamentary Elections Act 1868} introduced various amendments to the petition system, and to the anti-corrupt practices regime. Most significantly, petitions were no longer to be heard by Parliamentary Committee but were to be tried by an election judge, from a rota to which all the common law courts were to contribute members. (The bench was increased to two judges by an Act of 1879).\textsuperscript{109} Petitions were to be tried speedily, with a certificate of the determination being forwarded to the Speaker of the Commons, together with a report on anyone involved in a corrupt practice, on whether the candidate was involved or had knowledge of such, and on whether corrupt practices in general had extensively prevailed.

\textit{The Ballot Act} of 1872 \textsuperscript{110}

The Ballot Act introduced the secret ballot - ie an official paper ballot, to be marked in the privacy of the ballot booth, and secured in ballot boxes. The Act opened with no lofty sentiments or claims, merely a demure and stifled preamble that began ‘Whereas it is expedient to amend the law relating to procedure at parliamentary and

\textsuperscript{107} FB Smith, \textit{The Making of the Second Reform Bill} (1966) 229. The dream of an elite or limited franchise was still predicated on fears of unruly democracy, whether drawn from prejudicial interpretations of French, United States or Australian societies.

\textsuperscript{108} \textit{The Parliamentary Elections Act 1868} (31 & 32 Victoria, c 125).

\textsuperscript{109} \textit{Parliamentary Elections and Corrupt Practices Act 1879} (42 & 43 Victoria, c 75), s 2.

\textsuperscript{110} \textit{The Parliamentary and Municipal Elections Act 1872} (35 & 36 Victoria, c 33) aka \textit{The Ballot Act}. 
Chapter 2: Historical Suppression of Vote-Buying

municipal elections ...’. To the uninitiated 20th century reader, familiar with the system of the secret ballot, the Act might pass as a mere pragmatic reform in the technology of elections.

However the secret ballot was no mere tinkering with the manner of voting, as we shall see later in this chapter. An Australian innovation, pioneered first in Victoria’s 1856 Electoral Act, it was known, at least prior to its widespread adoption internationally, as the ‘Australian Ballot’ or the ‘Victorian Ballot’. One enthusiast, in a study published in the United States in 1889, extolled its virtues as an electoral panacea: ‘The ballot reform movement promises to have effects far wider than the mere achievement of a single reform. It is the opening of a road (perhaps the only road) to the whole field of political improvements.’

Written ballots as they had evolved in Europe and the United States however, whilst being much more anonymous than viva voce or show of hands methods, were far from secret in practice, due to their informality and the lack of regulations truly enforcing their secrecy. As long as voters could write up their own handwritten ballot, or parties could print up mass ticket ballots to distribute to supporters, the system was wide open to traditional forms of corruption, especially bribery and intimidation. As one United States account recalls, perversions such as ‘straight-arm voting’, where lines of persons could be seen approaching the polls holding their coloured ballots aloft, to prove they were faithful supporters following their orders or earning their bribes, were not uncommon.

---


The ‘Australian’ secret ballot, as adopted in the United Kingdom by the Ballot Act, ensured accountability through numbered counterfoils and the individual marking of ballots by polling officials as they were issued to each elector at the polling station. Further, as a pre-emptive move to counteract the possibility that systematic bribery might remain enforceable through a candidate’s scrutineers recognising special pre-ordained marks placed on ballots, any writing which might identify the voter was to render the ballot void.114

The Corrupt and Illegal Practices Prevention Act 1883

The 1883 Act is memorable as a systematic attempt to introduce a new set of regulations, tightening penalties for corrupt behaviour but more significantly establishing a lesser set of illegal practices to curb expenditure. The Act thus built on the auditing requirements pioneered in the 1854 Act. It also provided stricter regulation of practices that had often raised concerns about covert bribery, such as the numbers and types of employees on campaigns, the use of conveyances, and the use of licensed premises as committee rooms.

Whilst some campaign expenditure breaches were rendered serious enough to void an election (eg making a knowingly false return), most illegal practices attracted a fine and a censure in a report to the Speaker of the Commons, but no significant disqualification. Bribery or treating, undue influence including intimidation, personation and knowingly making false expenditure returns were however deemed to be ‘corrupt practices’. If committed by a candidate or his agents, they rendered the candidate unable to sit in or stand for Parliament for seven years. Those personally guilty were also liable for a misdemeanour and barred from voting or holding public office for seven years. Some of the definitions of corruption were expanded or clarified: eg treating by third parties such as political clubs and associations was caught for the first time; and undue influence was amended to explicitly include spiritual suborning.

114 The Ballot Act, s 2.
Reform in the Period 1884 - 1918

Prime Minister Gladstone succeeded in 1884 in securing the passage of the third of the Reform Bills, enfranchising male agricultural workers in the counties, just as their brethren artisans in the towns had been in 1867. In the wake of this expansion, there was much legislative focus on questions of registration and the system of revising barristers, but little further legislative (as opposed to judicial) development of the law relating to corruption. The vote for women however had to await the end of the long Parliament of the First World War, with the Representation of the People Act 1918.¹¹⁵ Even then, women were unequally treated. The male voting age was 21; but the female age was 30 years. Subsequent enfranchisements lowered the voting age for women to that of men, and for both sexes to 18, eased occupancy requirements and eliminated the vestiges of double voting rights. 1918 marks the culmination of the franchise reform begun 86 years earlier.

¹¹⁵ 7 & 8 George V, c 64.
Acts Disfranchising Boroughs

Finally, it needs to be noted that Parliament on occasions took the knife to itself and excised some of the more cankerous constituencies from its body. Between 1844 and 1885, 12 Boroughs were formally disfranchised by Act of Parliament, for widespread and extensively prevailing corruption. This most extreme of moves almost became a common practice in the wake of the Second Reform movement and the Royal Commissions which preceded it. Some eight seats were disfranchised in three purges between 1868 and 1870. 116

### Forms of Electoral Bribery in Victorian and Edwardian England: Lessons from the Case Law

#### Outright Vote Buying

This is the simplest form of bribe to comprehend - the payment of geld in return for voting a certain way, or for not voting at all. The transaction could be upfront and one-one. Or it could be based on a customary expectation, and regularised to accommodate large numbers of ‘claimants’, for example by having word sent out that

<table>
<thead>
<tr>
<th>Borough</th>
<th>Disfranchising Act</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sudbury</td>
<td>7 &amp; 8 Victoria, c 53 (1844)</td>
</tr>
<tr>
<td>St Albans</td>
<td>15 &amp; 16 Victoria, c 9 (1852)</td>
</tr>
<tr>
<td>Great Yarmouth</td>
<td>30 &amp; 31 Victoria, c 102 (1868)</td>
</tr>
<tr>
<td>Lancaster</td>
<td>“ “</td>
</tr>
<tr>
<td>Reigate</td>
<td>“ “</td>
</tr>
<tr>
<td>Totnes</td>
<td>“ “</td>
</tr>
<tr>
<td>Beverley</td>
<td>33 &amp; 34 Victoria, c 21 (1870)</td>
</tr>
<tr>
<td>Bridgewater</td>
<td>“ “</td>
</tr>
<tr>
<td>Cashel</td>
<td>33 &amp; 34 Victoria, c 38 (1870)</td>
</tr>
<tr>
<td>Sligo</td>
<td>“ “</td>
</tr>
<tr>
<td>Macclesfield</td>
<td>48 &amp; 49 Victoria, c 23 (1885)</td>
</tr>
<tr>
<td>Sandwich</td>
<td>“ “</td>
</tr>
</tbody>
</table>

‘rewards’ would to be distributed at a particular place before, during or after polling day.

In either case, to constitute an outright bribe, money need not have been directly offered or paid. Extinguishing another’s debts was sufficient: indeed such a tactic was not uncommon when the franchise was restricted to ratepayers, since paying the rates of those with some sympathies towards you not just ensured their support, but ensured they would be able to register to vote.\(^{117}\) Paying another for his time lost in attending the poll, albeit something the elector may have felt deserved given the distance needed to be travelled in the days when polling places were still relatively highly centralised and transport times extenuated, would also be bribery.\(^{118}\) Similarly briberous were payments made in the guise of recompense for time lost in registering to vote, which had become known as ‘barrister’s court money’.\(^{119}\)

The ‘Charity’ Cases

In the so-called charity cases, where wealthy candidates would donate significant quantities of private aid, and even their own money, to the poorer classes in their electorates, the 19\(^{th}\) century courts were keen to insist that the governing motive or purpose had to be the corrupt one of influencing the election. This tended to enable wealthy candidates, particularly those who were of long residence in the county or borough and steeped in traditions of noblesse oblige, to perpetuate systems of regular patronage, knowing that such acts would purchase them sympathy and support in the constituency at large. That such practices were deeply entrenched in many areas, reflecting traditional hierarchies and the conceptions of duty associated with them, is

\(^{117}\) Borough of Cheltenham (1869) 1 O’M & H 62 (although case not made out on evidence).

\(^{118}\) Borough of Plymouth (1880) 3 O’M & H 107 (fisherman paid for cost of travel and to hire replacement for day he would spend travelling up to poll).

\(^{119}\) Borough of Taunton (1869) 1 O’M & H 181 – at least as regards payments made willy nilly; Blackburn J did not think that a payment made bona fide to an elector who believed he was entitled to compensation for lost time attending to their registration, was caught by the Act of Registration courts were also known as revising barrister’s courts, since barristers were appointed to administer what, prior at least to the universal male franchise, could be quite complex and difficult questions of entitlement to registration as an elector.
reflected in such judicial statements as: ‘… to bestow gifts upon the borough which he represents. Is this not what every member is expected to do, and what a great many members constantly do?’ As we shall see in Chapter Six, the practice can be analogised with ‘pork-barrelling’ and tax ‘bribes’ – the contemporary use of public resources to ‘buy’ electoral support.

Whether the tendency for judges to accept such ‘charity’ was realistic pragmatism, or merely the reinforcing of a system that perpetuated the rule of an elite, it enabled candidates to benefit from the natural and intended consequences of their ‘charity’ without having it declared a ‘sham’. Cases where the petitioner succeeded in unseating members for briberous ‘charity’ were not common. One was the Borough of Launceston, where a public gift to various tenants of a right to trap and shoot rabbits on the candidate’s estate was seen as a bribe. A second was the Borough of Boston, where a former member, who had been in the habit of giving to local charities through the clergy, arranged to distribute 150 tons of coal to the poor of the borough one month before Parliament was dissolved: the judge equivocated, but unseated him largely because his agents distributed the coal much more broadly than to only the most needy (many of whom would not have been electors), and accompanied it with cards printed ‘with the compliments’ of the candidate.

Typically, inferences of corrupt intention were only drawn where, as in Boston, the agent could be painted as over zealous and made the fall guy, for too blatantly linking the gifts to electioneering. Reformist judges, such as Groves J in Boston, by reasoning that any charitable donations made on the eve of an election campaign should prima facie be treated as suspect, gave warning to candidates and their agents to take more care. More commonly, the judges were simply unwilling to impugn the candidate and label their largesse as having been ‘corruptly’ intended to sway votes as such, and settled for a soft finding that the candidate perhaps unwisely was wearing his charitable heart on his sleeve or playing out time-honoured traditions of

---

120 Borough of Plymouth (1880) 3 O’M & H 107, 110 per Lush J (member had habit of sending £250-500 to Mayor for distribution to poor, especially on occasions such as the marriage of his children).
121 Borough of Launceston (1874) 2 O’M & H 129.
122 Borough of Boston (1874) 2 O’M & H 161.
benevolence. Implicitly, they were reinforcing a paradigm of electoral bribery as involving an *individual* transaction.

Other judges almost endorsed such practices as customary, despite being ‘injudicious’, when they were seen as time-honoured or expected: eg Lush J in the *Plymouth Petition* excused a member who habitually sent £250-500 to the Mayor for distribution to poor, especially on occasions such as the marriage of his children. That the charitable instinct usually stopped at the somewhat artificial limits of the constituency was oddly not treated as evidence of corrupt intent in the *Nottingham East Petition*, where the member appointed an agent to distribute money to needy applicants from his constituency. Indeed in this case, which occurred as late as 1911, an agent was able to distribute charity in the form of 10s amounts to those who made application at the Unionist office. These alms were accompanied by a reminder that its source was the respondent, who intended to stand at the next election.

A less common, but perhaps no less insidious form of bribery involved members and candidates, who through their position in a municipal office or church, had control of the charitable or welfare funds of a district. Indeed, indiscriminate misuse of such public funds, whether to buy the votes of those who were in little need of such aid, or to buy freeman status for poorer men, was such a major problem in many purely municipal elections, that it spilt over into Parliamentary elections and tainted them.

---

123 *Borough of Salisbury* (1883) 4 O’M & H 21 (distribution of £100 to be spent on coals and blankets very shortly after respondent elected; as defeated candidate at previous poll he had done the same). Pollock B, whilst ‘not admiring’ the practice, felt it excusable as part of an ‘ancient tradition’ done to keeping up the ‘good feeling which it is desirable should exist between the rich and the poor’ (at 28-9). Pollock B doubted even less restrictive dicta of Bramwell B in the *Borough of Windsor* (1873) 2 O’M & H 88 at 90 (distribution of £100 to tenants well before election but with election in mind). The *Salisbury* approach was reiterated in *St George’s Division of the Borough of Tower Hamlets* (1895) 4 O’M & H 89 at 95 (distribution of 1000s of charitable relief vouchers bearing candidate’s name, from his house).

124 *Borough of Plymouth* (1880) 3 O’M & H 107, 110.

125 *East Division of the Borough of Nottingham* (1911) 6 O’M & H 292 at 306.

126 Eg, *Borough of Beverley* (1869) 1 O’M & H 143 (such bribery had corrupted municipal elections for years; evidence 1000 votes influenced at last poll; previous municipal poll only two weeks before).
In all, charitable largesse came to be regarded with suspicion - indeed in some quarters it earned the label ‘ground-baiting’.\textsuperscript{127} However the judicial response to it was equivocal, and successful unseatings were the exception rather than the rule. In considering this, it must be remembered, we are judging a pre welfare-state era, at a time when, despite Biblical invocations to the contrary, the ideal of charitable anonymity was not strong.\textsuperscript{128} Indeed the rise of mass literacy and the growth of the press may have only contributed to this immodesty: news of a ‘good deed’ was bound to leak anyway.

**Employment**

One ruse to disguise bribery was ‘colourable’ employment - the payment of significant numbers of canvassers and runners, who may not have been given any meaningful work in the campaign. The difficulty was proving a subterfuge and an intention to buy support, as opposed to a real attempt to marshal a campaign of supporters. For example, in the *Tamworth* petition it was shown that 130 men were ‘employed’ at 5s per day, but the court was unwilling to draw a corrupt influence.\textsuperscript{129} Nonetheless, it warned that colourable employment for a service not rendered was bribery, a view found in the earlier *Leicester* petition.\textsuperscript{130} Indeed any colourable hiring could be equated to bribery, including, eg, the letting, en masse and unnecessarily, of ‘committee rooms’ at Inns, to secure the hotelier’s support.\textsuperscript{131}

What of genuine employees and their right to vote? There had long been concerns about undue influence over subordinates. For some conservative opinion, such subordination was either a natural incident of a hierarchical society (one’s betters would

\textsuperscript{127} King, above n 31, 132.

\textsuperscript{128} ‘Beware of practicing your piety before men in order to be seen by them … Thus, when you give alms, sound no trumpet before you, as the hypocrites do … But when you give alms, do not let your left hand know what your right hand is doing.’ Matthew 6, i-iii.

\textsuperscript{129} *Borough of Tamworth* (1869) 1 O’M & H 75.

\textsuperscript{130} *Borough of Leicester* 1 Power, Rodwell and Dew 178, cited in the *Borough of Tamworth* (1869) 1 O’M & H 75, 79.

\textsuperscript{131} *Borough of Sandwich* (1880) 3 O’M & H 158 at 159-160.
better know which political faction would protect the collective interest of the domain), or even a reason to restrict the franchise until society was less hierarchical. But as both the franchise and the industrial towns spread, so did concerns about employers suborning workmen. Where payment was involved, rather than threats, fears of bribery were aroused. In *Simpson v Yeend*, it was held that a promise to remunerate someone for lost time in voting would prima facie be bribery - it was seen as payment for the act of voting.\(^{132}\)

Thus, the practice of letting employees have polling day as a paid holiday, especially if the employer was not otherwise in the habit of allowing paid leave, was prima facie corrupt. Whilst an employer might argue he was merely being generous in the typically festive atmosphere of the poll, evidence that the employer was an overt supporter of one candidate could prove the necessary agency to that candidate and help show that the grant of time off was linked to an expectation of support for the favoured candidate. In egregious cases, such evidence was not hard to produce. In one instance, the workmen were told they had to clock in on the morning, but could have polling day off. The men clocked in, returned home for breakfast, then reassembled at the workplace sporting the rosettes and colours of their employer’s favoured candidate for a march into town led by their foreman. It was the first paid holiday at the firm in some 25 years.\(^{133}\) 19th century judges were on the whole conscious of the realities of class in the workplace - if less sensitive to its fundamental inequities - for they grew out of a system that naturally expected deference from subordinates. They were quite capable of suspecting corrupt influence on the part of employers.\(^{134}\)

Yet in time, and with the rise first of Liberal and then explicitly class-oriented Labourite candidates, giving voice to newly enfranchised workmen, it seemed odd that six-day a week workers were not guaranteed time off to cast their ballots. An Act of 1885 therefore legislated to permit the ordinary payment of wages provided this

\(^{132}\) *Simpson v Yeend* (1869) LR 4 QB 626.

\(^{133}\) *Borough of Gravesend* (1880) 3 O’M & H 81.

\(^{134}\) Perhaps the clearest case was the *Borough of Westbury* (1869) 1 O’M & H 47 (employer threatened to dismiss men if they would not pledge to vote for favoured candidate. Corrupt intimidation found.)
was given to employees equally, although it did not guarantee employees a right to voting leave.\footnote{\textit{Parliamentary Elections Corrupt Practices Act, 1885} (48 & 49 Victoria, c 56).}

**Treating**

Treating appears to speak of a simpler, and poorer, age when sustenance was a more immediate and daily concern. Treating in the 18\textsuperscript{th} and 19\textsuperscript{th} centuries usually, but not invariably, was associated with the provision of alcohol, and in Chapter Three we will encounter various cases of that in alcohol-friendly colonial Australia. Even in the mid Victorian era, fairly blatant examples abound: eg of free drinks being provided at various pubs, by the order of a candidate’s agent;\footnote{\textit{Borough of Bewdley} (1869) 1 O’M & H 16.} or of pubs opened with free drinks to those in the know, under the pretence that the pubs were the candidate’s committee rooms and the electors/drinkers were his committee men.\footnote{\textit{Borough of Bradford} (1869) 1 O’M & H 35.} Polling day breakfasts were another feature of the landscape. Such breakfasts were also expected to provide their share of alcohol. Ruses such as delaying treating until after a successful election were hatched then impugned: although it must have been no easy task to draw a line between a celebration by genuine supporters, and a corrupt pre-poll understanding that all who voted a certain way would be favoured after the poll. As explained below, treating came to die out as a significant concern, as living standards rose and electioneering entered a more impersonal information age. (Yet, curiously, as we shall also see in the next chapter, fear of allegations of it keeps arising in Australia.)

**Conveyances**

As mentioned in relation to the 1850s legislation, the provision of vehicles to take voters to the polls was an issue even then. In some instances, voters lived a long way from the polls and travelled rarely. In those cases, provision of a conveyance was a not insignificant benefit. By strict analogy, the provision of the travel was no less a form of consideration on account of voting than the giving of money to cover a train
ticket, and the working assumption of the law was that candidates did not offer such consideration unless the elector was being rewarded for their vote or capable of being swayed by it. However there was a thin line in substance between a supporter who could not afford to travel (not a true instance of bribery) and the elector who was not really a supporter but could be induced to vote if travel were provided. The 1883 Act, as initially drafted, sought to prohibit candidates using conveyances to bring voters to the polls. The Act as passed however only outlawed the use of vehicles for hire, not vehicles borrowed or owned by the candidate, in a compromise focussed on campaign costs rather than briberous inducements. With the spread of affordable, mass transportation in most countries, the question became something of a non-issue in the 20th century, and as we shall see is almost no concern in systems like Australia’s where voting is compulsory.

General Corruption

Earlier, we discussed the distinction between ‘general’ (ie widespread) and specific bribery and treating. The adversarial petitioning system was better adapted to bribery allegations attributed to action by the successful candidate and his agent. However more open ended inquiries, such as Royal Commissions into corruption over several elections in particular seats were held, and sometimes led to whole constituencies being disenfranchised. Not unnaturally, as bribery became less and less a matter of accepted culture, allegations of general corruption began to dry up.

Agents - Fall Guys or Conduits?

Gentlemen candidates delegated the management of their campaigns to political agents. Over time, some of these agents, who not uncommonly were lawyers themselves, became political professionals, whether linked to one party or faction or not. Indeed the 1883 Act, in establishing a detailed system of accountability for

---

138 Corrupt and Illegal Practices Prevention Act 1883 (46 & 47 Victoria, c 51) ss 7, 14.
139 Regulation of conveyances remains a live concern in poorer but populous countries, such as India.
140 See eg the table above, n 116.
expenditure, regularised agency by requiring the appointment of agents and sub-agents.

Agents, formally and informally, marshalled campaign teams and hired rooms, halls, runners etc. The problem of vicarious liability thus arose for the law. To what degree could briberous conduct by supporters be attributed to the candidate and his agent for the purposes of both unseating and disqualification, without at least some evidence of tacit authority? Each case of course depended on the proximity established by the facts.

The common law had developed a reluctance against attributing one person’s conduct to another. This may have been reinforced by reluctance on the part of some parliamentary committees and later judges to besmirch the reputation of well-known candidates. Had these views prevailed and electoral agency been treated as a narrow concept, candidates could have washed their hands of bribery. Instead, sympathy for a candidate who claimed he had trusted his agent gave way fairly early on to a general rule that an agent’s actions were strictly attributable to the candidate - and indeed the strict law was that a single act of bribery attributed to a candidate was grounds for unseating him.\footnote{141}

In 1809, bribery had been attributable to a candidate if done by any ‘Perfon or Perfons for or on his, her or their Behalf’,\footnote{142} and this notion of an act done on the candidate’s behalf was perpetuated in the 1854 definition.\footnote{143} Agency clearly extended beyond an agent formally employed by the candidate, and scope was left for committees then courts to interpret the idea of ‘on his behalf’ according to the particular facts. However this still left room for forgiving judgments, especially if the bribe was relatively small or isolated, and instances exist of agency being denied in cases

\footnote{141} The length of disqualification however would vary depending on whether the candidate was personally guilty of bribery (life) or via his agent (seven years) - cf \textit{Corrupt and Illegal Practices Prevention Act 1883}, ss 4, 5.

\footnote{142} 49 George III, c 118.

\footnote{143} \textit{Corrupt Practices Prevention Act 1854}, s 2.
involving an employee of the party association allied to the candidate in question, and even of a member of the election committee. Conversely, agency could be found in the act of a candidate asking a businessman for his ‘vote and interest’, where it was mutually understood from the context that the businessman would lobby his workers to support that candidate, or in the act of canvassing itself, where canvassing involved soliciting others to vote for the candidate, or at least to abstain from voting for his opponents.

As a sop and incentive to candidates who had taken all reasonable means to prevent breaches by his agents, a court could relieve the candidate of the effect of the breaches, but only in ‘trivial’ instances, and, under the 1883 Act, this extended only to treating, and not bribery as such.

The rise of expenditure and campaigning by ‘3rd parties’, especially trade associations, led to a roping in of all expenditure in support of particular candidates, into the system of expenditure limits. However this left, in the interests of free discussion, general agitation of political causes unregulated. Since parties were usurping individuals as the focus of campaigns, this led to the problem of ‘soft money’ campaigning that prevails today in many countries.

**HOW THE WAR WAS WON - FACTORS IN THE DECLINE OF VOTE-BUYING IN THE VICTORIAN ERA**

The conventional belief is that vote-buying was slain after several centuries of battle, through several simple but profound reforms: (a) the secret ballot, (b) the extension

---

144 **Borough of Wigan** (1869) 1 O’M & H 189 (employee of Liberal Association had paid rates of some electors).

145 **Borough of Windsor** (1874) 2 O’M & H 88 (member of committee offered travelling expenses, but mere assertion of membership of committee supporting candidate held insufficient proof of agency without evidence of how or why member or committee appointed.)

146 **Borough of Westbury** (1869) 1 O’M & H 47.

147 **Corrupt and Illegal Practices Prevention Act 1883**, s 22.

148 Eg King, above n 31, 134-136.
of the franchise, and (c) a crackdown on campaign expenditure and costs. To this I would add (d), the rise of national politics and professional parties.

Before we explore the issue of the decline of bribery *per se*, let us consider the decline of treating. Treating, more than any other corrupt practice apart perhaps from spiritual undue influence, is culturally specific. As electoral culture became more puritanical, so the ‘roll out the barrel’ mentality came to be seen as recherché. Similarly, the rise of mass, national and class based ‘issue’ politics also served to shift the culture away from the politics of fellowship. ‘Culturally specific’ here includes the economic value and meaning associated with a practice. The contemporary predilection for beer and circuses is strong, but it is largely de-linked from elections. As average incomes have risen, the value of an alcoholic entertainment has shifted from something that sensibly could be seen as a prima facie inducement, to something that can only be read as hospitality.

**The Impact of the Secret Ballot**

The secret ballot dramatically increased the risk of the transaction from the point of view of the briber: it largely cut off the possibility of knowing for sure that the bribed elector had earned his bribe by voting for your candidate, rather than double crossing you by voting for the other. John Henry Wigmore, a contemporary author advocating the ballot in the US context, made great claims for the secret ballot as a method of curing the ‘grosser evils’ of improper influence that beset free and fair elections, by ‘checking bribery and all those corrupt practices which consist in voting according to a bargain or understanding’. The mere outlawing of bribery under pain of penalty was too indirect and of little effect or enforceability he argued, compared to the secret ballot as a prophylactic measure. Indeed so obvious, to Wigmore or his readers, were the virtues and effects of the ballot, especially in relation to bribery, that he felt

---


152 Ibid, 29.
obliged to apologise for the tediousness of dwelling on them! At the core of the case for the efficacy of the secret ballot against bribery was the presumption that ‘[b]y compelling the dishonest man to mark his vote in secrecy, it renders it impossible for him to prove his dishonesty, and thus deprives him of the market for it’. This logic echoes earlier reformers who appealed for secrecy and reform, most notably Jeremy Bentham.

The claims of folk like Wigmore might be devalued on the grounds that they were passionate advocates of the ballot, but their arguments have both intuitive and practical logic. It is more than coincidence that the ballot preceded the decline of crude vote-buying. Direct, as opposed to correlative evidence is of course impossible to find, let alone reconstruct, although Wigmore cites empirical evidence suggesting that the secret ballot had an immediate beneficial impact from various sources, including proponents and converts, and election officials alike. Even Wigmore concedes that, in some areas, the culture of bribery may have ensured that trust between briber and bribee remained to the extent that bribes still passed hands despite voting secrecy. If nothing else, policing of the secret ballot itself became an issue, as ruses were developed to try to circumvent it (a renowned one, which survived into the 20th century in union ballots, to ensure block voting by members of factions, involved the first of a group of bribed voters smuggling his ballot out of the polling booth, where it would be completed by the candidate’s agent, returned to the ballot box by the next man, who would smuggle his blank ballot out, and so on.)

154 Ibid, 32.
156 Wigmore, above n 149, 3-4, citing Dutton and Torrens, leading politicians in South Australia.
157 Ibid, eg at 15-16 citing English evidence to the Dilke Committee.
158 Ibid, 18 n 1 citing a Nova Scotian official.
159 Similar practices persist today: mafia and indeed party control of Italian municipalities was enhanced when the voting system allowed voters to write candidate numbers on the ballot: where multiple members were to be chosen, people in particular housing blocks are instructed to list the numbers in particular orders, allowing a rough verification that the group-under-control, had voted as
However, no more than the use of voting tablets had been in Rome, the institution of the Ballot Act of 1872 was not a ‘silver bullet’ in itself; otherwise strong, specific anti-corruption legislation in the form of the 1883 Act would not have been needed. Writing in the *Westminster Review* in 1881, an anonymous author claimed that vote-buying as a singular, observable transaction had, in at least some seats, merely given way to vote-buying in the form of general largesse, ie the indiscriminate showering of constituencies with money:

In 1872 it was still possible to contend that secret voting would put an end to bribery and intimidation; but the experience of two general elections has put an end to all such illusions. Actual purchase and sale of individual votes are, of course, at an end; but corruption has never been confined to this single form. The election agent in a corrupt borough does not say to his principal, ‘You must pay A. so much and B. so much to vote for you.’ He says, ‘You must spend so many thousands in the place, or nobody will vote for you.’ The sum required for general corruption under the ballot is larger than the sum which would have sufficed before, because you must waste money on the enemy’s voters in the hope that some of them will cheat their employers and vote for you. Venal electors will take bribes from both sides (as 127 persons are proved to have done at Sandwich), and will thus be free to vote ‘according to their convictions’.  

Fabrice Lehoucq, writing recently from both an instrumentalist and empirical perspective, concluded that, ‘[t]he available research does support the claim that vote-

---

160 Rousseau claims (citing *Custodes, Diribitores, Rogatores suffragiorum*) that the use of tablets and rules of secrecy around them ‘… did not prevent the officers entrusted with these functions from being suspected of dishonesty. Finally, edicts designed to prevent intrigue and the buying and selling of votes were passed in such numbers that their very multiplicity proclaims their ineffectiveness.’ (Rousseau, above n 38, 167-8).

buying proliferates when the secret ballot does not exist’, in line with the intuition that parties will buy votes when it is cost-effective to do so. However the ballot alone is not a sufficient prophylactic, without other measures to ensure that parties cannot monitor voting, and rigorous law enforcement and campaign finance reform.

In Australia, the secret ballot eventually became the compulsory ballot. Around 1915, compulsory registration and voting, pioneered in that unlikely wellspring of democracy, Queensland, may have helped seal forever the fate of crude bribery in general elections in Australia. After all, if voters were compelled to the polls regardless, then inducements like free conveyances, beer or shillings, once effective methods of enticing relatively uninterested or lukewarm supporters to the polls, were rendered relatively worthless. Further, reconfiguring the vote as a public duty, over time, may encourage electors to see bribes as offensive or a threat to public interests, as opposed to a merely private and consensual transaction. Compulsory voting may also have been an important expedient, since there is evidence, from the US at least, that the introduction of the secret ballot brought a significant drop in turnout (whether because bribery initially dropped off and some electors had only been voting to ‘earn’ their bribe, or because elections were less colourful, open and hence the expressive value of the vote declined). Finally, legal compulsion minimises the potential for an inverted form of bribery: paying lukewarm supporters of one’s opponents to stay home on polling day.

---


163 Ibid, 8. For 20th century (US Democratic Party) examples of alleged attempts to circumvent ballot secrecy or at least monitor voting habits of bribed electors, see 9-10.


165 Geoffrey Brennan and Loren Lomasky, Democracy and Decision: The Pure Theory of Electoral Preference (1993) 220 (suggesting that ‘some of the point went out of voting when voting ceased to involve an open declaration of one’s political convictions’).

166 Lehoucq, above n 162, 10, cites an example of this in rural New York in modern times, drawing on a study of Gary W Cox and J Morgan Krouser, ‘Turnout and Rural Corruption: New York as a Test Case’ (1981) 25 American Jnl of Political Science 646.
The Gradual Universalisation of the Franchise

The gradual universalisation of the franchise through the Victorian era and into the early 20th century ensured not only a democratisation of participation and the rise of labourism. It also expanded the electorate to a point where direct bribery of enough individual voters to make a difference became infeasible. Similarly the expansion of the franchise also led to the elimination of many small, sometimes corrupt constituencies, albeit not in a single redistribution. Expansion on its own, as we noted earlier, was not a cure for vote-buying, and certainly not without the secret ballot. Lehoucq, for example, maintains that expansion initially only ‘amplified the market for votes’, ie expanded the demand for bribes. Over time, however, the combination of more populous electorates and rising campaign costs (which in an increasingly literate and media-accessible population now included print and advertising expenses) created a powerful disincentive to the continuation of a once
tacitly acceptable system of vote-buying. As the cost squeeze impacted on the resources of campaigners, economic reality became a driver of electoral morality. Bribery shifted from being a customary expectation in many constituencies, to something whose repression, through strict expenditure limits, was a practical necessity.

There are interesting paradoxes and surprises even in this apparently logical account of how the beast of crude vote-buying was slain. Blackstone claimed, in his alluringly sweeping way, that a limited franchise – typically one based on a minimum property-holding - was needed to preserve democratic goals from undue influence and corruption. The argument went that in traditional society, anyone so ‘mean’ (ie poor) that they could not generate a 40s annual income, must be a servant or peasant, subject to undue influence from more powerful, wealthier people who could not be trusted not to buy their way to power. The reason for not enfranchising the poorer classes therefore was not because they lacked education or moral development enough to have valuable opinions about politics and government. Rather, the ideal of voting was to have the choosers independent enough to be free of influence based on their personal needs, so that they could choose representatives to govern for all. Boiling it down, governance was about an ideal of the ‘common good’. Explicit also for Blackstone was a kind of ‘fair play’ amongst those in a position to compete for power: it would be unfair to those candidates who wished to work towards an ideal of public service and good, to have to compete with politicians who spent their way into power, whether by exploiting the needy or otherwise. In short Blackstone (and others) argued that the franchise had to be restricted to limit bribery. Lehoucq echoes this reasoning when he claims that ‘economic dependence does not foster autonomy, a necessary condition for a market of votes to emerge.’

169 Blackstone, 1 Commentaries, 165. For an account of how early Stuart elections (1620s-1640s) were dominated by landlord’s influence over tenants see Hirst above n 53.


171 Lehoucq, above n 162, 12.
With the rise of consciousness of class however, there was a loss of faith in the idea of ‘a public good’. Chartists and later Labour reformers could thus implicitly appeal for a universal franchise on two fronts: to give voice to the neglected interests of workers, the poor and women; and incidentally to render widespread direct bribery impractical. Blackstone’s answer would have been that enfranchising the poor simply meant more voters susceptible to smaller bribes. But as the population boomed with industrialisation, large scale vote-buying to affect a result became an even costlier exercise, not least as when prosperity spread the amount needed to buy each vote would also rise.

\[172\] Bribery being anathema to a labourite for reasons not dissimilar to Blackstone: the cost of it froze out the less wealthy candidates and parties. Bribery however was not such an important issue for the labourites as other forms of regulation needed on similar grounds, such as payment of members, campaign finance limitations, and more lately public funding of elections.
Limiting Campaign Expenditures and Practices: Fairness in Electoral Opportunity

The institution of limits on campaign expenditures, as we have seen, took the form of both caps on the level of expenses, and limitations on the types of expenditures that were legitimate. It had its roots in the mandating of electoral auditors in 1854. The UK at this stage was not experimenting with campaign finance controls - unlike the US who pioneered them federally in 1907-1911, President Teddy Roosevelt claiming prohibiting corporate donations ‘would be, as far as it went, an effective method of stifling the evils aimed at in corrupt practices acts’. Rather, the purpose and effect of UK restrictions – when enforced – was to diminish the amount of money a candidate’s agent could spend in the election, including thereby to limit the lavishness of any treating or gifts in the nature of bribes.

Thus, at the turn of the 20th century, when the question of capping and limiting legitimate campaign expenditure superseded the question of stamping out electoral bribery, the question of wealth buying political favour was less a concern in the UK than a prior question of ‘fair’ electoral competition. An example of this substantive concern with equality of electoral opportunity was the movement, given voice in the Fabian push for the remuneration of Parliamentarians, in tandem with the limitation of expenditure on elections, to ensure that Parliament was accessible to candidates without private means. Fairness found an ally in enlightened expediency: parties needed to put a lid on the cost of elections, which even without widespread bribery, were subject to upward pressure due to the increasing numbers of enrolments. Both motivations coincided with a public sentiment that saw elections as more serious affairs than before. If not dour, later campaigns would never possess the ‘colour’ of

\[^{173}\text{Cited by Frankfurter J in Us v International Union, UAW 352 US 567 (1957), 572. For an introduction to the US reforms, see KD Ewing, above n 170, ch 6.}\]

\[^{174}\text{Although of course their larger aim was to eradicate undue influence in the other direction: interest groups buying favours and influence from politicians. In either case – minimising bribery by politicians or of politicians - broader goals of political equality (avoiding ‘big money’ entrenching unfair electoral competition) and better governance (by lessening distraction of the political process from the core tasks of seeking and implementing inclusive legislative and policy responses to social problems/needs, caused by the need to constantly pursue contributions and other support from powerful, wealthy and/or influential concerns) were envisaged.}\]
unreformed elections. Indeed, such was the appeal of close regulation in the name of fairness, that, for example, certain types of electoral paraphernalia such as bunting and hat cards were variously prohibited or limited in size and content. Through this door, micro-regulation became a feature of electoral law that survives to this day. But concerns with the cost of elections and the interrelationship of bribery with that cost, as we have seen, arose as early as 1695.

The coming of secret voting with the Ballot Act, described earlier, shifted the act of polling from the public to the private sphere. Party and policy came to a large degree to supplant the individual candidate-constituent relationship. As we shall see in Chapter Three, these factors combined in at least one jurisdiction (South Australia), in the late 19th century, to lead to a prohibition on face-to-face soliciting of votes altogether, primarily driven by hysteria over electoral bribery.

All this predates the contemporary focus on the supply side of electoral finance, particularly donations and the misuse of public resources (which will be discussed in Chapter Six). From a contemporary perspective, the shift in focus is curious, in that the problem has inverted, from one of the politically powerful buying influence over the electoral many, to the few (especially corporate donors) buying influence over the politically powerful. In reality, they are both species of buying political favours - they are just directed at different stages of the political process (voting in elections cf voting in the legislature).

The Nationalisation of Politics and the Professionalisation of Political Parties

Parties, including their local associations, had long played an important role in co-ordinating campaigns as well as policies and personalities. They did so both as organisations and as parliamentary factions. However whilst the 19th century has

---

175 Captured vividly in Hogarth’s famous Election Series: reprinted and analysed in Christina Scull, *The Soane Hogarths* (1991), appendix, plates 1 and 2. One of these paintings, titled with irony ‘Canvassing for Votes’ and illustrating vote-buying, is reproduced in Appendix Two to this thesis. The other painting worth studying is ‘An Election Entertainment’, which caricatures treating.

176 See above, text at n 55.
been seen as a time of the rise and rise of the parties, there is a strong sense, explicit in the judgments, that the candidate was also a significantly freer entity than s/he came to be by the early 20th century. Party discipline, enforced both through rules, but also spread through the centralisation and nationalisation of political institutions and debate, is not as apparent.

Certainly in particular elections, issues of national importance dominate, as they always tend to do (e.g., Unionism, foreign policy, or the leader’s personalities and leadership qualities especially when dominant figures such as Disraeli or Gladstone are at the helm). But electioneering and canvassing retained an air of relative amateurism, and definite localism, about it. The candidate is a wealthy identity; he hires a friend as an agent, who hires several committee rooms. Meetings are held, bunting and handbills printed and some advertising space purchased. Entertainment including treating is organised, and electors are bribed one-on-one during the canvass, or en masse through the formalised distribution of customary largesse. Campaign teams grow quite large (sometimes through colourable employment) and agents work full time, developing expertise, which they hire out at the following election. The local campaign and the local candidates are not, however, mere ciphers for a party label. They have an independence that reflects community politics or municipal politics as it is known today, rather than parliamentary politics.

As has been written of the United States, ‘the growth of political parties and national issues … “encroached on the personal character of the relationship between representative and electors by introducing considerations of general and impersonal policy”’.177 In the UK, this process of the centralisation of politics and parties happened later, and of course there is room for debate about the degree to which the shift occurred.178 But any trend away from localism and a candidate’s relationship to his particular constituency and its electors, towards a more homogenous conception of

178 Nossiter, above n 94, 160-161, argues a revisionist position that the shift has been over-stated, or at least that broader factors and consensus in public opinion may have existed to an extent greater than historians have admitted.
the mass electorate, moved by impersonal and increasingly national policy, must have been another factor in the decline of individual vote-buying.\textsuperscript{179} So too must have the professionalisation of electoral accountancy, a legal imperative once excessive expenditure became unlawful.

Of course the mere professionalisation of campaigning was no guarantee against vote-buying. As much as the campaign agent was taken to both know and be subject of the law, he was also, as a repeat player, potentially the exponent of a developing expertise in the art of bribery and how to get away with it. But the subsequent development of more formal party hierarchies, and the accretion of power over local campaigns within those structures, was one bureaucratic means by which electoral laws could not just be internalised and transmitted, but reinforced. In particular, as the severity of the consequences of and determination to fight bribery grew, so there must have reached a kind of critical point, at which the odium of bribery was such that whilst some individuals might risk it, the collective (ie the party) wanted to avoid the taint of it. Parties, in this situation, become a means of providing effective informal sanctions and policing of bribery, because the briberous candidate cannot simply be ostracised as an isolated rogue, if his activities taint the image of all in his party.

The growth of both party and legal regulation thus became a mutually reinforcing process in another way. As electoral laws grew more numerous and complex, so too did the need for specialist structures to interpret and comply with them (both in terms of electoral authorities and policing, but in the realm of electoral actors themselves). The party becomes an indispensable source of information and advice for the candidate, as it is efficient for the party to centralise and professionalise this role of electoral law adviser and informal policing agent as much as it is to centralise resources and their allocation.

\textsuperscript{179} Burn, above n 70, at 442.
CONCLUSION

In this chapter, we have surveyed, in broad sweep, the development of electoral bribery law in the common law of the UK, to the end of the Victorian era. We have seen how certain factors such as cost, changing conceptions of fair electoral competition and the professionalisation of party politics helped underwrite what became a legal and administrative ‘war’ on crude vote-buying and treating, led by institutional reforms such as specialist election judges, the secret ballot and the mass franchise. We have also seen how the buying of seats was eclipsed by the buying of votes, first predominantly through treating then through outright vote-buying, and how the latter practices morphed in different ways (eg through ‘colourable’ employment, agency and charitable largesse) in a ‘cat and mouse game’ to avoid detection test and legal definitions or to take advantage of cultural acceptability.

A sense of history is salutary for those in every era who fear that politics and the public space it constructs is at a nadir. On any view, the problem of direct vote-buying, which plagued parliamentary electoral law for centuries until the end of the Victorian era, reflects a greater corruption of the polity than that posed by contemporary manifestations of trading in electoral support, which we shall survey in later chapters. But conversely, it is a failure of the legal imagination to remain rooted in 19th century assumptions that ‘electoral bribery’ = ‘crude vote-buying’. Whilst as we shall see in the next chapter, electoral bribery regulation was a secondary issue in electoral law in Australia for most of the 20th century, there is certainly no assumption on the face of the statutory law that the prohibition only applies to crude vote-buying or treating. As later chapters will describe, there are a host of more modern but problematic practices, from preference deals and the deals to gain lobby group support, which contemporary law must confront.

Whilst we must unshackle the legal mindframe from 19th century assumptions, that does not mean the lessons of the earlier era are irrelevant. Far from it. As we will see, drivers such as the cost of elections and questions of fair electoral competition remain key issues for electoral regulation. So too, differences between contemporary and historical problems remind us that questions of political landscape (eg the size of
the electorate, the rise of parties over candidates) and techniques of campaigning (eg face-to-face and communal campaigning versus the mass media) are vital in structuring both what is possible and our understanding of what is acceptable in electoral conduct. A detailed historical appreciation also reminds us that defining what is acceptable and unacceptable in terms of swaying votes and influencing electoral support has never rested on grand normative or moral theories about political virtue or the aim of governance, but has been more a question of a nuanced dialogue between law and political conduct. This dialogue is played out as the law develops from particular instances or categories of conduct (eg treating or payments for conveyances), and only develops in the context of political behaviour, understood not as a question of abstract political ethics, but as an evolving question of balancing factors such as wealth, power and cost in relation to existing electoral frameworks (eg electorate size) and technologies (eg the ballot). In short, electoral bribery laws are as much about civilising the conduct of political life as they are about dreaming of some pure or utopian form of public life.
Chapter Three

The Australian Experience of Electoral Bribery.

Evolution and Historical Caselaw

CHAPTER COVERAGE AND PURPOSE

Whereas the previous chapter focused on the British legacy, this chapter will describe the evolution of electoral bribery laws in Australia including most of the – relatively sparse – formal case law elucidating these provisions.

In terms of legislation, the chapter focuses on the rules governing national parliamentary elections, ie the Commonwealth Electoral Act (CEA). This is not a fudge to save space nor a slight on state law, but a focus on the national legislation, which in electoral regulation in Australia forms a paradigm for debate. In any event, the variations in current state legislation from the anti-bribery rules in the Federal Act are more matters of drafting style than substance. (Comparative tables and samples of the contemporary provisions are gathered in Appendix One.)

To understand the shape of the initial Commonwealth law (CEA 1902) it is instructive to examine the parliamentary history of the colonial laws – the South Australian Electoral Act 1896 in particular - which inspired the relevant parts of the CEA

180 Future references to the ‘CEA’ will be references to the current Act, ie the Commonwealth Electoral Act 1918 (Cth) in its present form, unless qualified (eg CEA 1902 or ‘former CEA 1918’).

181 Finn argued in 1977 that ‘the State and Commonwealth electoral Acts have no uniform approach to the control of malpractice – either in its naked, or in its more subtle, forms’ but he was referring to a much wider terrain than bribery law, as he was examining offences generally (including misleading campaigning and expenditure): Finn, above n 26, 207. Even in relation to bribery, the divergences he notes at 209 were in large part smoothed over in updates to State laws especially in the 1990s.
Chapter 3: Evolution of the Australian Law

1902. The discussion of the evolution of Australian statutory law is throughout illuminated with references to the Parliamentary Debates. In contemporary legal research, Hansard is often discounted; the debates it reports are seen as either too formal or staged to shed light on the detail and context of legislation, or, given modern party discipline and executive dominance, too restrained to be revealing. But these factors were not such concerns at the turn of the 20th century, when deliberation on Bills was more robust than today. In any case, Hansard remains an ideal reference for discussion of electoral law. Parliamentarians are political actors and animals by trade, and as the primary subjects and overseers of electoral law they know its intricacies and terrain intimately, and are the key repositories of knowledge about actual electoral practice and conduct. Admittedly they are not always open about their partisan motivations – as opposed to principled reasons – for advancing certain positions on electoral law. However far from being repressed by some politesse generated by cartel parties dominating parliamentary debate, revealing allegations about electoral conduct and alternative viewpoints are brought directly to the surface by the inherently competitive nature of discussion of electoral regulation.

Interspersed in the discussion of the CEA is discussion of several early Australian cases of electoral bribery. Given that the initial debates occurred early in the new federation, the important early cases are of colonial origin. The cases are noteworthy because they were current in the legal mindframe when the CEA was being framed.

In the second section of this chapter, the current bribery provisions, as found in the CEA 1918, are documented, with reference back to any significant changes from the 1902 position. At the tail of this section, under the heading ‘Legal Mushrooms’, legislative provisions that appeared after 1902 but have since disappeared are also

---

182 For a chronicling of the changes in the South Australian provisions, see Dean Jaensch, Community Access to the Parliamentary Electoral Process in South Australia since 1850 (2002) 112-115.

183 As Ian Marsh argues in some detail, ‘Parliament was a substantial arena in the 1901-0 period. This contrasts with the dignified and ritualistic role it has come to play in the two party era.’ Ian Marsh, Beyond the Two-Party System (1995) 283.

184 This is not to say their often self-interested decisions as to the shape of the law should be given deference, merely that their debates are the richest source on the topic.
outlined. These are not just curios, for they reveal something of the shifting concerns and debates in the 20th century and their relevance to evolving campaign practices.

The third section surveys 20th century Australian case law and incidents concerning electoral bribery as traditionally understood, i.e., as tangible incentives to individual electors to induce their votes. Of this, there is a very limited amount. Indeed the chapter concludes with the contemporary discussion of seemingly risible concerns over whether ‘treating’ is still of any practical concern to the law regulating campaigning.

The purpose of this chapter, aside from chronicling the development of the law in Australia to the latter quarter of the 20th century, is two-fold. One is to show how the issue of electoral bribery fell into abeyance but never off the radar of electoral law. The problem of crude vote-buying experienced in the UK and described in detail in the previous chapter, did not translate on the same scale onto the newly evolving Australian electoral scene. In large part this was because the Australian system, whilst in general inheriting British style party structures and campaign practices, was couched in a more egalitarian political and social culture. That culture reflected itself, amongst other things, in a more democratic and, for its time, state-of-the-art electoral law, including the early adoption of legal forms such as the universal franchise, the secret ballot and compulsory voting, forms which as we saw at the end of the previous chapter were important impediments to crude vote-buying.

The other aim of this chapter is to reinforce a point made at the end of the previous chapter. That is that implicit legal assumptions that electoral bribery could only exist in its traditional paradigm of crude vote-buying or treating has left the legal mindframe and machinery poorly equipped to comprehend and respond to the more subtle and indirect modern manifestations of the buying of electoral support, conduct which will be examined in later chapters.
THE INAUGURAL COMMONWEALTH PROVISIONS and their COLONIAL SOURCES

The first Commonwealth election was held in 1901 under State laws.\(^{185}\) Along with the representativeness of different methods of distributing seats and of voting, the most pressing issue of electoral regulation for the new Commonwealth Parliament was defining the franchise. In particular, how to institute a one-person-one-vote principle, whilst still carving out certain racial exclusions from the universal franchise.\(^{186}\) In this environment, questions of campaign ethics and regulating electioneering tactics were sublimated. Indeed a desire to broaden the franchise remained the foremost concern of electoral administration for some decades, giving rise to a Benthamite concern with systems and practices that would maximise enrolment and voting,\(^{187}\) and culminating in compulsory enrolment in 1911 and compulsory voting in 1919.\(^{188}\)

We can see from this that a spirit of egalitarianism was prevalent in early national electoral law, albeit one cocooned in a White Australia Policy. That spirit is significant to the bribery question, in that it reflects a widely shared assumption that Australia was a polity of relative equals, that had largely - if not completely - left behind such British diseases as undue influence in the form of electoral bribery. A second element in the relative lack of focus on anti-corruption mechanisms was a belief that the laws that had evolved in the latter half of the 19\(^{th}\) century were both apt and well understood,\(^{189}\) and that corruption was no longer, if it had ever been,


\(^{188}\) Compulsory voting having first been adopted in Queensland in 1915.

\(^{189}\) Thus, in introducing the Commonwealth Electoral Bill 1902 at 2\(^{nd}\) Reading Stage, Sir William Lyne stated merely that ‘[The Offences and Penalties Part] deals with electoral offences such as breach of duty, bribery, undue influence … The provisions … are similar to those contained in the various
rampant or widespread in Australian elections, although, as we shall see, there is evidence of its concentration in some, especially smaller, regions.

Nevertheless, the memory of electoral bribery and treating was still strong in the legal consciousness. Petitioning of election results in the colonies, throughout the latter third of the 19th century, had been far from uncommon, although more often than not the petitions failed. The reason cited was often insufficiency of evidence – although this could as much relate to linking malpractice to the candidate and his agents, as to problems in proving its existence. Far from suggesting perfectly clean elections, the petition record may suggest a high degree of professionalism in keeping candidates and agents aloof from the dirty work. It also recognises the fatalistic

---

190 ‘Is there a shadow of evidence for the suggestion that bribery and corruption have been rampant in Australia? No.’ Senator St Ledger, opposing one ostensibly anti-corruption measure: Commonwealth, Parliamentary Debates, Senate, 26/10/1911, 1861. A more contemporary claim, by one who would later be a ‘Founding Father’ was Sir George Kingston’s that in no election he had been personally interested had bribery occurred (a claim the Hansard reporter recorded as being greeted with affirmations of ‘Hear, Hear’): South Australia, Parliamentary Debates, Legislative Assembly, 24/6/1879, col 230.

191 For example, in Queensland from 1863 to 1888, at least 5 petitions alleged corruption in the form of bribery or treating: the East Moreton Petition; Brookes v Edmondstone (1863); the West Moreton Petition; Foole v O’Sullivan (1867); the Bowen Election Petition; Long v Beor (1877); the Aubigny Election Petition; Cooke v Perkins (1883-4); and the Cairns Election Petition; Kingsford v Wimble (1888). The Cairns Election Petition is discussed below, text at nn 214-8. The Aubigny Election Petition succeeded, Perkins being ‘declared to have been guilty of bribery and corruption’. The petition itself specified allegations of treating with alcohol, and also undue influence as a Minister of the Crown over employees in ‘Government Works’: Report from the Committee of Elections and Qualifications in the Matter of the Petition of Certain Electors of Aubigny against the Election and Return of Patrick Perkins Esquire, the Sitting Member for the Electoral District of Aubigny, Queensland Legislative Assembly, 21/2/1884, 2-3.

192 Eg the West Moreton Petition was resolved with a declaration that the evidence did not ‘implicate[] any one of the Candidates at the election, by himself, or his authorised Agent’: Report from the Committee of Elections and Qualifications in the Matter of the Petition against the Election and Return of the Sitting Members of the Electoral District of West Moreton, Queensland Legislative Assembly, 17/10/1867, 2.
realisation, to use the words of one South Australian colonial politician, that legislation could not ‘prevent bribery, seeing that it was always committed in secret.’ No less worrying in this regard were signs of a lack of backbone on the part of colonial Parliamentarians who formed the juries of ‘assessors’ to hear petitions in many jurisdictions. But, to be fair to them, those men, being by definition successful candidates, would have felt more keenly than anyone else the fear of mud being thrown in unfounded petitions.

There remain, as Scott Bennett observes in a study of corruption in colonial Tasmania, serious ‘problem[s] for the historian seeking to investigate electoral corruption [in] the great difficulty of procuring reliable evidence.’ Nonetheless, in a case-study of corruption at successive Huon Legislative Council elections of 1880-1, Bennett concludes that that ‘electoral corruption apparently was widespread throughout [that] Colony’, albeit that ‘there is no doubt the popular belief regarded [the Huon] as the rottenest apple.’

Huon seems to have been a perfect illustration of the successful taking root, in the colonies, of the traditional British electoral culture that was described in the previous chapter. The Huon was a broad rural district, with just 125 enfranchised voters, at a time before both the universal franchise and the advent of parties. Despite – or perhaps because of the limited numbers on the roll (which rendered individual bribery more effective) – small fortunes were spent on campaigns. The successful candidate

---

194 For example, see the Cairns Election Petition; Kingsford v Wimble (1888), below, text at nn 214-8.
196 Ibid.
197 Ibid, 34.
198 To this day, Tasmanian Upper House politics remains the province of independents. An historical fear of corruption, combined with a desire to keep parties out, seems to underpin the maintenance of strict expenditure limits in the Electoral Act 1985 (Tas) Pt VI. Only about $9000 is permitted on any candidature, including expenditure by supporters. Such strict limits are now unique in Australian law: see Graeme Orr, ‘The Currency of Democracy: Campaign Finance Law in Australia’ (2003) 26 University of New South Wales Law Rev 1, 14
declared over £244 of campaign expenditure at the 1880 poll: almost £2 per elector.\(^{199}\) After the first successful petition, when bribery and treating were proven on the part of the successful candidate’s agents, a re-election was held. Bizarrely enough, the tainted candidate was allowed to stand. He won again, but when another petition was mounted, he stepped aside, ostensibly for the public-minded reason that he feared that the electorate as a whole would be disenfranchised. A culture of malpractice, apparently affecting candidates on both sides, had grown up to the point of creating Robin Hood-like expectations of vote-buying and treating amongst electors, especially when wealthy candidates from outside the district sought the seat. Bennett gives one returning officer’s assessment of the electors as a whole:

… [they] were uneducated and had acquired properties only after a hard struggle, ‘they have been led to think too much of money, and too little of the responsibilities devolving upon them as burghers.’ Such people not unnaturally expected treating from wealthy candidates, though they would not dream of accepting such from poorer candidates …\(^{200}\)

However widespread such corruption had been in 19\(^{th}\) century Australia, as a result of its memory, anti-bribery provisions were prominent, in numerical terms at least, in the inaugural CEA 1902. The Commonwealth provisions were in large part drawn from the 1896 South Australian and 1899 Western Australian provisions (the West Australian are of lesser interest, having been modelled on the South Australian).\(^{201}\) The cornerstone was CEA 1902, s 175:

Whoever –

(i) Promises, or offers, or suggests any valuable consideration, advantage, recompense, reward, or benefit for or on account of, or to induce any candidature, or withdrawal of candidature, or any vote or omission to

\(^{199}\) Bennett, above n 195, 27.

\(^{200}\) Ibid, 33, citing Edward Innes in *The Mercury* (Hobart) 19/10/1880.

\(^{201}\) *Electoral Act 1896* (SA) ss 153, 155-163, 168-169, largely replicated in *Electoral Act 1899* (WA) ss 123, 125-134, 139-140.
vote, or any support of, or opposition to, any candidate, or any promise of any such vote, omission, support, or opposition:

(ii) Gives or takes any valuable consideration, advantage, recompense, reward, or benefit for, or on account of, any such candidature, withdrawal, vote, omission, support, or opposition, or promise thereof:

(iii) Promises, offers, or suggests any valuable consideration, advantage, recompense, reward, or benefit, for bribery, or gives or takes any valuable consideration, advantage, recompense, reward or benefit for bribery:

shall be guilty of bribery.

The use of litany in the drafting is not kind on modern eyes. However the provision and its South Australian and Western Australian forbears were models of clarity compared to the ad hoc sections that had evolved, or rather accreted, over the 19th century. The new wording survived the major overhaul and consolidation of the legislation in 1918 (becoming CEA 1918 s 175) and was not modernised until the major re-write brought about by the Commonwealth Electoral Legislation Amendment Act 1983 (Cth).

202 For example, the Electoral Act 1895 (WA) s 105 read: ‘Each of the following acts shall be deemed and taken to be an act of bribery and corruption on the part of any candidate at any such election, whether committed by such candidate or by any agent authorised to act for him: that is to say, the giving of money or any other article whatsoever to any elector, or the making with or giving to any elector any agreement or security for any gift or reward, or the holding out to any elector any promise or expectation of profit, advancement, or enrichment to himself or to any of his family or kindred or friends or dependents in any shape, or making use of any threat to any elector, or otherwise intimidating him in any manner, or the treating of any elector, or the supplying him with meat, drink, lodging, or horse or carriage hire, or conveyance by steam or otherwise whilst at such election, or whilst engaged in or coming to or going from such election, or the payment to any elector of any sum of money for acting or joining in any procession during such election or before or after the same, or the keeping open any public house, shop, booth, tent or place of entertainment, whether liquor or refreshment of any kind be distributed threat or not, or the giving of any dinner, supper, breakfast, or other refreshment or entertainment at any place whatsoever to any elector with the view in any such cases as herein specified of influencing the vote of any such elector.’

203 For the full text of the current provision, CEA s 326, see Appendix One.
From a statutory interpretation perspective the noteworthy question in 20th century electoral bribery law is the width of terms such as ‘any … advantage … or benefit’. On their face these are wide words, but on orthodox interpretive principles, the 1902 provision could be read down to tangible incentives, in the context of the class formed by the surrounding terms ‘valuable consideration … recompense, reward’.

**Candidature – Temporal Scope**

Candidature was defined, in CEA 1902 s 3, as ‘includ[ing] any person who within three months before the day of election offers himself for election’. In debate, some Parliamentarians objected that this period was too long, since formal nominations typically might only occur within a month or so of polling day. Others objected that the idea of ‘offering’ oneself as a candidate was too vague, compared say to making a ‘public announcement’ of candidature.

Attorney-General Deakin defended the new definition, citing:

> ‘[a] case [which] occurred in one of the States, in which the intention to bribery and the fact of bribery were manifest, but it was perfectly impossible to to have justice done, because the bribery had taken place some two or three months before the actual date of election.'

Similar debates had marked the *Electoral Act 1896* (SA). Indeed one of the few elements that raised passion in the 1896 parliamentary debates concerned when a candidature commenced. Most South Australian members wanted precision and a limited time period in which candidates would be liable for illegal inducements. They complained that a government could spring an early election, catching out those who had already been campaigning close to the wind. They also feared that relatively innocent affairs, such as a member entertaining friends with a political dinner, would be caught in the net. In short they wanted a narrow and clear-cut rule that would

---

cordon off a period (of a month or so) prior to polling where candidates would have to be scrupulous, but outside of which the Act would not run. Thus, the South Australian Legislative Council voted to restrict candidature from the first public declaration or confirmation of intention to stand after the election writs were issued.

However the South Australian government warned that this would open the way to abuse, as those intending to stand could bribe freely until they made – a probably delayed – formal declaration of their candidature.\textsuperscript{206} The government’s position was that bribery could occur at any time: the only test was whether an intention to influence an elector was present. Only after a conference between the two houses did the Legislative Council back down on their narrow definition, and approve the three month rule as a compromise.\textsuperscript{207} In any event the debate showed a parliamentary concern that the war on vote-buying be curtailed, in the interests of the majority of candidates, who were presumed to have been innocent of any intent to corrupt their electorate. That rule filtered through into the new Commonwealth Act, however it is no longer the law – not surprisingly given the modern penchant for a ‘permanent campaign’ and a recognition that candidate activity is much less important today than ongoing and centralised party activity.

**Exemption for Statements of ‘Public’ Policy or Action**

Also following the South Australian precedent,\textsuperscript{208} the CEA 1902 carved out an explicit exception for any ‘declaration of public policy or promise of public action’.\textsuperscript{209} (This exception applied to both bribery and undue influence.) The principle behind this must have been taken for granted, as the provision generated no debate at the Federal level, and minimal at the South Australian level. The principle on its face seems clear: elections are about winning support based on promises of legislative or governmental action if one wins power. It was not just legitimate for electors and

---

\textsuperscript{206} South Australia, *Parliamentary Debates*, Legislative Assembly, 11/12/1896, 953 (Attorney-General).

\textsuperscript{207} *Electoral Act 1896 (SA)* s 5.

\textsuperscript{208} *Electoral Act 1896 (SA)* s 159.

\textsuperscript{209} CEA 1902 s 179, which became CEA 1918 s 160.
politicians alike to expect and make such metaphorical ‘bribes’, but on one liberalist view of electoral democracy as a utilitarian calculation of individual self-interest, such campaigning was desirable. This is not to say that this view represented a consensus view of the only proper aims of governmental power, let alone electioneering. With Federation dominating debate in a still young electoral tradition, building a sense of national interest, without upsetting parochial identity, was a more central concern of government than maximising individual self-interest. Between the cross-currents of Tory conservatism, mercantile interests (protectionist or free-trade) and Labourism, which were all equally rooted in class affiliations, electoral politics was more about group identity, loyalty and visions than it was about self-interest as we know it today. Australia then was a Benthamite society, but a distinctively pragmatic and State oriented one, rather than one where individualism and a market based conception of politics reigned supreme.210

Nevertheless, there was felt to be a need to clarify that undertakings to benefit particular groups of voters, as long as they were made publicly in terms of promises of policy or action, were not bribery. Perhaps it was feared that case law against charity and largesse by candidates, forged in Britain in less egalitarian times, might mutate into judgments against egregious swaying of votes through partial dispersal of public funds and benefits. It may also simply have been an exemption felt necessary once descriptions of benefit had broadened from the narrow focus on money or employment to otherwise all-encompassing terms such as ‘any valuable consideration, advantage, recompense, reward or benefit’.

The provision, as we shall see in Chapter Six, remains the bulwark separating ‘metaphorical’ bribery – vote-buying through pork-barrelling – and unlawful bribery. The dividing line of course is not without interpretive difficulty. In the South Australian debates, an innocent suggestion was adopted, to insert ‘public’ before both ‘policy’ and ‘action’ to clarify that a public declaration of a benefit for a particular person might remain brierous.211 But this intervention invites the question of when a


211 South Australia, Parliamentary Debates, Legislative Assembly, 15/12/1896, p 971.
policy or promised action is sufficiently ‘public’, in the sense of generalised, to qualify for the exemption. At the turn of the 20th century, marginal seat campaigning was not the science that it is today, but in the smaller seats of the day, the idea that targeting benefits to a handful of wavering or influential electors might clinch an election was surely not foreign.

**Treating, Wagering and Licensed Premises: Wowserism or Electoral Purity?**

In the CEA 1902, treating was specifically deemed to be a form of bribery, as too was the provision of hired conveyances, provided it could be shown that the ‘meat, drink or entertainment’ or conveyance was supplied to voters ‘with a view to influence [their] vote’. For some time afterwards in the early Federation, these provisions, or at least their enforcement, proved problematic. This was to be expected in a society known for its liberal consumption of alcohol. Whilst the treating law would later be claimed to be ‘a farce’ in practice, the treating issue did not, in fact, go the way of the dodo. The proper dividing line between hospitality and undue entertainments continued to trouble at least conscientious candidates. One Senator in 1911 sought to clarify the law by advocating a strict prohibition on ‘meat or drink at any political meeting’ during an election campaign.

It is clear that allegations of treating in late Victorian Australia were clearly far from matters of levity or sport, and they often blended into with claims of outright bribery. For example, the political and journalistic caste in the colony of Queensland was enlivened, if not rocked, by allegations and revelations in the *Cairns Election Petition; Kingsford v Wimble* of 1888.

---

212 CEA 1902 s 176, which became CEA 1918 s 157. But note that one could still provide lifts using unrented vehicles, so that the provision is best understood as primarily one about limiting the cost of elections.


214 *Certificate and Report by the Elections Judge in the Matter of the Petition of Richard Ash Kingsford against the Election and Return of Frederick Thomas Wimble, the Sitting Member for the Electoral District of Cairns with the Minutes of the Evidence Taken before the Tribunal*, Queensland Legislative Assembly, 13/11/1888.
poll. Kingsford alleged promises and payments of specific amounts, by Wimble or specific agents and supporters, to some 17 electors, as well as treating generally during the election, and a count of treating after the election tainting a further 11 votes. In a further instance, a promise to misuse public power (in the form of a right of way on the elector’s land) was also specifically alleged. The particulars also claimed that the candidate money had been furnished money to his agents on the understanding it as to be used for treating and vote-buying.

As was the Queensland practice, the assessors – MLAs chosen by the parties – heard the evidence as a virtual jury. They unanimously found the case ‘Not Proven’ (the so-called ‘Scottish verdict’, which differs from a finding of innocence), but this seems to suggest a sensitivity to attributing agency and a concern with conflicting accounts of transactions that had occurred mostly in private, rather than a denial that corruption had taken place. The overseeing Elections Judge (Chief Justice Lilley) instructed the assessors explicitly about the ‘large’ amount of expenditure unaccounted for by Wimble and his team. He was moved to report:

… in relation to the Sitting Member, that a considerable sum of money had been spent in paying publicans and others for alleged “expenses”; that some of the accounts sent in contained no details; that the candidate (Mr Wimble) was sent out of the committee-room when the accounts were to be examined; that he afterwards paid them without any scrutiny himself – relying on his agent and committee; and that these accounts were not forthcoming, because (as his agent … said) they had been destroyed, lost, or were “knocking about the office in Cairns.”

Either a miracle saved Wimble’s seat – or his parliamentary colleagues were not ready to bite the bullet. A cynic might suggest that a briberous culture prevailed, of which they themselves were part; though it is noticeable that Wimble did not level counter-allegations (or ‘recriminatory charges’) against his petitioner. In any event the Chief Justice recommended substantial tightening of the rules relating to election

\[215\] Ibid, 100.
\[216\] Ibid, 3.
expenditure. *The Brisbane Courier* agreed, in purple indignation against what it clearly believed was a corrupt poll:

… we hope that … Parliament will not be slow to pronounce at least some judgment on the scandalous proceedings which took place at the Cairns election, and upon the extensive means employed to corrupt in a wholesale manner a community in the exercise of what ought to have been a sacred and patriotic trust.\(^{217}\)

The new Premier, Sir Thomas McIlwraith, seemed to agree that a miscarriage of justice had occurred, blaming either the Judge or the assessors for not finding Wimble guilty of at least illegal practices relating to expenditure.\(^{218}\)

In a similar vein, a bitter defamation case arose in Queensland in the same year. On this occasion, the boot was on the other political foot, with Premier McIlwraith suing an opposition MLA for claiming, at the declaration of the MLA’s poll, that the Premier and his partisans had tried to buy votes in the MLA’s electorate. The alleged words were:

… my opponent [ie McIlwraith’s candidate] and his friends were extremely lavish of their money. I had not those sort of friends, and from the way that the money of my opponent was used in the election, I am very glad that I had not. Sir Thomas McIlwraith had three or four public-houses in the district thrown open, and there free drinks could be obtained …\(^{219}\)

The MLA’s central defence was that he had not slandered the Premier personally, but merely referred to treating by his party as a collective. Of course the truth in cases

\(^{217}\) *The Brisbane Courier*, 14/11/1888, 4.

\(^{218}\) Queensland, *Parliamentary Debates*, Legislative Assembly, 13/11/1888, 1112 (The Premier): If the current legislative provisions had been properly argued or explained, ‘and the evidence given in court by Mr Wimble was not enough to bring him under that Act, God help us for any Act of Parliament … I only regret that those provisions were not carried out. If they had been we might have got a different result in one of the decisions.’

\(^{219}\) *McIlwraith v Grimes* (Interlocutory Appeal, Queensland Supreme Court, *The Brisbane Courier*, 3/10/1888, 7).
like these is uncoverable. But the fact that a successful candidate would have dared to raise such allegations, and that the Premier and his party were moved to take the risks inherent in litigating political defamation, and so quickly after the event, suggests that the stakes were high all around. Treating must have been assumed by all sides to be a potentially significant influence on electors, if not widely practised, or else its allegation would have been ignored as fanciful or insignificant. Clearly it was still a profound political slur.220

Treating remained a part of electoral culture in at least some regions at the fin de siècle. In the 1891 Tasmanian case of Brighton Election Petition; Mugliston v Dillon, amongst a variety of allegations of corruption against the member, Dillon, were a patchwork of claims of treating: from the equivocal (three bottles of whiskey to a man for providing a meeting room at his house) to tales of election meetings at hotels, where the candidate encouraged drinking, and where his agent and the barkeeper supplied free drinks to the point where some in attendance became drunk.221 As the Tasmanian Chief Justice held, treating (or bribery for that matter) was no less corrupt merely because a candidate felt obliged to do it because of cultural expectations that might cause him to lose popularity if he didn’t oblige, or lose support to other candidates who did.222 A similar case of unseating for treating arose three years later, also in Tasmania, in the Cumberland Election Petition; Brown v Urquhart, where evidence included the agent buying 64 drinks at one hotel, the equivalent of a couple of drinks for every person who voted in that town, and of attending another town’s

220 For an earlier Queensland case alleging ‘bribery and corruption by treating and otherwise’, see the petition of various electors in the seat of West Moreton, Report of the Committee of Elections and Qualifications (Forbes v Challinor), Minutes of the Committee, Queensland Legislative Assembly, 16/5/1861. The petition was not heard as Challinor was unseated as a disqualified candidate (being the Ipswich Coroner).

221 Brighton Election Petition; Mugliston v Dillon (1891) 13 ALT 44, 47. In relation to Tasmanian elections in colonial times note Newman, above n 111 at 95 (description of riotous behaviour at pre-ballot elections) and at 100 (drafting flaw in earliest Tasmanian ballot reform, whereby treating only by candidates rather than agents was covered, did not seem to affect success of ballot in taming excesses).

222 Ibid, 47, citing the Borough of Wallingford (1869) 1 O’M & H 57 at 58-9 (per Blackburn J).
hotel some 13 times to shout drinks.\textsuperscript{223} Widespread treating was also an aspect of the successful \textit{Huon Election Petition}, described earlier. There, the unsuccessful candidate was a teetotaller, and his objection to treating was not just with its tendency to corrupt, but the competitive disadvantage he suffered since his principles prevented him shouting drinks.\textsuperscript{224}

The CEA 1902 was thus born into a legal system well aware of the problem of treating and the cultural equation of alcohol and electoral politics in parts of Australia. Relatedly, a clause prohibiting the use of licensed premises for election purposes was included of the original Commonwealth Bill. Its heritage was as a general anti-treating measure, but it also reflected concerns with public order and decorum.\textsuperscript{225}

Such a provision, or at least one outlawing the use of any part of licensed premises as a ‘committee room’ (ie a campaign office or place from which to promote a candidature), was enshrined in the Western Australian legislation.\textsuperscript{226} Strong debate waged between the Senate and the House over the use of licensed premises. The House insisted on voting the prohibition down. Its objection was that in some rural locations the pub was the best, if not only, place in which to address potential electors.\textsuperscript{227} Reluctantly, the Senate caved in.

Wagering on an election was also criminalised, with a maximum penalty of £50.\textsuperscript{228}

This curious provision provoked more than a modicum of Federal Parliamentary

\textsuperscript{223} \textit{Cumberland Election Petition; Brown v Urquhart} (Tasmanian Supreme Court, \textit{The Mercury} (Hobart), 15/2/1894, 4).

\textsuperscript{224} Bennett, above n 195, 29.

\textsuperscript{225} For an earlier case turning on whether the dining-room containing the polling booth was sufficiently separate from the licensed premises (owned by the returning officer!), see \textit{In re Rapken; ex parte Stewart} (1888) 14 VLR 317 (local government election).

\textsuperscript{226} \textit{Electoral Act 1896} (WA) s 131. It was not a West Australian initiative of course. Some other States, such as Tasmania had similar provisions, and its inspiration dated to earlier UK battles against treating.

\textsuperscript{227} Compare Commonwealth, \textit{Parliamentary Debates}, Senate, 4/9/1902 15774-80 and 15800-9 and House of Representatives, 24/7/1902 14647-8. There were also conflicting opinions over whether newly enfranchised women voters would be more put out or deterred by meetings held in pubs, or meetings held in the elements!

\textsuperscript{228} CEA 1902 s 182.
debate. One Senator justified the prohibition by reference to fears of widespread wagering as a cover for corruption. He alleged that a Tasmanian Minister of the Crown, having been unseated for illegal practices, nonetheless stood again for election and his supporters ‘went through the electorate and said to elector after elector – “I will bet you so much that [that candidate] does not get in.” The result was that the people with whom the wagers were made voted for the candidate and he was returned.’

He may have been referring to the *Brighton Election Petition*. As noted earlier, the Tasmanian Full Court there unseated the member, Dillon. His sins of bribery and treating included two counts of briberous wagering. A short extract from the evidence of the co-wagerer captures the flavour:

This was about a month or six weeks before the election. Dillon and I were the only two people in the dining room [of a hotel]. Dillon asked me what I thought of the election, what sort of chance he had. I told him I thought he would be returned. He offered to make a bet of £5 to £1 that he was not. I said I would take the £5 that you are returned. We shook hands … There was another bet a short time before the election … [Dillon’s agent] was present. We talked the election over, and I bet Dillon a level sovereign that he headed the poll at Green Ponds…. After the £1 bet I bet him a champagne supper that he would be returned. Mr Dillon made the offer of that bet.

Dillon admitted the conversations, but claimed that he had neither offered the bets, nor agreed to them. The voter said he voted for Dillon. It might be wondered why a candidate would keep accepting bets, especially for smaller amounts. Perhaps he felt a need to keep in the elector’s good books; or perhaps he was nervous of winning and each bet represented more insurance. The Court had no qualms finding the allegations proven, in part because of other stark evidence, in which Dillon, on being rebuffed by a voter, had said ‘If I give you three guineas will you vote for me, and induce other

---


230 *Brighton Election Petition; Mugliston v Dillon* (1891) 13 ALT 44.

231 Ibid, 45-46.
members of your cricket club to vote for me?’\textsuperscript{232} The unseemly amounts of money on offer, especially in the first bet, are noteworthy. Princely sums were not unusual in a betting culture, nor necessarily uneconomic from an electoral perspective if the voting population were small (Tasmania was then far from a universal franchise, and voting was voluntary). But a more revealing piece of evidence was elicited from the elector. When asked if he had sought to collect his winnings, he replied that he had been dissuaded from doing so, having told Dillon would never pay up. If this is true, it is easy to see how costless wagering could be, since unless a trusted stakeholder was used, short of blackmailing the candidate the wager was legally and practically unenforceable; in contrast, those directly bribed for their vote could expect payment upfront.

A Western Australian Federal member even wanted electoral wagering of any sort to be made an offence \textit{equal} to bribery, a suggestion the Government did not treat seriously enough for his liking:

‘The Minister for Trade and Customs may smile, but he would not do so had he had my experience of the results of wagering in elections. It is extremely dangerous to allow people to wager in this way.’\textsuperscript{233}

He was supported by a fellow Western Australian who claimed to know of candidates who had ‘laid wagers with individuals who were able to influence a large number of voters, that they would not win’, a practice he felt was ‘one of the most insidious and objectionable methods of bribery’.\textsuperscript{234} This curious mix of bribery and influence has modern resonances, in that serious buying of electoral support on a large scale today is best done by acquiring the support of influential people, eg in the media or lobby groups.

\textsuperscript{232} He was still rebuffed: ibid, 46.
\textsuperscript{233} Commonwealth, \textit{Parliamentary Debates}, House of Representatives, 24/7/1902, 14647 (Mr Mahon).
\textsuperscript{234} Ibid (Mr Fowler)
On the other side of the wagering debate stood some Parliamentarians who felt that the general proscription of bribery was sufficient to cover cases where a candidate personally, or through agents, laid bets against themselves. One Senator seemed to think that outlawing all betting on elections was tantamount to cultural insensitivity, since ‘in Western Australia it is the invariable custom for nearly every one to bet on the result of an election’. However the anti-wagering measure passed into the CEA 1902, not just because of some implicit wowserism, but because of a genuine fear that permitting wagering generally would make it easier to hide briberous wagers. It remained, until a re-write of the Act in 1983. Today, large scale betting on Federal elections is commonplace, especially through Northern Territory bookkeepers – the odds are regularly reported on the assumption that it they may reflect insider knowledge of the likely outcome.

As regards the prohibition on hired conveyances in the early CEAs the purpose was mixed. In part, as we saw in the previous chapter, it was a hangover from the days when a free excursion to the city or town on polling day was of sufficient value to be a lure; in part it was because excessive payments for hiring had been used as colourable bribes. But by the early 1900s the provision had been watered down and was largely meant as a restraint on the cost of elections per se. By 1905, one Senator was pragmatically claiming that since some candidates continued to hire vehicles, and wealthy ones could lawfully use privately owned vehicles, the prohibition on hire

---


236 It became part of the Table of Offences in CEA 1918, s 170, which was overhauled in 1983 following Commonwealth, Joint Select Committee on Electoral Reform, *First Report* (Sept 1983) ch 13. Wagering remains an offence at NSW and Tasmanian elections, for instance: *Parliamentary Electorates and Elections Act 1912* (NSW) s 154; *Electoral Act 1985* (Tas) s 248 (subject to repeal by *Electoral Act 2004* (Tas)).

237 This effect was not entirely spent in less built-up parts of Australia: see eg the suspicious allegations in *Brighton Election Petition; Mugliston v Dillon* (1891) 13 ALT 44, 47.

238 Again, see the suspicions raised at ibid, 46-47, where payments as high as £10 for the use of a horse and cart on election day were alleged.
should be withdrawn to equalise competition.\textsuperscript{239} The Federal government eventually agreed that the provision was unenforceable.\textsuperscript{240}

A campaign practice known as ‘shepherding’ also arose, involving agents or candidates providing lodging to electors, on the night before a poll, in their own houses. Superficially, shepherding might have suggested both treating and briberous conveyancing. Where done without intent to influence votes, it would have been unobjectionable. Indeed the term implies protecting, if not herding, one’s own supporters, whether to help ensure they voted or to ensure they were not subject to bribes from an opponent. There appears to have been at least one case in which this form of conduct was held not to have been bribery.\textsuperscript{241}

The curious amount of attention directed to questions of treating, wagering and conveyances provides a gloss to the rule that Australian electoral law, in its formative stages, was otherwise more concerned with ‘big picture’ issues of defining the franchise and constructing a liberal voting system, than in campaign practices as such. In these debates over campaign practices, a competition between a puritanical approach to elections – one stressing ‘purity’ and electoral virtue – and a more pragmatic mindset, is also detectable. As we shall see, that contrast in attitudes remains one way of understanding debates about electoral bribery to this day.

**Penalties, Judicial Power, Agency and the Muddle of the ‘Common Law of Elections’**

In the CEA 1902, electoral bribery was declared to be an illegal practice and subject to a maximum fine of £200 or one year’s imprisonment.\textsuperscript{242} In limiting the maximum penalty for corrupt practices to one year’s imprisonment, the Act echoed the old

\textsuperscript{239} Commonwealth, *Parliamentary Debates*, Senate, 31/10/1905, 4284 (Senator Clemons). Other Senators felt this flew in the face of the anti-bribery provisions.

\textsuperscript{240} Ibid, 22/11/1911, 298809 (Senator Findlay).

\textsuperscript{241} See comments of the Hon A I Clark, acting as barrister in the *Cumberland Election Petition; Brown v Urquhart* (Tasmanian Supreme Court, *The Mercury* (Hobart) 15/2/1894, 4)

\textsuperscript{242} CEA 1902 s 180 (‘illegal practice’) and s 181(a) (penalty).
distinction between felonious crimes and mere misdemeanours, as a one-year limit came to be adopted in criminal law as the boundary between simple and indictable offences.\textsuperscript{243} On any view, the criminal penalty was hardly as stiff as it might have been; indeed by 1911 a one year time limit on prosecutions was introduced, effectively ensuring candidates were safe if everyone involved in the corruption kept mum for twelve months.\textsuperscript{244} In contrast, personation (ie impersonating an eligible elector) and destroying or forging a ballot paper were offences punishable by two years imprisonment.\textsuperscript{245}

Oddly, the 1902 Act also omitted any explicit civil or political penalties for bribery. By contrast, both the South Australian and Western Australian legislative precedents contained explicit disqualification provisions.\textsuperscript{246} The omission was doubly strange, as such a disqualification had evolved as part of the common law of Parliament.\textsuperscript{247} In 1902, bribery at a Federal election carried several possible consequences. The cleanest of them would occur on conviction of a member. The one year maximum penalty was just sufficient to trigger both the Constitutional disqualification from sitting, and the legislative disenfranchisement.\textsuperscript{248} In 1905, the tougher South Australian penalty was adopted, ie two years disqualification for bribery or attempted bribery.\textsuperscript{249}

\textsuperscript{243} It was made explicit in CEA 1902 ss 190-191.
\textsuperscript{244} CEA 1911 s 46, introducing a default rule for prosecutions generally, in CEA 1902 s 208A.
\textsuperscript{245} CEA 1902 s 182.
\textsuperscript{246} Electoral Act 1896 (SA) s 162 and Electoral Act 1899 (WA) s 133 (disqualification for two years for bribery). For the current provisions and brief discussion, see Gerard Carney, \textit{Members of Parliament: Law and Ethics} (2000) 47-9. Carney’s book however predates the radical toughening of electoral offences in Queensland in 2002 (following pre-selection ‘rorting’ scandals investigated in the Shepherdson Inquiry). Bribery in that State’s parliamentary and local elections now carries a 7 year sentence (Criminal Code (Qld) s 98C) and providing money to fund an illegal payment (surely a form of abetting/accessory in any event) carries a 2 year sentence (s 98F). Disqualification from candidature for 10 years is incurred for conviction of any electoral offence carrying a potential prison term, anywhere in Australia (Parliament of Queensland Act 2001 (Qld) s 64).
\textsuperscript{247} Carney, ibid, 47, citing Rogers on Elections.
\textsuperscript{248} Constitution s 44(ii) (disqualification from Parliament); Commonwealth Franchise Act 1902 (Cth) s 4 (voting).
\textsuperscript{249} CEA 1905 s 59, inserting new s 206A, which became CEA 1918 s 211.
With the UK purge fresh in the legal memory, it was likely assumed that the primary deterrent to bribery was not criminal prosecution but the possibility of being unseated by a post-election petition. With allegations of partisanship or excessive tolerance on the part of parliamentary committees still resonating, the new Parliament transferred the historically hard-won - and Constitutionally recognised - power to review its own membership to the newly established High Court of Australia, sitting as a Court of Disputed Returns. This was a significant concession to the rule of law, not least because members who had been involved in formal court proceedings over elections were all too aware of the cost and delay of court action compared to a parliamentary committee or mixed tribunal.

The CEA 1902 however gave neither guidance nor limits to the Court’s broad discretion to declare elections void. It did not, for example, codify the by-then traditional rule that a candidate, proven on petition to have engaged in bribery, would lose their seat regardless of whether the bribery was widespread or even acted upon. Contrary to recent dicta of Justice McHugh, the legislature appears to have assumed that the common law of parliamentary elections would apply to the disputed returns jurisdiction, at least that part of the common law, discussed in the previous chapter, which had developed in the late 19th century in response to a wave of petitioning and the crackdown on corrupt practices. Such an assumption would hardly be surprising. Much of that common law was fresh in the mind, and in any event, the disputed returns jurisdiction as judicial power was a recent phenomena, and hence not ready for codification. Parliament most likely assumed that the common law principles would enure, to fill in the inevitable lacunae in the legislation, so the CEA was not yet a true

250 Constitution s 47 anticipated this move, in providing that ‘Until the Parliament otherwise provides, any question respecting the qualification [of a Parliamentarian] and any question of a disputed election’ shall be determined by the relevant House. But ceding this power to the Courts did not come without lengthy and heated debate: see eg, Commonwealth, Parliamentary Debates, House of Representatives, 29/7/1902, 14664-691. Indeed the reference to the High Court was voted down in the House at one point, see those Debates at 30/7/1902, 14707-10.

code. If this were not the case, Parliament would surely have given some legislative guidance to the new Court of Disputed Returns as to when to use its power to unseat.\textsuperscript{252}

But what was the common law of elections concerning the power to unseat? Under \textit{Woodward v Sarsons},\textsuperscript{253} breaches must have been:

(a) such as to have probably affected the result (a condition that could only be satisfied in very close results, and hence normally only relevant to small electorates or rare, ultra-marginal results), or

(b) so widespread that no real electing had occurred (ie that the poll had in a sense taken place but not substantially under the law).

Courts – from the High Court in 1916 to a Full Court in Queensland in 1990 – have held that the test in \textit{Woodward} can be applied to Parliamentary elections in

\textsuperscript{252} It has now, see CEA s 362, which has been interpreted by at least one High Court judge to ‘provide exhaustively as to the general grounds on which an election may be invalidated or declared void.’ See \textit{Hudson v Lee} (1993) 177 CLR 627 at 631 (per Gaudron J). Section 362(1) mandates that a candidate found guilty of bribery or undue influence must lose their seat; otherwise under s 362(3) the Court should only intervene where satisfied the result was likely to have been affected and it is just to do so.

\textsuperscript{253} (1875) LR 10 CP 733.
Australia,\textsuperscript{254} and more generally that they should, where not inconsistent with statute, apply the common law of elections.\textsuperscript{255}

However on the bribery question, the case law, as we saw in the previous chapter, was split as to whether a single act of bribery, adducible to a candidate, would automatically void an election. On one view, small and isolated bribes were trifles, at least unless they were ‘cumulated’ into a pattern of conduct suggesting an unknown amount of bribery. On the opposite view, the purity of elections and the fight against the scourge of bribery prevented the use of any \textit{de minimis} excuse.\textsuperscript{256} This very question, as we shall see below, came to trouble the High Court in its first election law outing, the \textit{Riverina Election Petition} of 1904.\textsuperscript{257} In short, the common law was a useful source of principle, but could not always be relied upon for an unequivocal rule.

In any event, if such common law rules and remedies only came into play through a petition, then the ease or difficulty of petitioning was a crucial practical question.

\textsuperscript{254} \textit{Bridge v Bowen} (1916) 21 CLR 151 (local government case); \textit{Turner v King} [1990] 1 Qd R 307.

\textsuperscript{255} The contrary position, popular for a time in Queensland, was that Courts of Disputed Returns were statutorily summoned to apply principles of ‘equity and good conscience’, and whilst they might find older common law principles to be persuasive in some situations, they should not feel bound to them: the \textit{Flinders Electoral Petition}; \textit{Forde v Lonergan} [1958] Qd R 324 at 332 (per Philp J). Philp J’s position makes sense of the historical concern that many Parliamentarians had that judges would become too legalistic in election cases. Whether or not that concern related to the strictness of rules or unpredictability of common law, or simply to the cost of litigation/evidence is perhaps by-the-by. The Philp J position is hard to reconcile with the views of the High Court in \textit{Sue v Hill} (1999) 199 CLR 462, 485 and 520, that acting ‘just and equitably’ does not mean not being bound to act judicially. And of course a key aspect of acting judicially is being bound by developing precedent, not just in terms of the meaning of an election act, but in applying the common law against which the act was drafted, to fill any lacuna in the act. Philp J’s position was most recently disapproved by the South Australian Full Court in \textit{Featherston v Tully} (2002) 194 ALR 703.

\textsuperscript{256} See eg, \textit{Bridge v Bowen} (1916) 21 CLR 151 (High Court case on local government elections), \textit{Crafter v Webster (No 2)} (1980) 23 SASR 321 (South Australian Court of Disputed Returns) and \textit{Featherston v Tully} (2002) 194 ALR 703.

\textsuperscript{257} \textit{Chanter v Blackwood (No 1)} (1903) 1 CLR 39. As noted below, n 338, the current CEA now explicitly provides that a finding on petition that a candidate committed an act or even attempt of bribery will render his election void: CEA s 362(1).
Chapter 3: Evolution of the Australian Law

From day one of the Commonwealth regime, petitions have been very hard to mount. A central hurdle is that the time limit on petitions has always been short: just 40 days from the return of the writ.\(^{258}\) In that period, particulars of each allegation being relied upon must be specified – quite a hurdle for any would-be petitioner. And the time limit is very strict. Not only is no extension of time permitted, but, contrary to ordinary civil procedure, particulars cannot be amended.\(^{259}\) A study of electoral malpractice in Australia then, so long as it relies on legally tested evidence, will always confront a conundrum. There have been few petitions, but that may be as much because (in the interests of stability and protecting politicians from possibly scurrilous allegations) the petitioning process is a Herculean task, as it is a sign of impeccable purity in Australian elections.

Nor, under the CEA has the statutory definition of agency been as strict as it could be. Agency was addressed in CEA 1902 s 186, which made a candidate liable for any illegal practice committed ‘directly or indirectly by himself or by any other person on his behalf, and with his knowledge or authority.’ The rider, ‘with his knowledge or authority’ limited agency compared to the long-standing common law of elections rule that a candidate was liable for all the misdeeds of his electoral agents even if against the candidate’s express instructions. Whilst the exact scope of agency was not settled by the common law of elections, it was certainly wider than the ordinary common law idea of an agent for commercial purposes: wide enough to include any supporter who the candidate or his employed ‘agents proper’ knew to be canvassing for him.\(^{260}\) Of course even this broad approach was no help if the people committing the illegal practices were unidentifiable. But the common law rule was a rule of common sense,

---

\(^{258}\) CEA 1902 s 194(e), replicated in the current Act in CEA s 355(e).


\(^{260}\) See discussion in Finn, above n 26, 200-1, drawing on the definition in the *Borough of Bewdley* (1869) 1 O’M & H 16, 17 (per Blackburn J). See also the definition in *Borough of Wakefield* (1874) 2 O’M & H 100 at 103 (per Grove J).
catching cases where otherwise the candidate could escape by having turned a blind eye, or worse, merely because of lacuna of evidence over his knowledge or involvement in the bribery. In the *Cumberland Election Petition*, a treating case mentioned earlier and which was decided under the common law rule of agency, the Court was able to adopt a common sense approach. Men who had been seen in consultation with the candidate over an electoral roll, or who were later appointed to scrutineer for him on election day, were held to be his election agents, even in the absence of evidence of formal engagement, paid or unpaid, on his campaign team, or the extent of their role. Their lavish and boozy hospitality in hotels in small towns forming the electorate therefore was pinned on the candidate, who must surely have co-ordinated or supplied the money to campaign, even though the candidate did not frequent the pubs and hence could not be shown to have known of the treating. The candidate, after all, had the benefit of the corruption.

The new Australian law however eschewed the term ‘agent’ and narrowed the attribution rule. It did this to protect candidates from a fear of liability for errant supporters (or worse, bogus supporters). Again, this would not have happened had the legislative concern been an ongoing battle to root out corruption at all costs. Rather, it suggests a re-balancing of the law in the wake of a war felt largely to have been won.

The law thus is once again revealed oscillating between a hardline, ‘purity of elections’ pole, and a softer, more politician friendly pole. The uncertainty this oscillation can cause is illustrated in a later Queensland case, which turned on the common law agency principle, *Webb v Hanlon*. (The case involved anonymous ‘shit-sheets’ rather than bribery, but the agency principle is the same). Ned Hanlon, a sometime Queensland Labor Premier, had his seat petitioned after a particularly bitter campaign, at a time of acrimony in the Labor movement against a ‘Protestant Labor’ faction. Two supporters of Hanlon had distributed anonymous pamphlets that

---

261 *Cumberland Election Petition; Brown v Urquhart* (Tasmanian Supreme Court, *The Mercury* (Hobart), 15/2/1894, 4), see above n 223.

262 *Ithaca Election Petition; Webb v Hanlon* (1939) St R Qd 90.
contained false statements that went to a rival candidate’s character. The trial judge found evidence of ‘association’ between Hanlon and the two supporters, but not of knowledge or authorisation. Adopting the hardline common law of elections test of agency, he found Hanlon liable for the illegal practices. His decision was overturned on appeal. The Chief Justice held that an intimacy greater than a mere association was required to make the supporters Hanlon’s canvassers, eg foreknowledge and at least implicit consent, greater than mere knowledge that the supporters were likely to do acts in his interest. In effect, the Full Court watered down the common law agency test, bringing it more in line with the statutory test in the Commonwealth Act. Such uniformity was not the expressed object, however; the Chief Justice asserted that he would not follow the (largely English) common law of elections because he thought electoral agency should be assimilated to the commercial law idea of agency. In doing so, the muddle about the extent to which the common law of elections would apply to guide the broad discretionary powers of the newly formed Australian Courts of Disputed Returns, was compounded.

Agency however is less an issue today, as campaign practice in Australia an age of centralised party machines accords, by comparison to the 19th century, much less freedom to local or constituency level campaigning. Thus, whilst acts of bribery designed to help a party’s prospects across-the-board (eg buying a lobby group or media baron’s support) may be unlawful on the part of the organiser of the deal, they

263 It is an offence to publish both anonymous election matter, and false statements of fact relating to a candidate’s character.
264 *Ithaca Election Petition* (1939) St R Qd 90, 96 (per EA Douglas J, quoting from the *Borough of Wakefield* (1874) 2 O’M & H 100).
265 Ibid, 137 (per Blair CJ).
266 Ibid, 139-40 (per Blair CJ).
267 With the caveat that in different electoral cultures, constituency campaigns may have more freedom: campaign agents are still a key feature of UK candidacies. Compare *R v Jones* (1999) 2 Crim App R 253 (conviction of candidate and agent for illegal expenditure overturned). Agents in Australia tend to be known as ‘campaign managers’. Agency also arose as an electoral law issue in *Tanti v Davies (No 3)* (1996) 2 Qd R 602 (postal service held to be ‘agent’ of electoral authority as regards delayed postal ballots).
would not be attributed to any particular candidate or seat and hence be unlikely to found an election petition.

**Expenditure Limits - a further Legislative Containment?**

A final, if indirect, mechanism relevant to bribery suppression was the imposition of limits on expenditure incurred or authorised by a candidate (albeit that the limits never extended to parties or factions as such). These perpetuated the parsimony of expenditure caps instituted in the UK in 1883, which were noted in the previous chapter. The original Commonwealth election limits were £250 for a Senate candidate and £100 for a House of Representatives candidate; expenditures outside matters such as advertising, communications and public meetings were prohibited. Expenditure limits were primarily aimed at modesty in campaigning, if not to ensure equality of competition, then at least to limit the ‘arms-race’ and ensure that the system did not lock-out those who lacked great wealth. Expenditure caps posed an indirect deterrent to widespread bribery, since although no sane candidate would admit to briberous expenditure in a return of expenses, if accounting evidence could show excess expenditure or expenditure on items other than those listed, then an illegal practice was made out, even if it could not definitively be shown that any particular payments were briberous. Indeed one vociferous proponent of expenditure limits in Australia hailed them as essential to the freedom of elections, including the repression of bribery and corruption.

However the expenditure caps, although they survived until 1981 in Commonwealth law, rarely had teeth. For one, their enforcement was neglected. For another

---

268 CEA 1902 ss 169, 170; the general penalty for breaches of the Act applied, namely a fine of up to £50 under s 182.
269 On the last sentiment, see Commonwealth, *Parliamentary Debates*, Senate, 31/1/1902, 9542 (Senator O’Connor, Vice-President of the Executive Council, giving the 2nd Reading Speech).
271 Orr, above n 198, 5-7.
272 Eg, as early as 1910 the Attorney-General accepted the practice of the Chief Electoral Officer to not prosecute unsuccessful candidates who failed to file expenditure returns: Patrick Brazil (ed)
were only increased once in 80 years,\textsuperscript{273} and they fell into disdain,\textsuperscript{274} not least as they took no account of expenditure promoting parties rather than individual candidates.\textsuperscript{275} Problems with definition and enforcement aside, the absence of any expenditure caps in Australian elections today,\textsuperscript{276} reflects a shift to a laissez-faire campaign culture, and as we shall discuss in Chapter Six, raise concerns about the buying of influence and electoral inequality equal to the problem of traditional bribery.

\begin{quotation}

\textsuperscript{273} CEA 1946 s 4 doubled the limits.

\textsuperscript{274} Rawson, writing of the 1958 election, said that the expenditure limits were ‘preposterously low figures, and no one seriously supposed that they were observed.’ DW Rawson, \textit{Australia Votes: The 1958 Election} (1961) 61.

\textsuperscript{275} This restriction was evident on the face of the provisions, which after all were drafted prior to the rise of the mass party. In \textit{Crittenden v Anderson} (Fullagar J, High Court as the Court of Disputed Returns, unreported, 23/8/1950) held that the Act was not breached merely because a party spent more on advertising than the £250 limit multiplied by the number of its candidates. A similar reading was confirmed, in more detailed legal argument, in \textit{R v Tronoh Mines} [1952] 1 All ER 697 in relation to the equivalent English provisions.

\textsuperscript{276} Excluding the exceptional case of the Tasmanian Upper House, see Orr, above n 198, 14.
\end{quotation}
A Ban on Personally Soliciting Votes? Hysteria and Aesthetics in Campaign Regulation

One curiosity of the South Australian initiatives was a prohibition on candidates personally soliciting votes. This ban dated to the original South Australian Electoral Act 1856 (SA), which equated such solicitation to ‘bribery and corruption’.277 The ban was gradually narrowed in subsequent Acts,278 however its supporters maintained that asking individual electors for their vote helped foster bribery or at least its suspicion.279 It was also seen as ‘degrading’ by some incumbents.280

By 1896, the South Australian ban had shrunk to one against solicitation or attending meetings within forty-eight hours of noon of polling-day.281 Nonetheless, it survived through the 20th century, becoming entangled with debates about the definition and desirability of how-to-vote information at polling booths in South Australia.282 It remains as an explicit ban on polling day solicitation by candidates themselves.283 Atrophied in this way, the ban became more of a ‘cooling-off’ period, analogous to

277 Electoral Act 1896 (SA) s 52 (banning not just personal solicitation after the writs issued, but even attending meetings of electors).

278 For detail, see Jaensch, above n 182, 93-94.

279 See eg debates on the Electoral (Amendment) Bill 1880 (SA) cl 14: South Australia, Parliamentary Debates, 18/9/1880 at 1139-44 and 30/9/1880 at 1209-1212 (House of Assembly); 19/10/1880 (Legislative Council). A ban on canvassing was far from Quixotic: in 1908, a UK author, King, above n 31, 137-9 surveyed arguments for and against, and concluded that some legal restriction was warranted, mainly because canvassing had little educational effect to outweigh the element of pesterling and perceived imposition on the secrecy of the ballot.

280 South Australia, Parliamentary Debates (House of Assembly), 30/9/1880, 1211 (Sir George Kingston).

281 Electoral Act 1896 (SA) s 160 (a), (b). It shrunk further to just polling day.

282 See eg Jeffreys v Thornton (1974) 8 SASR 380 (local government election – cards on polling day giving personal details of candidate possibly unlawful solicitation, however not proven to have occurred with candidate’s knowledge or consent: if it had, under then Local Government Act 1934 (Qld) s 132, the election would have been void). For another example see R v Ward; ex parte Bowering (1978) 20 SASR 424 (local government, evidence of solicitation on polling day at house, but householder not in fact an elector).

283 Electoral Act 1985 (SA) s 117(2), penalty $1250.
contemporary ‘blackouts’ on electronic advertising (or, overseas, on publishing opinion polls), to give voters breathing space, rather than to protect them from avaricious or briberous candidates.

The Commonwealth regime consciously eschewed any ban on solicitation – except to provide a ‘hassle-free’ zone around the polling booth.\(^\text{284}\) Allowing personal solicitation reflected a democratic approach to campaigning where some level of door-knocking is expected, if only to humble candidates, as well as a greater optimism about candidate ethics. Certainly, as Jaensch says, such a ban would be ‘unthinkable’ in current notions of democracy, especially demands by electors that their representatives be on a par with them.\(^\text{285}\) That such a ban was ever institutionalised reflects hysteria over vote-buying in the late 19\(^{\text{th}}\) century possibly more than any cultural aversion to solicitation.\(^\text{286}\) It may also have reflected a preference by incumbents for low-key campaigning and it certainly reflected a favouring of the written word (specifically the platform pamphlet) over the oral.\(^\text{287}\) Reminders that the aesthetics of campaigning have always been a factor in its regulation.\(^\text{288}\)

\(^{284}\) CEA 1905 s 52 introduced a ban on canvassing or soliciting votes ‘at the entrance or within a polling-booth’, which survives today in a 6m exclusion zone around polling-booths in CEA s 340. Again this relates to decorum more than undue influence.

\(^{285}\) Jaensch, above n 182, 93.

\(^{286}\) South Australia, *Parliamentary Debates*, Legislative Assembly, 15/12/1896, 971 (Mr Copley).

\(^{287}\) See other contributions at ibid.

\(^{288}\) For development of this thesis, see Orr, above n 60.
THE CURRENT COMMONWEALTH PROVISIONS

The current CEA 1918 is founded in a re-write of that Act in 1983. The driving force of this exercise was Labor’s commitment to reforming the law relating to campaign finance. In 1981, the Liberal government, with the repeal of the outdated candidate expenditure limits, had introduced a brief period of laissez-faire.289

As we have noted several times, since the late 19th century, expenditure control had been seen as the second wave of the anti-corruption drive. As recently as 1977, PD (now Justice) Finn complained, in his article on ‘Electoral Corruption and Malpractice’ that lax expenditure laws and the unaccountability of donors had created ‘a breeding ground for a more subtle form of malpractice – the possible obtaining of influence over, or compromising of, a candidate through financial ties and support.’ 290 Expenditure limits, Finn argued, placed

reasonable practical limit upon the resort which candidates can have to one of the most potent sources of influence – advertising. No less so than in heydays of bribery and treating the policy of the law is still aimed at ensuring the success of a candidate does not depend upon the depth of his and his supporters’ pockets. 291

Finn’s call went unheeded, however. Even Labor’s reform shied away from tackling the ‘arms race’ in the cost of elections with either expenditure limits or caps on donations. Instead they sought to minimise scandal and reduce resort to private donors with public funding, and shine a modicum of ‘sunshine’ onto suspicions of influence by requiring larger donations to be declared. In introducing the reform, the responsible Minister, Kim Beazley, began:

---
289 This had been precipitated by the realisation, brought on by the unseating of some Tasmanian Parliamentarians, that the laws, if enforced, spelt an end to campaigning in the manner to which candidates had become accustomed. For more, see Orr, above, n 198, 6-7 and Deborah Cass and Sonia Burrows, ‘Commonwealth Regulation of Campaign Finance: Public Funding, Disclosure and Expenditure Limits’ (2000) 22 Sydney Law Rev 447.
290 Finn, above n 26, 225-6.
291 Ibid, 226.
About 200 years ago the great English artist William Hogarth drew a series of six cartoons showing a typical election day. With a limited franchise, some of the rotten boroughs had less than 10 voters and bribery was rife. Open voting meant that the candidate and his agents were able to be assured that their bribes had paid off. The candidate had to get his money for the campaign from some rich patron and secret subsidies from the King or his Opposition were an essential part of the politics of the day. We have advanced some distance from the eighteenth century. But there is still a potential for the corruption of candidates and parties, who just like the politicians of other days, must have money to campaign even if today it does not go on bribes.

The narrative is seductive. So is the horse sense underlying it: a mixture of ‘the more things change, the more they stay the same’ and a presumption that money is the symptom (if not the root) of all evil. Bribery as the corruption of electoral politics is not so much slain, as inverted. Once Parliamentarians bribed and practised undue influence on electors to win office; now they are bribed and unduly influenced by special interest donors, who give them the money they need to advertise to the masses.

In later chapters, we will return to this theme, and to question whether the inversion, to explain the transformation to an age of mass media and elections, is as simple as it sounds, or whether new practices of buying electoral support have arisen to replace the old. In its transforming zeal, the 1983 Act did not, however, wash away the old anti-bribery laws. Rather, true to its modernising sentiment, it pruned some arcane elements, and streamlined the drafting. As earlier noted, elements pruned included the offence of wagering on elections. The new bribery provision, now CEA s 326, reads:

(1) A person shall not ask for, receive or obtain, or offer or agree to ask for, or receive or obtain, any property or benefit of any kind, whether for the same or any other person, on an understanding that:

292 Hogarth’s ‘Election Series’ consisted of four works.
(a) any vote of the first-mentioned person;
(b) any candidature of the first-mentioned person;
(c) any support of, or opposition to, a candidate, a group of candidates or a political party by the first-mentioned person;
(d) the doing of any act or thing by the first-mentioned person the purpose of which is, or the effect of which is likely to be, to influence the preferences set out in the vote of an elector; or
(e) the order in which the names of candidates nominated for election to the Senate whose names are included in a group in accordance with section 168 appear on a ballot paper; will, in any manner, be influenced or affected.
Penalty: $5,000 or imprisonment for 2 years, or both.

(2) A person shall not, in order to influence or affect:
(a) any vote of another person;
(b) any candidature of another person; or
(c) any support of, or opposition to, a candidate, a group of candidates or a political party by another person;
(d) the doing of any act or thing by another person the purpose of which is, or the effect of which is likely to be, to influence the preferences set out in the vote of an elector; or
(e) the order in which the names of candidates for election to the Senate whose names are included in a group in accordance with section 168 appear on a ballot paper; give or confer, or promise or offer to give or confer, any property or benefit of any kind to that other person or to a third person.
Penalty: $5,000 or imprisonment for 2 years, or both.

(3) This section does not apply in relation to a declaration of public policy or a promise of public action.

The section remains a mouthful, although its structure is more transparent. Sub-section 1 deals with the ‘bribee’ or promissee; sub-section 2 with the briber or promisor. The modernisation extends to making it explicit that bribery extends to attempts to influence the ordering of candidates in Senate elections, and not only to an elector’s allocation of her preferences vote, but to the advocacy of how preferences
should be allocated (which most notably occurs when parties issue ‘how-to-vote’ recommendations).

The maximum penalty is such that any conviction for bribery will still automatically disqualify a member from holding her seat and hence from standing whilst under such sentence, but not, oddly from voting whilst under such sentence, at least for Federal elections. Prisoner disenfranchisement for Commonwealth elections now only applies to sentences of 3 years or more, so someone – elector or political actor – found guilty of bribery would retain her Federal vote.

Disenfranchisement of ordinary prisoners may be a pointless form of punishment. But it would be a proportionate penalty to disqualify anyone convicted of an electoral offence from voting for a set period, however short their sentence. Queensland achieves this indirectly, having stiffened sentences for electoral offences in 2002. Electoral bribery in Queensland (and South Australia) now carries a 7-year maximum. Queensland simultaneously introduced a 10-year disqualification from candidacy for electoral offences generally. Such political penalties are justified

---

294 Constitution s 34 (House of Representatives), s 16 (Senate).
295 CEA s 93(8)(b). The disenfranchisement was liberalised in 1983 and 1995, but tightened in 2004.
298 Electoral Act 1985 (SA) s 109; Criminal Code (Qld) s 98C. At NSW elections it is three years: Parliamentary Electorates and Elections Act 1912 (NSW) s 147. Curiously, in Queensland an older definition of bribery and a smaller penalty (one year) was retained for bribery at public elections other than parliament or local government: Criminal Code (Qld) s 104 (eg elections for state registered unions, statutory boards, the Law Society etc). There is little writing, let alone theorising, about penalties and sentencing for political offences in Australia: Roger Douglas, ‘Sentencing Political Offenders’ (1994) 1 Australian Jnl of Human Rights 86 offers an overview and considers, eg, in what circumstances political motivations would be a mitigating or an aggravating circumstance, but his paradigm is activities such as civil disobedience or political communication, categories which would only overlap with corruption such as electoral bribery in cases of relative innocence.
299 Electoral Act 1992 (Qld) s 64(2)(d).
not just for symbolic reasons, but because they may act as an added disincentive to party activists who can otherwise be caught in unethical practices due to a party culture or an overly competitive environment. The Queensland law is, however, arguably guilty of overkill in disqualifying all electoral offenders from even being members of registered parties for 10 years from conviction.\footnote{Electoral Act 1992 (Qld) s 73A.} Suitable levels of imprisonment for electoral offences have also proven a vexed question following two dramatic recent cases. The public clamour for harsh penalties against politicians subsided when Pauline Hanson received 3 year’s imprisonment with no date for early release, on her initial conviction for fraud in the registration of a party.\footnote{R v Ettridge and Hanson (District Court, Wolfe CJ, 20/8/2003) <http://www.courts.qld.gov.au/qjudgment/sentencing/ettridge%20hanson.pdf>; conviction quashed in \textit{R v Hanson} [2003] QCA 488.} (By contrast, a would-be candidate received 3 years, to serve 9 months for good behaviour, for forging enrolments to ‘stack’ a pre-selection.)\footnote{R v Ehrmann [2001] QCA 50.}

The Queensland reforms also involved moving offences for ‘corrupt and improper practices at elections’, such as bribery, undue influence and voting when not entitled, from electoral legislation to the general Criminal Code. In part this was a political response to a scandal over the rorting of rolls, and partly it served to ensure such offences apply to all elections held under a statute.\footnote{Criminal Code (Qld) Ch 2 Pt 10.} Whilst it certainly makes sense to ensure that the prohibition on electoral bribery clearly applies to all elections – including supposedly ‘private’ elections such as corporations – it is potentially confusing to have an Electoral Act that lists administrative offences but not the more serious electoral offences.

Treating was abolished as a distinct offence in the 1983 Federal re-write. It was assimilated to the general bribery prohibition, at least in cases where it was tangible enough to amount to a ‘benefit’. As early as 1962, one Senator had mocked the treating provisions: ‘[the specific treating offence] has not been policed since Ford
produced his first motor car … [the section is] a farce. As wealth increased, so the relative value of food and alcohol decreased, and treating tended to fade as a serious concern. Although we earlier saw a number of colonial cases suggesting that treating was alive and well, particularly in Queensland and Tasmania, it is unclear whether treating was ever a serious concern across Australia as a whole. This is a little counter-intuitive, since we have already noted debate raising concerns about any link between alcohol and polling – unsurprising given the prominence alcohol has always played in Australian life. But representative democracy was born into a less dependent culture in Australia than in the UK, where treating grew rife as a variation on potlatch and as part of an electoral culture emerging from feudal and festival (or feast day) roots.

However treating has not been legalised. Rather it has been subsumed under a general definition of ‘benefit’ in bribery provisions such as CEA s 326. As we shall see at the conclusion of this chapter, treating, or the fear of its allegation, generated a surprising amount of angst amongst parties and candidates as late as the 1990s: although this may be attributed more to an excess of caution on their part than to any recrudescence of the ‘roll out the barrel’ spirit of electioneering.

**Legal Mushrooms – Anti-Bribery Provisions which Came and Went in 20th Century Commonwealth Electoral Law**

Since 1902, a few legislative provisions relevant to the bribery debate have sprouted and vanished like mushrooms. They are noted in passing, not merely for the sake of comprehensiveness, but to reveal how concerns about particular forms of conduct are born out of the electoral culture specific to certain places and eras. That is, they arise because of particular electoral circumstances, and are addressed (or ignored) because of the political and legislative mood of the day.

---

In 1905, it was made an offence for a candidate to give any ‘gift, donation or prize’ to any club or association, in the three months prior to polling.\(^{305}\) The Hansard debates suggest a prime motivation was Parliamentarians’ hip-pockets, ie the age-old concern with the cost of electioneering. Some members complained of being pestered around election time by associations who, in a residue of the days of candidates buying their way into Parliament, had come to expect such customary tributes. King O’Malley, who fathered the amendment, even complained of ‘masked “blackmail” on miserably paid Members of Parliament’!\(^{306}\) Others supported the proposal as an anti-bribery measure and to put the average candidate on an even keel with the wealthy.\(^{307}\)

The penalty was ‘Five pounds in addition to any other penalty provided by law’, although prosecution had to occur within three months of the gift. The reference to ‘other penalty’ recognised that, in egregious cases, such gifts were briberous. As we have seen, concern with largesse to associations as an indirect way of buying support dated to Victorian England. This regulatory offence deterred the practice without equating it necessarily to bribery. The provision has since been repealed in most jurisdictions as archaic, but is interesting for two reasons.

First, by the time of its introduction, its primary motivation was not bribery actually occurring, but the second-order concern with the cost to elections and equality of competition, of perpetuating practices that began with briberous intent but subsided into less corrupt form. Thus the section was placed under the Part of the Act dealing with ‘Limitations on Electoral Expenses’ rather than the Part dealing directly with corrupt offences. Curiously, gifts, donations and even prizes to clubs, associations ‘or any other body’ during a candidature are still criminalized in Tasmania, nominally as a form of treating.\(^{308}\) A defence is made out, however, if the payment is merely part of

\(^{305}\) CEA 1905 s 59, inserting new s 206B, which became s 150 in the CEA 1918. A few members wanted no time limit on the prohibition: Commonwealth, *Parliamentary Debates*, House of Representatives, 15/12/1905, 7123 (Mr Johnson); Senate, 19/12/1905, 7333 (Senator Millen).

\(^{306}\) Commonwealth, *Parliamentary Debates*, House of Representatives, 15/12/1905, 7119. O’Malley’s proposal however would have excepted ‘charitable organisations’ from the prohibition.

\(^{307}\) ‘Donations … very frequently influence weak people’ and ‘when they pander to members of [clubs] they are guilty of a form of bribery.’ Ibid, 7122 (Mr Webster).

\(^{308}\) *Electoral Act 1985* (Tas) s 207(2).
an ongoing practice of the candidate as a private individual in relationship to that group, eg routine charity or membership subscriptions. Western Australia retains a similar offence.

Also of contemporary interest is the fact that such issues raise perennial concern. The question of gifts to associations foreshadows the kind of pork-barreling using public money targeted at community organisations that was exemplified in bribery the case of Scott v Martin, and which will be analysed in Chapter Six.

In 1911, also under the rubric of limitations on election expenses, it was made a specific offence to employ canvassers or committeemen, ie for a candidate to pay for others to campaign for him. In introducing the measure, the responsible Minister said ‘[t]he object … is clear. It is to prohibit the payment of persons to act as canvassers, which, after all, is an indirect form of political bribery.’ The reform was introduced by a Labor administration; but its conservative opponents smelt partisanship. They objected that the prohibition would not cover organisers whose unions decided to campaign for Labor, claiming that the ban was ‘rough’ on the Liberal party who, lacking such organisational support, were presumably employing campaign assistance. Further, it offended the liberal ideology that people with money should be able to promote the causes they espoused. The provision is no longer part of the law. It is entirely outflanked by professionalised modern campaign practice, where parties, who are decreasingly based in a mass membership, employ numerous staff to work on campaigning throughout the election cycle, and where parliamentarians’ publicly employed staff have also been known to engage in electioneering.

---

309 Electoral Act 1985 (Tas) s 207(3).
310 Electoral Act 1907 (WA) s 189.
311 (1998) 14 NSWLR 663.
312 Chapter Six below, text at nn 581-97.
313 Commonwealth, Parliamentary Debates, Senate, 19/10/1911, 1593 (Senator Millen).
In 1924, compulsory voting was introduced for Commonwealth elections (compulsory enrolment had been introduced in 1911). As is well known, remarkably little Parliamentary debate greeted these reforms. As we noted at the end of the previous chapter, compulsion, whether of voting or to give full preferences, formed an indirect and final barrier to direct vote-buying on any significant scale. Prior to compulsory voting, negative bribery - to induce non-voting by supporters of one’s opponents - was always a possibility. Compulsion of course does not guarantee 100% turnout: Federal elections attract roughly 95% turnout on a 95%+ enrolment figure. So it makes sense (contrary to Finn) that the CEA for a long time nevertheless maintained an explicit prohibition on inducements to refrain from voting.

It is doubtful today, however, if an inducement to enrol is implicitly covered by the terms ‘influencing or affecting’ any vote in any manner. The Joint Select Committee report that led to the 1983 re-write of the CEA consciously removed the explicit prohibition on bribery relating to enrolment. It may have been felt that since enrolment should be encouraged, inducements to enrol are unobjectionable. Indeed, as we shall note in the final chapter, some US jurisdictions with voluntary voting, have experimented with inducements to attract enrolments and turnout, including things such as donut vouchers and chances to win prizes. But the reverse does not apply: inducements to not enrol would be highly suspect in Australia and should be explicitly prohibited in the bribery provisions, rather than falling to be penalised by some obscure secondary offence such as interfering with performance of a public duty.

315 Commonwealth, Parliamentary Debates, House of Representatives, 7/12/1911, 3933 (Mr Fowler).
316 Under the CEA 1911 and CEA 1924 respectively.
317 Which was introduced when first-past-the-post voting was abandoned for the House in CEA 1918 and Senate in CEA 1919 (albeit until 1934, a Senate elector ‘only’ had to give preferences for twice the number of Senators to be elected plus one: eg 13 in the then six person Senate election). Whilst compulsory voting is universally applied at State and Federal (and most local) elections in Australia (Norfolk Islanders excluded), compulsory expression of preferences between all candidates is no longer required in either NSW or Queensland.
318 Former CEA 1918 s 156.
319 Current CEA s 326.
320 Joint Select Committee on Electoral Reform, above n 236, para 13.4.
A related and more telling issue involved the use of inducements, particularly alcohol, to lure Indigenous electors from the polls, especially in Western Australia. Indigenous voters, it might be noted, have historically favoured Labor. This practice was aided by the fact that, until the 1984 election, the Indigenous franchise - which only became general in 1962 for Federal elections - remained voluntary, unlike for other citizens.\footnote{CEA 1962.} Echoing obstacles to black enfranchisement better known in the US ‘Deep South’, both Commonwealth and Western Australian law felt a need to explicitly punish inducements influencing Indigenous enrolment.\footnote{Finn, above n 26, 209. The amendments in CEA 1962 explicitly extended the definitions of bribery and undue influence in ss 156(aa), 158(aa) and 159 to refer to Aboriginal Australians.} In debate on the extension of the Federal franchise to Indigenous citizens, concern was expressed about the dependent status of many Indigenous people, one Senator fretting that owners of big stations would misuse their influence using 19th century techniques to evade ballot secrecy,\footnote{Commonwealth, \textit{Parliamentary Debates}, Senate, 10/5/1962 (Senator Kennelly), 1298-9, citing claims of the AWU that station employees had once been required to vote in turn: the first elector dropping a blank piece of paper into the ballot-box, giving his real ballot to someone outside the polling booth to fill in and be deposited by the second elector, and so on.} and that their economic vulnerability left them open to ‘offers [and] intimidation’.\footnote{Ibid, 1303 (Senator McManus).} Curiously absent from this debate was any sense that many Aborigines, having waited so long for the right to vote, might use it more carefully than some apathetic whites who were compelled to the polls.

A corollary of compulsion, especially in a vast continent like Australia, is a need to make balloting accessible. The primary technology for this, for almost a century, has been postal voting,\footnote{First made available in CEA 1905.} which is available both to the physically confined and the geographically remote. Concerns have long been expressed about the corruptibility of any elections relying on widespread postal balloting,\footnote{This was a plank of Labor’s opposition to postal voting, evidenced most clearly in debates on the CEA 1911 proposal to abolish it. In turn, the ALP was accused of partisanship, in that a majority of postal votes historically favoured conservative parties.} and evidence for this exists in
some union elections. Because it permits easy breach of ballot secrecy, postal voting is in theory more open to bribery. Another fear is of individuals being subject to undue influence, especially electors who are economically or physically dependent on others. In 1949, dual offences, of ‘inducing’ an elector to apply for a postal vote or to hand over a completed postal ballot, were introduced.\textsuperscript{327} These stricter offences reinforced the generic offences of bribery, undue influence and imposing on ballot secrecy.

**CASE LAW ON DIRECT VOTE-BUYING IN 20\textsuperscript{th} CENTURY AUSTRALIA**

Petitions alleging bribery surfaced not infrequently in the life of the early Commonwealth Parliaments. It is unclear in most cases whether such allegations were substantial yet the petitions foundered because of lack of money or on procedural grounds such as the very short time limit in which to gather evidence, or whether they were merely allegations made out of mischief or habit. The very first petition after the inaugural 1901 election, *Adcock v Solomon*, pleads bribery and undue influence. It was referred to the House of Representatives Committee on Elections and Qualifications (the CEA 1902 not yet having come into force), but was rejected for not meeting procedural rules.\textsuperscript{328} Then in 1904, Norman Cameron petitioned Sir Phillip Fysh, who had beaten him by 32 votes. The petition initially alleged numerous offences by Fysh or his agents, including bribery, undue influence and expenditure malpractice.\textsuperscript{329} However these were struck out by consent after a chambers hearing before Griffith CJ.\textsuperscript{330}

\textsuperscript{327} CEA 1949, inserting new ss 87A and 94A in CEA 1918. The penalty in either case was £50 or one months imprisonment. The latter offence survives in the current s 198. As with debates about postal voting in principle, this debate was soured by suspicions of partisanship.


\textsuperscript{329} This much is only clear from the summary in Harris (ed), ibid, 757. The CLR report politely glossed over the nature of the allegations.

\textsuperscript{330} *Cameron v Fysh* (1904) 1 CLR 314 at 315.
The judicial and parliamentary record in relation to petitions in the early
Commonwealth is equivocal. It could be taken as evidence of bribery and treating as a
continuing, albeit dwindling, type of corruption. Or it could be taken as the vestige of
a habit of some losing candidates to petition out of disgruntlement or a desire to throw
mud. The record could support both conclusions. But as the following survey of the
relatively few cases where bribery laws were subject to any sustained judicial
discussion suggests, the question of electoral bribery came to lay dormant for most of
the 20th century in Australia, surfacing only occasionally in unprosecuted petitions
which usually alleged a variety of breaches of the Act. 331

To Unseat or not Unseat: Chanter v Blackwood

One of the first duties of the new High Court was the resolution of petitions resulting
from the 1903 election (the first under uniform Commonwealth electoral rules). In
Chanter v Blackwood (No 1), 332 the Court was faced, amongst other things, with a
claim that candidate Blackwood and his supporters treated constituents to win their
votes. In the end, the case turned on more prosaic claims relating to the validity of
certain votes that had wrongly been held to be informal.

But in obiter, the Court the common law versus electoral code question, raised earlier,
of whether ‘a candidate is incapable of election if he has committed one of the acts
prohibited’ by the CEA 1902, 333 or whether some other standard, such as whether the
bribery was likely to have affected the election result, should be read into the original
Act. Griffith CJ avoided answering the question, though he adopted the Woodward v
Sarsons test. Barton J held that under the CEA 1902, a single act of bribery would not
automatically unseat a candidate on petition: but he explicitly reserved the question as
to whether the result may have been different if a petitioner argued the common law

---

331 A more contemporary example is Smith v Lavarch, noted in Commonwealth Parliament, Votes and
Proceedings, VP 1987-89/98. Harris (ed) above n 328, 759 notes this petition as lapsing without
further action.
332 (1903) 1 CLR 39 (a reference to the Full Court from the Court of Disputed Returns, hearing the
Riverina Election Petition)
333 Ibid, 57 (per Griffith CJ).
rather than the statute.\textsuperscript{334} In contrast, O’Connor J was adamantine that the only penalty lay in the Act, namely a prosecution that would if successful unseat a member: otherwise the Court of Disputed Returns as first established did not have the power to penalise by unseating ‘on the ground of any misconduct however great on the part of either candidate’.\textsuperscript{335}

Confusion and hedging in this case, including the different views expressed about the survival of the common law as a jurisdictional source and whether the CEA formed a true ‘code’, is reflected in continuing debates today.\textsuperscript{336} The best that can be said of the decision is that the judges were keen to leave the question of whether any bribery by a candidate would unseat him, to Parliament. The Court perhaps sensed that although some of the heat had gone out of the bribery question compared to the Victorian era, nonetheless the issue was sensitive and political enough to be left to Parliament.

Amy McGrath, an activist against electoral fraud, laments the general implication from \textit{Chanter} that a petition will fail, even if some corrupt or illegal practice by a successful candidate is proven, unless the election result was probably affected.\textsuperscript{337} (Dr McGrath also attacks the very involvement of the judiciary in disputed returns matters, claiming it leads to legalism \textit{despite} a statutory requirement that the electoral courts be guided by ‘substantial merits and good conscience’. This criticism may be well founded in relation to evidence, ie proving allegations of corrupt or illegal practices: it however rather contradicts any call for a clear-cut rule, favoured by purists, that a single corrupt or illegal practice committed in the name of a candidate should spell their unseating).

\begin{itemize}
  \item \textsuperscript{334} Ibid, 65 (per Barton J).
  \item \textsuperscript{335} Ibid, 75 (per O’Connor J).
  \item \textsuperscript{336} See above, text at nn 251-5.
  \item \textsuperscript{337} McGrath, above n 259, 158, describes the effect of \textit{Chanter}, combined with the onus of proof on the petitioner, as a ‘straitjacket’ against those seeking to expose and challenge electoral fraud in general.
\end{itemize}
However the legislature stepped in to reverse *Chanter*, at least as regards bribery and undue influence in 1905. Since then, the CEA has decreed that a single instance of such corruption by a candidate or their agent is grounds for that candidate’s unseating.\footnote{CEA 1905 s 56, inserting a new s 198A. See now CEA s 362(1).} Other acts of bribery, committed without the candidate’s knowledge or authority, may still void the election. They certainly will if ‘the result … was likely to [have been] affected, and it is just that the candidate should be declared not to be duly elected.’\footnote{CEA s 362(3).} This test is worded exclusively,\footnote{Hudson v Lee (1993) 177 CLR 627.} but it retains the flexibility to declare an election void for general or serious bribery or attempted bribery by persons other than those working in co-ordination with the winning candidate. In effect this follows Griffith CJ’s opinion in *Chanter* that a Court of Disputed returns could invoke the common law of *Woodward v Sarsons* and overturn an election in cases where bribery was widespread, but it was unclear whether it was attributable to the winning candidate.

That question is most likely moot in large-scale public elections today, where old-fashioned vote-buying is dead, unless a court found that widespread pork-barrelling or preference deals amounted to bribery. In smaller scale and more tightly knit electorates, the problem is more likely to arise. Thus, in relation to trade union ballots, the High Court has clearly suggested that concerted attempts at vote-buying or coercion, especially if widespread, would amount to ‘irregularities’ sufficient to invalidate the election.\footnote{Re Collins; ex parte Hockings (1989) 167 CLR 522 (per Toohey and McHugh JJ).} Similar rules apply to ATSIC elections,\footnote{Aboriginal and Torres Strait Islander Commission Act 1989 (Cth) Sch 4, cl 11(3).} where one-on-one bribery by candidates has allegedly occurred, including one case where a teenage couple in Brisbane were paid some money and allegedly promised more to vote for a candidate who was subsequently elected to a regional council. The case only came to light when the candidate allegedly reneged on the promise of extra money and became...
abusive. Similarly, claims relating to treating and vote buying in campaigning in the Alice Springs region were raised as recently as the 2002 ATSIC poll.

In any event, a court investigating a Parliamentary election may fudge the onus of proof, where any serious or widespread errors, let alone malpractice, have occurred. The legislation deliberately uses passive language, not placing the onus of proof on either petitioner or respondent. According to Scarcella v Morgan, once a ‘substantial contravention capable in some circumstances of affecting the result’ is shown, the onus shifts to the respondent, to defend her seat by showing ‘beyond reasonable doubt’ that her majority was not affected.

---

343 Anon, ‘ATSIC Candidate Accused of Offering Cash for Votes’, The Australian, 2/2/2000, 6. In a sworn statement, the couple named up to 10 people they claimed had been offered bribes of cash or gifts.


345 Eg CEA s 362(3) requires the Court to be ‘satisfied that the result … was likely to be affected, and it is just [to unseat’].

346 Scarcella v Morgan [1962] VR 201 at 203. Scarcella is even more noteworthy in that it involved mere official error, not illegal practices by partisans. It has been followed and applied in later Victorian and Queensland cases, such as Fell v Vale (No 2) (1974) VR 134 and Re Forrest [1993] 1 Qd R 378, but may be contradicted by decisions in other jurisdictions, eg Crafter v Webster (No 2) (1980) 23 SASR 321 at 329 (‘[E]rror on the part of an officer is significant … only if it is proved to have affected the result of the election.’ Emphasis added.) This is a slippery practical question: every jurisdiction would do well to clarify its statutory test for the level and onus of proof on electoral petitions by considering three classes of case: (a) malpractice by the winning candidate or agents; (b) malpractice by other political actors (including, albeit unlikely, officials); and (c) errors by officials.
A Joking Matter: *Crouch v Ozanne*\(^{347}\)

This 1910 petition against the election of Ozanne included a string of allegations, such as inadequate polling booth facilities, unlawful canvassing to the door-step of the polling place, and exclusion of the petitioner’s scrutineers at some polling places. O’Connor J, sitting as the Court of Disputed Returns, did not even find a prima facie case against Ozanne.

Amongst the litany of allegations was a single act of attempted bribery, alleged to have occurred when Ozanne told an elector, ‘Miss Connors, if you vote for me, when I get in I will give you a new silk dress.’ O’Connor J believed Maggie Connors when she testified she took the promise as ‘a joke’. The judge railed:

> When one considers the circumstances under which this supposed bribe was offered [it is] almost shocking to common sense to suppose anyone could take the incident seriously. I have no doubt whatever it was merely a joke, and was understood by both parties to be so, and it is to be regretted that a serious charge of bribery should be brought before this Court to be solemnly tried upon such an exceedingly flimsy ground.\(^{348}\)

The judge opened his reasons by noting that even if a single act of unsuccessful bribery was proven, and even if no vote was affected, he would be obliged to declare the election void.\(^{349}\) In part this was theatre, to reinforce his chiding of the petitioner for turning a jest into a serious allegation. The broader implication was that the explicit upping of the legislative ante in 1905, such that a single act of even attempted bribery would automatically damn a candidate, did not necessarily harm those accused of bribing. On the contrary, judges and prosecutors alike were being warned to take extra care over allegations. Clearly, compared to the Victorian era, sensitivities in both legal and electoral culture had shifted from being part of a

\(^{347}\) *Crouch v Ozanne* (1910) 12 CLR 539.

\(^{348}\) Ibid, 542. As if to illustrate how culturally and time specific such a conclusion is, compare the Indian case of the distribution of saris at election rallies, Chapter One above, n 6.

\(^{349}\) Ibid, 541.
purgation of electoral malpractice to a concern for fairness to the accused. In the 19th century, bribery had never been a joking matter!

**De Minimis Benefits – of Matches and Teabags**

O’Connor J’s warning however must have been forgotten by 1958. In that year a Victorian state election was challenged on the grounds that the successful candidate, Sir Thomas Maltby, had committed bribery or treating, by distributing books of matches to electors. The books, of 20 matches, were printed with exhortations to vote for Maltby. A rival candidate petitioned his return.

Justice Smith in the Victorian Supreme Court dismissed the complaint, reasoning that at law such ‘gifts’ could not be treats (he limited ‘entertainments’ to events involving refreshments).\(^{350}\) As regards bribery, he noted that the corrupt intention to induce support must be made tangible in the giving of the gift. He held that the matches were merely an advertising gimmick, thereby separating the exhortation from the product.\(^{351}\) This analysis is fine as far as it goes – and may explain why everything from t-shirts to hats plastered with campaign slogans can be distributed freely. But curiously he overlooked the obvious argument from the maxim *de minimis non curat lex*. Instead, thinking like a contract lawyer, he even held that the matches, although small in value, were ‘valuable consideration’\(^{352}\).

In an even greater ‘try on’, the ALP referred a mailout by a Federal Liberal MP to the AEC at the 1996 election. The mailout, directed to nursing homes and retirement villages, artfully affected concern that the ALP had been ‘making a nuisance of

\(^{350}\) Woodward v Maltby [1959] VR 794 at 796, interpreting ‘any meat, drink, entertainment or provisions’ in the archaic definition of treating in then The Constitution Act Amendment Act 1956 (Vic) s 241.

\(^{351}\) Ibid, 798.

\(^{352}\) In fairness to Smith J, s 244 of the Victorian Act used the term ‘valuable consideration’. Note that the Electoral Act 2002 (Vic) s 146(3) provides an alternative escape route, in that a Court of Disputed Returns may ‘declare an act, matter or thing [which otherwise might unseat or disqualify a candidate or member] never to have occurred if [it] was in all the circumstances of a trifling nature.’ (emphasis added).
themselves’ with door-to-door canvassing. The Liberal candidate instead wrote that he was content to provide printed information, and enclosed a teabag, with the invitation ‘to make a nice cuppa, sit down, relax and read the information in your own good time.’ (Ignoring the patronising tone, it is noteworthy that the ‘teabag’ gesture had been popularised by real estate agents touting for business).

The ALP’s intention in referring the matter was as much to wheedle legal clarification out of the AEC and the DPP about the dividing line between trinkets and treats and briberous benefits, as to make partisan mischief. The AEC’s curt response, presumably drawing on a *de minimis* reading of Maltby’s case, was that ‘the distribution of minor items … is not likely to be in breach of [the Federal bribery provision].’ 353 The parties of course would prefer a bright-line definition of what ‘minor items’ means, perhaps in terms of a monetary value. 354 But leaving the matter open to interpretation may be preferable, if only because distributing items such as apparel might well amount to a bribe if the recipients are poor. In this respect, one can query the DPP’s advice to the AEC that neither ‘a cut-price petrol campaign sponsored by the National Party’ nor the sale of discounted ‘Fightback petrol’ by a Liberal candidate’ at the 1993 Federal election warranted prosecution. 355 Also illustrative are allegations (not prosecuted for insufficiency of evidence) that a Northern Territory election candidate distributed kangaroo tails to electors: 356 the value of such a gift lying not its market valuation, but in the cultural background and means of the recipient.

---


354 Some US States do legislate a dollar value limit to the trinkets that can be distributed per elector.


Latter Day Treats

As the instances just discussed illustrate, nervousness about the breadth of the law of treating persisted through the 1990s, as evidenced in submissions by both major parties to the Commonwealth Parliament’s Joint Standing Committee on Electoral Matters (JSCEM). The ALP, for example, in a parliamentary submission devoted two pages to it, citing ‘concern [of] a large number of individual ALP candidates in respect to both their own activities and in some instances actions of their opponents.’ During the 1996 campaign, the ALP had referred, to the AEC, leaflets distributed by the National Party candidate for Leichhardt, promising a ‘meet the candidate’ (and his wife!) ‘Happy Hour’ at a hotel unit. The AEC’s response was legalistic. The ‘implied offer of drinks at a reduced price in the advertisement does not come within the terms of [the bribery section].’

The ALP was surprised by the bluntness of the conclusion. It should not have been: after a 1988 by-election, the Liberals had complained of an ALP bicentennial barbecue, where invitees were encouraged to meet senior ALP figures. The AEC took formal legal advice on that complaint, which clearly recommended against prosecution.

It needs to be remembered that the prevailing assumption, inherited from the late 19th century cases, had been that free alcohol was the essence of illegal treating. In that light, an easily adopted pretence of charging discount prices for drinks did not seem to be a reasonable dividing line between lawful and unlawful hospitality. This

357 The ALP was particularly dogged, raising the issue in its submissions in 1990, 1993, 1996 and 1999.
360 National Secretary of the Australian Labor Party, above n 358, 1022.
361 AEC Submission, above n 355, 1271-2.
assumption had some basis. Hanging over the parties, since 1911, had been an Attorney-General’s Department opinion, under the hand of Robert Garran (soon to be Solicitor-General). The opinion warned, ‘the supply of refreshments generally to the electors present at a political meeting, held after the nominations have been officially declared, would, prima facie, be an offence. … [But] circumstances would have to be such as would justify … a conclusion that the refreshments were supplied with a view to influence the votes of the electors present.’

But perhaps most of all in the ‘Happy Hour’ dispute, the ALP seemed miffed that its candidates had felt disinhibited from staging such treats. In essence the call for legal clarity was as much about a desire for an equal campaign field as it was concern over the propriety of such hospitality.

In 1993, the JSCEM had agreed with both major parties that offering food and drink was ‘unexceptional’ and that the Act should be clarified in that regard: it asked the AEC to advise. However in the JSCEM report issued in 1997, no amendment was recommended. Federal legislators did not have to look far for a precedent: the Victorian Act at the time contained a section headed ‘Service of tea after political meeting not prohibited’ which quaintly covered ‘light refreshments by way of afternoon tea or supper following a public political meeting’. The JSCEM in 1997 seemed reassured that bribery prosecutions under the Federal Act were almost unheard of, and that the AEC (on DPP advice) distinguished between hospitality in the form of courtesies that merely encouraged public participation in election meetings proper and attempts to influence voting intentions. The legislative inaction mirrored the (then Labor) administration’s statement in 1995 that:

Criminal law policy considerations indicate that the proposed [clarificatory amendment] to section 326 would impair its effectiveness and is not

---

362 Brazil (ed), above n 272, 544-6.
justified in view of the low risk that conduct, involving the provision of small amounts of food etc to voters, would be prosecuted...366

In this case, having ‘fuzzy’ law or rather the fear of it may prove to be a useful moderating force: refreshments are okay, but it is best not to ‘roll out the barrel’. It might be objected that a lack of bright line, legislative exceptions can lead to unworthy complaints. For example, Liberal-turned-independent Paul Filing, Federal MP for Moore, was petitioned in the High Court, on grounds including two counts of treating. One related to a well-advertised meeting he staged at which a former member of The Seekers performed and children’s entertainment was provided; the other related to food and entertainment aimed at children in a political picnic held at a soccer club.367 Unsurprisingly the petition was left to lapse,368 although its prosecution may at least have shone some judicial light on the limits, if any, on ‘bread and circuses’ at election time. In US and now Russia, such concerts and razzamattaz are common features of electioneering. Whether they make elections ‘sexier’, render comical the politicians who feed off them, or whether they are a subtle form of vote-buying is yet to be established by researchers of electoral psychology.

Complaints like the anti-entertainment allegations in the Moore Election Petition, or that levied against the ALP’s bicentennial barbecues are reminders that allegations motivated by political mischief making or revenge369 are one risk of fuzzy law. But short of abolishing anti-bribery laws altogether, there is no way to prevent such allegations being made. As criminal prosecutions can only occur with DPP approval, and private prosecutions in the form of a petition can only occur after polling has completed (and even then, at significant expense to the complainant) the potential for

368 The petition and its lapse are noted in Harris (ed), above n 328, 760.
369 Filing’s re-election as an independent, having left the Western Australian Liberal Party, was a bitter one, as evidenced by Filing’s own list of complaints of ‘dirty tricks’ against his old party: Paul Filing MP, Submission to JSCEM, Inquiry into all Aspects of the Conduct of the 1996 Federal Election and Matters Related Thereto, Submissions: Vol 2 (Submission 42) 352-4.
unfounded political damage is limited and disincentives to trivial complaints are high, not least as risible complaints are likely to backfire if exposed to media scrutiny or public cynicism.

CONCLUSION

This chapter serves as a bridge between the 19th century UK war on crude vote-buying and the legislative concerns of the Australian Parliament in the 20th century. It reveals a rather ad hoc approach to the framing and understanding of electoral bribery law, unsurprising given that, as measured by prosecutions and petitions, the issue was not at the forefront of political or legal consideration for most of the 20th century. In large part this is because of an implicit assumption that electoral bribery was only concerned with crude vote-buying and that mechanisms to deter such activity had been put into place in the 19th century. As a result, we see curious phenomena, such as an excessive, even continuing, obsession with the boundaries of treating law, even though in practical terms, not least for reasons of growing economic prosperity, treating has long since ceased to be a source of real influence in parliamentary election campaigns.

As the following three chapters will demonstrate, however, a variety of less direct forms of buying electoral support have evolved and assumed prominence in the changing landscape of 20th century campaigning, all of which implicate, either legally or metaphorically, the concept of electoral bribery. That is, the law’s dormancy for much of the 20th century was more a reflection of a blinkered assumption that electoral bribery was paradigmatically about crude vote-buying or treating by candidates and their agents, when electioneering culture had moved on.

In terms of black-letter concepts, we do find a number of issues of relevance to contemporary concerns unfolding through the definitional debates of the earlier part of the 20th century. These include questions such as the nature and extent of illicit ‘benefits’ (which is highly relevant to a variety of political deals), the question of the reach of bribery law prior to the campaign period (now outflanked by the modern reality of the ‘permanent’ campaign), and to agents (albeit less of a concern with the
centralisation of campaigning) and the purpose and extent of the exemption for public policy and action (an understanding of which is crucial to the question of ‘metaphorical’ bribery, as we shall see in Chapter Six).

We can also often discern in these debates a tension between two sets of attitudes to electoral law. One is a puristic position, the other a more pragmatic one. The puristic may sometimes draw on high-minded assumptions about democracy or political virtue, but it may also draw on a sense of social propriety (as in the puritanical approach to alcohol or wagering in relation to electioneering). The more pragmatic approach tends to accept a more relaxed regulatory approach, although should not be misunderstood as a necessarily laissez-faire attitude.

This chapter has consciously paid close attention to the detail and chronology of developments in bribery law, understood in their political context. As with the previous chapter, one lesson to be drawn from this is that the interplay of law and politics is not best understood from the vantage point of normative jurisprudence or political philosophy - though of course those seeking unifying or philosophically coherent explanations of ‘right’ and ‘wrong’ in this area will assume that vantage point, as we shall see in the final chapter. Rather, as with the detailed description of the UK history in Chapter Two, the intention has been to respect the fact that legal regulation and electoral behaviours are rarely susceptible to grand narratives, and in particular, that electoral law, though it serves ‘democracy’, is not determined in any strong sense by arguments from such lofty concepts. Its answers (or lack of them) to perennial questions such as ‘what influences on electoral support are appropriate’ are shaped in a mutually constructive way by its relationship with electoral mores and assumptions that are grounded in the prevailing electoral culture and forms.
Chapter Four

The Australian Experience of Electoral Bribery.

Dealing in Electoral Support.

CHAPTER COVERAGE AND PURPOSE

The previous two chapters may seem like works of archaeology, exploring legal doctrine and the history of electoral practice relating to the traditional concern with direct vote-buying, including treating. In contrast, the present and succeeding two chapters (which should be read together) will explore a series of cases – legal judgments, inquiries and political scandals – that have occurred in the last 25-30 years. These chapters will demonstrate that, defying assumptions that electoral bribery died out in the early 20th century, it remains a thorny legal concept and a potent consideration in evolving norms of conduct designed to seek electoral support.

The cases we will explore do not illustrate attempts to buy the votes of individual electors, which was the traditional concern of electoral bribery law. That, as we have seen in preceding chapters, involved the use of relatively tangible lures, notably money and treats, in a crude attempt to transact the vote of supplicant electors through a form of personal exchange. By definition, that activity involved relationships of inequality, since voters and politicians possess different types and levels of political power.

Instead, the present chapter and Chapter Five immediately following explore ‘political deals’, in particular conduct involving the trading of political benefits and influence. This conduct involves people who are equals, if not exactly in terms of influence or institutional position, then at least people who are formally equal in that they are all actors dealing in political power. By contrast, electoral bribery as traditionally conceived and surveyed in the previous two chapters tended to involve a political actor bribing electors – an exchange of difference.
The present and following chapters focus on three categories of political deals. The first is preference deals. To understand the variety and importance of these deals, the nature and centrality of preference votes to the Australian party system and elections is first discussed at some length. Such deals are a factor of a system, which in the common law world at least is peculiar to Australian elections. The second category of deals involves the electoral support of influential extra-parliamentary actors, in particular lobby groups and the media. The two categories discussed in the present chapter are united in being attempts to buy electoral support from other political actors, and thereby indirectly sway voters collectively rather than individually.

The third category, dealt with in Chapter Five, broadens the discussion to bribery in the context of parliamentary deals involving electorally motivated political exchanges. It concludes with reflections pertinent to both chapters – ie to the question of deal-making generally. The conclusion is that certain ‘benefits’ are part of the very currency of politics, and are not, therefore, assimilable to the idea of an illicit ‘purchasing’ favours which is at the heart of the legal wrong of bribery.

In Chapter Six, we will return to vote-buying – ie political actors bribing electors - but in the more modern forms of the use of public funds and promises to directly sway electors, albeit collectively rather than individually.

The purpose of these chapters is to make good the claim of the thesis that the problem of electoral bribery – of buying electoral support – did not dissipate entirely merely because the 19th century war on crude vote-buying was won. The competitive nature of electoral politics and the changing framework of electoral politics – eg the advent of preferential voting as a determinative factor in electoral outcomes, the rise of lobby groups and the media and even the advent of the internet - have brought to the fore a variety of practices that call for renewed attention to both the meaning of the statutory prohibition on electoral bribery, and the concepts underlying it.

We will work through a variety of types of electoral and parliamentary conduct, but the purpose is not to generate a detailed law reform manifesto. Ultimately, if
parliamentarians resent the shadow of electoral bribery law falling across the practices examined here, they can address that with simple legislative clarifications. My aim in this thesis is to mount a detailed, context-sensitive analysis of the interplay of law with questions of electoral conduct. Indeed, it will be seen that there is no ‘magic-bullet’, in the sense of an over-arching or additional factor to add to the basic elements of electoral bribery (viz benefit + intent to influence) that could separate appropriate from inappropriate conduct as a general legal rule.\textsuperscript{370} However in this and Chapter Five, the notion of ‘political currency’ will be developed to explain why certain deals – such as preference swaps and vote-swaps, along with bartering parliamentary support for parliamentary office – are acceptable trades.

The discussion in this chapter is novel. Most of the material gathered here is primary material – principally media reports, but occasionally reports of inquiries – which has not been subject to critique or analysis before.\textsuperscript{371}

**DEALING IN PREFERENCES**

**Preferential Voting: its Operation in Australian Elections**

Voting in Australia is by way of preferential balloting using the ‘alternative vote’ or ‘(single) transferable vote’, systems that, although not unique to Australia, were pioneered here. They occupy a ‘half-way house’ between the simplistic ‘first-past-the-post’ system and more complex variations on the theme of proportional representation. Before exploring the electoral bribery implications of preferential voting, it is necessary to clarify and contextualise how preferential voting works in Australia, because the nuances of how the law circumscribes electoral choices are of profound significance, not merely to the outcomes of elections, but the entire political landscape. Preferences contribute to and cement a two-tiered party system, and create a campaign culture within which potentially bribereous trading can occur, between

\textsuperscript{370} See for example the discussion of ‘secrecy’ as such an element, below text at nn 475-8. Normative political and economic theory also is unavailable to do such a job, as argued in Chapter Seven.

\textsuperscript{371} The exception to this rule, as already noted, is Hughes, above n 3.
otherwise rival candidates and parties, over preference recommendations. (The discussion under this sub-heading is primarily intended for readers unfamiliar with the Australian voting system: anyone steeped in that system may safely skip this section.)

The first-past-the-post system asks electors to plump for their favourite candidate.\footnote{372} It is still employed in the larger common-law countries with which Australia is often compared, viz the United States, the United Kingdom and Canada. It generally ensures disproportionate majorities, since candidates can win seats with a plurality rather than a majority. Its proponents champion powerful and stable government, with parliamentarians accountable to geographically distinct ‘seats’. Elections are notionally built around individual candidatures, but in truth parliamentarians may be subservient to a tightly controlled party.\footnote{373} Aside from having a say in electing their leader (and with him the executive government) individual parliamentarians are relatively powerless and their main role is to ‘service’ their electorate in a low-level sense.\footnote{374} Minor parties are almost excluded by first-past-the-post systems, except for regional parties whose supporters are geographically concentrated enough to achieve

\footnote{372}{Or favourites, in the case of multi-member electorates. Two member electorates were not uncommon in 19th century UK and Australia.}

\footnote{373}{I say ‘may be’ since the US, whilst replicating a ‘Tweedledum’ vs ‘Tweedledee’ two-party ideology (of Republicans vs Democrats), does not have strong internal party discipline. In part this may be due to a cultural individualism, where the cult of the candidate is more important than the binds of the party as an association. In part it is also due to primary elections: parties do not control the pre-selection of their candidates through limited internal ballots of their paid-up members or executive endorsement of candidates. Rather, laws mandate that at a minimum, an eligible citizen can register in a public ballot to endorse a party’s candidate, merely by ‘registering’, ie nominating, as a notional supporter of that party. For a brief comparative explanation of the differences, see Graeme Orr, ‘Overseeing the Gatekeepers: Should the Preselection of Political Candidates be Regulated’ (2001) 12 Public Law Rev 89, 89-93.}

\footnote{374}{Of course these aren’t invariable effects. As Norris points out, many parliamentarians in PR systems may focus on individual constituent’s problem out of social expectation or philanthropy; conversely many constituent MPs in common law countries focus only on national issues: Pippa Norris, ‘Are Australian MPs in Touch with Constituents’<http://democratic.audit.anu.edu.au/norris.pdf> at 2.}
a plurality. First-past-the-post voting leads to centripetal electoral dynamics, and all other things being equal, tends to lead to the oscillation of power between two centrist parties vying for the ‘median’ voter.

By contrast, truly proportional systems of representation (PR) usually involve a party ‘list’. Electors do not vote for individuals, but for a party, and the party’s share of the total vote guarantees it a proportionate share of parliamentary seats. The political dynamic of such systems tends to be centrifugal. Far from forcing party discipline and atrophying party competition, PR encourages factions to form new parties. Numerous parties emerge with, over time, no deep or fixed divisions in status; instead there is a fluid continuum. Rather than formally represent a geographically defined electorate, parliamentarians typically represent that section of the electorate-at-large who support their party’s ideology or positions. In return for more colourful and accurate representation of political pluralism, government becomes less stable. Not because electoral outcomes are chaotic: centrist tendencies remain, because, if the centre is where the largest numbers of votes are to be harvested, that is where the larger parties will congregate. Rather, instability arises in the shifting and unpredictable nature of coalition formation after elections.

There are compromises between first-past-the-post and PR, in the sense of mixed systems (as in New Zealand). But Australia has erected a half-way house in a different sense. Preferential voting asks voters neither to plump for a favourite candidate, nor a party list. Instead, the voter ranks her choices between the candidates on offer. In the count, the least favoured alternatives are discarded and the votes of supporters of excluded candidates are allocated according to their next

---

375 Indeed not simply minor parties, but major parties that are not parties of government. The UK Liberal Party is the best example of a major party (in terms of voting support) consigned to a life of a minor parliamentary party, because its support is broad but geographically diffuse across Britain.

376 Subject, invariably, to achieving a set minimum or threshold of the vote.

Chapter 4: Dealing in Electoral Support

preference. (The ballot is hence known as the alternative, contingent or transferable vote.).\textsuperscript{378}

The net result of preferential voting is that a majoritarian winner is forced. Minor or new parties are not discouraged, but nor are they successful in proportion to their vote. Depending on the variant set down in law, voters are either compelled to give a complete ranking of preferences to cast a valid vote (‘compulsory preferential voting’) or free to express as many preferences as they wish (‘optional preferential voting’).\textsuperscript{379} Strong government is typically still achieved through the use of single-member constituencies in lower houses (where governments are formed), but a modicum of proportionality is achieved through multi-member electorates in most upper houses (or houses of review).\textsuperscript{380} In that sense also, Australia uses a mixed system. But the upper houses are not strictly elected by PR. For instance, in the Australian Senate, quotas for election are fairly high so results are only semi-proportional,\textsuperscript{381} and there is no neat allocation of seats to votes. Rather, the last couple of seats decided in any Senate election are decided through a complex method of transferring preferences.

One criticism of the Australian system of preferential voting is that elections can become a measure of the least disliked, rather than the most liked, party or candidate. An nth preference is as valuable as a first preference, provided your ultimate opponent is ranked worst than nth. Of course the system is not entirely unique to Australia: a Continental European variation, the ‘run-off’ is used in head-to-head races, eg in France and Russia, where voting occurs over two election days. In the first race, voters plump for their favourite, amongst a very wide field. Then in the run-off, electors are invited back, to decide between the two most popular options.

\textsuperscript{378} In the single-transferable vote system, a variant of the Alternative Vote for multi-member elections, successful candidates are also excluded from the count, and their ‘surplus’ support transferred at fractional value to help decide who fills the remaining seats.

\textsuperscript{379} Preferences are compulsory at Federal elections, but optional at, eg, Qld and NSW elections.

\textsuperscript{380} Tasmania and the ACT are exceptional in using forms of PR in their lower houses.

\textsuperscript{381} To borrow the phrase coined by psephologist, Malcolm Mackerras.
from the first ballot. Preferential voting as practised in Australia, is known in American parlance as ‘instant run-off’ voting.

The analogy with run-offs is not completely accurate, however. The upside of the Australian system is that a farce such as the 2002 French Presidential election would be unlikely, at least under compulsory preferential voting. The upside of the run-off system is that all parties are ostensibly equal in the first ballot. Minor parties and their supporters need only turn their mind to the lesser-of-the-two-evils choice of how to allocate their second preference after the first ballot, allowing them to run in that ballot on their own merits. By contrast, the Australian system tends to construct minor parties and their supporters as preference ‘cows’, to be milked by the major parties. The marginalised naturally trade on whatever they have, so it is precisely the ability to recommend – and, in the case of the Senate today, to guarantee - preference flows that minor parties have some power in the Australian system.

**Why Preference Deals are Central to Contemporary Campaigning**

Horse-trading between parties over preferences has been an institutionalised feature of Australian elections, since 1919 (the first general election for the House of Representatives to employ them) and 1949 (the first Senate election to employ them). For much of that time, however, preferences were not at the forefront of

---

382 There, conservative incumbent President Chirac trounced Front Nationale candidate M Le Pen in the run-off, after the real opposition, the Socialist candidate, ran third in the first round when the leftist vote split across a plethora of candidates.

383 By advising supporters to allocate their preferences a certain way, most importantly to place one major party ahead of another. This is done with ‘how-to-vote’ advice, typically through advertisements and the distribution of ‘how-to-vote’ cards at polling booths.

384 Since 1984, to ease elector’s choices and reduce informal voting, Senate electors have been able to simply vote ‘1’ in a party or group box. This is not a list system however: rather the party or group nominates up to 3 rankings of candidates on the ballot paper, and its ‘box’ votes are distributed according to those preferences. Close to 95% of electors routinely choose this easier option, which effectively transfers their preference options to the party apparatchiks. This system, also known as ‘above-the-line’ voting is further explained by Marian Sawer, ‘Above-the-line Voting: How Democratic?’ <http://democratic.audit.anu.edu.au/abovetheline.pdf>
consideration, since a Labor versus non-Labor dichotomy ruled electoral politics\textsuperscript{385} routinely over 90\% of votes split between those two forces.\textsuperscript{386}

In contrast, since the mid 1970s, that bi-polar consensus has eroded significantly. Leaving aside occasional, highly polarised elections, minor parties have proliferated and a range of non-aligned but significant minor parties (Democrats, One Nation, Greens) has emerged in that time. Support for these parties and independents routinely varies between 15 and 20\%.\textsuperscript{387} Without preferential voting, fledgling minor party would face a formidable task in convincing electors that a vote for them is not a vote thrown away. But a couple of other factors peculiar to the past three decades have shaped this emergence. One is a decline in ideological differentiation between Labor and non-Labor parties. Another is institutional support to minor parties, through public funding\textsuperscript{388} and an expansion of the Senate that made it easier for minor parties to win Senate seats, leading to no government having a majority in that House since 1977.

The ‘major’ parties remain the parties of government, but they do so to the degree that they can attract preferences from minor party and independent supporters. Conversely, in their bids to gain some parliamentary representation in the Senate, minor parties need preferences. Preferences are thus central to the contemporary electoral dynamic, and hence arrangements and deals involving them are inevitable. By deals, I do not mean the giving of benefits to any individual elector in return for her second and later preferences (which would be equivalent to crude vote-buying), but commitments between the parties or candidates as to how they direct their Senate

\textsuperscript{385} The only significant minor parties - the Country (now National Party) and the conservative ALP breakaway, the Democratic Labor Party – were both in actual coalition or de facto league with the major non-Labor party (the United Australia, later Liberal Party).

\textsuperscript{386} See the figures and discussion in Dean Jaensch and David Mathieson, \textit{A Plague on Both Your Houses: Minor Parties in Australia} (1998) 1-3.

\textsuperscript{387} Ibid. The trend peaked in the 1998 federal election where only 79.6\% of first preference votes were cast for the major parties: AEC, \textit{Electoral Pocketbook} (2002) 71.

\textsuperscript{388} Albeit that the law discriminates against minor parties and independents, in that there is a 4\% threshold to qualify for public funding at federal elections: CEA s 297.
preferences or how they recommend their supporters allocate their House of Representative preferences.

When, then, would such preference deal be briberous? Some might ask whether, if a practice is central to elections, it should be liable to be impugned at all. Any such regulation may distort the trade in preferences in unpredictable ways, and be hard to enforce. But since preferences are ‘where the action’ is, we should not be surprised to find that it is a site for potentially briberous, and electorally efficacious activity. If something is electorally valuable, desperate or over-competitive political actors are likely to stretch ethics to breaking point.

To give an example of such conduct, parties desperate to harvest preferences have often resorted to designing and distributing tricky ‘how-to-vote’ cards aimed at minor party supporters. Such cards camouflage or hide any reference to the major party that produced them, and in the worst case mimic that minor party’s get-up to lure gullible electors into believing they represent the recommendation of the minor party. In such cases, electoral laws prohibiting matter ‘that is likely to mislead or deceive an elector in relation to the [manner of] casting of a vote’ have been invoked. Yet parties persisted in the face of such laws, and in some cases merely sharpened their practices. For example, they took to circulating such cards only on election day, knowing that judges are reluctant to injunct ‘political communication’ in hurried interim hearings on polling day. The design of these cards was also nuanced, to omit references to any party affiliations, besides those of the minor party whose supporters were being targeted. Almost by definition, people who rely on ‘how-to-vote’ cards, particularly those voting for a minor party as a protest vote, are among the more gullible or

---

389 Eg CEA s 329. The restriction of the ‘manner’ of casting a vote was introduced by the High Court in Evans v Crichton-Browne (1980) 147 CLR 169 to prevent the section chilling general political debate, eg about a party’s alleged policies or a candidate’s alleged attributes. For an example of a conviction of such an offence, see Bray v Walsh (1976) 15 SASR 293.

politically unsophisticated of electors. Here, we have even see a re-run of the old agency problem, viz when can unauthorised actions of volunteers be attributed to the party or candidate they support? Zealous major party activists, working in effect undercover, have been known to supplement the written how-to-vote card with misleading oral statements, implying that the cards came from a minor party.

In short, when the stakes are high, parties have shown themselves willing to push the boundaries of campaign ethics and legality. That they would do so in a relatively public domain such as publishing ‘how-to-vote’ material, suggests that they are no less likely to do so in preference deals made ‘behind the scenes’.

**Varieties of Preference Arrangements and Deals**

Preference arrangements can take varying shapes and involve various forms of quid pro quo and degrees of ‘transactedness’. At the most innocent, there is no deal at all: one party merely announces its preference recommendations or makes its preference allocations based on ideological sympathies. For example the Democrats typically preference the Greens and vice versa, rewarding each other’s pro-environment agenda.

Often such decisions will also be based on calculations of political self-interest as much as ideological or policy convergence: for example the Liberal party’s insistence on putting One Nation last was as much a calculated decision to starve a conservative

---

391 *Goss v Swan*, ibid, per Derrington J at 41 rightly held that the test included ‘any gullible and naïve elector’ (after all they are the ones most likely to be affected by last minute entreaties). But he then held they had to be ‘probably’ affected, setting the bar of ‘likely’ higher than it needed to be.

392 In that they do all they can, including dressing plainly and not associating with their real party at polling booths, so the distribution of such cards appears independent of the party that produced them.

393 *Carroll v Electoral Commission Queensland* (1999) 1 Qd R 117. Although not finding them sufficiently unlawful or effective as to lose it the seat in question, Mackenzie J so frowned on the ALP’s ‘how-to-vote’ activities that, he recommended legislation. After a parliamentary inquiry, a micro-regulating bill was enacted mandating that such cards clearly identified their true source, to the point of using a minimum font size to identify the party responsible: *Electoral Act and Other Acts Amendment Act 2001* (Qld) s 10.
rival of preferences and avoid alienating urban-dwelling, small ‘l’ liberals, as it was a rejection of the radical aspects of One Nation’s policies. Indeed preference recommendations and allocations may be based on an avoidance of ideology and a desire to ‘position’ a party. Thus the Democrats traditionally avoided preference allocations by offering voters a double-sided card showing them how to preference either Labor or the Coalition. Sometimes preference announcements are made quietly, as part of the business of gearing up for an election; other times they are done with fanfare, particularly if a ‘message’ is being sent (eg in the decision to ‘put One Nation last’) although the degree of publicity can tailored to different regions, to send different signals to different electorates.

A second, plainly unobjectionable form of preference arrangement is a simple preference swap. This is where representatives from each party simply agree to trade preferences. For example, it was reported that at the 2001 Federal election ‘in return for preferences in 15 marginal seats, Labor agreed to list the Democrats above the Greens in most states, but split 50/50 between those parties in Tasmania and Western Australia.’\footnote{394}{Matt Price, ‘Preference Deal Saved Democrats from Rout’, \textit{The Australian}, 4/12/2001, 2.} Such swaps cut mustard, especially in Senate races where, as noted earlier, preference flows can largely be guaranteed to follow the parties’ decisions. The Democrat national secretary admitted ‘the preference deal was crucial’ in the survival of two of its Senators.\footnote{395}{Ibid, quoting Jack Evans.} Such preference swaps of course do not necessarily ignore ideology - the three parties involved here are linked by various degrees of social democratic ideology. Indeed a swap that defied ideological or policy sympathies would raise eyebrows and may attract inquiry, although usually the overriding motivation is mutual electoral ambition rather than venality.\footnote{396}{Annabel Crabb and Paul Heinrichs, ‘Democrats Strike Family First Deal’, \textit{The Age}, 19/9/2004, details how, shut out of a Greens-ALP preference deal, the Democrats turned to the Family First Party, despite the latter’s socially conservative \textit{raison-d’etre} being opposed to the Democrats’ social progressivism.} These calculations are far from simple, involving the juggling of assumptions across dozens of marginal seats, and unpredictable Senate races. Further, suitors who would otherwise be ideologically simpatico can be played off against each other: minor
parties like the Greens and the Democrats are typically direct competitors in Senate contests.\textsuperscript{397}

Why are such preference swaps unobjectionable? The simplest answer is that they involve trading like for like: they are true commensurables. Not that parties are swapping items of \textit{identical} value. Major parties want preferences in key lower house constituencies, minor parties in return want preferences in key Senate races. But what is being traded is the same currency: surplus votes, which must go somewhere and would not otherwise exist if preferential voting was not part of the legislative framework.

Of course some people are offended by any bartering over preferences, and would prefer parties to be banned from recommending, let alone controlling preferences, since it is suspected that some innocent electors imagine they have to follow a ‘how-to-vote’ card for their vote to be certain of being counted. This objection amounts to a claim that the system encourages voters not to think for themselves or come to a set of their own preferences, diverting more power to party apparatchiks. However given the High Court’s discovery of an ‘implied freedom of political communication’ in the structure of ‘representative democracy’ it is doubtful that any restriction on parties advocating preferences would be constitutional.\textsuperscript{398} As long as we have preferential

\textsuperscript{397} Indeed in the lead up to the 2004 election, they were openly competing for deals involving their preferences, Democrat Senator John Cherry making public research he had done showing that ‘Democrats’ preference decisions appear to have a stronger influence on preferences than Greens’ decisions’: Cherry, ‘Do Democrat or Green Preferences Make a Difference at Federal Elections?’ <http://www.mumble.com.au/federal/cherry2.pdf>. The reason is that Greens’ voters are generally of a leftist ideology, so their preferences naturally favour the ALP over the conservative Coalition: see Peter Brent, ‘Lies and Statistics’, \textit{Australian Financial Review}, 16/11/2002, 59. A journalist who publicised this paper commented that ‘[Cherry’s] conclusion is clear and so is his message to [the ALP]: when it comes to preference deals, shop around’: Glenn Milne, ‘No Real Value in Vote Deals’, \textit{The Australian}, 24/5/2004, 7. This is ironic given the Democrats’ once proud policy of even-handedness between the major parties (its slogan was ‘keep the bastards honest’.)

\textsuperscript{398} \textit{ACTV v Commonwealth} (1992) 177 CLR 106. Although in \textit{Langer v Commonwealth} (1996) 186 CLR 302 the Court upheld a ban on advocating a form of voting that was formally legal, the reason was that the advocacy was merely a clever way of exploiting a technical provision to undermine the express legislative intention to mandate preferential voting. Banning parties recommending
voting, preference-swap deals will continue, but do not amount to ‘buying’ preference support, because they involve the exchange of the same currency.

preferences would be prohibiting electoral speech about the very form of voting that the Act mandates. But as one legal academic and sometime candidate argues, how-to-vote cards are inherently misleading, since the typical instruction ‘How to Vote Labor/Liberal … Number your ballot as follows…’ implies that electors must vote that way to vote formally for Labor/Liberal: see submission of John Pyke, discussed in Queensland Legislative Assembly, Legal, Constitutional and Administrative Review Committee, *Issues of Electoral Reform Raised in the Mansfield Decision: Regulating How-to-Vote Cards and Providing for Appeals from the Court of Disputed Returns*, Report No 18 (1999) 13-14.
Chapter 4: Dealing in Electoral Support

**Horse-Trading: Policy for Preferences**

A third and more complex form of ‘gaming’ with preferences involves actively framing policies and promises to attract minor party preferences. This would also be seen as legally unobjectionable, assuming at least that the policies are publicly promoted.\(^{399}\) Indeed it may be desirable. What better way to ensure minor parties have some influence on government and law-making, given they are otherwise effectively excluded by the majoritarian voting system from directly initiating, let alone controlling, legislative or executive action? What better way to ensure that the opinions of their supporters are taken into account by the major parties? Nevertheless, charges of ‘metaphorical’ bribery, or the distortion of policy-making and the national interest, may be raised when a major party becomes cynically focused on pandering to a particular constituency merely for its preferences. (Similarly, minor parties have been accused of metaphorical electoral intimidation against major party candidates, eg when the Family First party, despite having secured a preferences-for-policy deal with the federal Liberal Party in 2004, then wrote to individual Liberal candidates insisting they make commitments on issues like restricting abortion.\(^{400}\))

Such accusations were levelled most recently at the Howard government’s response to the One Nation challenge, especially in its hardening of immigration policy. Perhaps the most blatant and successful example of such a political tactic was Labor’s discovery of the value of Green preferences leading up to the 1990 election. After 7 years of a conservative Labor administration, its core or first preference vote had dwindled to just 39.4%\(^{401}\). Yet Labor retained power, thanks to Greens’ preferences and chief credit went to a polling driven, second-preference strategy orchestrated by

---

\(^{399}\) With or without an explicit exemption of public policy promises or action from bribery laws: cf CEA s 326(3) or state equivalents (listed in Appendix One).

\(^{400}\) The Liberal Party responded by announcing it had sought legal advice over Family First’s demands on Liberal candidates, claiming that they were ‘borderline legal’ but advising their candidates to reject them: Michael McKenna and Malcolm Cole, ‘Family First Backs Liberals into Corner’, The Courier-Mail, 6/10/2004, 1; Anon, ‘Liberals Spurn Family First Policy Demands’, The Courier-Mail, 7/10/2004, 7.

political tactician cum-Minister, Senator Richardson. In his un-self-consciously titled memoir, *Whatever it Takes*, Richardson devotes a chapter (‘Election ’90 and the Wooing of the Greens’)\(^\text{402}\) to relating how he ‘urged our local campaigners not to campaign against green candidates but to pursue them for preferences’ and describing various, sometimes highly symbolic, environmental announcements that he pushed through Cabinet. He even gloats that his agenda succeeded in the face of internal Cabinet opposition that the wooing of the Greens was coming at the cost of broader economic aims, and admits that he sought to sell the tactic to Cabinet as a ‘political strategy’.\(^\text{403}\) He argues it delivered Labor 10 seats thereby ‘dragg[ing] us over the line’ back into government, and proudly quotes a moderate, policy-oriented Liberal describing him as ‘the most dangerous man in Australia’.\(^\text{404}\) One man’s metaphorical bribery is another man’s electoral triumph.

Labor’s preference relationship with the Greens remains a key theme in Australian electoral politics. In the lead up to the 2004 Federal campaign, Labor is formulating and fine-tuning environmental policy in consultation with the Greens, with the ultimate outcome of the negotiations, from Labor’s perspective, the benefit of a preference swap. Greens’ leader Senator Brown openly spoke about the horse-trading and Green expectations of having a significant impact on Labor policy promises, saying he would not recommend preferences one way or another for just a ‘marginal [policy] difference’.\(^\text{405}\) Marginal electoral differences are central to calculations in such negotiations, however. Upwards of 75% of Green voters preference Labor regardless of whether their party recommends preferencing Labor. On figures for the previous election, the benefit of an explicit Green party recommendation in Labor’s favour was only an extra 3.5% of Green preferences.\(^\text{406}\) Assuming a typical Green vote of around 8%, that amounts to only around 240 votes in an average mainland


\(^{403}\) Ibid 260.

\(^{404}\) Ibid 276-7.


\(^{406}\) Ibid. See also the paper by Senator Cherry, above n 397.
electorate, albeit enough at most to sway the odd ultra-marginal seat.\(^{407}\) Set against such minute calculations, however, must be weighed any backlash to Labor in regions whose economies may be effected by such policies.

The relative openness of this type of preference deal, reflected in the increasing openness of them to media scrutiny, should be welcomed. If electoral bribery law extended to such deals, they would be forced underground. Some may object to this new-found openness, as if it showed a slipping of ethics and inhibitions, in that parties now assume that such horse-trading is not just a normal but an acceptable way of forming policy. Others simply object to a minor party flaunting the policy ‘rent’ it can seek. However it is hard to object to the public at least being aware of the existence and general terms of such arrangements. At a minimum, such information allows electors to better assess party motivations and positions.

An assessment of the degree to which such deals corrupt balanced policy-making is beyond the scope of this thesis, although it should be noted that they are not the implementation of policy, but merely its incorporation into a party’s election platform. The major party concerned retains the ability to downplay such policies in its campaigning (hypocritical though that may seem) and, more significantly, when in government to adjust the policy to meet contingencies. There is a difference then between electoral campaigns and the formation of policy pre-elections, and the process of government, and democratic theory would have more concerns with deal-making by governments who by definition have a relative monopoly power, than by parties in electoral mode, assuming a competitive electoral system.

Why do preference deals involving policy trades not offend electoral bribery prohibitions, either legally or conceptually? In such deals, there is an element of quid pro quo – an understanding that the minor party’s electoral support will be influenced or affected. But provided the major party’s policy is promulgated, the benefit fits the exemption for ‘declarations of public policy’. Further, the benefit is

\(^{407}\) At the 2001 election, for example, Labor lost two seats by under 500 votes. Generally, whilst it is possible to predict which seats will be marginal, it is very hard to predict which will be ultra-marginal – it is in the latter where preference deals are likely to be decisive.
typically generalised, and moves to no-one in particular. Certainly the offence of bribery covers a ‘benefit of any kind’, but it must be a benefit ‘to [the minor party] or any other person’. The process certainly ‘deals’ the minor party into the policy arena, but that is a political, not a legal ‘benefit’. Just as a straight preference swap creates no new benefit that is not already part of the rules of the political trade, so too the influencing of policy creates no new element to the ‘game’ of policy generation, unless we believe that preferences and policies are incommensurables.

They are, on their face, very different currencies. But examined more closely, what are preferences but indications and recommendations of ‘second best’ support? If it is right for a movement to recommend that its supporters preference the major party whose policies are closer to their ideology, then lobbying to increase that closeness is not objectionable in itself, especially in an electoral system where, in the lower house of government at least, minor parties are largely shut out from parliamentary power.

**Tangible Benefits and Intra-Party Support in Preference Deals**

The problem of electoral bribery, as a legal offence, is however squarely raised where any tangible benefits are offered to a party or candidate to influence their decision to recommend preferences. Although they fit the traditional paradigm of bribery (as purchasing support from or through an individual) such offers do not require widespread vote-buying, since only a handful of individuals are involved. As a form of buying electoral support, they suit the professionalised nature of modern parties and electioneering, as they do not require face-to-face dealings with a mass of electors. Further, unlike offering a bribe to an elector, the actors involved are relative equals. As political activists they occupy similar positions, and indeed may be known

---

408 CEA s 326

409 I say in itself, because it is easy to imagine scenarios where major parties lost sight of their own core values or the broader public interest, and simply became a hall of mirrors for as many minor parties as possible to milk the preferences of an unholy alliance of disparate interests. But in a plural society such a failure of leadership could occur regardless of the existence of minor parties and preference deals.
to each other from earlier campaigns. Each will usually be politically savvy, and typically they are repeat players in the electoral ‘game’. None has any real interest in reporting their deals to the media let alone the authorities, not just for fear of never being trusted again or of being caught in an investigation themselves, but because their parties and hence their political careers would be damaged by such publicity.

We will now discuss two similar scandals – one from the 1970s and one from the 1990s – involving payments of money to rival candidates in relation to preference arrangements. The interpretive problem, as the cases illustrate, is not in whether there is a ‘benefit’ but in determining if the benefit was designed to influence, or expected as a quid pro quo for, a favourable preference recommendation. The broader problem is whether payments or tangible benefits between ostensibly rival campaigns should be regulated and if so how. A third issue worthy of discussion is whether private promises of policy or governmental action to lure preference support are tantamount to bribery – this will be canvassed later in this chapter, under a broader heading relating to deals for lobby group support generally.

**The Garland Case of 1975-6**

At the Federal 1975 election, a young Liberal Parliamentarian, Vic Garland, almost lost his political career over payments alleged to be part of a preference deal. Garland, who after the election was appointed a Minister in the Fraser Government, and George Branson, a former Liberal Senator, were accused of paying $500 to an independent Senate candidate in the ACT in return for the independent recommending that his supporters preference the Liberal ticket, headed by John Knight.

The independent candidate, Michael Cavanough, made the accusations during the election campaign. He accepted the $500, which Garland gave him in cash, but passed it the next day to a newspaper, saying it was evidence of bribery.\(^{410}\) He said he was also offered help in the form of Liberal party activists handing out how-to-vote cards.

---

According to Cavanough, the initial approach to discuss preferences came from candidate Knight and his son, who was on Knight’s campaign team. Cavanough indicated that he favoured Knight, but would have to wait and see, for if another independent stood, Cavanough might preference that independent ahead of the Liberals. Cavanough subsequently offered his preferences to the Liberals, who thereupon, through Branson and Garland, began discussing how they could help his campaign, to the point of advising him of how and when to advertise. Indeed Garland said the Liberals would prepare the copy for a newspaper advertisement, have their solicitors check it for libel, and cover the cost. At one meeting, discussing the cost, Garland produced ten $50 notes. Cavanough understood that the money was purely given ‘on the condition that I was still willing to give my preferences’ to the Liberals.

Garland and Branson were charged with bribery, Garland having resigned from his ministry when the investigation began. The payment was admitted, the Liberals’ defence being that it was merely a campaign donation for legitimate election purposes.

The incident is curious, given the political backdrop. Although the campaign began in the volatile atmosphere of the dismissal of the Whitlam government, it must have been clear to both major parties that the Liberal Party would be swept into power. That it occurred in the ACT, whose two Senate places are virtually guaranteed to split 1-1 between Labor and Liberal, is even more curious – had they reflected on it, the Liberals would have realised that preferences would not matter to the outcome of the Senate election. The only other explanation is that a former Liberal Prime Minister, John Gorton, was running as an Independent Senator, and the Liberal Party in the ACT either over-estimated his support, or resented his leaving the party so

411 Ibid, 16.
415 Because the quota for election in a two-seat Senate race is just 33% - ie the ALP, although the majority party in the ACT, would need nearly 67% to win both spots.
badly that they campaigned over-zealously to deny him preferences. But this explanation seems unlikely given the election outcome. Gorton attracted a creditable 11% of the vote, but hardly at the Liberals’ expense (in a rare outcome for the normally pro-Labor ACT, the Liberals’ outpolled the ALP 43.6% to 37.1%). Ironically, Cavanough, who received the alleged bribe, polled just 263 votes.\footnote{Statistics sourced at Adam Carr, \textit{Psephos Election Archive} <http://psephos.adam-carr.net/countries/a/australia/1975/act-1975.txt>.}

This background suggests that Garland and Branson’s actions were just ‘business as usual’, rather than the actions of desperate or pressured people in a tight campaign. On this occasion they ran into an independent candidate who was initially naïve,\footnote{Cavanough told \textit{The Canberra Times} he was ‘amazed at the amount of money which seemed to be “flying around”’ during the campaign, and when to the paper when things were ‘getting too hot’: Cranston, above n 412.} then moved to an ethical response,\footnote{Cavanough ‘told the court he refused to be bought’: Anon, above n 414.} when confronted for the first time with the realpolitik of campaigning.

On Garland and Branson’s committal, the Chief Magistrate concluded:

\begin{quote}
I have given very careful consideration to the totality of the evidence. …It is my view that the evidence against each of the defendants has established a prima facie case, but it is my further view that a jury, properly directed would not convict the defendants on the evidence.\footnote{Anon, ‘Garland Cleared of Bribery Charges’, \textit{The Australian}, 9/3/1976, 5.}
\end{quote}

This seems a rather bold statement, given the evidence against (and admitted) by Garland and Branson. It can be understood in part against the high onus the Crown faces in criminal prosecutions. The moral of the tale may be that bribery in secret, where the word of one political actor is pitted against another, will always provide a ‘reasonable doubt’ if the defendant can suggest an alternative motive for offering or giving the benefit.
A more kindly interpretation of the Chief Magistrate’s decision is that the dismissal of the charges illustrated an old problem in electoral bribery law – proving whether the benefit was an inducement or reward for the electoral support. This is particularly problematic in horse-trading over preferences, since except in egregious cases where a venial minor party candidate pockets money for personal benefit or for supporting a major party candidate who they had otherwise publicly opposed, the major party which provides the benefit can always claim that they were merely offering campaign support to a sympathetic candidate. The Chief Magistrate perhaps felt such a defence would raise sufficient reasonable doubt, given that the independent candidate had indicated a willingness to preference the Liberal’s candidate prior to any direct raising of the issue of money or support.

As Paul Finn discussed in 1977, the traditionally worded bribery laws then in place did not explicitly deal with the preferential voting system, not least as such laws evolved under a first-past-the-post system. Finn advocated that the legislation be amended to clearly cover bribery affecting preferences, in particular a candidate or party’s preference recommendations. That is now explicitly covered in the Commonwealth Act. (The position is not so clear in jurisdictions which perpetuate older wordings of the law: eg Tasmania explicitly forbids bribery of an elector to win her preferences, but buying a party’s preference support could only, if at all, be covered by the limb against ‘induc[ing a] person to procure … the opposition to a candidate’.)

Could the Chief Magistrate have dismissed the charges against Garland on an interpretation that the CEA, as it stood at the 1975 election, did not cover preference deals? This seems unlikely. First, because he found a ‘prima facie case’, implying a prima facie breach of the Act as it then stood. Since the Act made it illegal to offer a bribe ‘to induce .. any support of … any candidate’, on any purposive interpretation a preference recommendation formed a kind of ‘support’ of a candidate, albeit a rival candidate. Second, even if the principle of strict construction of criminal offences against the Crown contradicted that purposive reading, such a question of law ought
to have been left to a higher court and could hardly have been resolved definitively on a non-judicial committal hearing.

Garland, it might be noted later resumed his Ministerial career. His stumble and temporary demotion presaged, by some 15 years, very similar allegations, which enveloped Federal Labor frontbencher, Wayne Swan MP.

**The Wayne Swan Case: More Cash for ‘Rival’ Candidates**

In late 2000, Federal Labor frontbencher Wayne Swan was forced to stand aside after revelations he had paid cash to a Democrat candidate standing against him in his marginal Brisbane seat of Lilley. The matter came to national attention after Labor party activists revealed the payment, which was made during the 1996 campaign. During that campaign, Labor was aware it faced a huge swing against it, imperilling even natural Labor seats such as Lilley.

Although the amount of the payment was disputed (Swan asserted it was $500, the activists claimed it was $1400) it was common ground that Swan gave the money to a party organiser to deliver to the Democrat’s local campaign manager. The organiser claimed this occurred a couple of days after a meeting between Swan and the campaign manager at which preferences had been discussed. As previously

421 As Minister for Veterans Affairs, then Minister for Business and Consumer Affairs, and Minister Assisting the Minister for Industry and Commerce, 1977-80.
422 The activists had been members of the ‘AWU’ faction, of which Mr Swan was a senior figure; their motivations for making their claims public were inseparable from the fact that they were being subject to public pillory and investigation for involvement in enrolment fraud aimed at distorting internal party ballots, a practice allegedly rife in that faction, and chronicled in the Queensland, Criminal Justice Commission, *The Shepherdson Inquiry: An Investigation into Electoral Fraud* (2001).
423 Swan lost the seat by 0.73%. He won close to 60% of preferences, but this in itself is not surprising given he was (a) a well known incumbent, and (b) the vast bulk of preferences flowed from centre-left parties the Greens and Democrats. The Democrats, whose preferences were at the centre of the controversy, polled 6.58% of the vote.
noted, Democrat practice was traditionally to favour neither major party in preferences: but in 1996 Lilley was one of about 10 seats nationally (a significant share of which were in suburban Brisbane) in which the Democrats preferred Labor; in a further few it preferred the Coalition.\textsuperscript{426} Both the ALP and the Democrat parties responded to the allegations of electoral bribery by pointing out that ultimate decisions as to preferences were taken by the Democrats at the national level, not by local campaign teams.\textsuperscript{427} The Democrat national campaign director explained that the decision to favour Labor in Brisbane seats was part of a preference swap agreement, under which Labor’s Senate preferences would favour the Democrats’ Queensland Senator, Cheryl Kernot.\textsuperscript{428}

The AEC referred the allegations to the Commonwealth Director of Public Prosecutions for advice and the Federal Police for investigation; no charges, however, were recommended.\textsuperscript{429} Again, we are left to speculate as to the legal analysis involved. Given the evidence that the ultimate decision as to preferences was made at national level (and by implication that any local input would be far from determinative), and assuming Mr Swan knew that, then it could not be safely concluded that the payment or other support was intended to influence the Democrats electoral conduct in the form of their preference decision.

This, however, is to take a rather narrow view of the phenomenon. The Swan imbroglio flushed out a host of similar allegations.\textsuperscript{430} They included an allegation

\textsuperscript{428} Shanahan, above n 424.
that Swan (a senior party figure) had agreed to pay $1000 worth of printing expenses for an independent State candidate if she preferred the Labor candidate in another election.\footnote{Hedley Thomas, ‘Campaign Manager Alleges $1000 deal’, The Courier-Mail, 30/11/2000, 4.} In the same vein, an independent candidate at the 1998 Federal election claimed he was approached by a Liberal party staffer who asked where his preferences were going and then said, ‘We can’t offer you money – however, we can offer you some printing’, where ‘some’ equated to many thousands of dollars’ worth of assistance. The independent saw that as a clear offer to purchase his preference support.\footnote{ABC Television, ‘Liberals Caught up in Tit-for-tat Electoral Rort Claims’, The 7:30 Report, 4/12/2000, <http://www.abc.net.au/7.30/s220123.htm>}

Gerard Henderson, a former speech-writer to the Liberal leader also revealed that it had been common practice for the Liberal Party to help fund Democratic Labor Party (DLP) campaigns from the late 1950s to the early 1970s. He claimed this was unobjectionable ‘mutual interest’ as the DLP, having split from the ALP on conservative Catholic/anti-communist grounds, had assumed a primary electoral role of channelling preferences to the Coalition governments.\footnote{Gerard Henderson, ‘All in Mutual Interest’, The Courier-Mail, 30/11/2000, 19. Henderson saw the Democrat/Labor preference deal in the same light, and seemed to doubt Liberal Party claims that it was ‘not standard practice for any political party to give another political party a bag of cash in support of any activity of that party’.

In the latter case, independent candidate Nigel Freemarijuana initially claimed that an agent of his made a preference deal involving his support for Labor in return for in-kind campaign support. The Liberal Party alleged that this involved Freemarijuana’s campaign material being reproduced on an electorate office photocopier of a state Labor MP. Freemarijuana later denied making the claims and not surprisingly the Federal Police again recommended no charges: Rosemary Odgers, ‘Police Drop Election Inquiry’, The Courier-Mail, 4. ABC Radio, ‘Libs Call for Investigation into Labor Vote-buying Allegations’, PM, 28/11/2000 <http://www.ac.net.au/pm/s217701.htm> recounted allegations that a Liberal Senator had offered $1000 to print Shooters Party how-to-vote cards favouring the Liberals. Similarly, Shanahan, below n 425, repeated admissions that the Greiner-led Liberal party in NSW had paid nearly $10,000 in printing costs for four candidates, some of whose independence was in doubt.
Making Sense of Preference Deals

The picture that emerges is of a campaign culture in which preference deals are an institutionalised part of campaigning. Indeed within contemporary electioneering culture it would be seen as ‘unprofessional’ to avoid them: one high profile independent Senate candidate in a tight race in 2004 even engaged a professional political consultant to negotiate with party suitors on her behalf.\(^{434}\)

It appears from the evidence discussed above that horse-trading over preferences has for some time extended to major parties providing cash and in-kind benefits to the minor party concerned. I have found, however, no admissions that individuals pocketed money for private gain (although that is unsurprising since what minor party recipient of such a benefit would admit to taking a clear bribe?).\(^{435}\) Rather, the benefits are directed to keeping afloat or enhancing the minor party campaign: for advertising, printing, and distribution of campaign material, in particular how-to-vote material, that both promotes the minor party and encourages its supporters to preference the major party. Henderson, as we just noted, believes this practice to be entirely unobjectionable. If two campaigns are simpatico enough for one to favour the other with preferences, then what is wrong with the wealthier supporting the poorer? Political alliances are fluid, and it would be dictatorial to suggest, for example, that members of one party ought not assist a sympathetic campaign or movement.

Nonetheless, it is clear that quid pro quo expectations have evolved, ie that preference arrangements are made in the legitimate expectation (in the sense of based on customary expectation, rather than normatively legitimate) of tangible campaign support. Of course each case will vary in terms of the mixture of venality and

\(^{434}\) Scott Emerson, ‘Parties in a Spin over Vote Deal’, *The Australian*, 22/5/2004, 8. The independent was revealed to have hired a ‘spin-doctor’ to negotiate with both the Australian Democrats and Greens Senate candidates, who were expecting to vie for one of the final Queensland Senate positions.

\(^{435}\) It might be countered that no major party player would offer such graft if there was any chance of the bribee running to the police; on the other hand the history of failures to prosecute electoral offences
innocence in the motives of those involved. The more neophyte and poorer the campaign, the more likely that money or in-kind assistance would be suggested or offered during preference discussions. It is hard to see in such cases how a finding of an intention to influence could not arise. A conditional promise, express or implied (‘if you support us, we’ll help your campaign’) is at the heart of the classical notion of electoral bribery (‘vote for us for a reward’). Further, the smaller the campaign, the less likelihood it is that there is a formal process of deciding preference allocations to insulate that decision from any promise or expectation of a benefit. In this regard, the Democrats’ procedure of keeping preference decisions at the highest level, is salutary to the extent that it ensures any ‘deal’ element to preference arrangements are more likely to be based on ideological or preference swap factors, than more venal expectations.

Henderson’s political realism appeared to be contradicted by other analysis and public reaction to the Swan case. Journalist and political commentator Dennis Shanahan identified Swan as exemplifying an ‘insider syndrome’; ie that Swan perpetuated practices that the public would consider unethical, yet such a charge of impropriety would genuinely surprise long-term political operators such as himself.436 Denials of wrong-doing by the political actors concerned, of course, can also be read as a response to a fear of prosecution: in this sense, bribery law, as with any law covering otherwise consensual transactions, may thwart itself by discouraging openness about behaviour and intention.

Part of what ‘smells’ in instances such as the Swan and Garland cases is the manner of payment – why cash, if not to avoid record-keeping? The Swan case occurred after the enactment of electoral disclosure obligations: any gift over $200 in money or kind to a candidate must be publicly disclosed, albeit after the election.437 His

---


437 CEA s 304 (obligation on candidate), s 305A (obligation on donor). Section 305A however contains a loophole that Swan, as a former State Secretary of the ALP, was presumably aware: it does
‘donation’ was not properly disclosed. The Democrat’s local campaign manager appears to have disclosed it merely as a donation by him to the campaign. Since preference decisions, to be meaningful, have to be made public at the very least there should be no secrecy over deals to gain such campaign support. Perhaps such secrecy is born of shame, either with the dishonour of needing assistance, or a realisation by those involved that ethical and legal questions are implicated in the payment. Or perhaps it is born of political nous, since a revelation of major party assistance may make voters (perhaps unfairly) think that the minor party is a mere pawn of the major party. However, since a preference deal sealed by tangible campaign assistance is itself proof that the two parties are in cahoots to some degree, if disclosure law at least could be better enforced to ensure that such arrangements were publicised, then electors would be better informed in making their electoral choices.

‘Dummy Candidates’ as Siphons for Preferences, and the Payment of Campaign Expenses

The most egregiously unethical problem with preferences and secrecy involves the ‘dummy candidate’. That is, someone who stands as a decoy to siphon preferences, rather than with the intention of being elected or of sincerely promoting a particular viewpoint. Dummies indirectly implicate electoral bribery law. Although ideally a ‘truth in electoral advertising’ law would deal with this phenomenon, it elides with another issue of modern campaign practice of concern to electoral bribery law, namely payments relating to candidatures.

All electoral systems are open to dummy candidates or indeed parties. For instance, in first-past-the-post voting, anything that splits an opponent’s vote weakens him. However as long as voting is voluntary, it might be said that whilst anyone who

not apply to parties or candidates giving money to another candidate. I label this a loophole as the exemption really ought only apply transfers of money within a political party, to a candidate in a coalition party. This conclusion is reinforced by the fact that payments from one party to another – even in a coalition – are discloseable as donations: Benjamin Haslen, ‘Libs were Suspected of Hiding Donations’, The Australian, 4/12/2000, 5.

wastes a vote on a dummy deserves what they get (ie nothing) the outcome is not corrupted since the dummy candidate’s votes are not transferred. For instance, if a conservative elector votes not for the Tory candidate, but for a left-sponsored dummy standing under an obscure right-wing banner, then it can at least be said she deliberately did not want to give her vote to the better-known Tories. Indeed it can be said that she consciously – albeit misled – wanted to support the cause for which the dummy’s banner stood.

In Australia’s preferential system, however, the dummy candidate is more sinister. The dummy is designed to siphon preferences. That is the dummy’s purpose is to attract first preference votes and, through how-to-vote cards (in lower houses) or guaranteed preference flows (in upper houses like the Senate), channel preferences to the party behind the dummy candidate. A typical dummy candidate masquerades as an independent, or stands for a front group such as a micro-party party with a sloganistic name.\footnote{For example, there have been undenied allegations that the ALP in Queensland ran a dummy independent at a State election and that staff of a federal Liberal minister organised dummies at a local government election. See further Orr, above n 27, 138. A minor party MP (representing the Outdoor Recreation Party) lost his parliamentary career after an inquiry, inter alia, found that he had used parliamentary allowances or resources to help register 11 front parties with titles like ‘The Horse Riders’ Party’ and the ‘Anti-Greens Party’: NSW, Independent Commission against Corruption, Report on an Investigation into the Conduct of the Hon Malcolm Jones MLC (July 2003). A supposedly ‘independent Labour’ candidate for the 2004 federal election has been revealed to be a member of the Liberal party: Roger Martin, ‘Beazley’s Labour Rival is still a Liberal’, The Australian, 11/8/2004, 2. Whilst the Liberal party denied any co-ordination between the campaigns, they shared office space with the alleged ‘dummy’: Roger Martin, ‘Beazley Foe “No Stooge”’, The Australian, 12/8/2004, 5.} It may seem at first perverse to run candidates in competition to one’s party, but given the strength of the ‘protest’ vote, and the compulsion to vote, they make sense in a close race. Further, as close contests typically attract a variety of sincere minor party and independent candidates, it is not difficult to hide a dummy in a field of candidates.

Dummies are clearly unethical in ways that go to the heart of electoral democracy. They mislead electors, make a mockery of sincere candidates, and exist for undue
political gain. Given that there is no general law against misleading campaigning, the legal position appears to be caveat elector (to coin some pig Latin). If the dummy is paid money as a reward, or to convince them to stand, however, electoral bribery law is breached, since it is unlawful to induce a candidature by the giving of benefits.

Assuming the dummy is a partisan, and not personally paid to run, however, is the payment of her expenses, such as nomination fees and campaign costs, sufficient to amount to bribery? Recall that a gift or promise of any property or benefit ‘to influence or affect … any candidature’ is electoral bribery. On one view, holding such payments to be briberous would be irrational, since the payment of the same costs by a party for one of its endorsed candidates, is clearly not bribery, even if the candidate is poor and could not run without such help. Besides being a necessary limitation of the concept of ‘benefit’ without which only independently wealthy candidates could safely run, such a reading is intuitively correct since the real motivation for the genuine candidate is not the payment of her expenses, but the ideological desire to advance the cause for which she stands and the honour of representing her party. The payment of expenses is really a condition subsequent, or a collateral arrangement to the candidature, and not a lure. In the dummy’s case, however, it could more easily be argued that the candidature would not go ahead without the reimbursement of their expenses, and so attention shifts to whether such payment is a ‘benefit’ at law. It is arguably not a personal benefit in the requisite sense; rather it is a neutral accounting for a personal burden that would not otherwise exist but for the overall arrangement to stand. That is, the dummy receives no

---

440 South Australia has a ‘truth in political advertising’ law: Electoral Act 1985 (SA) s 113. But it only applies to advertising – a dummy in SA could still attract votes under the ‘independent’ ballot label or register a micro party slogan. Elsewhere there is only an offence of misleading an elector in the manner of casting her vote, and this does not apply to misleading an elector as to what one stands for: Evans v Crichton-Browne (1980) 147 CLR 169. At least it has only been applied to passing-off through misleading how-to-vote cards: see cases above, text at nn 389-93. It might be argued that dummy candidates are a form of passing-off, but this might only apply if there was another party with a similar name.

441 I first raised this question in Orr, above n 27, 138.

442 CEA s 326(2)(b).
tangible benefit above or beyond the desire to serve, albeit nefariously, the interests of her party.

By the same reasoning, merely offering to cover the expenses, already incurred, of a candidate who is otherwise minded to withdraw, is not in itself a bribe to induce their withdrawal. However if such an offer were made as part of a package of benefits – as opposed to merely giving political reasons to withdraw – it might amount to a briberous inducement on the grounds that the purpose of the anti-bribery provision in relation to inducing candidature decisions is to limit anti-competitive conduct. 443

On the reverse side of this coin are payments by candidates to parties for or as part of the party’s endorsement. 444 For example, a wealthy person who ‘bought’ an endorsement with cash, even if dressed up as a political donation to the party, would be guilty of electoral bribery, for they would be buying the party’s electoral support. The greyer area is with payments demanded as a condition of endorsement, where the endorsement process is otherwise above board. The fledgling One Nation party was investigated for electoral bribery by Federal Police in this regard, after it was revealed that a condition of its Senate endorsement in 1996 was that candidates contribute fees of up to $10 000. 445 No charges were laid. Since One Nation’s defence was that the money was needed for the campaign, this was a sensible outcome. More established parties levy branches for such campaign contributions, forcing candidates to contribute via fund-raising. The true evil of a levy directly on a candidate is that it tends to exclude poorer candidates. 446 But if a party, or its officials, were ever shown

443 The question of an offer to pay campaign expenses thrown away on withdrawal was raised in The Bay of Islands Election Petition (1915) 34 NZLR 578, but not addressed (as other benefits were focused on). The case is further discussed below, text at nn 524-5 and Chapter Five below, n 564.

444 Also noted in Orr, above n 27, 137-8.


446 It would not be unexpected if, in an age of millionaire candidates, this concern should resurface. In the 19th century when the cost of campaigning and buying an election spurred an assault on electoral bribery, the question of the marginalisation of non-wealthy candidates also arose. This problem had other manifestations, eg in the Fabian push for parliamentary salaries so working class men could afford to serve.
to have intentionally profited, personally or collectively, from such a ‘levy’ then the demand could be characterisable as a briberous gouge.

Curiously, however, the standard contemporary definition of bribery does not neatly fit even the situation of an outright sale of a party endorsement. The paradigm limb of the definition of electoral bribery refers to buying or selling ‘any support of, or opposition to, a candidate’ where ‘candidate’ literally refers to someone who has already nominated or has declared their candidature. It might be argued that ‘support’ includes future support, which is what a party endorsement ordinarily involves. To clarify this issue, it ought be explicitly stated that ‘candidature’ includes candidature for a party pre-selection. The position is beyond doubt if the transaction involves the relative position of candidates in a Senate group.

**LOBBYISTS, POWER-BROKERS AND ELECTORAL BRIBERY**

In this part of the chapter, we will look not at deals between political parties or candidates to sway preferences, but deals between political parties or candidates and influential third parties to sway the latter’s electoral support. The key third parties in this respect are lobby groups (we will examine a celebrated case involving a trade union) and those with editorial control in the media (we will examine the recent allegations involving Alan Jones, a very influential broadcaster).

---

447 Such cases are far from fanciful, especially in PR voting systems where securing a place high up on a party list is enough to secure election. See, eg, Ian Fisher, ‘A Scandal Embarrasses Israeli Party’, *The New York Times*, 19/12/2002, 12.

448 Which, curiously, is explicitly covered in CEA s 326(1)(e) and (2)(e). Curious since if the drafters turned their minds to this very particular form of sale, why did they not clarify the more obvious form of sale, namely selling a Senate or House endorsement per se?

Mundingburra: Buying a Lobby Group’s Electoral Support

Following the 1995 Queensland State election, the Townsville electorate of Mundingburra became the focus of intense political interest. The Goss Labor government, in a surprise result, had lost its comfortable majority, but clung to power by holding Mundingburra by 16 votes. The Court of Disputed Returns then held that the ALP’s majority in Mundingburra was impugned through (innocent) failures in electoral administration, primarily the fact that 22 postal ballots had not reached soldiers stationed overseas in time.\footnote{450} By ordering a re-election in Mundingburra, the Court in effect asked its electors to determine the fate of the government. No by-election could have greater stakes. The stage was set, as one author labelled it, for ‘the Politics of Buying Government’.\footnote{451} As it happened, the Opposition won the fresh election, and formed a minority conservative government.

Both major parties – the ALP and the National Party, leading a Coalition with the Liberal Party – were accused of electoral bribery involving arrangements with (as it happened, conservative) associations. The ALP admitted it had purchased $22 000 of advertising space that had been booked by the Sporting Shooters Association of Australia (SSAA), a lobby group promoting the interests of gun owners. The Association had been planning to campaign against the ALP government in the 1995 general election, but won a written concession from Premier Goss:

I make a commitment that if re-elected … the Queensland [ALP] will not introduce any sort of longarms registration or defacto registration … I also agree that my party will not support Federal registration … This commitment will stand for the duration of our term if elected …\footnote{452}

\footnote{450} \textit{Tanti v Davies (No 3)} (1996) 2 Qd R 602.\footnote{451} Mary Barlow, ‘Mundingburra: the Final Battleground’ in Andrew Fraser (ed) \textit{Electoral Wrath: the 1995 Queensland General Election} (1997).\footnote{452} Letter from Goss to the Queensland President of the SSAA, 13/7/1995, exhibited in Queensland, Criminal Justice Commission (CJC), \textit{Report on an Investigation into a Memorandum of Understanding between the Coalition and QPUE and an Investigation into an Alleged Deal between the ALP and the SSAA} (Dec 1996) (‘CJC Report’) Part B, 12.
Satisfied with this commitment, which was to be made public, the SSAA dropped its plans to campaign on the gun issue. The ALP State Secretary, Mr Kaiser, shortly thereafter agreed to take over the advertising space booked by the SSAA. The Criminal Justice Commission (CJC) was asked to inquire into whether Goss, Kaiser or the SSAA Secretary were prima facie in breach of Queensland’s electoral bribery laws. The inquiry, initially under the aegis of former NSW Supreme Court Justice Carruthers, eventually found no prima facie breach.

The policy commitment, for reasons that will be explored shortly, was held not to be a ‘benefit of any kind’, because it was a benefit to a group at large and in a category of policy promises that could be classed ‘as part of the normal processes of government’. In short the inquiry appeared to be informed by a belief that there was nothing untoward in a lobby group lobbying hard.

The payment to the SSAA to cover the advertising space, however, was ‘readily characterised’ as a ‘benefit’, since the SSAA was effectively relieved of a contractual obligation. However there was no evidence, other than circumstantial inference, that the mental element, ie an intention to influence the SSAA’s decision to drop its campaign, was present. The question of what the SSAA would do with its advertising space was not raised until after the written policy commitment was made, and the fact that the ALP made full use of the space also pointed to a transaction motivated in larger part in the ALP’s side by a desire to acquire the benefit of the advertising space.

---

453 Then in Electoral Act 1992 (Qld) s 155.
454 Carruthers was all but forced to leave the inquiry when the National-Liberal Coalition government appointed a second inquiry to inquire into his inquiry (the Connolly-Ryan Inquiry)! That second inquiry was then enjoined by the Supreme Court because of ‘overwhelming evidence’ of bias on the part of its Chair, former Liberal MLA and Justice, Peter Connolly: see Re Carruthers v Connolly [1997] QSC 132 and Peter Morley and Mark Oberhardt, ‘Court Bans Inquiry into CJC’, The Courier-Mail, 6/8/1997, 1. Colleen Lewis situates this aspect of the Mundingburra fiasco in wider conservative antagonism to the CJC ‘watchdog’, in ‘The CJC and the Political System’, a chapter in Colleen Lewis, Complaints Against Police: the Politics of Reform (1999) especially at 159-163.
456 Ibid, 14. The Report however equivocated over whether it could also be classified as a ‘gift of property’ within the Act.
itself. The CJC Report was willing to infer that the ALP secretary, Kaiser, had other motivations, such as ensuring that the SSAA would not renge on its promise to abandon its anti-ALP campaign. But since a purely innocent motive was just as plausible, it was not safe to recommend criminal charges on such speculation.\footnote{Ibid 18-22.}

This conclusion is understandable given the high onus of proof of ‘beyond reasonable doubt’. But the final Report proved to be a rather narrow analysis by practising criminal lawyers, which failed to canvass some core aspects of electoral bribery. The key aspect here is whether the purchase was a bribe after the event. That depended on whether the ALP’s purchase of the space was, on an objective measure, both a useful purchase of advertising space, and also a blatant reward to the SSAA,\footnote{As described in Chapter Two above, text following n 137, a reward after the event can be a fulfilment of a bribe, where there was an expectation of such reward. However since there is no custom of political parties rolling over to threatened campaigns against them, then relieving the campaigners of their campaign costs, any expectation in the SSAA case would have to have been specifically proven.} given that it occurred so contemporaneously to the SSAA’s decision about its electoral conduct, a decision made after negotiations in which both sides must have been aware that the SSAA would be lumbered with unusable advertising space. Undoubtedly there are evidentiary problems with this analysis: in the absence of admissions as to their expectations at the time, only inferences could be made. An innocent inference was that the SSAA, had it reflected on its position at the time it withdrew its threatened campaign, would have been happy to have borne the cost of the unnecessary advertising space, as the threat had generated the policy fruit it was designed to bear. Nonetheless, it was politically naïve of the Report’s authors not to canvass this line of analysis.

An even more contentious set of revelations overtook the National Party. It transpired that in the midst of the Mundingburra re-election campaign, the National Party’s parliamentary leaders had signed a lengthy ‘Memorandum of Understanding’ (MOU) with the Queensland Police Union. The MOU was intended to remain confidential as between the parties. During its negotiation it was understood that the union would
mount a substantial campaign in the re-election campaign,\textsuperscript{459} which it duly did with various forms of advertising, effectively advocating a vote against the ALP government, costing $20,000 in an electorate of around 20,000 voters.\textsuperscript{460}

The police union, unlike most unions of employees, was an innately conservative organisation. Whilst its central concerns were not ideological, but industrial, as in most parts of the western world industrial relations involving police were of long-standing political contention, given the police service’s special relationship to law, order and the executive. In Queensland, this relationship was doubly sensitive, given the revelations of political and police corruption in the 1988 Fitzgerald Inquiry, which had brought down the previous National Party administration.\textsuperscript{461}

The MOU, understandably enough, committed a Coalition government to increasing police numbers - a logical promise given that ‘law and order’ was an election issue and a natural and legitimate industrial consideration for a union. However the MOU also promised the union executive an unprecedented role in the daily administration of the police service. Its most remarkable clause gave the union a role in the selection of the next police commissioner, which on one interpretation would have amounted to a power of veto. The MOU grew, through negotiation, out of a ‘wish list’ sent by the union’s secretary to the National Party’s police spokesperson. The wish list was accompanied by an indication that the union intended a ‘substantial campaign’ in the re-election. The union’s secretary filed documents relating to the negotiations under a computer folder marked ‘Election Deal’.\textsuperscript{462}

\textsuperscript{459} The union had already conducted a campaign on police numbers critical of the government at the earlier general election: for detail on the several campaigns and executive authorisations behind them, see Cedric Hampson QC, ‘Submissions by Counsel Assisting’, admitted as MFI-A on 26/8/1996 to the CJC Inquiry, at pp 5 et seq. There was evidence that the ALP, ie government, spokesperson on Police was not informed of the union’s intention to campaign in Mundingburra.


\textsuperscript{462} Hampson, above n 459, 20.
The CJC report however did not find a prima facie case of electoral bribery. As points of law, it found in favour of prosecution that a corporate body like a union could indeed bribe or be bribed,\textsuperscript{463} that the necessary mental element of an intention to influence electoral conduct (or being so influenced) need only be one of several motivating purposes of the promise or exchange,\textsuperscript{464} and that bribery did not require any overarching ‘corrupt’ mind.\textsuperscript{465} But the central question, a mixture of fact and law, was whether the promises in the MOU represented ‘property or a benefit of any kind’. The Report rejected an interpretation of ‘benefit of any kind’ that would include ‘any advantage whatsoever’, as that would include ‘advantages of a non-personal nature in the sense of advantages enjoyed by the public at large or by relatively large groups of persons’.\textsuperscript{466}

Applied only to a promise to increase police numbers, or to limit gun reform, such a conclusion is obviously correct. It amounts to no more than implying an exemption for public policy declarations or public action into the Queensland bribery law (curiously such a defence remains absent on the face of Queensland legislation).\textsuperscript{467} Without such an exemption, even a psychological benefit, such as believing one’s lobbying has helped improve public life generally, could be argued to be a briberous reward. Such a result would deter activists and representative associations from any form of political campaigning, lest the campaign prove successful in swaying government policy, and would chill such groups from congratulating and supporting a party that was influenced by their lobbying.\textsuperscript{468} This pragmatic approach also avoids

\textsuperscript{463}CJC Report, above n 452, Part A, 8.
\textsuperscript{464}Ibid, 11-12.
\textsuperscript{465}Ibid, 12-18. This conforms to the common law position that the wrong exists in the intent to influence or affect the electoral conduct through an objective benefit: ie there is no need for either party to ‘feel’ guilty.
\textsuperscript{466}Ibid, 24.
\textsuperscript{467}See Appendix One for a table summarising the laws in all states.
\textsuperscript{468}Former NSW Liberal Premier, Nick Greiner, gave evidence that lobby groups often approached governments, who gave loose commitments in writing, leaving it up to the lobby group to publicise the commitment as and when they saw fit: see Nick Greiner, ‘Statement of Nicholas Frank Greiner, AC, BEc (Hons) (Syd.), MBA (Harv.)’, admitted as Exhibit 393 on 21/8/1996 to the CJC Inquiry, 2-5.
what the Report said would be the ‘absurd conclusion’ that promises to reduce taxes or increase welfare services could be labelled election bribes at law, as opposed to political rhetoric (this issue will be discussed in depth in Chapter Six).

The CJC Report defined the legal exemption it crafted as covering: (1) promises to advantage a group or class generally, through (2) measures taken as part of the normal process of government. The promises to the police union were, it found, made to the union secretary on behalf of the union. Crucially, it also found that the gains or advantages accrued to the members of the union ‘as a group … indiscriminately; no individuals are nominated for special advantage’, and concerned the structure of police services in a form that it would be legitimate for a government to implement. Whilst it is reasonable to characterise unions and similar associations ultimately as member-controlled organisations, the Report displayed a certain naïveté in not recognising that particular promises in the MOU gave significant power to particular union officials, and hence the Report failed to explore whether those promises were not, at law, benefits to those officials. A case can be made that power, especially exceptional power, is a personal benefit. It is a benefit politically (not least to someone in an elected position) and psychologically (power, if not always an aphrodisiac, can certainly be used as a lure.) Shorn of the peculiar context of police/police union-government relations in Queensland, and the exceptional nature of some of the promised power in this particular MOU, however, it would generally not make sense to read ‘benefit’ too broadly, lest that chill the process of robust lobbying in a plural society.

Greiner as we shall see in Chapter Five below, text at nn 540-7, had during his office been embroiled in a corruption scandal involving an allegation of political bribery for electoral advantage.

470 Ibid 30.
471 Ibid 49. However it was also recognised that a corporate body could be bribed, not least because it could engage in election conduct, such as campaigning: ibid 41.
472 Ibid 50.
473 Ibid 51.
474 As to which see Finnane, above n 460.
The Report’s most egregious lacuna, however, is the weakness of its treatment of the secrecy of the MOU. It is one thing, in a plural democracy, to recognise that public policy promises are naturally and properly extractable from governing and opposition parties by hard lobbying. But it is naïve to ignore the fact that the secrecy of the agreement both militated against an informed election campaign and provided a suspicious context to the question of whether the promises were made in the legitimate course of public policy making. Certainly secrecy, especially in negotiation, is not in itself necessarily evidence of corrupt behaviour. Secrecy was the factor of most concern to Justice Carruthers, who wished to consider broader issues beyond the penumbra of the legal definition of electoral bribery, by raising the democratic and governance implications of such deals.\footnote{475} For instance, he wished to consider whether mandating a public register of such agreements or understandings would be feasible.\footnote{476} The narrow criminal law orientation of the ultimate Report generated no discussion, let alone recommendations addressing those wider issues.

Dan Lowenstein, writing from a US perspective on the bribery of politicians, identifies secrecy as the ‘only serious candidate’ for the role of an ‘additional descriptive element [to the existing elements of ‘benefit’ and ‘intent to influence’] that would limit the scope of the bribery statutes to comport with widely held intuitions about which transactions are really corrupt.’\footnote{477} But on reflection, he argues that secrecy is not the holy grail, or even a definitive element. Otherwise, those with ‘chutzpah’ to bribe in the open would have a defence; and conversely, those with legitimate reasons to negotiate deals in private could be unfairly tainted.\footnote{478}


\footnote{476} Discussions between the author and Ken Carruthers QC, Sydney, September 1997.

\footnote{477} Daniel H Lowenstein, ‘Political Bribery and the Intermediate Theory of Politics’ (1985) 32 UCLA Law Rev 784, 829. By analogy, secret commissions or gifts received by agents are treated suspiciously, as tantamount to bribes if not disclosed to the principal, and have long been regulated specifically and even separately: see eg Secret Commissions Act 1905 (Cth) (repealed by modernising Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000 (Cth)).

\footnote{478} Ibid, 830-1.
Finally it might be noted that whether the police union’s campaign actually swung the Mundingburra election is a moot point (one analysis argued Labor fell down itself by using negative advertising, as opposed to the Liberal’s low-key campaign, a somewhat ironic analysis given the union’s campaign was entirely negative.) But its actual effect is irrelevant to bribery law. Like preference deals, the buying of a lobby-group’s electoral support is intended to indirectly sway votes, as opposed to buying any particular individual’s vote. That no particular votes are guaranteed to change is irrelevant, even to the parties to the deal. The aim is to tilt the balance in a mass campaign that is largely mediated through advertising and media coverage, as opposed securing votes, one-by-one, as occurred during face-to-face canvassing in the unreformed electorates of the 19th century.

The Media as Power-Broker or Bully: the Laws/Jones/Flint Affair

In April 2004, a remarkable controversy arose involving allegations that a major media figure used undue influence over Prime Minister Howard in relation to a statutory appointment. The media figure was Alan Jones, the highest rating personality on Sydney radio. The accuser was John Laws, himself a prominent, if not pre-eminent, radio personality. According to Laws, Jones had stated ‘I was so determined to have David Flint [re-appointed to the statutory office of head of the Australian Broadcasting Authority (ABA)] that I personally went to Kirribilli House [the Prime Minister’s residence] and instructed John Howard to reappoint [Flint] or he would not have the support of Alan Jones in the [2001] election.’

By way of context, it is important to understand the institutional and political positions occupied by the cast of characters involved here. Flint, a controversially outspoken conservative and legal academic, was twice appointed by the Howard government to the joint role of Chairman and CEO of the ABA. The ABA regulates broadcast media in Australia. Prime Minister Howard, it was revealed during the controversy, lobbied, over the advice of his Minister for Communications, for Flint’s

479 Barlow, above n 451, 79-81.
re-appointment.\textsuperscript{481} Flint, in turn, played a leading role in inquiries into unethical and potentially unlawful conduct by Jones, Laws and their employer radio station, in their receipt of contractual payments from large corporations in return for favourable editorial commentary.\textsuperscript{482} The practice was dubbed ‘cash-for-comment’; in itself it has obvious resonances with the topic of political bribery.\textsuperscript{483} Flint’s relationship with Jones, it transpired, was one of strong mutual admiration, as revealed in a succession of letters between them that was written shortly before the ABA began its ‘cash-for-comment’ inquiry.\textsuperscript{484}

As for Jones and Laws, they are euphemistically described as ‘broadcasters’. Their formal programming is a heady mix of ‘infotainment’, ‘advertorials’, highly opinionated talk-back and current affairs bordering on ‘shock jock’ territory, and journalism in the form of interviews with prominent public figures.\textsuperscript{485} Jones in particular is widely recognised as a powerful political voice, shaping public agendas through both his on-air editorialising and on-air and behind-the-scenes campaigning.\textsuperscript{486} Jones, a former Liberal party speechwriter, enjoyed easy access to the Prime Minister.\textsuperscript{487}

\textsuperscript{483} Compare the ‘cash-for-questions’ affair in the UK, in which two Conservative MPs lost their political careers after accepting payments to raise issues via Parliamentary questions. See United Kingdom (‘The Nolan Committee’) \textit{First Report of the Committee on Standards in Public Life}, Cmnd 2850 (1995). The Report at 7 recommended a recommittal to the 1947 House of Commons ‘resolution which places an absolute bar on Members entering contracts or agreements which in any way restrict their freedom to act and speak as they wish, or which require them to act in Parliament as representatives of outside bodies’.
\textsuperscript{487} Jones, for example, was a select invitee to a barbecue hosted by the Prime Minister for visiting US President George W Bush: Margo Kingston, ‘Howard’s Elite: the REAL Official List’, \textit{The Sydney Morning-Herald} (Web Diary), 5/11/2003.
It may never be known if Laws’ allegations were genuine, arising either from his rivalry with Jones or his jealousy that the ABA treated him more harshly than Jones, or if Jones was perhaps just bragging.\footnote{In turn, Howard admitted his friendship with Jones: Kevin Meade et al, ‘He’s a Friend, Not an Adviser, says PM’, \textit{The Australian}, 29/4/2004, 2. Howard’s regular appearances on Jones’s highly rating talkback segment is a central aspect of his political strategy, so much so that a former leader of the same party, John Hewson, stated that Prime Minister Howard used Jones almost as a member of staff through his regular and sympathetic appearances on Jones’s programmes: ABC News Online, ‘Ties that Bind’, 2/5/2004, \texttt{http://www.abc.net.au/news/indepth/featureitems/s1099552.htm}} Or, it may have been that Jones indeed threatened or even came to an arrangement or understanding with the Prime Minister to secure Flint’s reappointment. Laws’ version was corroborated by witnesses; conversely Jones and the Prime Minister denied or could not recall any such meeting or conversation over Flint’s position.\footnote{Jones’s unauthorised biographer thought it more likely to be just a boast: ABC Radio, ‘Jones-Flint Letters Uncovered’, \textit{PM}, 30/4/2004 \texttt{http://www.abc.net.au/pm/content/2004/s1098936.htm}} What is not doubtable, however is Jones’ close relationship to the Prime Minister and Flint, and that Jones had personal, as well as ideological,\footnote{Tingle and O’Louglin, above n 480.} motivations to prefer that Flint, a light-touch regulator, retained his office.\footnote{Jones is a former Liberal party speech-writer and several times failed candidate for pre-selection: Leser, above n 486, 246.}

Curiously, almost no commentator or analyst raised the obvious legal question: if the allegations were true, electoral bribery had probably been committed.\footnote{An exception is Joo-Cheong Tham, ‘Did Jones Bribe Howard? Public Inquiry Needed’, \textit{Sydney Morning-Herald} (online), 3/5/2004 \texttt{http://smh.com.au/articles/2004/05/03/1083436538651.html}} The focus instead was on what the allegations suggested about the clique-ishness of power, especially in Sydney, and whether an inquiry should occur as to whether improper...
influence, in breach of ministerial or other codes and guidelines concerning executive power and appointments, had occurred. But Jones’ alleged threat to withdraw his electoral support for the Prime Minister clearly implicates electoral bribery law. To paraphrase the relevant limbs of CEA s 326:

1. ‘A person shall not ask for … any … benefit of any kind, whether for the same or any other person, on the understanding that: … any support of … a candidate .. or a political party by the first-mentioned person .. will, in any manner, be influenced or affected.’

2. A person shall not, in order to influence or affect … any support of … a candidate … or a political party … promise or offer to give or confer, any … benefit of any kind … to a third person.

For the sake of argument, assume Jones had acted as alleged. Jones, prima facie, would have breached the first limb (in particular s 326(1)(c)). Employment and paid offices were and remain clear ‘benefits’ in bribery terms. The Act explicitly makes it irrelevant that the direct benefit – the statutory re-appointment – was to go to Flint, a third party, rather than Jones, the person making the demand. Nor is the law restricted to cases where the ‘demander’ is acting on behalf of the person to receive the benefit. In any case, it would be arguable that Jones personally would receive a benefit, as someone with whom he was friendly would remain as head of the ABA at a time when Jones’s commercial dealings were coming under ABA scrutiny. Even following the narrow definition of ‘benefit of any kind’ adopted in the Mundingburra report, this represented a real and personal, if unquantifiable, advantage.

It is difficult to see what defences would arise. Section 326(3) exempts ‘a promise of public action’. However a purposive interpretation of that defence would not cover a private and unpublicised deal, not least because that would mean, say, that a lobbyist could extract a promise of the most tangible of benefits (eg a government subsidy or employment) for themselves personally, but the deal would not be briberous if actual

493 See eg Opposition leader, Mark Latham’s initial response, reported in Wendy Frew et al, ‘PM and Jones Deny Deal on Radio Guardian’, The Sydney Morning-Herald, 29/4/2004, 1. This line of inquiry would reprise concerns raised in matters such as the ‘Gair Affair’ and the ‘Metherell Affair’, Chapter Five below, text at nn 539-47.
conferral of the benefit involved some ‘public action’. The exemption can only sensibly cover deals that lead to contemporaneous adoption and publication of public action, as part of the wider process of government.

Of course this reasoning assumes that Jones would have acted as brashly as was claimed. Jones rejects the allegations as ‘absurd and fanciful’. By its nature, and indeed in direct proportion to its seriousness and scandalousness, such lobbying would rarely occur with witnesses or a paper trail. This case reminds us that the evidentiary basis for any firm conclusions about such allegations, let alone legal action against them, will usually be implicit at best. Of course circumstantial factors may lend support to allegations of abuse of power: as a biographer has recorded, ‘[g]etting on [Jones’] wrong side can be the mistake of a lifetime.’

The same biography goes on to list numerous examples of people fearing political or commercial retribution from Jones. Even if Jones’ power or vindictiveness is overstated, it is nonetheless perceived as real, including in Liberal party folklore.

With a mystique like that, an implicit threat to shift electoral support at a particular election is all that a powerful media figure would need to achieve the aim of influencing a decision over a benefit.

For someone in the position that the Prime Minister was allegedly placed, the legal constraints in responding to any threat of electoral opposition or offer of electoral support is covered by the second limb of s 326, paraphrased above. The question of the guilt of the politician responding to such lobbying only arises if there is a connection between any decision to confer a benefit and the electoral support. That is, to have been bribed, the decision to confer the benefit must have been in some way influenced by the threat in the demand.

There is insufficient precedent to know what degree of connection or influence would be needed, especially as here, the decision-maker was probably already strongly

---

494 Leser, above n 486, 240.
495 Leser, ibid, 247-251 quotes senior Liberal figures arguing that several NSW election results, and even careers of party leaders and Premiers, were made and broken in significant part by Jones’s public views and campaigns.
inclined to confer the benefit (Flint remained more than formally qualified for the position, and the Prime Minister was more, not less, supportive of Flint because of Flint’s political affiliations).\textsuperscript{496} At a minimum any threat by Jones to shift his electoral support would have to have been a motivating factor, one that actually influenced the Prime Minister such that it could be said to have been one factor in the re-appointment, albeit not necessarily the pre-dominant or only one. It need not have been the decisive factor, since after all much traditional vote-buying was focused on natural supporters of the candidate.

Again, it needs to be noted that the Prime Minister denied any such discussions, let alone a link between his support for Flint’s re-appointment and Jones, claiming that if he had been subject to such pressure or offer, he would have said ‘get lost’. Even if such a meeting or discussions had taken place, a court applying \textit{Briginshaw} principles,\textsuperscript{497} let alone a ‘beyond reasonable doubt’ metric would demand highly cogent evidence, given the gravity of a finding of corrupt conduct compared to a finding of legitimate lobbying.

Whilst the way that electoral bribery is defined in the current CEA is more than capable of covering the allegation against Jones, it is clearly not the paradigm of attempted electoral bribery of a politician. That would be where a political patron approached a politician and said: ‘if you give me X, I will support you’. That is, an offer of support to reward the conferral of a benefit. Here we have an alleged threat. In functional terms, however, the two are no different according to the CEA. Threatening to withdraw support, to actively oppose or even to support a rival, all amounts to ‘affecting’ one’s electoral support. In style, Jones’ alleged demand was phrased as a threat or an intimidation, rather than as a reward. Australian electoral law once specifically banned ‘undue influence’, which included threatening


\textsuperscript{497} Even in civil cases ‘[t]he seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal’: \textit{Briginshaw v Briginshaw} (1938) 60 CLR 336, 362 (per Dixon J).
‘disadvantage’. However that was essentially a ‘top down’ prohibition, focussing on threats by political actors against electors.\textsuperscript{498} Further, it only related to a narrow range of electoral conduct, essentially bullying to win votes or stop a candidature. The repeal of ‘undue influence’ as a specific Federal offence does not prevent a threat that involves trading electoral support for a benefit from being electoral bribery, because the undue influence offence never covered the types of activities alleged against Jones.

The purpose of this analysis is not to arrive at any definitive legal conclusions about the Jones/Law/Flint imbroglio. As it was, the DPP saw fit to not pursue the matter because the ‘he said, she said’ nature of the evidence made it impossible to ‘undertake the thorough assessment’ required of the purposes of those concerned.\textsuperscript{499} My purpose however is to use the allegations as an illustration of a potentially significant area in which electoral bribery may be occurring, namely in influence between those with media power and politicians seeking election. I do not mean here to impugn ordinary journalists as such. Whilst they may have personal biases, they have little if any scope for editorialising in ways that clearly or openly endorse particular candidates, parties or leaders or which shape electoral debates or voter support. Rather, I am referring to those with substantial media power, be they prominent commentators, editors or proprietors. Whilst there is no definitive research to show that such editorialising delivers specific votes, such electoral support may well be worth more than ordinary campaign advertising. It can involve ongoing, electorally beneficial publicity, and a variety of such publicity, from outright endorsement to a favourable framing and slanting of issues, and through that, of political debate generally.

Laws, perhaps the most experienced media personality in contemporary Australia, admitted that what he found most surprising about Jones’ alleged threat was not so much what it revealed about Jones’ modus operandi or potential influence, but that he

\textsuperscript{498} Thus CEA 1918-1973 s 158 penalised anyone who ‘threatens any violence, injury, punishment, damage, loss or disadvantage’ in influence votes or candidatures. The nearest current analogue is CEA s 327, ‘interference with political liberty’, which prohibits interference with, including discriminatory retaliation against, the free exercise of any political right or duty relevant to an election.

\textsuperscript{499} Paul Dacey, Deputy Electoral Commissioner (AEC), letter to author, 25/5/2004.
might openly boast about it or be quite so direct in asserting his influence over a Prime Minister. Laws – indeed no other commentator – was surprised that such influence existed or would be traded on. The only surprise seemed to be that such a story of alleged influence would see the light of day, and the chief refutation of it seemed to be whether any intelligent figure of influence would be so brash as to directly and explicitly link their electoral support to an explicit demand, rather than applying similar pressure in more subtle ways.

That this issue was not more deeply analysed, or explicitly framed in terms of the offence of electoral bribery is, in itself, suggestive. Since at least the rise of press barons with political agendas (such as Lord Beaverbrook) common law polities have experienced different degrees of excessive influence by media figures over political action and elections. This is not just realpolitik, but a recognition of the inevitable advocacy role that the media enjoys as part of press freedom. Nothing in a society marked by liberal ideals of freedom of expression prevent a media outlet or commentator making the most brazen electoral endorsements. Nor does the law infringe on their lobbying, either publicly or behind-the-scenes, for policy outcomes which they believe are of public benefit, or indeed, of private benefit for them. The law of bribery, however, is squarely raised if their electoral power is traded for beneficial treatment for themselves or their interests. Such trades are not covered by any notion of commensurability: the power of the media is not the same currency as political power, except in instances where the media is openly campaigning for some truly public policy goal (as opposed to some private benefit). To think otherwise is to collapse the private media into just another business.

Some believe that the media’s electoral power is overstated, or at least more complex than equating media advocacy to votes. Andrew Scott argues that fear of the power of the advocacy through broadcast media naively assumes that ‘communication through the mass media is primarily monological’. He believes, for instance, that the

501 Provided they abide by the minimal broadcasting regulation to authorise electoral material and, in theory, to provide some balance in cover.
UK ban on any paid political advocacy in the broadcast media,\textsuperscript{502} ‘misapprehend[s] the vitality, plurality, and ingenuity of the public sphere, and condescend[s] towards a general populace conceived as a semi-cognisant mass.’\textsuperscript{503} Perhaps the real problem arises where there is a lack of media diversity, such as with the over-concentration of ownership in Australia, so that media influence would be less of a concern where there is real competition, provided media outlets were open and ideologically consistent in their advocacy.

Yet even if media influence is overstated, political and media players believe and act as if it were significant. Indeed, the larger the media outlet’s audience and reach, the more power is ascribed to it. This perception of power generates not just incentives for the media to take positions or push certain agendas for political ingratiation, but can encourage the media to self-censor. An egregious example of self-censorship is Disney’s decision to ban a subsidiary from distributing a left-wing Mike Moore documentary. In claiming that it was merely trying to avoid partisanship in a US election year, Disney conceded its real motivation was to avoid causing offence to a conservative White House in an election year, whatever the cost to media freedom. Moore was blunter: he accused Disney of not wanting to imperil its tax breaks (which flowed more from the administration of the President’s brother, Governor Jeb Bush of Florida, as from President George W Bush’s administration directly).\textsuperscript{504} Such unilateral action is not, however, electoral bribery even though the desired outcome may be the same as if a crude offer or threat had been employed in direct

\textsuperscript{502} Andrew Scott, “‘A Monstrous and Unjustifiable Infringement’?: Political Expression and the Broadcasting Ban on Advocacy Advertising’ (2003) 66 Modern Law Rev 224 at 236. He is, as the title suggests, arguing in the context of opposing a blanket ban on any paid political broadcast advocacy in the UK, but the objection to the assumption that ‘individuals can simply be programmed like the obedient automaton to ascribe to messages delivered’ (at 238) is a position on the media-citizen relationship generally. Via a similar route of stressing postmodern ideas such as the diffuseness of power and the media savvy of audiences, Norris argues against claims of a ‘media malaise’ whereby negative editorial and news values and cynical political communication strategies supposedly lead inexorably to a disengaged electorate: Pippa Norris, \textit{A Virtuous Circle: Political Communications in Postindustrial Societies} (2000).

\textsuperscript{503} Scott, ibid, 244.
lobbying. Such positioning and signalling of political partisanship is a subtler and much more indirect way of building political goodwill. The question of media-politician impropriety that electoral bribery law raises is not just a matter of ideological openness in the editorial stance of a media outlet, since bribery typically involves behind-the-scenes understandings. The electoral bribery question in relation to undue media influence arises when a tit-for-tat connection or understanding, even if unexpressed, emerges between the media outlet’s agenda and the politician’s expectation of its electoral support.

True power however is rarely exercised with such crude directness, and in most instances, it is done so far from the spotlight – because it occurs at the heart of power itself – that such understandings will almost never present themselves as prosecutable cases of electoral bribery. Instead, we live with suspicions and the odd allegation such as the Jones-Law affair. They serve to generate temporary cynicism about the independence of the Fourth Estate, and stoke ongoing low-level resentment of the political and commercial elites, which probably resound in a general lessening of trust in governmental decision-making and political discourse rather than any watershed scandal or prosecution. Paradoxically perhaps, such mistrust and cynicism may only serve to insulate and reinforce a culture in which the trade in such influence becomes normalised.  

Media Generated Candidates? Bribery or Political Entertainment in the ‘Vote for Me’ Programme

The media works in mysterious ways, and its relationship with electoral politics is symbiotic and complex at many levels. Undeniably, the media also yields great


505 Here I echo a similar argument of Joo-Cheong Tham, that large corporate donations designed to achieve undue influence over policy processes, may merely be ‘normalised’ by laws requiring their disclosure that are otherwise intended to inhibit such donations: Tham, ‘Campaign Finance Reform in Australia: Some Reasons for Reform’ in Graeme Orr et al (eds), Realising Democracy: Electoral Law in Australia, 114 at 123-4.

506 See, eg, Norris, above n 502, especially ch 1 ‘The News Media and Democracy’.
influence over politics and government, most of all by shaping debates and impressions of members of the public. The distinction between media power and political power is often blurred; but wholesale crossing of the boundary between the sectors is seen as dangerous, for if media influence can be ‘cashed in’ for political power, it can outflank the protections of the separation of powers that are meant to prevent the estates becoming over-mighty (the example of Italian Prime Minister and media magnate, Sylvio Berlusconi is a case in point). Australia has some limited history of political parties owning media,\(^{507}\) and some more of partisan proprietors and editors.\(^{508}\) In the interests of media independence, if nothing else, the Australian media has traditionally limited its involvement in electoral matters to reporting, commentary and occasional partisan advocacy.\(^{509}\) But what if we saw the media take a more direct role as participants in the electoral process?

In 2004, in the lead up to a federal election, the Channel Seven morning news and ‘infotainment’ programme, ‘Sunrise’ decided it would sponsor a competition to search for and launch independent Senate candidates in each State. The segment was titled ‘Vote for Me’, although it was quickly dubbed ‘Pollstars’, a reference to the programme ‘Popstars’ in which ambitious young entertainers seek fame through a series of performances aimed at viewers, who ‘vote’ for them via text-messages or phone calls.

Such formats have multiple purposes. Obviously the network seeks to generate ratings through ‘reality television’ devices that encourage audience identification with participants. It also seeks to generate revenue, even profits, from the voting process itself, as ‘voters’ have to pay per vote, and those who feel strongly about a particular participant are likely to vote many times. (Such voting ‘systems’ are thus easily swung, if not rorted, by participants with networks of friends and the money to do so.

---

\(^{507}\) For example the ALP in Queensland owned 4KQ radio, however this was a music-oriented station.

\(^{508}\) The partisanship is apparent, with varying degrees of subtlety, in anything from favourable editorial treatment to outright declarations of support. This occurs in the absence of the more predictable, almost institutionalised allegiances that individual elements of the British press have traditionally had to particular parties or ideologies.
The ‘Vote for Me’ format was not in any sense a democratic primary election, the method used for popular selection of electoral candidates in the United States. But most of all, these formats aim for a ‘snowball effect’, that is, to generate self-perpetuating interest in the community and other media, in both the process and its winners, to the mutual benefit of the profile of the network with viewers and advertisers, and the profile and career prospects of the winners.

In a very real sense, then Channel Seven had a vested interest in generating support for the ‘Vote for Me’ candidates, even though, outside of vetting candidates with extreme views or party ‘stooges’, the network showed no interest in the policy or ideological positions of potential candidates. Channel Seven, in effect, is endorsing independent candidates, although it sought to mask this by claiming a public-spirited motivation to encourage interest in the election generally and to support ‘everyday’ candidates as alternatives to activists or careerists endorsed by the established parties. A key aspect of this support was a contractual promise by Seven, in the rules governing its relationship with successful applicants, to provide both television coverage and $10 000, notionally towards campaign expenses. In short, Seven was offering its imprimatur and tangible support to elicit candidatures.

The established parties and incumbent parliamentarians initially reacted with apoplexy. ‘Vote for Me’ was labelled as trivialising electoral democracy, and risking the balance of legislative power falling into the hands of someone promoted and elected for their televisual personality. There were fears that insubstantial candidates might distort the Senate election process, which as we have seen revolves around complex preference arrangements or, worse still, slip through the lottery of

---

509 Media companies and proprietors of course may also back one or more political parties through donations.

510 That Channel Seven wasn’t particularly interested in the views of the participants is also suggested from the fact that it had originally considered a more straightforward documentary format, of following a candidate through the election period, reporting both public and private and emotional aspects of the experience. Presumably that format was rejected as insufficiently novel to attract interest.


512 Senator Brian Harradine, ‘The Senate is not a Game Show’, The Canberra Times, 30/6/2004, 21: Harradine, it should be noted, is in effect an independent Senator, and not standing for re-election.
preference flows and snatch the final Senate seat in a State, on the back of the ‘bounce’ provided by Seven’s support.\footnote{As Antony Green, the ABC’s elections analyst, pointed out, actual election of an unknown was unlikely, given that true independents are relegated to the far end of the Senate ballot, without the benefit of a ‘tick-a-box’ voting option: private conversation with Antony Green, 27/7/2004.} The programme’s defenders countered that it was no less trivial than spin-doctored professional politics,\footnote{Catherine Lumby, ‘Sunrise Search as Sincere as it Gets’, \textit{The Newcastle Herald}, 21/7/2004, 9.} an interesting experiment in bringing colour and life to the dull or excessively professionalised process of electoral politics,\footnote{Tim Ferguson, ‘Democracy Finally Gets Chance at Stardom’, \textit{The Courier-Mail}, 12/7/2004, 11.} and even (a little perversely given the artificial, media-dependent nature of the candidatures) that it brought ‘reality’ to the process.\footnote{Kath Kenny, ‘Heaven Forbid We Let Reality into Politics’, \textit{The Sydney Morning-Herald}, 26/7/04, 11.} However this controversy over the programme’s value to electoral politics occluded serious concerns about the legal status of its format – surprisingly given that Seven had borrowed the format from the United States, where concerns about its legality, amongst other things, had led to it only being used in a mock election.\footnote{The mock Presidential race of Showtime’s ‘American Candidate’: <http://www.hotjobs.com/start/americancandidate/> was originally intended to generate an actual Presidential candidate. Explicit reality tv/game show formats playing on real electoral contests were undoubtedly ‘pioneered’ in the US. ‘American Candidate’ was, eg, preceded by a programme piggy-backing on the Californian gubernatorial recall process in 2003: Anon, ‘Game Show Plan for Governor Race’, \textit{BBC News World Edition} (online), 12/8/2003 <http://news.bbc.co.uk/2/hi/entertainment/3143895.stm> A United Kingdom version of ‘Vote for Me’ is apparently planned by the ITV network for the next UK election: Brett Evans, ‘The Reality of TV Politics’ \textit{AustralianPolicyOnline}, 2/8/2004 <http://www.apo.org.au/webboard/results.chtml?filename_num=00791>}

In particular, under Federal law, the promise of $10 000 might amount to a briberous inducement of a candidature. As mentioned earlier in relation to dummy candidates, CEAs 326(2)(b) says: ‘A person shall not, in order to influence or affect: …. any candidature of another person … promise or offer … any property or benefit of any kind …’. There is a mirror provision directed at potential candidates agreeing to
receive such benefits. Prima facie, Seven’s offer was a substantial monetary offer, conditional on candidature.

The programme’s rules stated that ‘Each State Finalist who successfully nominates ... will be provided with the following reasonable costs of participating in Stage Three [sic, the election campaign, including appearances on Seven] ... a donation of $10 000 (inclusive of GST) towards campaign expenses.’ Seven’s lawyers had sought to portray the payment, at law, as just another campaign donation to a candidate, rather than an incentive to induce a candidature. To be on safer ground payment could have been stipulated purely as reimbursement for campaign expenses actually incurred. It would not be hard to imagine a contestant admitting that ‘a key reason I stood was the $10 000 offered.’ Worse, if there were proof that some of the money was not spent on campaigning but pocketed – a natural consequence of the loose way in which Seven structured the offer - electoral bribery would be more clearly arguable, because the money would have been a private pecuniary benefit to reward a decision to stand for Parliament.

The problem for the programme is that whilst donations towards campaign expenses are entirely lawful, they are envisaged as occurring in two circumstances distinct from Seven’s. First is that the donor is generally a true supporter, ie sympathetic with the donee’s philosophy, or at least genuinely interested in seeing the donee elected because of what they will do in power. Seven however was neutral as to the contestant’s positions – otherwise it could not have pretended that the process was controlled by and for its viewing public and the electorate at large, and indeed, would have been accused of promoting or owning ‘Seven candidates’, raising the spectre of Berlusconi.

---

518 CEA s 326(1)(b).

519 Part of the analysis that follows was published by me under the title ‘The People versus Seven Sunrise’ as an entry on William Bowe’s electoral analysis website and weblog, The Poll Bludger, 25/7/2004 <http://homepages.ihug.com.au/~pollbludger/index.htm>

Second, and more tellingly, the payments were not offered to particular candidates who had already declared their candidatures (in which case they could not be an inducement to candidature, as it would be causatively irrelevant).\(^{521}\) Rather, Seven offered the lure to the world of possible candidates, precisely to encourage them to participate in a process where a condition of receiving the payment was that the person actually nominate for election. Whilst $10,000 would not purchase broadcast advertising time in most states, it is clearly a not insignificant benefit, and in any event, the very considerable television exposure promised by Seven as a condition of candidature could also be seen as a benefit to induce that candidature.\(^{522}\)

The AEC, on DPP advice, chose not to investigate the programme, at least for criminal breaches of the Act prior to the election, and the political parties soon backed off, apparently concerned that they would be perceived as afraid of the programme, or worse, party-poopers. As it was, no ‘Vote for Me’ candidate came close to election in the 2004 federal poll (none exceeded 0.70% of the first preference vote). However if a ‘Vote for Me’ candidate happened to be elected, the gloves might have come off, in the form of an election petition. Whilst bribery, on petition, does not have to be proven beyond reasonable doubt, if proven, it still leads to automatic unseating. If that were to occur, the petitioning party would risk a public backlash, but the fault would largely lie with Seven for not tailoring the programme to democratic values rather than game-show imperatives. If Seven were truly interested in electoral participation, for example, it could run community service advertisements encouraging enrolment or offer free air-time equally to all independent candidates, with straw polls to encourage viewer interaction.

\(^{521}\) Curiously, the one ‘Vote for Me’ finalist who appeared to have a genuine chance of election was Hetty Johnston, who had already declared as a candidate for Queensland’s Senate election. That is, she could hardly be implicated in electoral bribery. Indeed Johnston claimed that the money offered was ‘just a drop in a bucket’ - she wanted the publicity: Scott Emerson, ‘Anti-child Abuse Champion Warms to Sunrise’, *The Australian*, 24/7/2004, 10. In a sense, Johnston was ‘gaming’ the ‘game show’, since she was a serious political figure, being a former Democrat activist and well-known anti-paedophilia campaigner who analysts anticipated would stand on an ‘ungrouped ticket’ and not as a lonely independent.

\(^{522}\) See comments by political advertising specialist, Sally Young, in ‘The Big Parties will be Scanning the Ether for New Talent’, *The Canberra Times*, 2/7/2004, 17.
A separate question is whether the legislation *ought* to be interpreted so as to apply to encouragements to candidature in situations like this. There are good reasons for it deterring payments influencing decisions to nominate for election, as we discussed earlier in relation to dummy candidates.

Similar reasoning applies where the motivation is anti-competitive, or to throw up ‘spoiler’ candidates. An example of anti-competitive conduct is ‘buying off’ an opponent; examples of spoilers include encouraging nominations to siphon votes away from opponents, or simply to confuse the electorate. Both of these examples are particular dangers in electoral systems with non-preferential voting. An illustration of such anti-competitive conduct was the *Bay of Islands Election Petition*, New Zealand’s last reported case on electoral bribery. The respondent, a sitting member of the House of Representatives aligned with the government, was opposed for the endorsement of the Reform League. To break the deadlock, the respondent and other party agents offered the alternative candidate a series of inducements to not stand for

---

523 Hence the genesis of the rule against bribery in relation to candidatures – it is not a modern addition to the definition, but one dating to the use of first-past-the-post voting, in times when fewer candidates stood.

the House. They included the promise of an appointment to the Legislative Council, a matter within the government’s pleasure (he was also allegedly offered the House seat in a year’s time and/or payment of his expenses thrown away if he withdrew). The Election Court found the respondent guilty of electoral bribery, through the promise of an ‘office … to induce [another] person to procure [his] return’ by withdrawing from the race.\textsuperscript{525}

But Channel Seven could hardly be accused of anti-competitive conduct – on the contrary. The established parties certainly view Seven as unnecessarily encouraging spoiler candidates, but that position is rather subjective. Whilst those parties would take offence at what they would feel is undue competition, the electorate might not. Whilst tapping into ‘anti-politician’ rhetoric, Seven was not aiming to ‘spoil’ in the sense of siphoning votes away from any party in particular, whatever the electoral effect of the programme turns out to be.\textsuperscript{526} Of course, depending on the way electors vote, the ‘Vote for Me’ candidates may well stymie other candidates, but that is probably not Seven’s intention. Whether the candidates generated by the process are sincere is another matter: ie whether they advance genuine policies, rather than being merely egos attracted by the Warholian promise of fifteen minutes of televiusal fame. But that is not an issue for bribery law to regulate. After all, the electoral system does little to deter joke candidates, let alone to ensure that party candidates are motivated by anything beyond personal ambition.

\begin{itemize}
\item \textsuperscript{525} Ibid, quoting \textit{Legislature Act 1908} (NZ) s 215.
\item \textsuperscript{526} At the time of writing, the election had not yet been called, however, the programme was proceeding, with particular interest from the general media, and had selected ‘finalists’ for each State.
\end{itemize}
CONCLUSION

The aim of this thesis is to better understand the pejorative and legal term ‘electoral bribery’ through a detailed and context-sensitive examination of electoral conduct that fits the broad rubric of buying or dealing in electoral support. This chapter (and the succeeding two) turn attention away from direct vote-buying, to indirect means of using benefits and deals to win similar advantage.

The present chapter has uncovered a variety of contemporary manifestations of such practices, all involving horizontal (one political actor to another) relationships, as opposed to the traditional vertical relationship (of elector to politician). These include preference arrangements and deals involving lobby groups, the media and candidates or parties.

The approach, as in previous chapters, has been to avoid addressing the question of electoral corruption with pre-conceived notions of an ideal state of politics or democratic virtue, or of importing similar normative assumptions from say law and economics theory. Instead, the method adopted has been to immerse any consideration of electoral bribery as a practical concept – which it must be if it is to be a workable legal concept, intersecting with and judging electoral conduct - in a detailed understanding of the dynamics of electioneering. Those dynamics are contingent on underlying electoral rules (such as the preferential voting system) and political realities (such as the changing role of the mass-media). That is, whilst ‘buying’ electoral support is a universal concern to any competitive electoral system, it cannot be understood as an abstract or ex-ante question.

This ground-up, rather than top-down approach must however generate more than a set of isolated sketches of clumps of trees, without any insights into the shape of the forest. By a close interrogation of legal norms in relation to a variety of specific electoral practices, it is possible to infer some generalisable concepts that may be of practical value.
Thus, we have been able to begin a taxonomy of indirect vote-buying, by categorising deals between political actors, distinct from direct vote-buying between politician and elector. In the next two chapters, this taxonomy will be developed further. First, in Chapter Five, by considering parliamentary deals for electoral advantage. Then in Chapter Six, a category of ‘metaphorical’ vote-buying will be developed, to encompass public policy practices that, although clearly not bribery in the legal sense, attract that appellation in a political sense.

These categorisations, in turn, can help generate insights to better explain or guide thinking about which practices are not so clearly inappropriate as to attract legal condemnation. In the next chapter, we shall develop an idea already mentioned in this chapter in relation to preference deals involving swaps or policy-for-preferences, namely the idea of a ‘currency’ of politics. By this, I mean that certain benefits can be exchanged between political actors because they are the stuff of politics, and are commensurables. As we shall see, this notion of a ‘currency’ to politics helps stabilise the otherwise uncontainable idea of ‘benefit’ that is at the heart of the idea of a corrupt ‘buying’ of electoral support.
Chapter Five

The Australian Experience of Electoral Bribery.
Parliamentary Deals and the Currency of Politics.

CHAPTER COVERAGE AND PURPOSE

The previous chapter chronicled various contemporary manifestations of trading in electoral support. In doing so, we shifted focus from crude vote-buying, where a political figure buys the support of less powerful actors such as electors, and turned attention to more complex questions involving ‘deals’, ie understandings or arrangements, between political actors.

This chapter, which in a sense is an extension to the previous chapter, continues that focus on deal-making between political equals, by extending it into the realm of parliamentary deals involving electorally motivated exchanges. We are now one step removed from conduct designed to win campaign support, but still dealing with conduct undertaken to engineer an electoral advantage.

After examining a number of actual scenarios, the chapter develops the idea, first raised in the previous chapter, that politics has a certain, legitimate ‘currency’. This idea is developed to explain why certain forms of benefits or consideration, whether they be preference recommendations or policy positions (as discussed in the previous chapter) or parliamentary opportunities or offices (as discussed in this chapter) are tradeable for electoral support or advantage. The concept of political currency grows out of the methodology adopted in the thesis, which is to seek an understanding of what distinguishes appropriate from inappropriate conduct in trading in electoral support and influence, not by starting with abstract assumptions about political markets or electoral democracy, but by attending to the interplay of bribery as a legal concept with actual political conduct, understood in the context of the dynamics peculiar to the polity in which it occurs.
Whilst it would be briberous to ‘buy’ electoral support or advantage using benefits from outside the political sphere, such as money or private office, it is not illicit to barter in the ‘stuff of politics’. Such deals are haggling in like-for-like, and are not ‘purchases’ in the sense of an illicit bribe. Whether of course they are to be encouraged or whether they are far from the ideal of wielding political and parliamentary power for the common good, is another question, on which a legal thesis, as opposed to one informed by a study of the art of government, can say little.

The chapter finishes with an application of the concept of political currency to the curious recent phenomenon of electors ‘swapping’ their votes, which has been (wrongly) equated with vote-selling by US prosecutors. It is concluded that informed electors, as equals, should be able to make such bartered deals, for they are trading ‘like-for-like’, not buying or selling their votes.

PARLIAMENTARY DEAL-MAKING AND THE LAW OF BRIBERY

Whilst this is not a thesis on political bribery generally, it is important to understand the contiguities between electoral bribery (ie buying electoral support) and instances of parliamentarians engaging in deals to seek electoral advantage (as opposed to pecuniary gain). This exercise is useful not least because the ethical boundaries, or lack of them, that are illustrated by parliamentary bribery are part of a seamless professional fabric and culture in which politics generally is played out.

Note we are not concerned here with base graft in the form, say, of a politician accepting a payment to take a particular policy stance, or vote a particular way. Such actions are clearly in breach of parliamentary standards and privileges, and would attract inquiry and penalties for official misconduct,\textsuperscript{527} if not criminal sanctions for

\textsuperscript{527} Eg in specialist regimes such as under the \textit{Independent Commission Against Corruption Act 1988} (NSW), which gives the Commission (ICAC) a broad remit to investigate corrupt conduct involving public officials, a class that specifically includes Ministers and Parliamentarians. See similarly Queensland’s Crime and Misconduct Commission (CMC) whose remit includes fighting official misconduct and promoting public sector integrity.
bribery and related offences.\textsuperscript{528} Acceptance of money to influence a vote in Parliament was declared a common law crime in Australia in \textit{R v White}.\textsuperscript{529} As regards briberous influence outside parliamentary duties, the High Court in \textit{R v Boston}, held that a member accepting reward to exert pressure on the executive as a high violation of trust, though opinions differed as to its criminality as opposed to unethicality.\textsuperscript{530} Any such arrangement is also void for public policy.\textsuperscript{531} And, as in the UK Commons scandal involving ‘cash-for-questions’ noted earlier, the conflict of interest and misuse of public office involved in graft is usually so clear that the price of discovery is almost inevitably the loss of a political career and public reputation.\textsuperscript{532}

Instead, the instructive parallels to trading in electoral support arise in deals where what is bought or sold is political gain, and we will consider cases involving quasi-electoral concerns, such as deals to engineer a parliamentary majority or an electorally advantageous vacancy.

\textsuperscript{528} See, eg \textit{Criminal Code} (Cth) Part 7.6 ‘Bribery and Related Offences’, such as ‘bribery of a Commonwealth public official’, ‘abuse of public office’ and ‘corrupting benefits’. See generally Gerard Carney, above n 246, ch 8, especially 272-291. The most recent such conviction was of an ALP MHR for taking money to aid immigration claims under former \textit{Crimes Act 1914} (Cth) provisions against bribery of a public official: \textit{R v Theophanous} [2003] VSCA 78.

\textsuperscript{529} \textit{R v White} (1875) 13 SCR (NSW) 322 (conviction for offering bribe to secure member’s vote on resolution concerning compensation for property).

\textsuperscript{530} \textit{R v Boston} (1923) 33 CLR 386 (criminal conspiracy in an agreement to pay a member significant sums to use his position to secure a land purchase). On \textit{Boston} and \textit{White} (ibid) see Carney, above n 246, 262-272.

\textsuperscript{531} \textit{Wilkinson v Osbourne} (1915) 21 CLR 89 (members of governing party who were also practising land agents, had agreed to pressure the executive government to ratify a particular land purchase). Of course any briberous agreement as such is unenforceable, but that flows from its criminal illegality, rather than the vaguer common law category of things contrary to ‘public policy’ or ‘contra bono mores’ i.e public morality. On political deals and the common law, see Graeme Orr, ‘A Politician’s Word: the Legal (Un)enforceability of Political Deals’ (2002) 5 \textit{Constitutional Law and Policy Rev} 1.

\textsuperscript{532} Chapter Four above, n 483.
The Rouse Bribery Case: $110 000 to Cross the Floor

The most egregious such case in Australian history occurred in Tasmania following the 1989 State election. With the Labor opposition poised to form a minority government with Green party support, a prominent local businessman, Sir Edmund Rouse, sought to bribe a Labor MP to cross the floor to support the Liberal government. An amount of $110 000 was promised, $10 000 of which was delivered. The MP in question alerted the police to the offer, and Rouse was sentenced to a rather lenient three years’ gaol.533

Rouse’s defence counsel had admitted the attempted bribe was ‘wildly naïve and inept’.534 Rouse, it should be noted, did not lack power: he was at the helm of ENT Ltd, ‘the dominant player in Tasmanian media’.535 He was probably motivated both by his conservative leanings and connections, and because his business interests included woodchip mills, likely to suffer if Green policies were introduced. Not surprisingly, suspicions were rife that he could not have acted alone and that conservative politicians must at least have known of the bribe. These suspicions led to a Royal Commission.536 The Liberal Premier Gray had indeed vowed to ‘tough it out’ despite the Greens-ALP pact leaving him in a one vote minority, as he believed a defection to his side was possible.537 Gray was found to have had foreknowledge of Rouse’s intention to improperly entice a defection.538

533 Unsuccessfully appealed by the Attorney-General in R v Rouse [1990] 1 Tas R 408. He was also fined a mere $4000 for misuse of company funds.
536 Tasmania, Report of the Royal Commission into an Attempt to Bribe a Member of the House of Assembly; and Other Matters (1991) (‘Carter Commission’).
537 Haupt and Darby, above n 534, 16-17.
The most obvious lesson for this case in relation to electoral law is that had it succeeded, it would have outflanked the electoral process altogether. Admittedly such a blatant bribe to engineer a defection could only make political sense in the relatively rare event of a hung Parliament. It also assumes a parliamentarian willing not only to ‘rat’ on the party that secured him election but also, in all likelihood, to doom himself to losing the next election. And it presupposes a willingness to take serious political action of a public kind, in the form of crossing the floor, action guaranteed to raise suspicions. In short it presupposes a parliamentary ‘bribee’ who is corruptible and willing to take a significant risk of detection. Similarly, as Rouse discovered, the briber takes an enormous risk when seeking to corrupt someone who, by definition, is an ideological rival and likely to ‘dob’.

This type of high risk, high stakes bribery is thus of an order of magnitude different even from ordinary vote buying, and involves different risks to most electoral bribery where political neutrality, if not sympathy, is the context in which the transaction occurs. Nonetheless, the Rouse case represents a form of attempted bribery involving direct vote-buying (albeit buying a parliamentary vote, rather than an elector’s vote) not conceptually different from crude vote-buying during 19th century elections when open polling was used. It was clearly beyond the pale both in the venal sense of taking immediate private profit, but moreover in enticing someone to sell out their political loyalties, and probably their career, to ‘earn’ that profit.

---

538 Carter Commission, above n 536, 770-1, where it was also concluded that Gray’s non-disclosure of Rouse and his evasive and dishonest answers to police were ‘improper, and grossly so’ given his position as Premier.
The Gair and Metherell Affairs: ‘Jobs for the Boys’ for Electoral Advantage

In Australia’s version of the Westminster model, the executive government has a general fiat to dole out statutory offices as it sees fit. (Executive government here means sometimes the Cabinet, but often merely the Governor-in-Council acting on the advice of the Prime Minister and one other relevant Minister). Not unusually this leads to political sinecures: appointments based less on merit than on a ‘reward’ for past political loyalty or allegiance.

In several celebrated cases, however, the motivation was not reward for past service, but to secure electoral gain by inducing a political irritant to resign or to free up a winnable parliamentary seat. The most prominent in electoral lore is the ‘Gair Affair’ of 1974 (albeit, and illustrating the long-standing culture of political ‘jobs for the boys’, this imbroglio was far from the first). Motivated to free up an extra, winnable seat in the upcoming Senate election for Queensland, Labor Prime Minister Whitlam appointed Senator Vince Gair of the rival Democratic Labor Party to the Irish Ambassadorship. In the event, the electoral benefit was thwarted in comic circumstances, when opposition members succeeded in plying Gair with hospitality long enough to allow their State Premier to cause Senate writs to be issued before the extra electoral vacancy could arise. The Whitlam government suffered opprobrium for its sharp tactics, but since offices such as diplomatic postings were not subject even to public service rules, there were no grounds for misconduct proceedings against it.539

Similarly, in 1992, the Greiner Liberal government in NSW was embroiled in a scandal involving a political appointment. Dr Terry Metherell, a former Liberal minister, had left the party to sit on the cross-benches. To remove Metherell from the parliamentary scene and reclaim his seat for the Liberals, a deal was made involving Greiner, his Environment Minister Mr Moore and Metherell. Metherell resigned from Parliament and was promptly appointed to a senior public service position in the Environmental Protection Authority. An initial Independent Commission Against

539 On the ‘Gair Affair’ see Clem Lloyd and Gordon Reid, Out of the Wilderness: the Return of Labor (1974) ch 15. As it happened, Gair’s party, the DLP, was eliminated at the election.
Corruption (ICAC) inquiry found both Greiner and Moore liable for ‘corrupt conduct’. Commissioner Temby found the deal ‘involved exchanging a Government job for a Parliamentary Seat’. He held it was corrupt conduct, in the legal sense, since it involved breaches of fairness and merit criteria under the public sector management legislation; in effect he found that the Premier acted for private gain in trading a public office to obtain political and electoral gain.

Greiner’s political career was finished. But was able to clear his name legally, by winning judicial review of the finding of corruption. The ICAC Act required a finding that the conduct of the politicians involved a ‘criminal offence … or reasonable grounds for dismissing, dispensing with or otherwise terminating the services of a public official.’ The Court of Appeal held that whatever the ethics or even legislative breaches involved, the deal was not criminal. Further, in an exercise in narrow statutory interpretation, it held that although they occupied high public positions, parliamentarians were not ‘public officials’ in the sense of statutory officers or employees within the terms of the ICAC Act. Hence, although the Court was willing to find that a Minister (as opposed to an ordinary parliamentarian) was capable of being ‘dismissed’, grounds for dismissal would only be a legal as opposed to a political matter in extreme circumstances. As the second ICAC report into the

---


541 Ibid, v.

542 ICAC Act 1988 (NSW) s 9.

543 According to Carney, they are ‘public officers’ in the legal sense of an ‘officer who discharges any duty … which the public are interested [particularly if] paid out of a fund provided by the public’: Carney, above n 246, 357. But being a member of parliament is a unique office in that it is membership of the Parliament and not an Executive appointment: whether they fit a particular legal concept of public official/office/officers etc must depend on context. (If there were no doubt, then corruption acts would not need to explicitly include parliamentarians in terms such as ‘public official’: as Carney notes, eg, in the Criminal Law Consolidation Act 1935 (SA) s 237(c).

544 Greiner v ICAC (1992) 28 NSWLR 125. Political grounds for dismissal were, eg, illustrated by Governor-General Kerr’s dismissal of the Whitlam government in 1975: Whitlam breached no law, but the dismissal was justified as resolving a growing constitutional impasse by securing an election.
affair lamented, this meant Ministers were in a ‘special category’ compared to other public office-holders.

At law, it has long been the offence of electoral bribery to offer a benefit to induce someone to mount or withdraw a candidature, as discussed in the previous chapter in relation to dummy and media-endorsed candidates. Also, as we noted, in discussing the Jones/Flint allegations, a statutory office is clearly a ‘benefit’ in the sense of the elements of bribery. The first ICAC report by Commissioner Temby discussed the bribery issue (as distinct from official misconduct) in some detail, although he was dealing with the general common law offence of bribery rather than the specific statutory offence of electoral bribery.

At common law, Temby found, the offence required ‘that the offer is made with a view to inclining a public official to act contrary to known standards of honesty and integrity’. Whilst moralising against the general practice of ‘jobs for the boys’, he did not find that Metherell clearly breached such standards, as they existed at the time, since he took the position as a real job, and not purely a sinecure. As against Greiner and Moore, he found that although they acted improperly in a public service sense, they honestly believed that their actions were not unlawful. This extra element is not, doctrinally at least, part of the test for electoral bribery, but as we saw, for instance in examining preference deals and the Mundingburra case, in the absence of clear precedent, the questions of current political norms inevitably colour the outcome.

**KING-MAKING AS TRADING IN POLITICAL OFFICE**

The Gair and Metherell affairs, and indeed the allegations against Jones canvassed in the previous chapter, all involved statutory offices as benefits. What of deals over parliamentary and political offices per se? By ‘per se’ here I mean to focus not on deals involving pecuniary/material bribes to appoint someone to a parliamentary

---

545 ICAC, above n 540, 58.
546 Ibid, 69.
547 Ibid, 73.
office, but on deals involving the trading of political benefits to secure appointments or resignations in such offices. We can surmise that such deals would be much more numerous than outright buying of office, since the trade of like for like – ie bartering – is the first and most durable form of transaction in any system of exchange that is driven by forces beside money.

To illustrate the issue and its relationship to electoral bribery, we will briefly consider two recent episodes, one involving the South Australian speakership, the other the leadership of the Federal ALP and through it the Prime Ministership itself.

**The Peter Lewis Case: Dealing in Parliamentary Office**

As appears to be increasingly common after Australian elections, despite the use of majoritarian preferential voting systems, the South Australian Parliament of 2002 was ‘hung’. That is, no ‘major’ or party of government held a majority in its own right. The ALP formed the largest bloc, although it had polled fewer votes than the Liberal government. Up to four independent MPs held the balance of power. One, Peter Lewis, had been a Liberal MP, but had left the party two years previously, and successfully re-contested his seat without any party’s endorsement.

Both ALP and Liberal parliamentary parties sought to woo the independents, any one of whose support would have been enough for the ALP to form a minority government. The ALP secured Lewis’s support after agreeing on a ‘Compact’ – a signed document that included various policy commitments that the ALP made to Lewis, centring on parliamentary procedure and processes for constitutional reform both issues important to Lewis’s desire to reinforce parliamentary over executive government. Curiously, Lewis had also secured the leaders of the parliamentary Liberal party’s agreement to the ‘Compact’ (although the Liberals had insisted on a side agreement). The Compact, immodestly titled ‘Peter Lewis’ Compact for good Government’, was, as was intended, made public. In return for the policy pledges in it, Lewis agreed to give his support on matters of supply and confidence motions.  

---

These negotiations occurred in short span: indeed by the Wednesday after the poll, Lewis announced that he would support an ALP government. His public reasons for preferring Labor – given that both major parties had acceded to his Compact - were that Labor had the best chance of providing stable government.\footnote{Which was true enough, given that only it could govern without relying on four disparate independents. However Lewis simultaneously held his own threat of instability over the head of the new government, stating that if it did not deliver on the Compact ‘the Liberal Party will take its place in government without the need for a further election’. See \textit{Featherston v Tully [No 2]} (2002) 128 LGERA 115 at 141-2. It should be noted that although Labor won almost 50% of the seats, the Liberal Party won over 50% of the two-party preferred vote: evidencing the imperfection in South Australia’s ‘electoral fairness’ mandate, under which redistributions are to be designed to attempt to ensure a majority to a party with a majority of the two-party preferred vote: \textit{Constitution Act 1934} (SA) s 83(1).} Lewis, it must be noted, had made public pronouncements prior to the election that he would not support Labor. Those statements were either reckless or in poor judgment, and they triggered an unsuccessful petition of his seat by the disgruntled Liberal party on the basis that he had misled what was a conservative electorate.\footnote{\textit{Featherston v Tully [No 2]} (2002) 128 LGERA 115; see also reference to Full Court in \textit{Featherston v Tully} (2002) 194 ALR 703.}

The central factor in any bribery analysis was that, as a Supreme Court judge found in deciding that petition, Lewis was wooed with more than just promises of improvements to parliamentary democracy and his desire to see stable government. In a letter to Lewis, roughly contemporaneous with the Compact, the ALP’s leader, Mike Rann MP, offered (to use the judge’s words) or rather promised him the Speakership:

\begin{quotation}
I want to place in writing central commitments made to you yesterday afternoon in my office.

I am committed, as are my Labor colleagues, to supporting you as Speaker of the House of Assembly for the \textit{full term} of this Parliament.\footnote{\textit{Featherston v Tully [No 2]} (2002) 128 LGERA 115 at 141.} \end{quotation}
The judge found that this offer might well have been an inducement for Lewis’s support in the House. But Lewis had been careful to avoid including it as a term in the Compact, so the judge found no evidence that Lewis made the Speakership a condition of his declaration of support for Labor.\(^{552}\) Realistically, the office was a great attraction for anyone passionate about parliamentary reform. The keenness of Lewis to avoid the perception that it was part of a deal, especially in litigation in which the question of bribery was not in issue, suggests that he was aware that he might be accused of being bribed.

The act of the ALP leader in placing his pledge in writing seems at first glance to be brazen. It suggests that from Labor’s perspective at least, the offer was of such attraction and importance to Lewis that it required stressing in writing, with the absence of deniability that entailed. Rann must have been aware that he was risking that Lewis would make the letter public, to embarrass or even blackmail Labor: Lewis after all was not just a conservative, but also someone with a record of independence from party dictate. The stakes however were high, since the fate of the government was in play.

The judge’s favourable findings about Lewis’s propriety offer Rann no defence to allegations that Labor traded in the office of Speaker to help seal political gain, since a promisor can be guilty of attempted bribery even if the promisee is innocent of having been influenced. Had they reflected on their promise at the time, the Labor leadership would have deduced that they were not liable to be charged with electoral bribery as such. Under the South Australian Electoral Act, ‘electoral bribe’ is limited to influencing votes and candidatures at, or in the course of, an election only, and so does not extend to the vote of a parliamentarian.\(^{553}\) But the promised Speakership implicated the separate offence of bribing a ‘public officer’, which in South Australia’s criminal law explicitly includes an MP.\(^{554}\) This criminalises a ‘person who improperly gives, offers or agrees to give a benefit to a public officer … as a reward or inducement for’ an act or exercise of power or influence by that officer in her official


\(^{553}\) Electoral Act 1985 (SA) s 109.

\(^{554}\) Criminal Law Consolidation Act 1935 (SA) s 249.
capacity or office. It is hard to imagine an act closer to a parliamentarian’s office than a decision to support a Ministry on the floor of the lower house, the house of government.

Yet myself aside,555 I am not aware of any public characterisation of the Rann letter as anything more than a metaphorical – as opposed to illegal – bribe. A positivist might dismiss this quietness about the issue as irrelevant to the legal question, which can only have a clear answer if and when court were asked to definitively rule on such a deal. Clearly the political caste does not want deals of this sort to be impugnable. As the Gair and Metherell affairs suggest, both sides of politics conduct them, as if the positions traded were part of the spoils of electoral success and public power. The media, if not the public, may simply be jaded into accepting that deals as an inevitable part of the exercise of political power. Further, as I elsewhere noted, it may simply be a matter of pragmatic comity and the separation of power between the courts and the parliament that political deals have not become the stuff of regular litigation, let alone prosecution rather than a case of the law’s silence betokening legal approval.556

What ethical position underpins this apparent consensus that such deals are not subject to bribery law? (We might note in this regard that the South Australian test for bribery of a public official requires a consideration of political ethics, as only ‘improper’ promises are criminalised).

In defence of the Lewis deal, it can be said that the offer was so neat as be publicly beneficial. An independent with a passion for parliamentary reform is the ideal person to be Speaker in the Westminster system. The appointment had other symmetries. If Labor had to provide its own Speaker (the much more usual outcome in Australian parliaments) it would have denied itself a guaranteed vote on ordinary legislation, as the Speaker only has a casting vote. That would have required it to convince two of the four independents to support it in its legislative agenda, rather than just one. Thus, in the circumstances, Lewis’s appointment minimised the likelihood of legislative

555 Orr, above n 27, at 140.
556 Ibid.
gridlock, in line with Lewis’s unimpeachable statement that he favoured Labor to help ensure stable government.

These are all valid practical points in favour of this particular deal, but they don’t dispel the fact that a Supreme Court judge found that Rann’s letter was an offer of a benefit as an inducement for Lewis’s support. If the peculiarities of the parliamentary numbers or the position offered had been different, eg if it had been a lucrative statutory appointment, then the pragmatic defence of the deal might crumble. The position of Speaker in any event carried with it considerable extra remuneration, not to mention status – ie private benefits to Lewis. Why does that in not make it a tangible bribe? What are the political ethics at work here?

We can find the gist of the political ethic in reaction to an earlier arrangement in which Labor Senator Mal Colston resigned his party, was appointed to the Deputy Presidency of the Senate, and began supporting conservative government legislation. That deal outraged the wounded ALP, but was accepted by it as politics-as-usual, albeit rougher than usual.557 That position was not limited to political insiders. A founder of the public watchdog ICAC was quoted as saying, in response to the Colston deal, that ‘politics was about “doing deals”’ and that to launch anti-corruption inquiries into such arrangements would diminish the fight against serious corruption.558 Remembering the observation on the Gair appointment that ambassadorships are seen as wholly within the fiat of the executive government, we might conclude also that parliamentary positions or indeed ministerial positions are simply part of the treasure of assuming office. That is a cynical way of suggesting a deeper truth that we noted in discussing preference swaps. If we accept that there is a particular sphere which distinguishes politics from other aspects of public and governmental service, one in which politics is irredeemably a question of forming alliances and deals by trading political power, favours and policies,559 then we must

---


558 Ibid, quoting Gary Sturgess.

559 Ibid.
accept that the political sphere has its own unique currency. Just as trading preferences for preferences is acceptable in electoral politics – not least since it is a currency that only exists because of the way the electoral system is structured – then it may be conceded that to exchange a parliamentary office in return for support on issues on the floor of parliament, is an exchange of a peculiar currency. It may not be an ideal motivation for filling such office or exercising a vote on a particular piece of legislation, but it is not improper or uncivilised to the point of being unlawful.

**Dealing in the Prime Ministership: the Kirribilli House Agreement**

A second form of trading in political office occurs within political parties themselves, and most notably in relation to leadership ‘transitions’. This is the process of easing out an incumbent and easing in his replacement. Such transitions are invariably sticky, as deference must be paid to the egos of those involved and the demands of their supporters, not to mention wider political factors such as the electorate’s preferences, the need to avoid destabilising confrontations whilst achieving ‘generational change’ and strategic considerations such as the timing of the handover in the electoral cycle. A naïf might say that the most meritorious leadership contender should always prevail, and leave the judgment of what ‘merit’ means to the individual members who vote for the leadership position. But even assuming that merit here could be defined without reference to the sorts of political and electoral factors just listed, the ‘merit only’ position unrealistically assumes that a parliamentary caucus is a simple collection of political equals, rather than an inherently hierarchical group, itself enmeshed in other hierarchies of government (the ministry or shadow ministry) and politics (the wider party).

The most celebrated and notorious leadership deal in recent history involved ALP Prime Minister Hawke and Treasurer Keating, Hawke’s effective deputy. It culminated in a solemn pact, sealed by handshakes and witnesses at Kirribilli House, the Prime Ministerial residence in Sydney, in November 1988. The following description of the deal draws on an earlier piece, Orr, above n 531, 1-2. The analysis in that piece focused on explaining why the common law would not enforce such deals, rather than why they would not be considered briberous.
Prime Minister for five years and a half years, and had formed a successful duet with Keating in both political and governmental terms. But their mutual respect had all but eroded. Hawke had come to consider Keating to be too abrasive and aloof to represent Labor let alone ordinary Australians, whilst Keating considered Hawke to be too self-possessed and insufficiently interested in policy. Their growing mutual disrespect aside, it was widely assumed and accepted, inside and outside the party, that Keating was the natural and inevitable heir apparent.

The form and setting for the deal were agreed in advance. There was a meeting at the Prime Minister’s Sydney residence, with each party bringing one witness of high repute, vetted by the other in advance. The arrangements befitted two powerful people whose working relationship had all but broken down, but were coming to an agreement over a very significant matter. At the meeting, Hawke agreed to stand aside after the 1990 election, in return for which Keating would continue to serve as Hawke’s loyal deputy and Treasurer, ensuring no destabilising challenges. The deal was intended to remain a secret. It most likely would have until Hawke reneged on it, whereupon it was revealed by a disgruntled Keating and his supporters, who then proceeded, ultimately successfully, to destabilise Hawke.

The quid pro quo of the deal, shorn of political context, was that in return for the benefit of Keating’s continued support, Hawke would retire the leadership at a time of his nomination and return the support. The deal did not strictly implicate electoral or political bribery laws, since the benefits and promises related not to election candidatures or support, nor to parliamentary duties, but party office. But in real terms, such office in a major party is not a private affair. It translates at a minimum to the Leadership of the Opposition, and in this case to the office of Prime Minister itself.

The Kirribilli deal had the dubious feature of secrecy – a feature shared, say, with the Mundingburra MOU but absent from the Lewis Compact. The element of secrecy however is equivocal as to whether the deal was improper. If either party had any

---

561 Hawke chose businessman Sir Peter Abeles; Keating chose ACTU Secretary, Bill Kelty. For further detail and background to the agreement, see ABC Television, News and Current Affairs Political Documentary Unit, Labor in Power (1993).
doubts about its legality, they would have been very unlikely to have insisted on
witnesses (whose presence reflected their lack of trust rather than a legally nefarious
deal). They certainly must have known that more high-minded members of their own
party would find the deal distasteful, if not unethical, because the deal was based on an
assumption that the internal democracy of caucus could be trumped by what the
leadership Gods decided in the Olympus of Kirribilli House. And they would have
been conscious that the ALP’s election fortunes in 1990 – a point of convergence for
the interests of both parties to the deal – would have been damaged if the deal were
public knowledge, since the Opposition would campaign with the slogan ‘A vote for
Hawke PM is a vote for Keating PM’. The secrecy, if unfortunate for the voting
public, reflected these political calculations.

Reduced to a formula, the deal mirrors the symmetry of the other political deals
discussed in this chapter, whose structure suggest bribery if we assume a public
duty/private gain test for corruption, ie the personalised trading in electoral advantage
and political office in a way that sidelines the ideal concern with the public interest, eg
in desert determining who occupies the office in question. In legal terms the deal did
not raise bribery concerns however. Again, to understand why, it is necessary to think
in terms of the legitimacy of exchanges of politically equal currency.

**DEAL-MAKING AS THE ESSENCE OF POLITICS?**

Politics, at one irreducible level, is a matter of deal-making. That is, politics is
inherently about compromises and exchanges, whether to enhance a particular
individual or group’s power, to achieve a policy outcome, or simply to exercise
payback. Electoral politics could never be immune from this, since it cannot be
disentangled from politics generally, and many of the same forces and most of the
same actors run both shows. Modern electioneering techniques and media practices,
in fact, have elided any strict division between the campaign proper and the rest of the
parliamentary term. Certainly governments do enter caretaker mode during the

---

562 Exactly the same dynamics are recurring in the long-running question of a transition between
Liberal Prime Minister Howard and Treasurer Costello. See eg, Glenn Milne, ‘Costello’s Backers
Have an Exit Strategy for PM’, The Australian, 10/5/2004, 7
campaign period and attention hence shifts from the compromise of political deal-making to the convincing of the electorate, but this convention can hardly magically expunge the ‘deal’ from electoral politics and leave it as a realm purely concerned with the promotion of ideas, images and visions. (In any event, as we shall see in the next chapter, campaigning has largely become a matter of ‘metaphorical’ vote-buying.)

In this and the previous chapter, we have surveyed a range of deals, from preference arrangements to parliamentary manoeuvring, all motivated to influence electoral conduct and achieve electoral advantage. Many of these deals at first glance seem to fail the literal definition of bribery law, namely the exchange of a benefit to influence a decision. Yet many of them would be seen as commonplace within the political realm, and perhaps even unexceptionable (if unlovely) by electors generally. Is there a metric to sort the truly briberous purchasing of electoral advantage from acceptable political exchanges? What is it that removes the taint of bribery from the trading in otherwise undoubted ‘benefits’ contained in a political deal? To understand this, we need to reflect on the idea that politics has its own legitimate currency.
The Currency of Politics

It is no explanation for the law, when confronted with evidence of a political deal and asked to sniff it for any whiff of tawdriness amounting to corruption in the legal sense, merely to say ‘that’s the way politics is’. But it is not tautologous for the law to exclude a deal from the category of briberous by saying that what was exchanged was merely ‘the stuff of politics’. The law must at some point draw a sphere around the core elements of politics – which includes parliamentary and party decisions. It must be able to say that whilst transactions such as buying such decisions through cash, political donations or tangible favours from outside, such as a promise of a lucrative position in the private sphere, are forbidden, that dealings transacted in the same ‘currency’ are acceptable, if not necessarily to be encouraged. This conception of politics as a market with its own currency is also necessary to avoid routine political arrangements such as ‘log-rolling’ over parliamentary votes and policy being implicated as bribery.

Without such a conception, political players would be required to act as saints, ie to renounce their very ‘politicality’. Such a de-politicisation of politics would be akin to asking professional athletes to play only to entertain the public with graceful and sporting performances, rather than to win. Not only would it be unrealistic, but to adapt Walzer’s metaphor,\textsuperscript{563} justice also would not be served since there would be no recognition of the uniqueness of different spheres of justice – in this case that democratic politics is not merely an exercise in the art of good government, such as other-centred or utilitarian considerations of the common good, but it is also a process by which power is attained and managed. And one natural tool in that process is making accommodations by exchanging political resources, where that term is broadly understood to include real advantages and benefits of political power such as electoral support and not merely say the sharing of ideas and ideals.

\textsuperscript{563}Michael Walzer, \textit{Spheres of Justice: a Defense of Pluralism and Equality} (1983) especially ch 12 ‘Political Power’. As noted in Chapter Seven of this thesis, Walzer adverts briefly (in one paragraph) to electoral bribery at 100 of this book, in the context of ‘blocked exchanges’ ie those in which money exchanges is banned for fear of commodifying the desired object, here the vote.
The concept of political currency requires us to recognise that certain benefits or considerations are fungible with others, and hence that dealing in them is not corrupt in the sense of briberous, even though the deal may be driven purely by mutual political gain. The modern definition of corruption as using public office for personal gain misses the point here: competitively elected offices (perhaps all high offices, since they all attract the ambitious and egoistical) are infused and indeed driven by those acting for gain in the hence of enhancing their careers and power. Political currency enables us to focus instead on the nature of what is being exchanged, and its relationship to the internal dynamics of the trade and the art of politics, rather than to classifying the motivation of the office-holder as public-spirited or selfish.

Of course, the acceptance of such exchanges in principle does not in itself give the law an explicit or sharp dividing line that can be easily applied in all instances. There are cases where what might otherwise be seen as political or parliamentary favours have been treated as bribes. In discussing inducements to mount or withdraw from candidacies, for example, we noted the New Zealand *Bay of Islands Election Petition*. There, bribery to induce a candidate from not running for the lower House was found in an offer of appointment to a seat in the unelected upper House. The Court held that such a seat was an ‘office’ within the traditional bribery proscription against promising ‘offices and employment’ in return for electoral conduct. It may have felt that what was to be traded – the chance to run for election in return for an appointment to the upper House – were incommensurables, even though in the broad sense both related to the ability to sit in the legislature. The Court shied away from ruling on a second charge, namely an allegation that an offer was made that in return for not standing, the rival would be rewarded by the sitting member resigning a year later and promoting the rival in a by-election.

It is hard to imagine such a deal being impugned today, especially as it occurred between rivals within the same party. Such deals are not only likely to be common, they seem a natural way of resolving intra-party tensions by sharing opportunities around. Here again the concept of the commensurability of the exchange is able to

---

564 *The Bay of Islands Election Petition* (1915) 34 NZLR 578, see Chapter Four above, nn 443, 524-5, and compare the similar contemporary Australian allegations by Tony Windsor MHR at n 524.
explain the distinction. Certainly within a party, what are being traded are opportunities for endorsement: on one view it is less a trade than a way of rationing a limited resource, namely party endorsements. It is only when anti-competitive conduct that truly restricts both voter choice and genuine freedom of candidature arises that the law should be as sensitive as in the *Bay of Islands* petition. When such sensitivity is heightened, closer scrutiny will be paid to the nature of the benefits the subject of the mutual promises, and hence to whether it is a case of a true trading of political commensurables or an illegal purchase.

Although the dividing line is not sharp, it clearly exists. For example, a parliamentarian trading his support on the floor of the house partly in response to the promise of the Speakership is a deal involving the same ‘currency’. By contrast, the sale of public honours (eg awards in the form of knighthoods etc) for political, including monetary support, is beyond the pale. For such honours to fall into a political market is to debase them entirely.

The concept of ‘political currency’, which underpins this understanding, also allows us to keep black-letter law well away from the intimate workings of the political and parliamentary sphere. It may, in doing so, also serve to enhance the separation of powers. Not out of some desire to ensure respect between two arms of government, nor to protect the independence or sensitivity of the judges who tend to not want to have to rule on activities that occur in the political domain. Rather, such a separation is desirable to open up a space in which political considerations – such as whether to grant preferences or lobbying support in return for policy - rein, unfettered by second guessing or fear of the law, or moralising in the shadow of the law.

Removing the spotlight of the law does not make the space lawless: factors such as the balance of political forces, the fluidity of political alliances and the ability of the media and public to question and debate political deals, all combine to inhibit the ethical excesses of such transactions.\(^{565}\) Of course, the more that such exchanges

---

565 They also serve to legitimise such deals when they are not excessive. The Rann government in SA recently offered Karlene Maywald, the lone National Party member a seat in Cabinet, in return for her support. Whilst the deal raised heckles in those who assumed the National Party was a sworn enemy
occur in elite cocoons – as the Kirribilli deal did – the less effective such tempering measures are. But by the same token the salutary effect of legal processes such as charges and inquiries, as witnessed in the Swan case and the Queensland Police Union deal, can themselves only occur if the arrangements become publicised. And the bribery law in itself, as we have noted, may be an inhibition to such deals becoming public knowledge.

There is a second reason why restricting the reach of electoral bribery law does not construct the space of political deal-making as a free market. That is because most of the deals discussed in this chapter are not legal in the sense that the law will not lend a positive hand to enforce them. Electoral bribery is a serious offence, and hence something of a last resort from a regulatory perspective. A more moderate legal sanction is simply to recognise an agreement as unenforceable. Thus, a more nuanced approach was taken to the question of the freedom of candidature in the NZ case of *Peters v Collinge* (as opposed to the earlier *Bay of Islands* Petition).\(^{566}\) Peters, a National Party MP facing a pre-selection battle, objected to signing a standard form used by the party that required potential candidates to pledge not to run for Parliament if they did not receive party endorsement. The NZ High Court gave Peters a declaration that such an agreement was against public policy; it was not a fair exchange to extract an abdication of political freedom as a pre-condition for a party to even consider a member for pre-selection. But it was not suggested that its proffering

---

of the Labor Party, much of the sting of critiques of the deal was lost when it was realised that both sides shared an approach to the key issue of the day, the degradation of the major river system in the State. As a result, a Liberal opponent of the deal’s attempts to label it corrupt and invoke legal process against it, fell flat: Tom Richardson and Craig Clarke, ‘The Karlene Coup: Maywald Runs for Ministry and Sends Her Party on the Run’, *The Advertiser*, 24/7/2004, 9. In short, the deal was accepted as a trading of like-for-like: support for a government with a role within that government.

\(^{566}\) *Peters v Collinge* [1993] 2 NZLR 554. Whether the party could have expelled Peters for not abiding by party rules was not decided, and would have involved juggling the degree to which the Courts would intrude into internal party affairs (parties then being seen as essentially private organisations) against considerations of ensuring natural justice to party members. In any event, a person who lost a pre-selection and stood against his party could quite legitimately be expelled from the party, for violating a fundamental rule, namely that the purpose of any party is to promote the election of its collectively endorsed candidates.
was a form of, say, electoral intimidation or undue influence (analogous to electoral bribery).

Contract’s writ does not, then, run to deals that are against ‘public policy’. Whilst this term is rather woolly, there is a variety of case law to suggest that it ensures that political arrangements that contradict higher values – eg parliamentary privileges and electoral freedoms, as well as illegal arrangements, including briberous ones – are not worth the paper they are written on from a legal perspective. Such agreements are not worthless however: their value is the extent to which they are binding in political honour or to which they have weight in political custom. From a policy perspective, the question then becomes the desirability of such arrangements being public knowledge, to ensure an informed electorate, but it is hard to see how such a question is one for legal regulation as opposed to media ferreting. Labelling them as electoral bribery may only provide incentives for those involved to keep such deals secret.

**Political Currency in Action: Vote-Swapping Electors Strike Back**

A very novel form of trading in electoral support, which deserves consideration, is vote ‘swapping’ or ‘pairing’. These are political transactions, but which involve an elector-to-elector exchange rather than a deal between one political actor and another. They have been attacked as vote-selling in the US, but as I will now argue, we can apply the logic of political currency to deduce that most vote-swapping is legally unobjectionable.

Attempts to formalise vote-swapping are a recent phenomenon, most notably in the UK and the US, where first-past-the-post voting is still in place. As Saul Levmore notes, ‘the potential for computerized voting and trading of voting rights means not only that new forms of vote selling are likely to appear but also that restrictions on

---

567 See Orr, above n 531. On political promises more generally, and why they are not to be equated with ordinary promises in the law or morality of contracting, see David W Lovell, ‘Political Promises – What do they Mean?’ (2004) *Quadrant* (July-Aug) 10.

568 This discussion draws on Orr, above n 27, 138-9.
vote trades will be [sic less] feasible.\(^569\) Vote-swapping draws on an older practice of ‘tactical’ voting. Since most electors live in relatively safe constituencies, many feel that their ballot is practically worthless; at best an expressive act with much less value than a vote in a marginal electorate. For example, if a UK Labour Party supporter happens to live in a traditionally middle class seat, then a vote for Labour may make less practical sense than a ‘tactical’ vote for the Liberal Democrats, who have a greater chance of defeating the Conservative candidate. Similar incentives can arise in the US, at least where three or more candidates enter the race. Tactical voting is a half-way house, which electors have spontaneously developed in first-past-the-post systems to compensate for the absence of preferential voting.

Vote-swapping takes the logic of tactical voting one step further. In a swap, two electors in different electorates agree to support each other’s party, if that will maximise the chance that their ballots together will help oust a mutually disliked party (eg a US Green and Democrat supporter may vote-swap to minimise the chances of a Republican victory). Attempts to formularise and encourage vote swapping have in fact recently been mounted. For example in the UK, pop star and Labourite Billy Bragg promoted the idea, and one web-site set up to facilitate trades recorded over 8500 pledges to swap votes.\(^570\) Similar US ventures arose at the 2000 Presidential election, to facilitate anti-Bush vote-swaps between supporters of Gore and Nader. (Whilst unlike the Liberal-Democrats in the UK, Nader was in no position to win a majority in any region, swaps could help him achieve 5% of the vote in liberal states, thereby entitling his campaign to public funding to defray its expenses.\(^571\) ) One site, <www.votexchange.com>, was forced to close, however, when the California Secretary of State threatened to prosecute it for ‘brokering the exchange of votes’, ie facilitating illegal vote trading. But is vote-swap against electoral bribery law? Applying the concept of political currency suggests it is not.


\(^{570}\) The site was <www.tacticalvoter.net> as reported in David Butler and Dennis Kavanagh, *The British General Election of 2001* (2002) 103, 231.

In the Californian case, the State based its threat of prosecution on an argument that each vote exchanged was a form of ‘other [ie intangible] valuable consideration’ within Californian electoral bribery law. The website owners however sued seeking damages for violation of the first amendment right to speech.\(^{572}\) Whilst the practice of advertising vote-swaps may seem to flout the secrecy of the ballot, it has always been the privilege of each elector to choose to reveal their voting preferences. Some may object that it promotes insincere or negative voting, but so too does tactical voting (which in its simplest form is clearly legal). Tactical voting and vote-swapping point to flaws in the first-past-the-post system more than they do to a corruptible electorate.\(^{573}\) Indeed, far from disrespecting or devaluing their ballots, vote swappers display a high degree of political nous and respect for their ballots.

Clearly, literally gifting a ballot to another is unlawful. Indeed this was a ruse devised early on in the life of the secret ballot to perpetuate bribery: a group of bribed electors would gather, the first would deposit a blank piece of paper as his ballot, he would pass his ballot to the next in line outside the booth, where the ballot would be filled in under supervision, and so on. (This tactic remains in some parts of the world, such as small mafia dominated Italian wards).\(^{574}\) So too of course a voter

\(^{572}\) Porter v Bill Jones, Secretary of State 319 F.3d 483 (2003). Curiously, sites such as ‘NaderTrader.com’ and ‘virtualvotesforNader.com’ that merely encouraged vote-swapping, without actively facilitating it, were not threatened presumably as they were clearly protected by the first amendment. That interlocutory judgment did not however resolve the core question of whether vote swapping was a form of electoral bribery, and the case, as of 2004, was yet to reach trial. The subsequent Californian Secretary of State reportedly announced that he did not consider vote-swapping to be legally objectionable: see <http://www.votepair.org/faq.php#legal>

\(^{573}\) Admittedly, if co-ordinated on a large scale, it could amount to gerrymandering the rolls and boundary distributions, if it involved shirting significant numbers of electors between electorates. But that assumes a high level of partisan organisation (ie party involvement) and indeed, co-ordination between parties. Such a scenario is quite different to an exchange that merely offers electors the chance to communicate one-on-one to consider if they wish to vote-swap in the sense of reciprocal tactical voting.

\(^{574}\) Email communication from Professore Carlo Fusaro, above n 159. The mafia reportedly is also reportedly turning to newer technology to obviate the secrecy of the ballot, viz the use of video phones by which electors would be required to send images of their ballots: Anon, ‘Mafia Turns to 3G Video
who offers her ballot for sale is engaged in electoral bribery, although even here appearances can be deceptive: an online market encouraged by the Dadaist ‘Edible Ballot Society’ of Canada, turned out to be a way of mocking the role of money in elections rather than an endeavour to profit from electoral bribery.\(^5\)

Compared to the parliamentary and electoral deals discussed throughout this chapter involving political agents, few of which have been investigated and even fewer subject to court scrutiny, it is ironic that vote-swapping has led to threats of prosecution. But there are easy targets and hard targets in law enforcement. Vote-swapping might need to be regulated if it led to large scale insincere voting, but even then, the problem would seem to be with the underlying voting system, of which vote-swapping is merely a symptom. Vote-swapping as an enhancement on tactical voting is an example of the bartering of the same currency. I exchange my legitimate motivations for casting a particular ballot with those of another elector. Indeed, in that it occurs between politically astute electors, it is an exchange between true equals.

**CONCLUSION**

By deepening the focus on ‘deals’ to secure electoral advantages, this chapter has continued to draw focus away from the stale assumption that electoral bribery was confined to crude vote-buying. It has done so by extending consideration of political trades to parliamentary deals to secure either an advantageous electoral position (eg a resignation) or a parliamentary majority.

These deals are not new phenomena, but discussion of them has been almost entirely absent from discussions of electoral bribery.\(^6\) Yet these deals are analogous to

---

\(^5\) <http://edibleballot.tao.ca>

\(^6\) An exception is that part of the US literature that concerns itself with the question of ‘log-rolling’, a matter implicating parliamentary vote-buying, but not the buying of electoral advantage. See, eg,
electoral bribery to the extent that they remain deals for electoral advantage or votes (albeit parliamentary votes). They can be discussed without carrying us into the unrelated realm of political bribery, understood as the offering rewards to politicians for their policies or votes on particular issue.

Again, the method of the thesis has been to approach such deals by exploring the specifics of actual case studies, and treating the primary question of bribery law as one of making judgements about the legal appropriateness of evolving forms of political conduct within the context of the political and institutional framework in which they arise, rather than coming to the question with abstract or normative assumptions.

This method does not consign us to wallowing in particularism. As the latter part of this chapter demonstrates, an analysis of parliamentary deals us develop the idea of the ‘currency of politics’, which was begun to be uncovered in the previous chapter. This concept, in turn, helps stabilise the otherwise unruly concepts of illicit ‘benefit’ and ‘influence’, which lie at the heart of the law of electoral bribery. The adaptability of that idea was then demonstrated, by applying it to solve the conundrum of an emerging form of voter conduct, namely vote-swapping.

In the following chapter, the last to be devoted to detailed consideration of case studies, attention returns to ‘direct’ vote-buying, but in the form of campaign

Lowenstein, above n 477, 813-5; Richard L Hasen, ‘Vote Buying’ (2000) 88 California Law Rev 1323, 1338-48. There is an extensive literature on ‘log-rolling’ in the US, where it is of particular concern and interest. This issue is not covered in this thesis, not merely because of its limited interest and lesser presence in Anglo-Australian parliamentary practice, which is dominated by relatively strict party discipline, but because its lawfulness can be understood by a simple application of the idea of political currency. Whether of course it is good law-making practice is another matter.
promises, pork-barrelling and public policy declarations, as opposed to crude vote-
buying. Consideration of this issue shifts attention away from the narrow statutory
interpretive questions in electoral bribery law, and towards a broader understanding of
the political and rhetorical uses of ‘bribery’ as a term in the discourse about electoral
conduct.
Chapter Six

The Australian Experience of Electoral Bribery.

Metaphorical Vote-Buying and Public Resources.

CHAPTER COVERAGE AND PURPOSE

Previous chapters have focused on political and electoral practices, both historical and contemporary, which the law either clearly impugns or, at a minimum, about which legal arguments can be raised. That is, we have so far considered case studies that shed light on the statutory proscription against electoral bribery by inviting its application to electoral conduct using standard techniques of legal reasoning and statutory interpretation. We have found however that these techniques run out when precedents about vote-buying run out or are by-passed by evolving political practices. In these situations, we need to make sense of electoral politics as practised to stabilise the law, and the idea of ‘political currency’ is a tool to assist that stabilisation.

The organising principle of Chapters Two and Three were an historical survey of ‘traditional’ or crude bribery through direct vote purchasing and treating, and how the law in first the UK, then Australia, evolved in response. The organising principle of Chapters Four and Five was ‘the political deal’. Most of the scenarios we have so far considered have involved individualised transactions and arrangements, conducted outside the public gaze.

This chapter broadens consideration by raising conduct involving pork-barrelling and public policy promises in a mass electioneering environment. It raises examples – mostly actual but some hypothetical – about which no lawyer would seriously consider making formal bribery allegations. This is because the scenarios would be exempted by the explicit or implicit exception in electoral bribery statutes covering public pledges and actions of a policy nature.
Interest in these forms of electioneering however lies not in the narrow question of the
formal application of the law, but in why public discourse routinely invokes
terminology such as ‘vote-buying’ and ‘election bribe’ in responding to governmental
largesse and promises such as tax or welfare ‘bribes’. This analogising to electoral
bribery is far from a purely Australian phenomenon (although this chapter, in keeping
with the rest of the thesis, focuses on the Australian experience). As Rick Hasen says,
writing from a US perspective:

vote buying is such a powerful image of electoral corruption that
opponents of a host of other electoral practices, from the giving of large
campaign promises to legislative logrolling, sometimes draw an analogy to
core vote buying [Hasen’s term for crude or traditional electoral bribery] in
making their case.577

This chapter therefore enters the terrain of electoral bribery as a metaphor, rather than
as a purely legal concept. By ‘metaphor’, I mean that the term ‘electoral bribery’ is
commonly applied as a pejorative, to demark a species of electoral conduct that is not
unlawful per se, but whose honour and desirability is questioned because of its
functional resemblance to the offence of electoral bribery.

In an exception that proves the rule, this chapter opens with the last successful
electoral bribery case in Australia, the *Port Stephens* Election Petition in NSW of
1988. In that case, a court actually unseated an MP for gross pork-barrelling using
government largesse during an election campaign. The decision caused a temporary
ashening of faces amongst professional politicians, yet it has not led to an outbreak of
similar petitions. This inaction suggests the case would now be confined to its facts,
and parallels the general unwillingness of the law in the 19th century to intervene to
stop charitable largesse by candidates in their constituencies.

As this chapter shows, the influence of legal concepts on discourse about political
conduct is not, however, confined to litigious and judicial interventions. From the

577 Hasen, ibid, 1325, citation omitted.
Port Stephens case, we shall work outwards to obviously metaphorical vote-buying, exemplified by pitches to individual electors’ ‘hip-pocket nerves’.

A second theme of this chapter is the tendency for political actors such as incumbents and established parties, particularly those in government, to (ab)use public resources to enhance their electoral standing. Whilst in a utilitarian conception of democracy, it is legitimate to build an electoral majority on promises to better the lives or at least wallets of a majority, an excessive focus on, or crudeness in, promises to provide subsidies to groups targeted for their electoral importance, is often seen as a perversion of electoral politics. This is reflected in the continuing use of the term ‘electoral bribery’ to criticise activities that may be corrosive of alternative forms of electoral appeals. This usage continues even though such activities are clearly not unlawful.

‘Pork-barrelling’ of course is an age-old practice, but as we will see, the problem of the partial usage and capture of public resources for partisan electoral gain is not confined to metaphorical vote-buying. The increasing generosity of parliamentary entitlements and governmental advertising budgets suggests that ‘metaphorical’ bribery in particular, but electoral bribery more generally, needs to be situated in a broader assessment of the inadequacy and limits of political finance laws in any attempt to achieve two fundamental principles of free and fair elections: political equality and a relatively level electoral playing-field.

Metaphorical electoral bribery reminds us that elections have the potential to pervert some of the democratic and good governance goals they are ostensibly designed to achieve, such as balanced policy making, social progressivism and equality of treatment and opportunity, by creating an auction in which electoral rivals bid for the votes of a narrow class of swinging voters in marginal seats.

The twin questions pursued in this chapter, in short, are the relevance of the term ‘vote-buying’ to modern political practices, and how ‘vote-buying’ depends in large part on the marshalling of public resources for partial ends. These insights, and their
contrast with the vote-buying of the pre-modern era, were pithily expressed by a correspondent to the letters’ page of *The Australian* newspaper:

The difference between electioneering in the 18th and 19th centuries and today seems to be that formerly, politicians used their own money to persuade electors to vote for them.578

This sentiment is not confined to politically literate members of the public. Academics who have studied electoral bribery in contemporary times, such as Fabrice Lehoucq, have concluded that ‘the line separating wholesale from retail vote buying is nebulous.’579 Hasen, in similar vein, labels the question of campaign promises as ‘the most difficult of the non-core vote-buying practices to analyze.’580

The chapter concludes with reflections on what role the secret ballot may be playing in encouraging metaphorical bribery, by acting as a cover under which electors are more likely to vote out of self-interest. This is ironic, since, as we saw in Chapter Two, the secret ballot was a central plank in the historical war against electoral bribery. Civic republicanism, however, offers an argument in favour of open balloting, by reasoning that secrecy only encourages individuals to see the ballot selfishly, as a property right to be ‘cashed in’ in the privacy of the ballot booth and for which they are not accountable. If I can keep my vote secret, I never need to explain or justify my electoral choices to others. This in turn feeds an electoral culture centred on pork-barrelling and tax and welfare ‘bribes’. It may thus be a little hypocritical for electors to blame politicians for such campaigns, if the real driver is how voters conduct themselves.

579 Lehoucq, above n 162, 14.
580 Hasen, above n 576, 1359.
PORK-BARRELLING and BRIBERY

Scott v Martin versus Bowering v Wells

As the New South Wales Labor government of Premier Unsworth was sliding to defeat in 1988, it predictably engaged in a fair degree of ‘pork-barrelling’, ie the partial promising or distribution of public money, to keep targeted electors in particular regions or sub-groups happy. Mr Martin, the Labor candidate for the new seat of Port Stephens was busy during the campaign. Indeed on a variety of occasions he was photographed and written up in the local press, doling out government grants and funding to community groups. In other instances, a retiring ALP member representing part of the district did the honours. This routine occurred up until election morning, and on at least one occasion, arrangements were so hasty that a facsimile, rather than genuine, cheque was used. The largesse exceeded $37 000, including $14 500 for three pre-schools, $8000 for three life-saving clubs, $7500 for two youth organisations, $3000 for a coast guard, $2000 for a theatre and $3000 for an entity known as ‘The Port Stephens Inner Light Trust’.  

Martin scraped home by 90 votes, out of over 28 000. The losing Liberal candidate petitioned the result, claiming the payments were deliberately targeted at community groups comprising people who could be expected to be influenced by the money, either to support Martin or to influence others to support him. In Scott v Martin (aka the Port Stephens Election Petition), Justice Needham issued a short judgment which, to say the least, disturbed the political and parliamentary caste. He unseated Martin, holding that Martin had in a relevant sense ‘procured’ the grants, and that:

There is no doubt that the actions of [Martin] had, as an intention, the influencing of persons to vote for him in the election. … [T]he conduct …

---

581 This precis draws on summaries and discussion of the case in Orr, above n 27, 135-6 and Hughes, above n 3, 212-214. For more detail see the judgment of Needham J in Scott v Martin (1988) 14 NSWLR 663.

582 Scott v Martin (1988) 14 NSWLR 663.
from 13 to 18 March was dictated by a desire to achieve election on 19 March.\textsuperscript{583}

The circumstances of the pork-barrelling in this case parallels earlier debates about largesse in the form of ‘charity’ by candidates to their electorates in the 19\textsuperscript{th} century. Needham J in fact seemed to be channelling the strict approach of Groves J, that charity – actual and not just promised - on election eve was suspicious, rather than the non-interventionist approach adopted by other Victorian era judges.\textsuperscript{584}

As if foreseeing criticism that pork-barrelling was a normal, indeed legitimate, part of the armoury of governments, particularly in an election year (and that promise is an aspect of campaigning from opposition), Needham J stressed:

\textit{This was not an ordinary case. All of these grants were made during an election period, after the writs had issued. The issue and delivery of the cheques had an air of urgency – Port Stephens, according to a government file, was one of the “special electorates”. One infers that its specialty resulted from the projected closeness of the coming election.}\textsuperscript{585}

It should be recalled, however, that the closeness of the election is meant to be irrelevant to the remedy if bribery is found. Even a single instance, attributable to the winning candidate or his agents - and probably even bribery by losing candidates, so long as it is widespread – will invalidate a poll.\textsuperscript{586} The point that Needham J seems to be making is that he felt safer in declaring the pork-barrelling in this case to be beyond the pale, because that sort of misbehaviour was consistent with what might be expected by a desperate party in a highly marginal seat.

\textsuperscript{583} Ibid, 672.

\textsuperscript{584} See Chapter Two above, text at nn 120-8 (‘charity’ cases) and Chapter Three above, text at nn 305-10 (law against candidates contributing to local organisations).

\textsuperscript{585} Ibid.

\textsuperscript{586} See eg CEA s 362(1) and \textit{Parliamentary Electorates and Elections Act 1912} (NSW) s 164(1). As to widespread bribery, see Chapter Three above, text at nn 339-40.
Whilst it is intuitively correct to expect that parties and candidates will sail closer to the wind in seats where the race is expected to be tight, there is no empirical reason to assume that such circumstances, and hence legal interventions such as *Scott v Martin* (if the case is good law), will be rare. At any particular election, there are numerous ultra-marginal seats. Further, most contemporary elections are close in the sense that opinion polls show slender divides in the overall two-party preferred vote. Given that campaigns, and by definition, pork-barrelling, are usually co-ordinated centrally by parties, and not at local level by candidates, there will always be an incentive for the parties to engage in ‘extra-ordinary’ vote-buying. Are Ministers guilty of bribery when they make pork-barrelled commitments in an election atmosphere?

Some of the community groups involved in the Port Stephens’ largesse expressed support for their unseated MP, claiming that he had lobbied for the money, not stressed the election when distributing it, and even, in the case of the Coast Guard, that it had not swayed any votes.\(^{587}\) Of course, electors or groups who benefit from largesse will wish to paint themselves as deserving, and reject suggestions that their support was ever purchasable. Certainly an ability to make holistic comparisons of the merits of different electoral options, and to recognise but sublimate self-interest, would be a mark of a sophisticated electorate. But this is nothing new: voters have long been able to ‘game’ the system, by threatening to withhold support if benefits are not promised, whilst reserving the ability to vote according to other factors.

There was an immediate backlash against the judgment in *Scott v Martin*. The new Opposition leader, Bob Carr, defended Martin:

> It seems that any candidate who’s out there working for his electorate is eligible for the criticism that his behaviour is wrong in law. Bob Martin was doing what candidates have done for a century in Australian politics,

---

\(^{587}\) Paolo Totaro, ‘Groups Support MP who “Bribed”’, *The Sydney Morning-Herald*, 21/9/1988, 2. Of course such groups may have been embarrassed and certainly had a vested interest, in the pork-barrel.
and that is, go out and support the claims of community organisations to funding under the various Government schemes. 588

On one view such a response from an ‘insider’ in the political system could be discounted as special pleading, particularly the claim that Martin was ‘working for his electorate’ as a whole, rather than for a few groups within it who were targeted for his electoral benefit. But such a response from a professional politician such as Carr was not simply a self-serving rationalisation. Behind it lays the belief that Needham J’s judgment was naïve and its consequences uncontrollable. If the Port Stephens’ campaign was impeachable, could any line sensibly be drawn between what occurred there and standard political practice? Could, let alone should, the business of making public promises or governmental decisions favouring one interest or need over others ever be cleansed of the likelihood that the decision-maker will be influenced by expected effects on electoral preferences?

Even the incoming Liberal Premier, Nick Greiner, weighed in on Martin’s side, saying the Attorney-General would investigate amending the Act. This occurred as Labor Leader Carr sabre-rattled that he was investigating ‘criminal conspiracy’ charges against three Liberal members for conspiring to breach the bribery laws, presumably for promises of future public ‘pork’. Carr railed that ‘The [Electoral] Act is now a joke, as it has been interpreted. The logical extension of what has been done in this case is that normal electioneering can be interpreted as bribery.’ 589 The general political feeling seemed to be that the decision threatened the ‘death of politics’. 590

Critics of the judgment would also see it as naïve to find that bribery had occurred in this case merely because of the flurry of largesse in the late stage of the electioneering process. In formal legal terms, nothing restricts electoral bribery to


590 A phrase later used by Premier Greiner when he was embroiled in a political bribery allegation during the ‘Metherell Affair’. See Orr, above n 27, 135 and discussion in Chapter Five above, text at nn 540-7.
actions in the campaign period proper, ie the time between the writ to polling day. Indeed scrutiny of electoral politics cannot be confined to the campaign period, because electioneering, let alone the formation of electoral preferences, is not so contained today, if it ever were. Governments in particular engage in permanent campaigning, a rolling process driven by constant ‘market’ research (opinion polling and focus groups), in which key groups and ‘squeaky-wheels’ are targeted and mollified. 591

Stripping some of the rhetoric away, it may be that both sides were right. Politics as usual had lulled Martin and the ALP, under pressure of a losing campaign, into undue and unsubtle pork-barrelling. In this light, the judgment was not a definitive line in the sand demarking briberous from acceptable pork-barrelling, let alone a thorough exploration of the competing conceptions of political ethics required to make such a distinction. Rather it was a call for more discreet or moderate campaign behaviour – a warning shot rather than a strict precedent. Needham J’s judgment is decidedly short (just 11 pages, five of merely which restate the pleadings) for a ground-breaking decision, and for all its formal logic, avoids addressing the political implications or realities. He discusses – and distinguishes – precedents relating to candidates’ charitable gifts in short order, before ending on a moralising note aimed at the executive government. Echoing older cases asserting that electoral bribery law was not about ‘corruption’ in any abstract sense, but about a practical question of the (in)appropriateness of certain forms of influence on decisions about electoral support, the judge concluded:

The respondent’s actions were not, in my opinion, corrupt in the ordinarily accepted meaning of that word; unfortunately, in modern times, there seems to be an accepted view that public moneys are in the unrestricted gift of those in power. 592

---

592 Scott v Martin (1988) 14 NSWLR 673.
Needham J then took the unusual step of awarding costs against the Crown, because Ministers were involved in the breach, without whose willing co-operation it would not have occurred. This decision is logical within its own parameters, but the net effect of the costs order was rather perverse. The public purse, which Needham J was jealous to preserve, bore the costs, rather than the wrongdoers, the candidate and his party!

As Professor Hughes points out, the NSW Act at the time lacked an express exemption for declarations of public policy or promises of public action. Hughes assumes that this would have saved Martin’s pork-barrelling from illegality. Is this necessarily the logical extension of that rule? Was Martin’s action, namely the doling out of largesse, an implicit declaration of policy? If not, would a ‘declaration of public policy or promise of action’ be exempt from bribery law, but the carrying out of that declaration or promise might not?

The extent of political apoplexy over Scott v Martin can be seen in a submission by the ALP, then in power Federally, to the Parliamentary inquiry into the 1990 Federal election:

> As far as activities of Ministers and Government are concerned, the Act ought to make it clear that Ministers are not precluded [by the bribery laws] from making announcements of, or implementing, routine Government decisions during election campaigns.

Evidently, the ALP’s legal advisers were not sure that the public policy/public action exception in the Commonwealth Act would necessarily cover all pork-barrelling, particularly its ‘implementation’, ie actual paying, of grants and subsidies during election campaigns.

Hughes’ assumption is a logical extension of the public policy defence in some but not necessarily all cases involving pork-barrelling. The payments in Scott v Martin, including the involvement of a campaigning candidate, and the almost comical hurry

---

593 Hughes, above n 3, 213.
to achieve favourable publicity of them just prior to polling day convinced a hard-line judge that they were briberous actions, not to be equated to ordinary announcements or implementations of policy - where ‘policy’, at least where welfare or grants are involved, implies a considered prioritisation of needs, rather than a motley collection of beneficiaries chosen for electoral impact. On this view, Scott v Martin, even in jurisdictions with an explicit defence for public policy promises, is good law. It would stand not for any coherent or precedential set of principles distinguishing legitimate from illegitimate pork-barrelling, but as a lighthouse, warning candidates, especially government ones, to re-route their campaign style by steering clear of doling out public money during the campaign proper.

Scott v Martin however can be contrasted with a local government case from South Australia in 1978, Bowering v Wells. At that time, the South Australian Local Government Act included an anti-bribery provision against any holding out to electors of promises or expectations of profit, advancement, benefit or enrichment to influence their votes. This offence was alleged to have been breached in relation to two community groups, a football club and a community centre. The secretary of the football club had written to its members indicating, in effect, that a vote for the respondent would ensure improvements to its oval. There was some dispute as to whether the secretary could be said to have been the candidate’s agent, but on the point of substance, the judge held that:

[T]he particular elector sought to be influenced must be offered something that is not only peculiar to the elector alone, or at least to a particular class of electors, but is in addition an offer of some profit, advancement, benefit, or enrichment which it is improper for the candidate to offer.

---

595 Roder, ibid.
In short the judge favoured an individualistic conception of electoral bribery, and reinforced that by narrowing the idea of ‘benefit’ to the relatively tangible and individualised, in effect carving out a form of ‘public policy’ exception. This is reminiscent of the position taken in the report into the Queensland Police Union deal, analysed in Chapter Four. It is cognisant with the dividing line drawn by a Mexican political scientist, Fabrice Lehoucq, who states:

What distinguishes vote buying from other vote trades is that sellers of votes receive private benefits. 596

A pledge to improve a sporting facility was hardly ‘improper’, according to the South Australian court, even if done in large part to win support of a narrow class of electors. There was a similar finding in respect of the candidate’s pledge - and the use made of it – to support the community centre.

This South Australian case however fell beneath the legal radar and was not cited in \textit{Scott v Martin}. Implicit in the decision is a reticence to courts becoming involved in reviewing the propriety of the allocation of public benefits. This may be born of a respect for the separation of judicial from legislative and executive power. Only in an exceptional case, such as \textit{Scott v Martin}, where the \textit{manner} of distribution of the benefits (as opposed to the process of selecting the beneficiaries, let alone the motivations for those choices) can be impugned for electoral impropriety, will the courts be involved. This distinction further reinforces the characterisation of \textit{Scott v Martin} as an exceptional case, whose effect is limited to crudity of style, in effect, to indecent electioneering.

\textit{Scott v Martin}, it is worth noting, is nevertheless on all fours with a recent Papua New Guinea court decision, ousting Dr Puka Temu from his seat at the 2002 election, over two counts of bribery through official donations. One involved the presentation of a 4WD vehicle as an ambulance to a local health centre – Dr Temu had ceased to be Health Secretary some months earlier, to contest the election. He also gave a Kina500 cheque to a local women’s fellowship. At both handovers, he asked those

596 \textit{Lehoucq, above n 162, 3. Emphasis added.}
present to ‘remember me’. His actions were held to have clearly involved an intent to
influence. Defence counsel’s arguments that one could not bribe an institution were
held to be inapplicable: an intention to unduly influence the members of the women’s
centre and group was identified.\footnote{Anon, ‘Somare Government Shocked as Dr Temu
suffered no disqualification and was able to stand for, and win, the subsequent re-election: Anon,
‘PNG Voting System Praised by New MP’, \textit{ABC Radio Australia News}, 24/12/2003,
\url{http://www.abc.net.au/ra/newstories/RANewsStories_1015553.htm}}

If, as seems to be the case, \textit{Scott v Martin} is being confined to its facts in Australia,
the question remains what role it might play, not as a strict legal precedent, but in the
broader work ‘electoral bribery’ plays as a pejorative in discourse about campaign
ethics. Understood as a question of the propriety political conduct, rather than as a
question of formal legal guilt or innocence, Martin’s conduct and its parallel with
crude vote-buying, reveals that ‘electoral bribery’ as a legal category can play an
active role in such discourse. Not because Martin was made example of as an
exemplar of ‘corruption’, but because the legal greyness surrounding the case adds
teeth to the use of ‘bribery’ as a pejorative in debates about the desirability of similar
conduct in the future.

\textbf{The ‘Sports Rorts’ Affair}

The cases just discussed can be compared to the so-called ‘sports rorts’ affair, which
engulfed a Labor Federal Minister only a few years after \textit{Scott v Martin}. The ‘sports
rorts’ affair suggests that \textit{Scott v Martin} was not read by politicians as a prohibition
against pork-barrelling per se, but merely as an inhibition against crude distributions
of actual pork during election campaigns proper. In this affair, the Minister
responsible for Federal sporting policy, Ros Kelly, was caught up in an embarrassing
imbroglio over moneys allocated to develop public sport grounds. As one
commentator describes it:

\footnote{Anon, ‘Somare Government Shocked as Dr Temu Ousted’, \textit{hellopacific} (online news service), 6/3/2003, \url{http://www.hellopacific.com/news/general/news/2003/03/06/06e.html}  Temu however
suffered no disqualification and was able to stand for, and win, the subsequent re-election: Anon,
‘PNG Voting System Praised by New MP’, \textit{ABC Radio Australia News}, 24/12/2003,
\url{http://www.abc.net.au/ra/newstories/RANewsStories_1015553.htm}}
After some minimal processing of applications by the Department, the allocations were decided in the Minister’s office with very strong evidence that it had been focused on marginal Labor electorates.\textsuperscript{598}

Clive Gaunt, in a statistical analysis of the scheme concluded that there was ‘strong support for suggestions that funding was allocated primarily on a political rather than a socio-economic basis, and that political rather than socio-economic bias was present.’\textsuperscript{599} Such partisan pump-priming, to use another political metaphor, has long been an issue for students and practitioners of public administration. Similar accusations have been raised more recently over the billion dollar ‘Roads to Recovery’ scheme under Prime Minister Howard’s administration. His Minister for Transport countered that degraded roads predominated in outer suburban and rural areas, which just happened to be more likely to be marginal Coalition electorates. Whether the motivation for nursing one’s own electorate is to demonstrate reward for electoral support, or an incentive for renewed loyalty, or a mixture of both, seems to depend on the government’s perception of its hold on power.\textsuperscript{600}

That such metaphorical bribery is not proscribed, either under the law governing elections or the rules governing the administration of governmental finances, reinforces the adage ‘to the victor, the spoils’. But political sanctions yet exist for such activity. Support may backfire if the pork is seen as mis-targeted; although this presumes a high level of media scrutiny and analysis. As it happened, Minister


\textsuperscript{600} Similar accusations, replete with the metaphor of electoral ‘bribe’ were directed at extra Medicare payments directed at doctors in certain outer-suburban and regional seats in the lead up to the 2004 election. The government countered that it was not merely targeting marginal seats, but that some safe opposition seats were included: Sophie Morris, ‘Abbott on Bulk-Billing: It’s No Bribe’, The \textit{Australian Financial Review}, 17/8/2004, 8. Such plausible deniability may make the scheme itself fairer from the viewpoint of recipients, but the ‘bribery’ element concerns timing and motivation more than how widespread the benefits are scattered: if the targeted seats are at the heart of the scheme, the desired influence is still achieved.
Kelly’s resignation over the ‘sports rorts’ affair had as much to do with embarrassment over process as with questions of substance. The criteria and reasons for the funding allocations approved by her were written on, then wiped from, a whiteboard in her office: a case either of ineptness in record-keeping or a conscious desire to avoid a paper trail.\footnote{For a fuller official account of the affair, aka ‘the whiteboard affair’, see Commonwealth Auditor-General, \textit{Efficiency Audit, Recreational, Cultural and Sporting Program} (Audit Report No 9, 1993-94).}

The question for electoral bribery law is why such pork-barrelling is not in the same ball-park as the \textit{Scott v Martin} case. The technical defence would be that the Ministerial largesse falls squarely within the exception covering any ‘declaration of public policy or a promise of public action’. But this again begs the question whether \textit{Scott v Martin} style campaigning should not also be protected as ‘public action’.

At the risk of obfuscation, it may simply be that there is ‘public’ action and then there is ‘political’ action. A bureaucrat routinely doling out government grants according to pre-determined and neutral criteria is clearly engaged in public action. An MP or candidate, in an election campaign, doing the same to select or targeted groups in a blaze of publicity, with an intent to buy votes, is not engaged in public action in the sense of being an agent of the state, so much as private action in the sense of directly milking electoral gain. It may be that questions of electoral aesthetics come into play, particularly in relation to the public actions of electoral actors.\footnote{For more on the relevance of aesthetics to electoral norms, see Orr, above n 60.} Election campaigns are clearly times of sensitivity – we are more inclined to invoke values such as ‘fair play’ during the explicit contestation for votes, out of a sense of fair rivalry that we inherit from amateur sport, than during the life of a government, since government is in one sense inescapably about the wielding of power by those who have won it in an earlier electoral contest.

This analysis of course invites the further question as to why a candidate might be liable for bribery when a Minister making similar decisions of general, if more diffuse benefit to her party is not. Perhaps there is no necessary dividing line; only a question
of whether there is sufficient circumstantial evidence to infer briberous intent, which in turn may only be satisfied if there is a targeted group sufficiently close to an election. This realisation, presumably, underlay the ALP request to explicitly exclude Ministerial actions during election campaigns.\(^{603}\) That request assumed that ‘routine’ Ministerial action could be identified with sufficient specificity, and begs another question. Why would the political caste fear that ‘routine’ action would be impugnable? Scott v Martin, it seems, truly highlighted the division between politics as practised and more demanding standard of political ethics.

As time as passed, however, the salutary effect of Scott v Martin has either faded, or the parties are now interpreting it very formalistically. To give an example, in his ‘final hours’ as a State parliamentarian, the Western Australian Minister for Regional Development, with a Federal election underway, announced over $600 000 in grants to organisations within the Federal electorate he was about to contest.\(^{604}\)

In terms of the wider public conversation about the propriety of political action, ‘electoral bribery’ can serve a useful function as a marker of the seriousness of the debate. To accuse a Minister of engaging in doling out electoral ‘bribes’, albeit a metaphorical rather than strictly legal claim, is to broaden the debate from one rooted merely in dissension over the wisdom of a particular policy or the method of allocating the benefits in that policy. Instead, it squarely implicates the policy in a broader critique of the manner and motivations of the political conduct, its relationship to electoral fairness and the way in which it sets up the relationship of government and governed.

**TAX BRIBES – A SINE QUA NON OF THE MODERN CAMPAIGN?**

The metaphorical practice of electoral bribery is perhaps best exemplified by a well-advertised promise of the Malcolm Fraser Liberal-National government in the 1977 federal election campaign. It is so well known as to be notorious, having been

---


dubbed the ‘fistful of dollars’ campaign. (Unfamiliar readers can see two of the ads in Appendix Two.) Some political commentators believe the campaign helped the Fraser government win the 1977 election. That may be an overstatement since the government had a huge majority and had only finished two years of its first term. The least that can be said, however, is that it helped swing momentum in the campaign at a point when the government felt it was facing a resurgent opposition campaign. The advertising of the promise was anything but subtle. The most forthright of the advertisements proclaimed: ‘Labor Gives Nothing. Liberal Gives Tax Cuts’ above two photographs of outstretched hands. One was empty; the other grasped a wad of cash.

At first glance, the brazenness of the image of a fistful of cash is reminiscent of Hogarth’s famous caricature of direct vote-buying, ironically titled ‘Canvassing for Votes’ (reprinted in Appendix Two). Hogarth captures the moment where the elector’s outstretched hand meets the geld dropping from the hand of the candidates’ agents. What makes one gift illegal and the other merely a metaphor of bribery? Colin Hughes has a plain answer: the difference lies in the exception, in the legal definition of electoral bribery, covering statements of public policy or action. ‘The exception’ he says ‘recognises the reality of electoral competition in Australia by the end of the 19th century; candidates and parties give or promise to give government created benefits to electors.’

---

605 Noted in passing, with sources, in Chapter Two above, n 175.
606 I use the term ‘gift’ here in a neutral sense, meaning something given. This is what distinguishes the tax bribe/break from say a promise to set fiscal policy so as to limit pressure on interest rates (a promise, which targeted to homebuyers, may appear to be the functional equivalent of a promise of money in hand). But with an independent central bank and an unpredictable economy, the interest rate promise is not just less certain, it is not in the ‘gift’ of the promisor in the way that the tax benefit is.
607 For its genesis see Chapter Two above, text at nn 208-11. Appendix One lists those jurisdictions in which the exception is explicit in the legislation; for an example of how it has been implied, see the discussion of Queensland law in the context of the Mundingburra/Police Union Memorandum of Understanding, Chapter Four above, text at nn 459-79 and following.
608 Hughes, above n 3, 210.
In the next chapter, we will encounter arguments from both political science and economics as to whether this ‘realism’ is normatively justifiable. Here, I simply wish to explore why such promises, although criticisable as ‘bribes’ are not conceived as beyond-the-pale. That is, why they are acceptable electoral conduct, if still enmeshed in a political debate about their desirability.

The public nature of the tax promise is obviously a key ingredient to explaining its acceptability. Admittedly, at its height, much traditional vote-buying was fairly open. The word would pass around, from the candidate or his agent, that interested voters should present themselves at a certain time before, and sometimes after the poll, at a certain place (often a quite public place, such as an inn) to collect their bribe. The traditional bribe however, as we have seen, was unique in that payment was invariably consideration for a particular vote. It was not merely an incentive to vote for the briber, but a reward for doing so. It was a payment that, but for rules against illegal arrangements, meet all the elements of the private law of contract.

The tax promise can be analogised to an incentive to support the promisor, but as a reward, it is rather too diffuse. Everybody who qualifies for the tax break will be entitled to it, without any necessary connection to their voting behaviour. As one economistic analysis puts it:

When wholesale [ie metaphorical] vote buyers make promises to benefit an entire class of voters, they each offer to pay each member of the class no matter whether that voter actually voted for the proposal. The benefit (if any) to each voter does not come from a side payment contingent on his or her vote, but from the victory of the proposal.609

Tax breaks go to taxpayers – including those who by virtue of being non-citizens or under 18 years have no vote to give – rather than to electors as such. Of course, there is a certain formalism to this analysis. In a broad sense, no one is likely to be entitled

to the tax bribe unless it works to help swing votes, particularly in marginal seats or the targeted electoral demographic. And not all traditional vote-buying was neatly targeted as a transaction with someone whose status as an elector was verified, let alone a one-on-one bargain - it was sometimes more efficient to treat and vote-buy en masse by distributing the benefits widely without individualised vetting.

Tax promises also work at a less direct level than true electoral bribes: they are part of a broad election platform, albeit central to it. So too the traditional canvasser did not limit his efforts to bribes: candidates in centuries past did not merely shower the electorate with money, they also espoused promises relating to local and national issues, and promoted the general image of themselves and their party or faction. But the tax bribe is still public policy, to the extent that it can be rationalised (and attacked) as an economic stimulus, or form of wealth redistribution.

Of course crude vote-buying in elections past may also have had some of these effects, especially where less well-off electors were more likely to respond to bribes or where the amounts of money distributed were large. The tradition of crude vote-buying may even have developed out of feudal expectations of largesse and reciprocity. Electoral culture today probably generates analogisable expectations. Elections have come to revolve around a pattern of expectation of ‘cash-in-hand’ through policies lowering tax rates or thresholds. Governments indeed deliberately build up fiscal surpluses on the back of ‘bracket creep’ (the natural rise in tax revenue as earnings increase with inflation) so they can sell the return of bracket-creep as a tax break late in their term of office, when the electoral gain is expected to be maximised. Hopefully there will be a natural limit to this trend, if a more sophisticated electorate comes to see such fiscal breaks not as benefits bestowed on it so much as something to which it is entitled.

The direct regulation of public policy action or promises, as we have seen, is not for

610 As clearly they were: see the figures for St Albans in 1832-1850, cited in Chapter Two above, n 74.

611 See, eg, the cultural context of traditional vote-buying, discussed in Chapter Two above, text at nn 58-61.
the law, but for the political realm. Any party that makes promises such as the ‘fistful of dollars’ risks the carping of commentators who will label it a metaphorical bribe. Editors now routinely label self-serving, election-focused policies with terms such as ‘bribery’ and ‘buying votes’, terms which have become ubiquitous and not limited to tax cuts, for they extend to egregious social welfare ‘giveaways’ and ‘pork’ targeted to sensitive regions. An illustration of this usage will give some flavour. A $600 cash ‘bonus’ for almost every family with a child under a certain age was announced and paid to those families in the lead up to the 2004 federal election in Australia. Geoff Pryor, a leading political cartoonist, depicted this in the form of a mock classified advertisement:

WANTED TO BUY. VOTES VOTES VOTES
Notice to all families. The Coalition will pay you $600 for your vote in the next election, in cash from a guaranteed tax-payer fund. Offer open till close, polling day. For further information contact John Howard on his private line.612

The terminology of ‘electoral bribery’ and ‘vote-buying’, which draws a large part of its power from its legal status, obviously plays a role in political discourse, even in relation to conduct which is not legally suspect.

The public nature of offerings such as tax bribes also means that opponents can critique their economic and social ramifications. Above all, if the candidate or party concerned wins and does not deliver, it faces a backlash. In relation to the traditional bribe, there was always a risk of backlash. If payment was not forthcoming, an agreement, albeit an unenforceable one, was dishonoured, creating a risk that the disgruntled promisee would report the matter to the candidate’s opponents, or the authorities, with grave legal consequences. With a metaphorical bribe, the risk is

612 Geoff Pryor, Opinion Cartoon, The Canberra Times, 1/7/2004. The concept of metaphorical electoral bribery has international usage, see eg Garrick Tremain’s Opinion Cartoon in the New Zealand Sunday Star Times, 23/5/2004, C10, depicting the Treasurer pouring water from a jug labelled ‘Overtaxation’ via mugs labelled ‘Education’ and ‘Health’ into a huge pot labelled ‘Election Bribes’. It is even applied throughout the electoral cycle: the NZ cartoon just cited was published more than a year out from an election date.
more diffuse but no less serious in its own way. And that is the risk that the ‘bribe’ was valued then its non-delivery is a breach of faith with the electorate. Trust is perhaps the most valuable resource in electoral politics. Indeed, examples of such breakdowns in trust have cruelled governments that offered ‘tax bribes’ that proved undeliverable.\(^613\) These are the political consequences and sanctions of ‘metaphorical’ bribery.

This is not to say that metaphorical bribery is not without systemic risks. As we shall see in the next chapter, public choice theorists see it as a threat to good governance. They claim it involves self-interested politicians capturing public resources, and gouging them in ‘inefficient’ ways to offer ‘rent’ to supportive groups or corporations. A second and especially modern phenomenon is the tendency for elections to resemble nothing more than policy auctions. The emerging pattern is of governments exercising fiscal rectitude in the first couple of years of the electoral cycle, with a view to amassing an electoral ‘war-chest’.\(^614\) Then, in the budget and related measures prior to the election, the government targets spending on electorally sensitive groups. The problem is not so much that some pork-barrelling is going on, or even that it is carefully co-ordinated (though this in itself buys advantage for the incumbent), but that good governance is rendered hostage to the electoral cycle, in an anti-competitive manipulation that is designed to give the opposition little or no room to make counter-balancing promises.

The ‘public policy’ exception is also to be found in other jurisdictions, notably in the United States, where (like so much else in constitutional theory and the law of politics) it is rationalised through the prism of First Amendment free speech doctrine.

\(^{613}\) The ‘fistful of dollars’ was not delivered in full. Similarly, the Keating Labor government promised ‘L-A-W’ (ie written in law) tax cuts prior to the 1993 election. On re-election, albeit for understandable economic reasons, it abandoned the cuts in favour of superannuation assistance. The government never recovered from this reneging.

By attending to discussions there, we can draw a wider sense of what values might underlie the public policy exception to electoral bribery law.

**Campaign Promises and Electoral Bribery Law in the US: Brown v Hartlage**

In 1982, the US Supreme Court in *Brown v Hartlage*[^615] struck down a provision in the Kentucky *Corrupt Practices Act* that barred candidates from vowing to accept less than the prescribed salary for their office. The provision was defended as a protection against improper vote-buying. The Court however held it to be an infringement of campaign freedom guaranteed by the First Amendment, arguing that an ‘I’ll take a salary cut’ promise was not rationally identifiable with a tangible bribe to each voter merely because a few cents would be saved by each taxpayer. Pamela Karlan refers to the speech considerations as ‘serving an informational role that enables voters generally to choose more intelligently among candidates’,[^616] although this seems to assume policy promises that are made not simply as lures for votes, but which a candidate is sincerely committed to for other reasons. Certainly in those circumstances, the shadow of an overly broad electoral bribery law could have a chilling effect on the freedom of informed electoral choice, as candidates might withhold their policy intentions for fear of legal consequences or threats.

Whilst reinforcing prohibitions against crude vote-buying with rhetoric such as, ‘No body politic worthy of being called a democracy entrusts the selection of leaders to a process or auction or barter’,[^617] the US Supreme Court carved a broad space for public statements of public policy or action. It did this even in the face of rational policy justifications for the Kentucky prohibition, such as that wealthy candidates would be advantaged over poorer ones if such pledges were permitted.


[^616]: Pamela S Karlan, ‘Politics by Other Means’ (1999) *Virginia Law Rev* 1697, 1711. Compare Levmore, above n 569, 130 (‘I suspect that most readers have something of a mixed view of indirect vote buying. We recognize that campaign expenditures proved some useful information and focus attention on candidates and issues. At the same time, much of these expenditures sway votes without providing much in the way of information, and candidates with more money to expend are advantaged’)

which share a lineage with one equality concern that motivated the war on electoral bribery in the first place, viz that wealthy candidates were buying their way into office.

In Karlan’s terms, *Brown v Hartlage* stands for the principle that:

> wholesale vote trafficking is not merely tolerated – it is constitutionally protected … wholesale promises about economic benefits that will flow from a candidate’s election are the lifeblood of American political campaigns [even though] the de facto ‘payments’ that accrue to a candidate’s supporters – from patronage, preferential access, and provision of public services – surely dwarf the sorts of compensation voters receive directly for their votes in a straightforward vote-buying scheme.\(^{618}\)

To Karlan, this position is understandable on pragmatic and historical grounds:

> We have never insisted that the franchise be exercised without taint of individual benefit; indeed, our tradition of political pluralism is partly predicated on the expectation that voters will pursue their individual good through the political process, and that the summation of these individual pursuits will further the collective welfare.\(^{619}\)

Further, metaphorical vote-buying in these instances is accompanied by a democratic control mechanism, in the sense of accountability to the majority. Individual bribes are ultimately a matter between candidate or agent and elector. ‘Campaign promises’ differ, as Karlan points out, because their implementation depends ‘ultimately on the consent of the polity.’\(^{620}\)

In short, this is an acceptance of a market-utilitarian account of the role electoral democracy plays in the broader scheme of government, as opposed to a civic

---


\(^{619}\) Ibid, 1461.

\(^{620}\) Karlan, above n 616, 1711.
republican focus on the interests of the commonwealth or a unitary sense of general welfare. In later work, as we shall see in the next chapter, Karlan dubs the criminalisation of retail vote-trafficking and the encouragement of wholesale vote-trafficking as an ‘incomplete commodification [that] reflects the complex nature of our vision of the right to vote.’

**Vote-Buying and Political Marketing: the Cost of Selling Politics**

The practice of pork-barrelling and metaphorical bribery is now intertwined with the professionalisation of campaigning and centralisation of party structures. Individual candidates are strictly deterred from making distinct promises, not least as only portfolio spokespeople (and sometimes only the leadership team) is permitted to make and announce such policy. Such electioneering, in any event, is driven by sophisticated social science research in the form of polling and focus groups. Its _raison d’etre_ is to carefully target labile electors – to lure swinging voters in key marginal seats or quieten hostility over particular issues – as part of an ongoing process of electoral marketing. There is more than a touch of irony here, for as we noted in Chapter Two, the rise of professionalised, centralised parties was part of the cure for the crude vote-buying practised in local constituencies. Yet such party hierarchies have now come to perfect a different form of vote-buying.

There is a second reason to attend to political marketing as a central feature of contemporary electioneering: metaphorical bribes only work to the extent that they are successfully communicated, whether to a particular target group or the electorate at large. A leading scholar of political advertising in Australia, Sally Young, recently described the ‘fistful of dollars’ as ‘[o]ne of the most infamous political ads ever used in Australia’. She highlighted not just the blatancy of the appeal to greed (we shall examine greed as a motivation for voters at the end of this chapter) but also the deceptiveness of the pictorial portrayal of the promise. ‘In the ad, the money in the

---

621 Ibid, 1710.
622 Young, above n 591, ch 9.
hand added up to $75 but the Liberals acknowledged that their tax cuts would see more like $3 to $6 returned to the average Australian.  

Curiously, Australian elections no longer have even an informal regulatory mechanism for addressing misleading electoral speech (media self-regulatory bodies having ceded the field). In this, we are like the UK. Australia however is particularly vulnerable however as we allow unrestricted political and electoral advertising on television and radio. This in turn raises broader questions about the corruption of electoral discourse, the freedom of political speech, and the laissez-faire approach to regulating electoral campaigning, particularly advertising, in Australia. (Questions that are much too broad for this thesis.) However the conduct and extent of advertising is central to modern techniques of swinging elections through metaphorical vote buying.

In this chapter, we have focused on the congruities between such metaphorical vote-buying and electoral bribery proper and explained the factors that distinguish it from the legal offence. A second line of distinction is that, in not manifesting itself in the form of a deal or arrangement, metaphorical vote-buying promises lack some of the essential features of such transactions, like the potential for negotiation and the mutuality of a personal exchange. They are equally cases of selling as much as buying. That is, they are questions of how parties and candidates market themselves and their promises, as much as a matter of bartering electoral support. This is not to say that modern electors are necessarily more empowered than their 19th century forbears, although those who favour neo-liberal economics and market analogies like to equate consumer sovereignty with popular sovereignty. In fact, despite optimistic hopes for the potential of the internet to revitalise political discourse, or research

---

623 Ibid, citing RR Walker, ‘No Adman’s Dream’, The Age, 2/12/1977, 9. Young goes on to point out that the promise was never fulfilled, another reason for its infamy.

624 United Kingdom, The Electoral Commission, Political Advertising: Report and Recommendations (June 2004).

625 The High Court having rejected the UK model of a broadcast advertising ban linked to free air-time for party political broadcasts: ACTV v Commonwealth (1992) 177 CLR 106.

626 Cf Pippa Norris’s optimism in the potential for ‘postmodern campaigning … to restore some of the older forms of campaign activity’: Norris, above n 502, 313.
into the use of voter-specific databases to ensure party-elector communications address individual voter interests, modern campaigns remain focused on delivering messages and images to a sedentary electoral audience, and the advent of both the hyper-information age and increasing professionalisation and centralisation of party campaigns suggest that this is unlikely to change greatly in the foreseeable future.

What a focus on selling rather than buying offers, is a reminder that regulatory attention needs to address the problem of ensuring a modicum of equality of access to campaign media, and of limiting the abuse of power and potential for corruption in financing the advertising driven cost of electioneering. As Dan Lowenstein concludes, quid pro quo expectations or deals involving political donations are, properly understood, prima facie bribes: ‘special interest contributions made wholly or in substantial part for the purpose of influencing official behaviour are the same as personal benefits.’

The private funding of parties and campaigns may well be the central regulatory question of electoral law worldwide, for it is here that the greatest scandals in contemporary times have arisen, and the driver of pressures on election finance is primarily the cost of electioneering and political marketing.

It is no surprise, then, to find campaign finance reformers invoking ‘vote-buying’ as a serious metaphor for undue influence through campaign donations and third-party advertising in support of favoured candidates. Thus, in a considered account of why electoral bribery proper is relevant to how we conceive of and regulate campaign

---


628 A term I do not use to imply there is more or more valuable information than ever before, merely that it is churning faster and there is less escape from this churn than in the past.

629 Lowenstein, above n 477, 850.

630 Consider, eg, the instances discussed in KD Ewing (ed) The Funding of Political Parties: Europe and Beyond (1999) and noted in that volume in Ewing, ‘Introduction’, 11-12.

finance, Daniel Ortiz provides two analogies. First, some campaign donations give the donor two ‘says’: he retains his vote yet he also buys direct influence over his favoured candidate. This is analogous with crude bribery, for the briber who ‘buys’ a vote outright gets an extra vote. A second analogy with vote-buying is that to the extent that passive voters respond unthinkingly to advertising messages, we can say their vote is metaphorically ‘bought’ in the sense of unduly swayed by the power of the advertising dollar.

**THE SPOILS OF OFFICE**

*The General Misuse of Public Resources for Electoral Advantage*

Tax bribes are just the most obvious examples of a form of metaphorical vote-buying that can also include welfare and other transfer payments. And, in turn, these are just a sub-species of a more general form of vote-buying which, as we saw earlier in the chapter, includes the targeting of sectional interests through pork-barrelling. The instances of pork-barrelling we discussed concerned community groups and regions, but such largesse can also be directed at corporate entities to buy their electoral support. Corporations can be ciphers for their stakeholders, including employees or others dependent on that corporation, especially if it is a key player in say a regional economy. Or, as we saw in Chapter Four, in discussing the Queensland Police Union deal, a corporate entity might be promised public benefits in return for its explicit electoral support in a campaign; although perhaps more common is the seeking of their electoral support via political donations (which is better studied from the viewpoint of donors purchasing political favours from politicians, rather than politicians purchasing electoral favours from donors).

The link running through all of these species of electoral ‘bribery’ is the (ab)use of public resources and benefits. One aspect of antipathy towards pork-barrelling and other metaphorical bribes is not simply the sense that politicians are attempting to buy

---


633 Eg the ‘baby bonus’ of 2004, mentioned above, text at n 612.
votes, but a realisation that public goods and taxpayer dollars are being used to pay for them. Resentment, manifesting itself in the pejorative ‘electoral bribery’, is not just jealousy from those who miss out on the bribes because they are not in the target class or seats (i.e., objection to partiality in the name of government), but resentment at the misuse of resources owned by or intended for the collective good being used, for electoral advantage (i.e., objection to partisanship in the name of government). It matters not whether such attempts are effective: i.e., whether pork-barrelling sways votes rather than, say, merely fulfilling voter expectations that consolidated revenue will be redistributed with a public flourish, or producing temporary bounces in opinion polls or mollification of transitory antagonism over issues that were seen as ‘neglected’.

It is still a concern in both strict legal terms – since an attempt to induce or influence electoral conduct is a bribe even if unsuccessful – and in terms of good governance and fairness – since public money is diverted to ‘squeaky wheel’ considerations and in partisan ways.

This realisation reveals a link between the electoral bribery problem and a wider problem in contemporary electioneering. That is the ability of incumbents, especially governments, to misuse public resources to shore up their electoral position. Whilst pork-barrelling is an old variant of this ruse, and tax or transfer payment bribes an extension of that into the welfare state era, an expensive manifestation of ‘buying elections’ - in the sense of gaming the system to swing advantage – in the communications age has emerged in the partisan use of public resources to promote one party over another.

---

634 One analyst argues that government spending as a whole hasn’t reaped measurable electoral dividends: Michael Warby, ‘Can Votes be Bought?’ (2004) 20(3) Policy 3. He explains this in part through a claim (at 5) that incumbency is a ‘wasting asset’ (governments lose votes at most elections) and in part (at 7-9) that the assumptions of pork-barrellers overstate the electorate’s gratitude at government largesse compared to its antipathy to taxation. These claims are not uncontroversial; but in any event they do not negate my claim that parties and especially governing parties nonetheless try to buy votes through metaphorical bribes, and that this can as readily occur with politically motivated tax cuts as with pork-barrelling (as the ‘fistful of dollars’ campaign, above, text preceding n 605 and through to text at n 614, demonstrated).
Incumbents enjoy very significant advantages over challengers in terms of access to resources.\footnote{Orr, above n 296, 73-78.} One obvious example is parliamentary entitlements, which parliamentarians have voted themselves. These include allowances of $125 000 alone for printing per Federal electorate,\footnote{Parliamentary Entitlements Regulations 1997 (Cth), reg 3. For a fuller list, see Sally Young, ‘Killing Competition: Restricting Access to Political Communication Channels in Australia’ (2003) AQ (May-June) 9.} much of which is spent on PR mail-outs promoting the incumbent member, as well as the use of state resources to maintain databases for partisan advantage.\footnote{Onselen and Errington, above n 627.}

Misuse of government advertising however is perhaps the worst form of incumbency benefit. Unlike parliamentary allowances, which at least are shared between rival political groups in rough proportion to their parliamentary status, government advertising is limited to the parties forming the executive government. Government advertising campaigns via mass media (whether broadcast, newspaper or direct mail) have reached outrageous proportions when measured in terms of quantity or timing.\footnote{Concerns in Australia gave rise first to a Report recommending guidelines to limit the ‘politicality’ of government advertising: Commonwealth, Joint Committee of Public Accounts and Audit, Report 377: Guidelines for Government Advertising (September 2000). The Coalition government has failed to implement these guidelines. This has led in 2004-05 to a Senate inquiry driven by the opposition and minor parties: see Commonwealth, Senate Finance and Public Administration References Committee, Inquiry into Government Advertising, <http://www.aph.gov.au/Senate/committee/fapa_ctte/govtadvertising/index.htm> (inquiry forestalled by 2004 election).} At least $1.4 billion (2003-4 values) in federal government advertising will have been spent in the period 1991-2004.\footnote{Richard Grant, Federal Government Advertising, Parliamentary Library Research Note (No 62 of 2003-04). The problem has escalated since 1999. The escalation is undeniable: in real terms, of the seven highest spending years since 1991, only one did not fall in the last six years. 11 of the 20 most expensive campaigns are being conducted in or straddle the term of the current government. Leaving aside the unexceptionable (defence recruitment and the impartial referendum campaign), five out of the six most expensive campaigns feature in or straddle the 2004 pre-election period. Source: Grant, tables 1 and 2.} Such expenditure outstrips public
funding of election campaigns nine-fold, thereby threatening to outflank the system of public funding of elections, introduced in 1983 to ensure a measure of political equality between all parties and candidates. The fact that the timing of government advertising campaigns is co-ordinated to ‘spike’ dramatically in the lead-up to an election period, is damning circumstantial evidence that it is used for electoral effect. It is used to promote the government, understood in a partisan sense, as a brand. Finally, tying government advertising to the question of metaphorical bribery directly, such spikes in government advertising are often used to promote the ‘pork’ that flows from public coffers in election years.

As with earlier forms of electoral corruption, in particular bribery, we have become caught in a vicious circle in which opposition politicians complain of unfair competition, but when presented with the opportunity, outdo their predecessors, entrenching a pattern of abuse.

Electors may like to believe that they have an innate cynicism in the form of ‘bullshit detectors’. Many individuals may well do in relation to issues of great salience to them. But they are not the targets of puffery in advertising, whose is to produce warm-feelings or a softening of negative attitudes to the ‘government’ across the population as a whole. As explained at the end of the previous section, campaign reformers such as Ortiz have drawn analogies between the effect of saturation advertising on unengaged voter choice, and vote-buying proper. Such advertising seeks to ‘buy’ elections in the sense of achieving undeserved support through anti-competitive and undue use of resources, and in so doing de-civilises electoral competition.

---

640 Public funding generated by the 2001 federal election was $38.6 million (2001 dollars) – or approximately $12.6 million across all parties per year of the electoral cycle. The average of federal government advertising for the same years, at prevailing dollar values, was assessed by Grant, ibid table 1, at $322 million.

641 Commonwealth Auditor-General, Taxation Reform: Community Education and Information Programme (ANAO, Audit Report No 12, 1998-99) figure 1 and Grant, ibid, p 3.
The Cost of Free and Fair Elections

It is commonplace, as we just noted, for journalistic rhetoric or the vernacular to talk of ‘buying’ elections through floods of political advertising and marketing. Some may object, in a scholarly context, that this is a metaphor-too-far. Certainly such pejoratives may be misused in partisan rhetoric. But the point, in introducing this topic in a thesis on electoral bribery, is not to assert any determinative links between electoral bribery and political marketing, nor to suggest a moral equivalence between the two. Obviously misusing public resources to massage and manipulate impressions in the electorate is less direct and regulable a threat to electoral democracy than crude bribery in the form of buying the votes of individual electors. What is interesting is that the pejorative of choice remains ‘buying’ votes.

The chief objection to excessive or unequal political marketing, according to Sally Young, drawing on Habermas, is that it distorts power in a liberal democracy, such power being maintained ‘less through coercion than by restricting [we might say manipulating or dominating] access to political communication channels.’ In machinery terms, elections may be freer than they were in centuries past, but the question of fair competition remains, and a chief latter day spectre over fairness involves fears that elections can be swung, if not bought outright, by inordinate and uneven access to the media through which messages are propagated. However to say this is to be reminded, as we were in the previous section dealing with tax bribes, that ‘buying’ elections here is only a partial metaphor. What is marketed is also being ‘sold’.

Certain patterns in electoral history and regulation appear to persist, even as the technologies and make-up of the electorate change. As we saw at the end of Chapter Two, the question of crude bribery in the 19th century melted into, then gave way to concerns about the cost of elections, of which the price of first buying, then bribing, a seat was a chief factor. This shift in regulatory focus from the specific (the offence of

---


643 Young, above n 635, 9.
bribery as a particular transaction) to the general (the regulation of finances) brought a new reform movement to the late Victorian and early Edwardian eras. In the UK and Australia, this manifested itself in expenditure limits on candidatures and, in the US, in limits on the sources of campaign finances, particularly addressed at corporate and union contributions. What this movement shared with the war against electoral bribery was a core concern with regulating electoral conduct to limit undue influence and to promote electoral equality through fairer and more transparent electoral competition.

This thesis has sought to demonstrate that whilst attention to electoral bribery is muted in comparison with earlier centuries, it is far from having disappeared entirely. In a sense it has merely mutated. The individual elector is not seen as vulnerable to crude electioneering as in the 19th century, so attention has shifted from a formal battle against undue influence in the legal sense, to a more broadly political debate about (im)proper forms of influence and lures to attract votes and electoral support. Secondly, technology and campaign techniques have developed such that the locus of attention is now far from a relationship, let alone any individualisable transaction, between politician and elector. Rather, deals are made that seek to mediate electoral support, via preferences, or through lobby groups or the media. In these deals, briberous influences may well be used. Communication with electors, in turn, is almost entirely mediated through expensive channels such as broadcast and print advertising and direct marketing. The question of influence is in this regard is also squarely raised, but this time in the context of campaign speech, and its focus on metaphorical bribes to the exclusion of other political discourse, and the cost of access to communication channels.

METAPHORICAL BRIBERY, THE SECRET BALLOT AND CIVIC REPUBLICANISM

To Stephen Buckle, underlying many of the problems discussed in this chapter is the secrecy of the ballot itself. Its consequences, he claims, are:

… the rule of the hip-pocket nerve in modern elections. More generally, it means that public debate has become detached from the actual process of voting, from acting as a citizen.  

Claiming support in Rousseau, he advances traditional arguments in favour of open voting, reasoning that if we had to declare our votes openly again, ‘in the public eye, voters would act as citizens rather than as self-seeking individuals – a utopian, but not an absurd, thought.’

This quest for the public good is rooted in a belief that the general will can express itself through voting, but that, as Rousseau put it:

… when the social bond is broken in every heart, when the meanest interest impudently flaunts the sacred name of the public good, then the general will becomes silenced: everyone, animated by secret motives, ceases to speak as a citizen any more than if the state had never existed, and the people enacts in the guise of laws iniquitous decrees which have private interests as their only end.


646 Ibid.

647 Rousseau, above n 38, 150 (emphasis added). By way of caveat, Rousseau retained enough of the wisdom of classical natural law to accept that whether liberal democracy was truly an ideal depended on a society’s state of political or moral development and health. Conversely, it must also be remembered that Rousseau’s model is haunted by his ideal of a ‘true democracy’ ‘where all men were equal in character and talent as well as in principles and fortune’ (at 156). Rousseau, that is, dreamt of an unstratified society, an homogenised egality. His concern was with the potential for sectional interests to arise, for voters to identify with particular sectional interests, and ‘the common interest becomes corrupted … the general will is no longer the will of all…’ (at 150).
Politician and legal humorist AP Herbert wrote a homily on the same theme, in a mock electoral bribery case condemning all sides of politics:

It is now commonplace for Parliamentary candidates to invite the support of the voters by the simple assurance that, if they are elected, the voter will receive more money, more food, and more material pleasure … The result is that the vote is generally regarded not as a precious instrument by which a man may do his country good, but as a weapon of offence or cajolery by which the country may be induced to satisfy his material desires.648

Today we recognise this Rousseauian quest in terms such as ‘civic republicanism’ and ‘deliberative democracy’. These are labels for commitments to a Habermasian public sphere, governed by forms of collective reasoning designed to achieve a common good that will be greater than the sum of individual preferences and in which private interests are sublimated.649 A necessary condition for such deliberation, of citizens inter-relating as citizens rather than merely being ciphers for self-interest, is openness rather than secrecy in public discourse generally and perhaps in voting in particular. Proponents of open voting, however, need not rely solely on civic republican arguments – Geoffrey Brennan and Loren Lomasky’s recitation of the importance of the expressive value of voting, an individualist and even existential account of the ballot, also concludes with an appeal to reconsider the secret ballot.650

648 AP Herbert, Uncommon Law: Being 66 Misleading Cases Revised and Collected in One Volume (1935, New ed 1969) 277. I’m indebted to my former colleague Dr Tom Round for pointing out this quote. The comic sting in the ‘tale’ was that in future, parties competed on promising burdens to electors rather than benefits!

649 See eg Nancy Fraser, ‘Re-thinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy’ in Craig Calhoun (ed) Habermas and the Public Sphere (1992) 109. This ideal does not simply make claims about good governance, but to be a necessary aspect of ethical psychological development and human flourishing itself: Hannah Arendt, The Human Condition (1958) especially Book II.

650 Brennan and Lomasky, above n 165, 217-221. Whilst the benefits they claim are ultimately generalised ones – eg greater reflection/deliberation, higher turnout (unsurprising since neither are psychologists, but friendly critics of public choice accounts of elections) – the benefits are sourced in the expressive dimension of the ballot to individual electors.
Ironically, as we saw in Chapter Two, the secret ballot was championed – indeed developed and sold - as a key element in the slaying of the historical scourge of crude vote-buying, in both Roman and Victorian times. It did this in a functional way, in limiting the efficiency of briberous offers and payments to individual voters by preventing the briber from knowing whether any particular voter upheld her end of the bargain. It was a tool to achieving ‘free elections’ in the sense of minimising undue influences. In the words of Isaacs J in *Kean v Kerby*:

> The Ballot itself is only a means to an end, not the end in itself. It is a method adopted in order to guard the franchise against external influence, and the end aimed at is the free election of a representative by a majority of those entitled to vote. Secrecy is provided to guard that freedom of election.

Writing recently, from a more empirical perspective, Fabrice Lehoucq similarly concludes that ‘[t]he available research does support the claim that vote-buying proliferates when the secret ballot does not exist.’

The secret ballot was not merely designed as a prophylactic in the war against bribery and undue influence however. It was a revolutionary re-configuring of the idea of the vote itself. It instantiated a quintessentially Protestant, liberal conception of voting as an act of individual conscience. The unstated assumption in Isaacs J’s definition is that ‘by a majority’ means ‘by a majority meaning the sum of individual wills, exercised as privately as possible’. This is clear from both the inherent form and effect of the secret ballot. It has come in Australian law, in particular, to be written as an absolute protection against being able to be made to reveal how one voted, including against legal process to trace how one voted, even if such revelation were

---

651 See Chapter Two above, text at nn 149-63. Even Rousseau accepted secrecy as the lesser of two evils, in his discussion of voting for the Roman Comitia: see Chapter Two above, n 38.

652 *Kean v Kerby* (1920) 27 CLR 449, 459 (per Isaacs J).

653 Lehoucq, above n 162, 6.

654 Although curiously, muscular English resistance to the ballot derided it as somehow feminine/unmanly (voting behind a veil, voting without the courage of one’s public convictions) and even Catholic (voting as a confessional).
useful in securing a bribery conviction, uncovering other corruption or in removing tainted ballots from the count.\footnote{655}

The secret ballot may unavoidably have come to encourage electors to see themselves as acting in isolation, unaccountable to any but themselves. For although voting in person on election day is configured as a communal ritual to remind us that we are taking part in the act that legitimates, if not constitutes, public power,\footnote{656} the secrecy shrouding the choice each individual makes as an elector permits her to act in accordance with the most selfish motives as much as for the most enlightened or other-centred considerations. This tendency is reinforced in mass electorates, where one is more likely to perceive oneself and one’s actions as anonymous and unaccountable than in a tightly-knit community.

In Buckle’s complaint, the secret ballot has turned ‘the right to vote [into] some piece of private property, ours to dispose of entirely according to whim.’\footnote{657} How does it protect the elector from accountability for her actions? In a weak sense people can disclaim accountability, as in the popular bumper sticker ‘Don’t Blame Me: I Didn’t Vote for the Government’. But accountability in a strong and positive sense involves being able to demand of each other our reasons and justifications for the decisions we make that implicate others, of which the vote is one of the most fundamental. This loss of accountability occurs because ballot secrecy minimises the opportunity for us to ask questions of each other about why we voted a certain way, and in subtle but powerful ways it encourages electors to treat the franchise as if it were an act of confession, rather than part of a shared enterprise.

\footnote{655}{Compare Amy McGrath, \textit{The Frauding of Votes} (undated, approx 2000), ch 1, arguing for a limited secret ballot, to ensure corrupted votes are traceable. McGrath invokes Isaacs J in \textit{Kean v Kerby} (1920) 27 CLR 449, 459 (quoted above, n 652). Isaacs J at 459 further stated that ‘[t]he ballot, being a means of protecting the franchise, must not be made an instrument to defeat it.’ Isaacs J advocated permitting oral evidence and cross-examination on how someone would have voted, if there was evidence of sufficient of denials of the franchise such that an election result could have been affected.}

\footnote{656}{Orr, above n 60.}

\footnote{657}{Buckle, above n 645.}
Self-regard is not, of course, a necessary consequence of the secret ballot. As we shall note in the next chapter, a voter might still see the vote as an expressive act, rather than an instrumental one. Thus, some people vote in a particular way because they have internalised and identify with a particular political ideology, irrespective of calculations of self-interest.

Nor are concerns about the secret ballot and voter (un)accountability intended as disparagements of self-interest altogether. One strain of utilitarian thinking would deny that hip-pocket lures were metaphorical ‘bribes’ in any pejorative sense implying that self-regard, especially financial self-regard, is an inappropriate consideration in citizen-state relations. In this conception, Rousseauian notion of a common good that transcends individual self-interest are pie-in-the-sky and unreachable through any form of democratic process that might be workable in a pluralist society riddled with economic, cultural and historical stratifications. It cannot be argued that self-interest is always an abomination, and it is unrealistic to imagine its eradication. Indeed it can play an ameliorative, community-building role (for example, as we shall see in the next chapter, metaphorical bribery may be good public policy if it provides redress to previously neglected blocs of voters).

However just because electors often conceive voting as just another form of calculus, making elections a mere sum of perceptions of individual interest does not make that a desirable conception. Even market-oriented sceptics of ‘the public sphere’ have concerns with this as the pre-dominant model of electoral behaviour: as we shall also see in the next chapter, public choice theory criticises metaphorical bribery to the degree that it involves the misuse of public power and resources by incumbents, entrenching themselves by buying the support of key sectional interests.

The civic republican position may be subtler than assumed. It is sometimes caricatured as a woolly call to a kind of altruism that would ultimately be devoid of content (if everyone deferred their needs to others). Rather, in the case of say ‘pork’ offered to a needy group or region, the civic republican position calls on that group or region to make its case to the broader community. In turn, the wider community should respond not with resentment, but with openness born of a kind of ‘golden
rule’. Through this civilising of electoral discourse and appeals, the formation, sharing and transmission of positions that go beyond purely private interests may be fostered, it being assumed that pure self-interest is not in need of encouragement. It is an appeal to an older tradition of thought, which does not focus solely on political actors in isolation, but reminds us that the elector-as-citizen also holds a kind of office. In that tradition, voting can be conceived as a public trust or role, and hence electoral law and scholarship should subject the conduct of voters, and not just politicians, to question.

CONCLUSION

Through a series of case studies, this chapter has broadened our exploration of the ways in which the politico-legal concept of ‘electoral bribery’ features in debates about electoral conduct in Australia. The focus of this chapter has been on instances of ‘metaphorical’ bribery, in particular the targeting of public benefits to sensitive electoral groups. As has been pointed out at various points in the chapter, the role the legal concept plays here is not so much to pass definitive legal judgments, as to act as a marker of the seriousness and breadth of debates about the propriety of electoral conduct. It is not to separate the ‘corrupt’ from the ‘uncorrupt’ in a legal sense, let alone an abstracted moral sense. Rather, the work the concept does is to make us think about a campaign promise or policy action, not merely in governmental terms such as ‘is it good policy’, but to consider its manner and form as a question of propriety in electoral conduct.

This in turn draws us into a wider debate about what ‘fair’ elections mean in practice in a civil society. In this debate, the bribery question intersects with two other fronts, namely the cost of elections and failures in campaign finance regulation, and the (ab)use of incumbency benefits and government advertising. These linkages are not new in the sense that the cost of elections has been a theme since the Victorian era. But they have particular modern forms, given the primacy of the marketing of

---

658 They may be in need of special protection, as in liberal constitutional thought, from majoritarian rule, but that is a different question.
electoral politics in a mass media age and the way that politics and elections are ‘bought’ and ‘sold’ in the modern era.

Ironically, two of the weapons in the Victorian era fight against crude vote-buying, the secret ballot and (to a lesser extent) centralised, professionalised party machines were argued to be factors in the modern tendency for electioneering to become an auction of metaphorical ‘bribes’. In particular, the secrecy of the ballot discourages electors from discussing each other’s motivations for their electoral choices. The secret ballot may fragment, individualise and potentially ‘transactionalise’ electoral choices, in a way that encourages campaigns to revolve around hip-pocket ‘bribes’ to the detriment of other forms of debate about policy and community interests. If so, the question of conduct, which is at the heart of this thesis, should not simply focus on political actors, but extends to the role of citizens-as-electors. Electors seem blind to the hypocrisy of criticising politicians who offer metaphorical ‘bribes’, yet remaining swayed by such policies. One job for discourse about electoral bribery may be to emphasise that ‘it takes two to tango’.

In the first half of the next and concluding chapter, we will review various theoretical accounts of why vote-buying is ‘wrong’ yet certain forms of it are acceptable. We will further explore the issue opened in this chapter – and treated as a paradox by many US authors – namely why is illegal to offer individual benefits for electoral support, but not to target benefits to identifiable groups in ways that are designed to have the same functional effect in terms of electoral support.659

An overarching theme of this thesis is that to understand how the concept of electoral bribery has developed, we need to focus on the particularities of the evolution of judgements about electoral conduct within the evolving framework of electoral law and campaign culture in which it arises. Abstract theoretical accounts, seeking comprehensive normative judgements about electoral behaviour are probably unattainable, and may well miss the point. Instead, paying attention to notions of conduct, couched in an appreciation that both politicians and voters hold public ‘office’ or roles, reminds us that the legal concept of ‘electoral bribery’ is best

659 See, eg, Kochin and Kochin, above n 609, 645-7 (‘Some paradoxes of vote buying’).
understood in its relationship to actual electoral conduct and questions of propriety and civility. It is rarely a marker of gross moral turpitude.
Chapter Seven

What’s Wrong (and Right) with Electoral Bribery?

CHAPTER COVERAGE AND PURPOSE

The question of why electoral bribery is prohibited has received relatively little attention in common law jurisdictions in recent times, outside America, where electoral law has emerged as a free-standing scholarly discipline since the 1980s. In part this is because of a belief that vote buying was slain in the late 19th century. But as this thesis has demonstrated, that assumption is only correct at one level, that of crude vote-buying (individualised transactions wholly involving money or treats for a vote) and even then only in certain western democracies.

What this comfortable assumption of the historical end to vote buying neglects is twofold. First, as discussed in Chapters Four and Five, a host of other practices have emerged (eg preference deals) which clearly implicate electoral bribery law. Second, as canvassed in Chapter Six, bribery is used metaphorically to criticise, if not legally condemn, a variety of other electoral conduct that has continued and even assumed greater significance in modern campaigns (eg tax ‘bribes’). On both these grounds, therefore, the question of the scope and rationale of the concept of ‘electoral bribery’ deserves close examination, especially from an Australian perspective, since electoral politics and legal culture in Australia are distinct from those in the US.

A typical American exception to the scholarly lacuna is a piece published in 2000 by Professor Rick Hasen, simply titled ‘Vote Buying’. In it, Hasen searches for a rationale for the prohibition on ‘core vote-buying’, his term for what I have labelled ‘crude’ or ‘traditional’ electoral bribery, that is direct-cash-for-votes. Hasen labels

---

660 Hasen, above n 576.
prohibitions on crude vote-buying as ‘among the least controversial election laws in the United States’.\footnote{Ibid, 1324.} By seeking to find the central, underlying rationales for the ‘core’ offence, he hopes to be able to generalise a theory of electoral bribery, to resolve questions about certain contentious ‘non-core vote-buying’ practices of concern to US politics, viz legislative log-rolling, vote-buying in corporate elections, payments for turnout, campaign promises and contributions, and voting in special district elections.

Besides Hasen, several other American scholars have also directly engaged with the regulation of electoral and political bribery in the past two decades. Most notable are Dan Lowenstein,\footnote{Lowenstein, above n 477: this is the germinal work, but much broader in conception than electoral bribery per se.} Pamela Karlan\footnote{Karlan, above n 616 and n 618.} and Saul Levmore\footnote{Levmore, above n 569.} (all US legal scholars, the first two electoral law specialists) and Fabrice Lehoucq (a Mexican political scientist).\footnote{Lehoucq, above n 162.} There are also more indirect contributions, notably from Richard A Epstein\footnote{Richard A Epstein, ‘Why Restrain Alienation’ (1985) 85 Columbia Law Rev 970 at 984-90.} (another US legal scholar) and occasional econometric analyses.\footnote{Notably Kochin and Kochin, above n 609.} Capturing the spirit of this scholarship, Lehoucq observes, ‘[t]he unexpected message of normative discussions of vote-buying is that it is not necessarily and always a “bad” activity.’\footnote{Lehoucq, above n 162, 4.}

The purpose of this chapter is twofold. First, encompassing the bulk of the chapter, is a critical review and categorisation – a taxonomy - of various theoretical perspectives on electoral bribery. In significant part this is distilled from the contemporary literature mentioned above, and involves an analysis of arguments from sources such as public choice theory, ideals of equality and essentialised conceptions of the ballot as an uncommodifiable good. Along the way, the discussion applies these theoretical
critiques to themes and practices uncovered in earlier chapters. The discussion in this chapter also generates new insights, in conformity with the thesis approach of treating electoral bribery as a question of the propriety and desirability of electoral conduct, rather than as a question for a priori theorising. These insights are two in particular. The first is that a culture of bribery, if it focuses voting decisions onto a model of a ‘transaction’, may enhance the problem of electoral disengagement. The second involves possible applications for Jeffrey Minson’s idea that the notion of ‘office’ can be resurrected as a potentially civilising influence on political behaviour.

The second part of the chapter presents a conclusion to the thesis as a whole. It situates the work in the genre of historical jurisprudence, closer to Lowenstein’s ‘intermediate theory’ of the law of politics than to abstract theorising in search of a comprehensive rationale or normative understanding of ‘electoral bribery’. The conclusion also gathers together the chief creative insights of the thesis, and makes suggestions for further work in the field.

A TAXONOMY OF THEORETICAL PERSPECTIVES ON ELECTORAL BRIBERY

Lowenstein classifies the quest to theorise political bribery into two categories of arguments: ‘Bribery as Harmful Because it Results in Bad Decisions’ and ‘Bribery as Harmful in Itself’. Both categories concern harms, and in that sense are consequentialist. However the latter suggests per se harms, that is harms to political and electoral values and forms, whereas the former involves harms to the processes and outcomes of governance.

In Hasen’s survey, by contrast, three broad sets of rationales are identified as underpinning concerns with and prohibitions against vote-buying:

---

669 Lowenstein, above n 477, 844-50.
670 In Kochin and Kochin’s summary of the theoretical literature on vote-buying, the arguments are distilled into two categories also. However they only identify ‘arguments from egalitarianism and arguments from efficiency’, as if arguments about per se harms, inalienability and so on could all be collapsed, presumably, into the equality rationale. Kochin and Kochin, above n 609, 648.
In what follows, to survey the normative discourse used to comprehend the buying of electoral support, I adopt Lowenstein’s broad duality, but tease out seven sub-classifications:

Systemic Effects and Distortions (ie governance harms)
1. Cost burdens distorting electoral competition, advantaging wealthy players and incumbents.
2. Distortion of electoral competition: a preferential focus on (or exploitation of) ‘target’ groups.
3. General corruption of good governance: inefficiency and increased disengagement.

Transformative Effects on the Nature of the Vote and Being an Elector (ie per se harms)
4. Corruption of the vote as vote: an inalienable right is commodified. Parallels with ‘political currency’.
5. Promotion of insincere electoral behaviour: electoral support is ‘marketised’, diluting expressive or ideological aspects of elections.
6. Corruption of public office: the ballot as a public duty or trust.
7. Distorting, by ‘transactionalising’, the relationship of representative and represented.

We will now explore each of these, at times overlapping and inter-related classifications, in turn.
BUYING ELECTORAL SUPPORT: SYSTEMIC EFFECTS AND DISTORTIONS

1. Cost Burdens Distorting Electoral Competition, Advantaging Wealthy Players and Incumbents

One does not have to subscribe to economic analyses of law and politics to appreciate that one key aspect of the formation and sustenance of a market in votes, particularly through crude vote-buying, is cost-benefit analysis. Writing from a realist-instrumentalist position, that assumes that parties will purchase votes when it is a cheaper way for them to attain their goal of election than alternatives, Fabrice Lehoucq reasons that:

> two conditions must exist for vote buying to proliferate. First, vote buyers must be able to monitor the behaviour of their agents. … Second, vote buying has to be cost-efficient.\(^{671}\)

He then hypothesises that prohibitions on vote-buying only become widespread or seriously enforced ‘when these activities are counter-productive for parties … [ie when they become an overly] expensive way to amass the votes necessary to win elections.’\(^{672}\)

As we saw in Chapter Two, cost was a significant driver in the putsch against crude electoral bribery, from as early as the 17\(^{th}\) century. After all, most politicians do not enter politics seeing parliamentary office purely as a business, not least in the Victorian era, where parliamentary remuneration was notional or non-existent. They may not all be saints, but they invariably have some public service or governmental agenda to motivate them.

When the cost of electioneering rises to undue levels, politicians can become beholden to fund-raising to the exclusion of other concerns, a state of affairs that is

---

\(^{671}\) Lehoucq, above n 162, 13.
\(^{672}\) Ibid, 6.
even less attractive when the demand for political capital exceeds supply, in which case donors and backers tend to assume more power than the politicians themselves. Admittedly, some candidates with wealth or rich backers may have been happy to continue in the time-honoured practice of vote-buying in the late 19th century. But as factions formed into parties centred on ideologies and platforms rather than just personality, the overall cost of elections became an issue of central and, importantly, of relatively equal concern, to the major players. In those circumstances, any prisoners’ dilemma impasse may be overcome, and the parties can agree to instrument more effective enforcement measures to crack down on the problem. 673

Indeed, as we also saw towards the end of Chapter Two, the imposition of expenditure controls was a late, but nonetheless related flow-on from the historical battle against electoral corruption in the UK. This involved both limiting the amounts and items on which candidates could spend money. Whilst, as noted in Chapter Six, campaign finance controls address undue influence in a broader sense than buying electoral support, they remain wedded to the broad, twin goals of political equality/competition and anti-corruption, the key values cited in the battle against bribery.

Controls on expenditure no longer apply in Australia. Unsurprisingly then, the problem of the cost of unregulated electioneering has returned and become entangled with a broader concern with incumbency benefits and the influence of wealthy, especially corporate donors. 674 The absence of caps on donations in Australia means

673 As argued by Alan Gerber, The Adoption of the Secret Ballot (unpublished thesis, 1993), discussed in Hasen, above n 576, 1327-8. The prisoners’ dilemma here was that no party in isolation would want to risk unilaterally foregoing vote-buying practices if they did not trust their rivals to do likewise. In a state of distrust, such practices would be perpetrated even if the ideal result for all the parties was its cessation because of its drain on all sides’ resources, until they could be collectively moved to crack down on it.

674 Expenditure controls are high on the reform agenda of those agitating from a political equality perspective: see, eg, Cass and Burrows, above n 289, 457-60; Orr, above n 198, 23-5 and Tham and Grove, above n 631.
that in a non-trivial sense, there truly is a market in access to and influence over politicians, even if the market in votes has assumed a less threatening form.\textsuperscript{675}

The cost of elections is inescapably linked to their fairness, and with that, to issues of distortion and inequality in electoral outcomes, from which flows inequalities in access to power and public benefits. In a very particular sense, the cost of electoral bribery distorts equality of political outcomes. As James Tobin concluded:

\begin{quote}
A vote market would concentrate political power in the rich, and especially in those who owe their wealth to government privilege.\textsuperscript{676}
\end{quote}

Saul Levmore’s analysis echoes this, arguing that crude vote-buying inevitably leads to wealth prevailing when it should not.\textsuperscript{677}

These are not just historical claims that traditional forms of bribery in fact advantaged wealthy candidates or those indebted to wealthy backers, but predictions that any lowering of legal prohibitions will lead to a capture of government power, creating problems for good or efficient policy-making. We shall consider the efficiency of governance case shortly, but one claim here is that politicians who buy votes will seek to recoup their ‘investment’ through public resources. They may do this either by rewarding themselves or their backers with favourable legislative treatment and subsidies, or by transferring the cost of winning votes to the public purse.

A second claim that the cost inherent in vote-buying distorts electoral competition in favour of the wealthy or incumbents arises in Levmore’s work. As the title of his

\textsuperscript{675} To an American, liberties of expenditure and contribution may seem natural extensions of the 1\textsuperscript{st} Amendment. But even thinkers such as Levmore - whose work is an economic analysis rooted in concerns with collective action problems – are willing to call a spade a spade. Levmore accepts that such liberties ‘permits indirect vote buying in the form of campaign contributions and expenditures.’ Levmore, above n 569, 114 (emphasis added), see also 129-133. Similar is Epstein, who posits metaphorical or indirect vote-buying as a real problem for good government: above n 666.


 contribution ‘Voting with Intensity’ suggests, Levmore’s primary interest is in asking why, unlike most arenas of life, electoral preferences are not measured in terms of intensity.\(^{678}\) The standard, if tautological, response is that each citizen counts equally, and hence everyone has the same indivisible ballot, whether one is a lukewarm voter, one with complex preferences, or one passionate about a particular outcome. In contrast, Levmore answers his own question by concluding that even a limited market in votes risks ‘shifting enormous power to wealthier citizens’,\(^{679}\) a risk presumably not worth the benefit of allowing vote-trading to measure the intensity of electoral preferences.

His analysis is rooted in concepts concerned with markets and their failure, and rests on arguments from the ‘collective action problem’.\(^ {680}\) Strong regulation limiting vote-trading is justified, he argues, since without it, individual electors, being dispersed ‘sellers’, will sell their votes too cheaply to politicians, who are a small and tight band of ‘buyers’. Voters overall have more to lose when vote-trading prevails than when it does not.\(^ {681}\) A radically free market in votes would lead to the wealthiest politicians, or those with the wealthiest backers, dominating the market, and with it governmental power. (Similarly, incumbents dominate metaphorical vote-buying). As one pair of authors writing from a free market position reason, however, this objection could, in theory at least, be overcome. If the costs of arranging coalitions to block wealthy and special interests were not high, there would be no reason, at least from an efficiency-oriented law and economics perspective, to prohibit vote-buying.\(^ {682}\)

\(^{678}\) A similar critique that one-vote, one-value is neither objective nor neutral in weighting all votes equally regardless of intensity is Grant M Hayden, ‘The False Promise of One Person, One Vote’ (2003) 102 Michigan Law Rev 213.

\(^{679}\) Levmore, above n 569, 112-3. The quote is from 113.

\(^{680}\) Similarly Kochin and Kochin, above n 609, apply collective action dilemmas to conclude that the cost of organising coalitions of individual voters is grounds for prohibiting vote selling, lest electors find themselves individually all worse off due to such trades, but permitting an electoral model where politicians buy votes en masse through promises. To the authors, legislators-as-representatives-of-sectional-interests is a means for such interests to surmount the cost of collective action.

\(^{681}\) Levmore, above n 569, 140.

\(^{682}\) Kochin and Kochin, above n 609, 647 (proposition 1).
One answer to Levmore’s desire for ‘Voting with Intensity’ is that we can devise an electoral system that permits electors to register the intensity of their views, albeit with a more complex and unpredictable voting system: viz through ‘cumulative’ voting. In this system, electors have an equal number of votes they can use to plump on an intensely preferred candidate, or spread around several candidates.\textsuperscript{683} (The system is even in use in part of Australia.\textsuperscript{684} It can lead to tactical abuse and the election of extremists (if their supporters are tightly marshalled to ’plump’); but it can also promote consensus.\textsuperscript{685} ) The problem with this system from a vote-buying perspective, is that it may reinforce rather than diminish a culture of metaphorical ‘bribes’. To be elected under such a system, at least for the first time, all a candidate needs do is promise large enough benefits to a sufficiently large sub-set of the population, and encourage them to plump for him.\textsuperscript{686} (An advantage is that it gives more choices – and hence power – to electors, and in side-stepping the need for preferential voting, would reduce the risk of briberous preference deals between parties.)

Levmore’s compromise conclusion is that permitting at least a moderately free-market in expressions of political support, whether through third party advertising or contributions to candidates and parties, allows people to register the electoral

\begin{flushleft}
\textsuperscript{683} Levmore, above n 569, 149-53, comes close to this system. He toys with the idea of a ‘limited market’ in votes, allowing electors ‘multiple votes to spend or conserve over several elections’, in effect the ability to ‘carryover’ votes from one election to another, to express intensity of preference whilst preserving equality between electors. But he concludes this would create more problems than it cures.

\textsuperscript{684} Cumulative voting applies to the Norfolk Island Legislative Assembly: see Dorothy Kitching, ‘9 Vacancies – 9 Votes- How Does it Work?’ (1994) 75 The Parliamentarian 15.

\textsuperscript{685} PJ Emerson advocates a form of cumulative, preferential voting he dubs ‘the preferendum’ particularly for divided or strife-torn regions: PJ Emerson, The Politics of Consensus: For the Resolution of Conflict and Reform of Majority Rule (1994) and Beyond the Tyranny of the Majority: Voting Methodologies in Decision-Making and Electoral Systems (1998). In cumulative voting, electors may stop seeing electoral politics as an ‘all or nothing’ game of ‘my party’ versus ‘the others’

\textsuperscript{686} I say ‘for the first time’, since if I cannot deliver my promises in power, it is unlikely the constituency I pandered to will re-elect me. So the system need not fragment completely, as beyond the election, there is the imperative to form blocs to achieve actual policy outcomes.
\end{flushleft}
intensity of their political interests and preferences, without descending to the wholesale purchase of electoral politics by the wealthy that could occur if crude vote-buying were legal. This is true in principle, but invites the question, ‘How loudly should money be able to talk?’ As noted in the previous chapter, unbridled electoral expenditure and contributions, as we have in Australia today, creates its own risks of inequality, corruption and undue influence as much as traditional electoral bribery. All that is different is the form in which it occurs, and the corporatised face of the ultimate beneficiaries.

### 2. Distortion of Electoral Competition: a Preferential Focus on (or Exploitation of) Certain ‘Target’ Groups

In James Lindgren’s general study of the definition of bribery and extortion in American law, he concludes that the common understanding underlying bribery is that ‘bribery is a corrupt benefit given or received to influence official behaviour so as to afford the giver better than fair treatment’. In electoral bribery, the giver is the briber, usually a political party or candidate. At the heart of the pejorative term ‘buying an election’ is the idea that something unearned or undeserved is sought by politicians who resort to it. This view, which can be linked to the idea of justice as desert, echoes the concern in the previous section about wealthy or incumbent candidates stealing a march on their rivals.

But buying electoral support may also involves discriminating between classes of electors, ie possibly preferential treatment of the receivers. Inherent in the economics of buying support is the likelihood that groups that can most easily be bought and represent most ‘value for money’ will be favoured. It is no surprise then that metaphorical bribes are more likely to be targeted at swinging voters, especially in marginal seats. This exacerbates the tendency, inherent in our electoral and party systems, for attention to be concentrated on the concerns of the median voter, to the exclusion of others. This preferential treatment in turn leads to other corrosions, such as increasing cynicism about government. It even be infectious, in the sense that

---

some groups, even a party’s traditional base, may threaten to withdraw their support or ‘protest’ vote, to encourage a profligate party to throw initiatives at them as a reward if they stay loyal.

Pamela Karlan, injecting a socially sensitive note to the debate, claims by way of contrast that:

reported prosecutions suggest that vote trafficking schemes (ie crude vote-buying) are more likely to affect the behaviour of economically or politically vulnerable groups.688

She argues this in the context of US elections (and hence voluntary voting), but as we noted in Chapter Three, the economic vulnerability of Indigenous electors in Australia has led to some crude vote-buying and treating of them in the past. Hasen affirms Karlan’s reasoning with intuitive economics: in a public election with a significant turnout, the price a candidate will be willing to offer per vote will be relatively small, since there is a very low chance that any particular vote will decide the result.689 In a democracy, the most cost-effective group to bribe ought to be the poorest voters. If such voters are targeted, then on one view are receiving preferential treatment, at least if the bribes are metaphorical; yet or on another (Karlan’s) they are in danger of being exploited, especially if the bribes are crude.690

Of course this argument can be turned on its head in a very pragmatic way, by asking why indigent or marginalised people, who may have little reason to have faith in the electoral system or existing parties and their policies, should not be able to profit out of their vote? Does an old-fashioned corrupt politician who crudely buys their vote

688 Karlan, above n 616, 1712, restating a position developed earlier by her in above n, 1470-74. Karlan is particularly influenced by a vote-buying scheme in New Jersey, which centred on black congregations.

689 Hasen, above n 576, 1329. This will not so much apply if it is known that the race is very tight, particularly if a bidding war is the result. It may also not apply if the elector being bribed is being coaxed away from a key opponent: although bribery is more likely to work on unattached voters than partisans.

690 See below, sections 3 and 7 of this Chapter.
show any less respect for the political agency or social plight of the electors targeted than a modern politician who, driven by opinion polls, focus only on the ‘mainstream’ voter? As we saw in Chapter Two, cost-benefit calculations are problematic. The expansion of the franchise in 1832 led initially to an increase in the amount of bribery, not a decrease. Whilst hardly welcome, it can be seen as a form of progress, a ‘democratising of corruption’ to borrow Etzioni-Halevy’s phrase.\(^{691}\) As Nossiter put the question, should the venal elector always be regarded as a ‘criminal’ for regarding the franchise as an ‘economic asset’.\(^{692}\)

Karlan’s broader argument is that vote-buying, at least in the long run, degrades the sense of ‘civic virtue’ that the vote ideally should engender.\(^{693}\) Certainly it does not suggest a particularly positive respect for the franchise of the target group. Even assuming the politicians concerned would prey on other vulnerable groups, presumably they would have to pay more for their votes. Karlan toys, however, with the idea that tangible inducements should be permitted, even publicly distributed, to maximise turnout of disadvantaged groups, although she would limit such inducements to items such as ‘vouchers exchangeable for public transportation or admission to public events’.\(^{694}\) In this she seems to be searching for a currency of commensurable exchange – public transport, public events in return for participation in public elections – which resonates with the idea, developed in Chapter Five, that exchanges are legitimate when what is traded is within the ‘currency’ of politics.

Payments for conveyance to the polls, a key form of payment to induce turnout, were forbidden in the UK, and by extension, in the early Australian definition of electoral bribery, as we saw in Chapters Two and Three. Whether they would be held to be prohibited today is another matter – the fear that they would be used as a cover for direct vote-buying is much less than it was historically. Hasen agrees with Karlan that equality considerations, far from arguing against payments for turnout (provided

---

\(^{691}\) Etzioni-Halevy, above n 76, 38.

\(^{692}\) Nossiter, above n 94, 161.

\(^{693}\) Karlan, above n 618, 1472.

\(^{694}\) Ibid, 1473.
they are offered generally) in fact support them, but he also concludes that inalienability considerations weigh against such incentives.\textsuperscript{695}

3. **General Corruption of Governance: Inefficiency and Increased Disengagement.**

In terms of corruption of governance, the buying of electoral support raises various spectres: wealthy candidates gouging the system; donors seeking quid pro quo for their ‘investment’; and rival parties entering bidding wars, auctioning metaphorical ‘bribes’ that, as pure policy, would be wasteful allocations of public resources. Binding these together, in an overall critique of vote-buying, both crude and metaphorical, is the claim that these practices are likely to lead to ‘inefficient’ outcomes, understood in the economic sense of sub-optimal wealth or welfare generation.\textsuperscript{696}

Richard Epstein in ‘Why Restrain Alienation’ considers voting rights from a law and economics perspective, both voting rights attached to shares (which of course are sellable) and, in contrast, the franchise for public elections.\textsuperscript{697} His views are inseparable from his tendency to see the world, including legal forms, through the prism of property, and he justifies this with an historical claim, that the franchise grew out of property rights. That explanation is unconvincing, to the extent that the right to vote long ago transcended such roots: indeed, in being universalised and linked to a


\textsuperscript{696} Hasen, above n 576, 1331-5 discusses the inefficiency argument in relation specifically to crude vote-buying.
conception of human freedom and self-determination, the franchise was reborn in the Reform Acts in *contradistinction* to notions of property. His analysis however is illuminating to the degree that it sheds light on why someone would wish to purchase votes.

‘The most probable answer’ he replies, ‘is to obtain control of the public machinery in ways that allow a person to recover, at the very least, the money that was paid out to the individuals who sold their votes, with something left to compensate the buyer for the labour and entrepreneurial risk.’\(^{698}\) This is an updated, public choice version of the concern, already met, that wealthy candidates who bought seats or crudely bribed voters expected a return on their ‘investment’ and would gouge public office for personal benefits, or to repay their backers. Epstein does, however, rather ignore the psychological incentives to public office, such as ambition, ego or a sense of service, without which his reasoning is a little circular (who would buy votes to attain office merely so they could recoup the cost of the exercise?)

Epstein’s analysis is noteworthy however as it goes further than critiquing crude, traditional vote-buying. He recognises that vote-buying also occurs through metaphorical vote-buying, eg pork-barrelling and tax bribes. ‘Political candidates can run for public office by making general promises that are akin to the purchase of votes.’\(^{699}\) From his public choice perspective, he argues that these are not *necessarily* less objectionable than crude vote-buying. A law and economics position, that would otherwise be expected to be favourable to market mechanisms, proves in Epstein’s hands to be antithetical to the idea of elections as auctions or markets it that involves raiding treasury to pander to target groups of electors or influential sectors:

I do not wish to condone any of these devices [metaphorical bribes]; indeed
I would support a workable system of constitutional restrictions on the power to dole out subsidies to interest groups …\(^{700}\)

---

\(^{697}\) Epstein, above n 666.

\(^{698}\) Ibid, 987-8.

\(^{699}\) Ibid, 988.

\(^{700}\) Ibid.
In short crude vote-buying is but one manifestation of a larger problem of governance, although until anyone can construct a viable regulatory deterrent to the worst excesses of metaphorical vote-buying that does not empty politics of its ability to achieve legitimate trade-offs, Epstein concludes that we may have to be satisfied with the limited reach of prohibitions on electoral bribery to individualised vote-buying.

As Hasen notes, the ‘it’s inefficient’ critique of vote-buying is counter-intuitive, from a market-oriented law and economics standpoint. Imagining perfect voter knowledge (admittedly an heroic assumption in matters of elections, since it assumes electors have full knowledge of parties’ real policy intentions, an appreciation of the legislative processes likely to govern the new parliament, and an accurate reflection on their own interests), surely a market metric would conclude that vote-buying should be permitted. After all a voter who, on reflection, decides that no party better represents her interests could sell their vote to another voter or candidate who values it more highly; correspondingly, voters who place high values on certain electoral outcomes could, following Levmore, register the intensity of their preferences by buying up votes.

It may be that there is a deep psychological naïveté to the market approach when applied to elections. The lure of electoral politics and the act of voting are rooted in social cleavages, ideology and tribal-bonding to party ‘colours’, and emotional

---

701 Compare Kochin and Kochin, above n 609.
702 See Hasen, above n 576, 1332 on the intensity line of reasoning.
703 Social cleavages have long been employed to explain party cleavages, commitments and stability: see, eg, the work of Seymour M Lipset, Political Man (1960) and Seymour M Lipset and S Rokkan, Party Systems and Voter Alignments (1967).
704 Or as Schumpeter put it, ‘The pyro-technics of party management and party advertising slogans and marching tunes are not accessories. They are the essence of politics’: Joseph A Schumpeter, Capitalism, Socialism and Democracy (1943).
responses generally as much as they are a matter of rational assessments by individuals of their wealth or welfare interests.\textsuperscript{705}

Nevertheless, we have seen, from within law and economics assumptions, arguments that a free market in votes is unacceptable. Tobin and Levmore (discussed above) conclude that crude vote-buying leads to wealthy interests prevailing but with an expectation of gouging the system to recover their ‘investments’ when in power. Similarly, for Epstein, parties pork-barrel through metaphorically ‘briberous’ policy and promises, gouging rent from the public purse in the process.\textsuperscript{706} Each is arguing, ultimately, against political monopolies.\textsuperscript{707} Epstein, in extending this argument beyond crude vote-buying to ‘metaphorical’ vote-buying, is influenced by his preference for small government, a preference that is itself a contestable ideological position, according to Hasen.\textsuperscript{708} But presumably it is consistent for someone who sees democratic elections as a back-door to rent-seeking to want to limit the size of government and hence the pool of rent available for misapplication.

Several US scholars suggest another more specific line of reasoning that vote-buying corrupts policy and governance outcomes, a line that links to claims in the previous two sections about the cost of elections, incumbency advantage and preferential treatment. A correlate to the claim of the capture of the power by the wealthy is, as Daniel Ortiz argues, the possibility that marginalised groups will not only sell their votes (as Karlan claims) but that this buys them short term profit, yet in the long-run

\textsuperscript{705} Although tribal attachments may be weaker than in the past, and politics often sold as a technocratic exercise in an age beyond the ideological divide of capitalism-socialism, the psychology of voting has not become a simple question of cost-benefit analysis. Indeed, parties offering similar policies, like brands marketing similar products, may be more rather than less likely to use emotional appeals to distinguish and sell themselves. Arguing for the centrality of the idea that ‘political choice is, ultimately, emotional choice’ in the context of Australian electoral politics in 2004, see Geoffrey Barker, ‘Political Passion at Play’, \textit{Australian Financial Review}, 30/8/2004, 66. See further the discussion in section five of this chapter, below.

\textsuperscript{706} Epstein, above n 666, 987-8.

\textsuperscript{707} Which as Hasen notes, above n 576, 1334, was made earlier by James M Buchanan and Gordon Tullock, \textit{The Calculus of Consent} (1962).
deals them out of bigger debates about policy, creating a vicious circle in which their subjugation is reinforced.\textsuperscript{709} Such a result would only have deleterious consequences for that group, but creates obvious distortions in social policy.

We should be careful to distinguish categories of vote-buying here. The argument that bribery leads to an overlooking of the policy needs of the target group is controversial, as will be discussed further in section seven, below, dealing with the corruption of the representative-represented relationship.

But the thesis that, if a market in votes prevails, marginalised groups will be disproportionately milked dry for their votes by crude electoral bribery does not, in any case, necessarily apply to metaphorical bribery, as we discussed earlier in section two above. In fact, a policy auction will benefit marginal social groups if their votes are crucial – hence the fear that such electioneering panders to ‘minorities’ or sectional interests. In such circumstances, if minorities are dealt out of wider policy debates, that may only be the result of self-limitation. For instance, if such a group presents itself as only concerned with a narrow range of issues, on which it can be bought. Further, if a minority group lacks sufficient numbers, is ‘not for sale’ because it is soldered to one side of politics (which may be the case with the black vote and the Democrats and the ALP in the US and Australia respectively) or are crowded into safe seats, that group will tend to find its interests drowned out by majoritarian legislative politics if electioneering is dominated by appeals to hip-pocket considerations.

This line of analysis suggests, however, the possibility of a broader governance critique of vote-buying, which has been neglected in the literature. And that is, that regardless of the background of the electors concerned, vote-buying in any form (crude or metaphorical) may create disengagement, rather than engagement. By engagement, I mean participation in and reflection on electoral politics at a number of levels, and not simply turnout (which is less an issue under Australia’s compulsory

\textsuperscript{708} Hasen, ibid, 1361 (‘Epstein’s rather chimerical solution is to shrink the size of government so that politicians would not have government benefits to trade for votes.’)

\textsuperscript{709} Ortiz, above n 632, 922.
voting system than elsewhere). But I do not mean participation in a romanticised, ‘call-to-arms’ sense of some civic republican or deliberative democratic ideal.\textsuperscript{710} Political engagement may be conceived in a more modest way, as a sense of being connected to political debates - that is of having \textit{some} level of intellectual or emotional involvement as opposed to only tuning in to single issues, especially only on the basis of lures appealing to self-interest.

Disengagement may arise because of the ‘transactedness’ of vote-buying. An elector, who feels her vote is ‘up for sale’, may experience the process of deciding to vote for party X because it promised her benefit Y as a simple and closed transaction, beyond which she has no interest in considering politics further, at least until the next election, when the ‘sale’ recurs. We will develop this argument further in section 7 of this chapter, on the relationship of the governed and governors. Its relevance here is that disengagement, if it reduces communication and understanding between electors and politicians, may impair governmental responsiveness and accountability (eg by impairing politicians’ awareness of the shades of sentiment in the community, and dampening interest in the specifics of keeping politicians accountable.). Either scenario poses a threat to the process and, in theory, the outcomes of good government.

\textbf{TRANSFORMATIVE EFFECTS ON THE NATURE OF THE VOTE AND BEING AN ELECTOR}

4. \textbf{Corruption of the Vote as Vote: an Inalienable Right is Commodified. Parallels with ‘Political Currency’}

To some, the idea of selling one’s vote or electoral support is a contradiction in terms: one cannot alienate a right that is conceived as inalienable. The ballot, after all, is

\textsuperscript{710} For a critique of such, see Jeffrey Minson, \textit{Questions of Conduct: Sexual Harassment, Citizenship and Government} (1993) ch 8 (‘The Participatory Imperative’). At 217, Minson states the crux of his argument as ‘the need to disaggregate arguments for participation from romantic republican dreams.’
rooted in unique citizenship rights and responsibilities, and one’s electoral support, at least from the expressive account of elections, is an aspect of one’s personhood.

In Karlan’s terms, electoral bribery law enshrines a ‘resolutely noncommodified competition for votes’, a view that voting is a ‘market inalienable activity’. Whilst opposed to commodification and to the idea of a market in votes, she recognises that what remains is still very much a competition. Votes are spent, because they are ‘cast’. The term ‘to cast a vote’ is such a deeply rooted turn of phrase that we never pause to reflect on it. It does not mean ‘cast’ in the sense of ‘thrown away’, but ‘spent’ in the sense of released into the broader pool of votes: we instantiate our ballot when we convert it from a blank voucher to a particular choice. In this act, however, we are not ceding our ballot to another. On the contrary, to borrow the terminology of natural law, the ballot reaches its teleological end, becoming a public record of the collective electoral opinion. Such spending and casting of the ballot, far from being a form of alienating the vote as a commodity, is the very act by which the ballot reaches its ultimate or essential form.

Neil Duxbury, in his essay ‘Do Markets Degrade?’ however, raises objections to the commodification debate. He admits that there are various things that cannot be bought or traded without being lost. The most obvious example of something whose value is intimately bound up with its non-commodification is captured in the cliché, turned pop anthem, ‘Can’t buy me love’. Duxbury however seeks to debunk arguments for limiting tradability of goods based on the claim that markets inevitably have a ‘degrading’ effect, an approach he identifies with two related types of argument. One is that certain things have a peculiarly personal nature that makes them inherently infungible. The other, an argument from incommensurability, is that market valuations of some goods or activities are demonstrably inappropriate, in effect that money is not the value of all things. In relation to both lines of reasoning,

---

711 Karlan, above n 616, 1709.
713 Although even this is culturally specific. Plenty of societies and ages have practised arranged, dowry contingent marriages, still believing in marital and sexual (if not romantic) love.
Duxbury’s response is that such claims, in practice, are rooted in idiosyncratic intuitions.\(^{714}\)

‘[U]ltimately, personhood and incommensurability can be seen to contain the same flaw: both ideas represent diverse individual feelings concerning what ought to be specially protected within or withheld from, the market domain. Individual intuitions as to what is and is not appropriately commodifiable will differ; and even where there exists substantial consensus concerning how particular goods and activities ought to be treated, that consensus may shift over time.’\(^{715}\)

Duxbury does not directly address vote-buying as such\(^{716}\) although it is fair to surmise that he would distinguish it from the general realm of property rights on grounds similar to Epstein, ie by employing arguments about market distortion in relation to good government. Duxbury’s analysis is influenced by considerations of allocative efficiency, and he stresses that the notion that one person might find trading in a particular thing degrading is no reason to count that as a ‘cost’ of its trade. This echoes the liberal idea that the fact that I find another’s lifestyle to be offensive, although it is a negative consequence of the way they gain their pleasure, is no reason for my psychological aversion to count in the utilitarian calculus. In short, claims that if others buy and sell votes, then this commodifies and degrades my ballot, rest on peculiar aesthetic understandings of the essence and value of the activity of voting.

A similar sentiment is apparent in Levmore, like Duxbury an instrumentalist. Levmore claims that commodification arguments suffer from ‘a circularity problem’.\(^{717}\) That is, any claim that the ballot has qualities that are at risk of being demeaned as a ‘commodity’ if it is traded, is unverifiable essentialism, a definitional trick in which something unique and essential is merely asserted to be at the heart of voting. To Levmore, it is just as easy to give examples of cases where a free market enhances the value of or respect for a thing rather than degrading it (he cites private

\(^{714}\) Duxbury, above n 712, 332-6.

\(^{715}\) Ibid, 336.

\(^{716}\) The examples Duxbury tackles are the trade in human tissue/organs and surrogacy.

\(^{717}\) Levmore, above n 569, 115.
education).\textsuperscript{718} So, he insists, we must searches elsewhere to explain the conventional anathema to vote-buying and support any conclusion that voting rights should be inalienable.\textsuperscript{719}

These claims that objections to ‘commodification’ are not genuine arguments need to be confronted in the context of voting and electoral support.

In his discussion of incommensurability, Joseph Raz offers the following everyday example of the distinction between a degrading and an acceptable exchange:

Many people, to give an example of the familiar kind, will leave their spouses for a month to do a job they do not like in order to earn some money. And yet they will not agree to leave the spouse for the same month for an offer of money, even a significantly larger sum of money.\textsuperscript{720}

To Raz, the explanation lies in ‘symbolic significance’, which in turn is rooted in ‘social conventions’, which determine the meaning of actions.\textsuperscript{721} For Raz, it is precisely the shared and consensual intuitions about right and wrong, good and bad, aesthetics and authenticity that matter. Yet these are the very same justifications that Duxbury’s narrower rationalism cannot abide because they are shifting and not susceptible to knock-down proof.

Raz’s position is certainly more familiar to the common law mind-frame than Duxbury or Levmore’s. It would be surprising indeed if questions of right and wrong in human affairs generally and in electoral conduct in particular, were not the subject of normative judgments that change over time and which speak to the importance of symbolic values that help bind social and public life.

---

\textsuperscript{718} Ibid, 116.
\textsuperscript{719} As we saw earlier, he finds such rationalisation in market-failure analysis, based on the problem of collective action.
\textsuperscript{721} Ibid 349.
Raz’s scenario of the spouse who feels no qualms about selling their labour at the expense of togetherness, but who would feel great guilt and expect condemnation for disloyalty if he were to be paid to achieve the same functional outcome, invites comparison to electoral bribery. First, because we would intuit that the spouse scenario was universal, at least to all cultures where long-term relationships were founded on intimacy, just as prohibitions on crude vote-buying are entrenched in the electoral law of all democracies. And second, because such thought experiments may help us explore the knottier questions of when a functionally equivalent transaction amounts to an illegitimate sale.

A spouse who will sell their labour but not their marital togetherness, is making a distinction between direct exchange and indirect consequences and between an economy of fair and unfair rewards/earnings. By the same token, the elector who would be offended by an offer of cash to vote for candidate X may feel no qualms at voting for candidate X because of a promise to lower tax rates. One still must work to receive the tax break, it is promised publicly to members of a class and its is not traded for an individual vote in a direct deal.

There is a further ingredient in Raz’s scenario that is important to the law of bribery: the symbolic. The symbolic is a manifestation of a complex mix of social conventions. It determines that selling one’s togetherness with one’s spouse would feel like a grubby bargain, just as selling one’s vote would feel shameful, regardless of what the law had to say about either activity. Leaving one’s spouse is lawful, but we are not likely to find people defending it on that basis. Similarly, while vote-buying is formally illegal, it is easy to do and the law notoriously difficult to enforce, yet it would remain something done on the sly even if contemporary law had nothing to say on the matter.

Ultimately, then one cannot so easily dismiss the concept of incommensurability as the instrumentalists do, even if the concept is not subject to scientific precision. Cass Sunstein, in his lengthy exploration of the idea and its application in law, could only offer a rough, working definition of the term. He says that incommensurability arises when relevant goods cannot be aligned on a single metric without doing violence to
our considered judgements about how those goods are best characterised. By ‘considered judgements’, he means reflective assessments involving the nature of various goods in our lives; by ‘violence’, he means inconsistent, to the point of violating, those goods as they are actually or ideally experienced.

Such definitions, on face value, may seem to dissolve into subjectivism. But if that is so, then any talk rooted in values, symbolism and aesthetics would have to be ignored. Sunstein only deals with vote-trading in passing, but in doing so demonstrates that the claim of incommensurability need not dissolve into Quixotic or idiosyncratic judgements about the essence of the ballot. Rather, arguments for incommensurability and inalienability gather together other arguments about the special value or nature of the ballot. Thus, according to Sunstein, we prohibit exchanges of votes for benefits, directly at least, because voting is a sphere embodying certain core symbolic values, notably civic equality, equal citizenship and respect. Indeed, in the black-letter of the franchise we find the right to vote inextricably linked with the concept of citizenship. The incommensurability metric may not apply across all electoral cultures, not even of ours in centuries past. But this does not mean it is an arbitrary concept; the values that underpin it, such as popular sovereignty through elections under a universal franchise and an ideal of political equality, had to evolve into being.

In Chapter Five, after analysing various political deals and arrangements, I developed the idea of ‘political currency’ to augment understanding of why certain exchanges of benefits for electoral and political support are acceptable, even if they formally meet the definition of electoral bribery. This idea is obviously related to the concept of incommensurability, but not reducible to it. For one, it is not a negative or a defensive concept – it is truer to say it is linked to commensurability rather than

---


723 Ibid, 787-8.

724 In particular in Australia. Of course, this is only a recent phenomenon, as the modern concept of citizenship must be, in a nation that grew out of Empire. But earlier preconditions of the franchise,
incommensurability. Second, it is a political rather than a philosophical use of the language. The use we found for the notion of ‘currency’ was not to collapse politics into a market lubricated by money, but, on the contrary, to seek equivalencies (i.e. currency) that were distinctly political.

Sunstein’s use of the language of ‘spheres’ is instructive, recalling Walzer. This language suggests a realm around electoral politics, to insulate it and thereby protect certain distinct aspects of the political sphere from corroding in the face of legal values imported from elsewhere.

5. **Promotion of Insincere Electoral Behaviour: Electoral Support is ‘Marketised’, Diluting Expressive and Ideological Aspects of Elections.**

This line of reasoning is not rooted in a claim that there is an essence to the ballot. Rather, the argument is that there are different ways of conceiving of how we can make electoral decisions, and some are more at risk of being crowded out by market driven conceptions than others.

A radical follower of Judge Posner’s style of thinking might retort that this position, though less essentialising than the anti-commodification argument, remains a form of paternalism. If we treat the *right* to vote seriously, why should electors not ‘cash it in’ on whatever terms they wish to barter, rather than having the law or political ethics suggest that certain ways of conceiving or of valuing that right are more sincere or noble than others?

If it is true that individual self-interest is a fundamental given of the human condition, then the desire to ‘sell’ one’s electoral support may be ineradicable. In ‘Politics by such as being a British subject, play the same role as citizenship here, by establishing an exclusionary definition of the political community.

---

725 See below, text at n 746 for Michael Walzer’s explanation of the ban on electoral bribery in *Spheres of Justice.*
Other Means’, Karlan is concerned ‘to discuss how talking about politics in market terms usefully illuminates problems in election law and how it obscures or distorts them.’ But even Karlan – who as we have noted has reservations about market-thinking - believes that any interpretation of electoral bribery that chills what she calls ‘wholesale’ vote-buying (ie metaphorical ‘bribes’) itself runs the risk of insincere political discourse:

A politics that did not discuss economic questions at all and ignored questions of self-interest ‘would … stifl[e] campaign debate, depriv[e] voters of important information, and forcel[e] upon the political process a vacuous form of republican discourse.’ Our politics is profoundly, although not exclusively, about economic regulation, and discussions of the economic effect of electoral outcomes are critical to having meaningful elections.

We might cavil about whether economic debate must collapse into questions of self-interest, but the claim that civic republicanism in its purest form unrealistically seeks to repress natural urges and interests, may be well-taken. That is, we might wish to argue that promises such as tax bribes are cheap forms of political discourse, or expensive ways to drain the public purse when collective investment may be preferable. But as we saw at the end of the previous chapter, to censor the voter self-interest that generates such promises in the first place would sacrifice sincerity for a forced, and perhaps unattainable form of altruism. Electors would still assess policies, to a significant extent, on their tangible impact on their own lives, particularly their immediate economic well-being.

Nevertheless, Karlan is awake to the alternative extreme of the putative Posnerian. The market conception of elections risks a polity in which, ultimately, we would be

---

726 Sunstein, above n 722, 849 (If votes were freely tradable, we would have a different conception of what voting is for -- about the values that it embodies -- and this changed conception would have corrosive effects on politics.)

727 Karlan, above n 616, 1698.

728 Ibid, 1712 (emphasis added) citing her earlier ‘Not by Money but by Virtue Won’, above n 618, 1468.
unable ‘to tell the difference between the economic and political spheres and what ought to count in each’ because ‘[i]f voters think of their votes as simply something to be auctioned to the highest bidder, they are likely to see the sole purpose of the political process as maximization of their own short-term self-interest.’

Even legal economists recognise arguments that vote buying may actually promote insincere choices, leading to undesirable electoral outcomes. Levmore reasons that the selling of votes by individuals will lead to perverse voting. By ‘perverse’ he means a voter (or for that matter contributor) who actually prefers candidate or party X, voting for or supporting party Y. Thus he concludes that ‘a market in votes will create the risk that voters, while holding out for higher prices or waiting to buy at lower prices, and so forth, will vote or sell perversely.’ Kochin and Kochin give a hypothetical example of such insincerity, and suggest, that in theory, it could lead to the election of candidates who are in nobody’s interest over even candidates who are in everybody’s interests. In their thought experiment, electors individually will be inclined to sell their vote to the ‘wrong’ candidate, hoping that sufficient other electors will still elect the ‘right’ candidate. There is thus some agreement amongst theorists that self-interest is so prevalent that metaphorical vote-buying is unavoidable, but that crude vote-buying risks both insincere voting and that people may sell their ballots to parties whose policies, overall, are not in their interests.

But what non-instrumentalist accounts of voter behaviour besides calculations of self-interest? The instrumentalist account focuses on voter self-interest as part of a wider calculus of determining the allocation of governmental power and public resources. Alternative, psychological and sociological accounts of electoral behaviour however stress the expressive and ideological dimensions in electoral choice and conduct. The ballot thus has a Janus-like quality. It is not just a cipher of self-interest designed

730 At the tail of Chapter Five above, text following n 569, we saw how tactical voting can appear to lead to such perversities. However that is essentially the product of wrinkles in the formal voting system (or plain unfairnesses, such as first-past-the-post). Thus, eg, in vote-swapping, it is not perverse or insincere for voters to avoid ‘wasting’ a vote for the candidate of their favoured party, the better to support that party.
to produce and legitimate governments, as Schumpeter might have it.\textsuperscript{732} According to Richard Rose and Ian McAllister, in our electoral choices we can be expressing at least three types of deeply-rooted preferences that do not reduce to self-interest: social cleavages (class, religion or race); socio-psychological identification (often formed by family attitudes); and proximity to a party’s position on issues (typically reflecting ideological preferences).\textsuperscript{733} Indeed, in the data they examined from Britain from the 1980s, expressive considerations outweighed instrumental ones in voting behaviour.\textsuperscript{734}

Unfortunately such data is unavailable in Australia,\textsuperscript{735} although we do know that at election times, around $\frac{1}{3}$rd of the electorate identifies itself as a ‘not very strong supporter’ of the party voted for,\textsuperscript{736} and at recent elections between 40\% and 50\% of electors did not decide which party to vote for until the campaign was announced or later.\textsuperscript{737} Further, such empirical studies may be era and place specific, and influenced by classification bias. In Converse’s oft-cited study of US electors, few voters were classified as ‘ideologues’ or ‘near-ideologues’ in the sense of having a coherent

\textsuperscript{731} Kochin and Kochin, above n 609, 656.
\textsuperscript{732} Democracy, in his definition, was essentially an ‘instrumental arrangement for arriving at political-legislative and administrative decisions’: Schumpeter, above n 704, 242.
\textsuperscript{733} Richard Rose and Ian McAllister, ‘Expressive Versus Instrumental Voting’, in Dennis Kavanagh (ed) \textit{Electoral Politics} (1992) 114, 119. Expressive theories of voting are not wishful thinking on the part of anti-instrumentalists. As Brennan and Lomasky demonstrate, they have psychological validity, testability and can be incorporated into a ‘hard’ social science model of electoral conduct: Brennan and Lomasky, above n 165.
\textsuperscript{734} Rose and McAllister, ibid, 121 and following.
\textsuperscript{735} The Australian Election Studies, for instance, merely present electors with a short list of crude, rationalist reasons for their voting choices (in order of importance: ‘policy issues’, ‘parties as whole’, ‘party leaders’ and ‘candidates’). See Bean et al, above n 17, 10.
\textsuperscript{736} Ibid, 9.
\textsuperscript{737} Ibid. By contrast, in the first such study (1987) only 26.9\% of electors said their decision was made during the campaign, a figure confirmed when three-quarters of respondents said they never thought of changing their vote during the campaign: Ian McAlister and Anthony Mughan, \textit{Australian Election Stud, 1987: Users Guide for the Machine-Readable Data File} (ANU, ASDA Study No 445).
political philosophy. More were found to form party preferences based on matters that had ‘no issue content’, and an even larger proportion on gut feelings of whether the times were good or not. The largest share, according to Converse, voted according to perceptions of group interest, a compendious term including self-interest but centred on perceptions of which party favoured which groups rather than on policy coherence.

Defenders of self-interested motivations for voting might argue that it is better, in the sense of more rational, for electors to respond to metaphorical ‘bribes’ than to arational cues such as a candidate’s looks or feel, or the mood of the times (which may depend on factors beyond political control, such as drought). But if we are to take voting as a public choice seriously, and see the ballot not simply as an item of personal property (as discussed in the next section) we are likely to prefer campaigns that encourage electors to consider group interest analyses, if not to construct and demand coherent political philosophies, rather than merely responding to personal rewards in a Pavlovian way. Even if this account strikes the reader as a one-dimensional privileging of certain electoral values over others (even aping developmental psychology, with deliberative democrats and political philosophers on the top, and the ego-driven beneath) the expressive-versus-instrumental voting axis provides an alternative account that is not reliant on any such an elitist hierarchy.

Admittedly, one can make an expressive statement out of a self-interested transaction: eg ‘I like party X because they offer the best tax ‘bribe’’ but even here, what is being expressed has become an ideological position, eg ‘Greed is good’ or ‘Smaller government is better.’ A market in votes will likely breed its own kinds of expressive voting patterns, just as a consumerist approach to life breeds the fashions of the day. But the point I wish to make is that there are other, perhaps stabler and deeper determinants of voting behaviour, which could not thrive if a transactionalised market

---


739 Hence the stress in modern campaigning on packaging candidates and party image – their appearances, sound, colour and the ‘feels’ of their advertising and set-pieces, as well as the influence on elections attributed to uncontrollable factors such as weather on the electorate’s mood.
in votes were the overwhelming campaign method and determinant of electoral choice.

6. **Corruption of Public Office: the Ballot as a Public Duty or Trust.**

Lindgren’s study of the definition of bribery and extortion in American law concludes that the common idea in all definitions of bribery is ‘a corrupt benefit given or received to influence official behaviour’. Yet, on the whole, modernity has tended to forget the idea of ‘office’. In the law governing work, for example, it has been relegated to relative obscurity, as contract, the quintessential language of the marketplace, has trumped status. The economy of politics, government and democracy itself have also tended, recently, to be conceived in market terms. This may have reached its most articulate form in the work of Downs and others in the 1950s-1960s. In truth it predates that work in the sense that self-interest and cost-benefit thinking has probably always been part of an understanding of political behaviour. We need also to take care not to romanticise the notion of ‘office’ as it was historically practised. Indeed in some eras offices were conceived not so much as public trusts or special positions of state, but a kind of tradable property – remnants this thinking may well this exist in the way that certain offices are to this day treated as governmental sinecures or favours.

There are those such as Jeffrey Minson, however, who wish to ‘hold on’ to office, in the sense of bringing it back to the foreground in debates about political ethics and behaviour. Minson confesses that talk of office has an ‘archaic’ ring in an age when ““autonomy” … has come to be seen as a defining mark of moral agency.” Far from being an essentialising or unattainable ideal, however, Minson reminds us that the notion of ‘office’ is at root a realistic one. What it helps us do is not erect absolute and pure norms, but to create a practical ethics, which may help to civilise

---

740 Lindgren, above n 687, 822 (emphasis added).
742 Minson, above n 23.
743 Ibid, 127.
democracy.\textsuperscript{744} In this exercise, it is insufficient to simply wax lyrical about the ‘public trust’ inherent in a public role or position, just it is naïve to imagine that the obligations attaching to an office can be reduced to a ‘do this; don’t do that’ code of behaviour.\textsuperscript{745} Harnessing both Adam Smith – the need to admit, but harness self-interest – and Max Weber – the ethic of responsibility – Minson’s realist argument focuses on a civility in the way we act out our various roles in political and public life. It respects the fact that political offices remain political; they do not exist on some altruistic plane where public service is reserved for saints. I believe that such a notion can elucidate the electoral bribery question.

Michael Walzer, in seeking to explain why political power and influence cannot be bought and sold, ie why electors should not be able to sell their votes or officials their decisions, notes that this isn’t an invariable rule. In many cultures gifts from suitors are an accepted aspect of remuneration, but that the gift relationship only applies:

\begin{quote}
when ‘office’ hasn’t fully emerged as an autonomous good, and when the line between public and private is hazy and indistinct. It won’t work in a republic, which draws the line sharply…\textsuperscript{746}
\end{quote}

In historical terms, however this, as seen in Chapter One, is a modern conception of ‘corruption’. It is not based on ideas of virtue rooted in an holistic vision of the body politic as an organic entity, but a newer idea of governmentality. This newer idea tends to compartmentalise offices and roles. Bribery becomes less a question of a personal excess that, if widespread, will form a cancer threatening the wider body politic, but a misdemeanour of personal judgement, revealing an unprofessional blurring of the boundaries of private interest and public responsibility. In an elective democracy, we no longer conceive of public officials as \textit{embodying} their offices, but at most occupying them.

\textsuperscript{744} Ibid, 128. The emphasis on ‘civilise’ is Minson’s.
\textsuperscript{745} Ibid, 128-9.
\textsuperscript{746} Walzer, above n 563, 100.
Walzer’s paradigm is bribery of officials, rather than by them. ‘Suitors’ seek access to power, and in doing so corrupt public officials by luring them with private benefits – privatising what is public. However, if we apply this reasoning to the sorts of parliamentary deals canvassed in Chapter Five, we find that those exchanges, although they may generate political and electoral advantages, do not risk privatising the public life of parliament. What is being traded is the currency of politics, at a level of dealing between one political official and another.

The core concern of electoral bribery, on the other hand, is with the converse relationship: ie bribery by political officials or aspirants for such offices and their agents, and their dealings with the electorate, lobby groups and the media. The power relationship here is more complex. The suitors are the candidates and parties, who we can certainly label ‘public officials’. They possess power in the form of whatever lures they have to offer, whether individualised benefits or promises of public goods. Their self-interest is not to corrupt voters as such, but to do what they can to ward off their electoral competition, in the quest for official power in the form of representative office. To achieve this in a democracy, where elections are the gateway to public power, they must become supplicants for the dispersed, but nonetheless real power that is vested in electors.

The key, then in thinking about electoral bribery and the buying of electoral support through the lens of notions of office, is to focus on electors as occupying an office, a point first developed at the end of Chapter Six. The vote, on any view, is a formal measure of public power: the power to select, or at least take part in that selection, on an essentially equal footing with fellow citizens. Fabrice Lehoucq describes this line of reasoning as an argument about inalienability, but one rooted in the idea that the vote ‘is a share in the public franchise, one that is a call to deliberate about matters in the public interest.’

The vote’s real status has always oscillated between a right and a duty. Not just a duty in the narrow legal sense implied by compulsory voting in Australia; although such compulsion reinforces the sense of duty, by reminding electors that they are

---

747 Lehoucq, above n 162, 3.
taking part in an important collective enterprise. That is, the shared task, exercised in
a communal fashion – equally by all, together, on polling day, in public buildings
across the land - to select a shared set of representatives to govern for all. The
franchise is a jointly held public office, which we exercise together in selecting
governments and keeping them accountable. It is on a par with forms of conscription
in other public affairs, such as military service (the defence of the community) or jury
duty (the administration of justice). Understood this way, it may be the ultimate form
of associational conduct.

The more we accentuate these elements of ‘duty’ rather than ‘right’, echoing
Augustine, the less likely we are to conceive of the vote as something that can be
traded. Property rights and personal rights (one’s labour) can be traded, and
increasingly people even seek to alienate rights to privacy and bodily integrity (eg
trade in body parts). They do so in the name of autonomy, where autonomy is seen as
inextricably linked to an idea of freedom bound up in the ability to alienate those
rights.

But the notion that one can trade in one’s duties is much more problematic. Why? It
is certainly not absolutely problematic. Economic rationalists are devising schemes
by which, say, environmental polluters can buy and sell emission quotas. These,
schemes allow trading in corporate responsibilities – ie duties – to the environment
(perhaps the most public, in the sense of common, good imaginable). What could
make the franchise different?

Margaret Radin, in her work, *Contested Commodities*, argues that the ‘right to vote’ is
not merely an individual right to participate, even though it is often conceived of as a
fundamental, almost talismanic birthright. It is an element of the ‘moral or political
duties related to a community’s normative life’. Although writing from a US

---

748 Orr, above n 60 describes the ritual and symbolic importance of having a single polling day, using
schools and other identifiably communal buildings (town and church halls), as opposed say to voting
via the internet or post, or voting at government offices.

749 Chapter Two above, n 36.

perspective where voting is voluntary, and rights-discourse at its peak, Radin puts voting into a special class of inalienable activities, sounding distinctly Australian in the process:

Rights of this kind not only may not be lost through change of hands, extinguishment, or cancellation, but also ought to be exercised.\(^{751}\)

Radin, though using the language of rights, invokes a notion of duty that can only be grounded in a conception of the ballot as a public role or office, something that is not ours to sell.

But what of indirect or metaphorical vote-buying? As explained at the end of the previous chapter, when pork or tax ‘bribes’ are on offer, some attention must be directed to the role of the elector as the holder of a public trust or office (there is no common law right to vote, and compulsory voting in Australia in particular establishes it as a duty. Even when voting is seen as an inherent natural right, its exercise is an official undertaking, as seen by the plethora of offences in relation to voting, since it is not an alienable or self-actualising power, but something that inheres in the citizen as citizen, and is so entrusted as part of an acutely public process of choosing representatives.) Yet in such electoral activity as pork-barrelling, the individual elector is not the primary, active participant. That role remains with the politicians concerned. So the focus of ‘office’ must also shine on them.

It would be circular to say that the normative life of our electoral politics involves hip-pocket appeals, therefore acceptable campaign techniques. But we can invoke Minson’s realist view that the notion of office must be able to fit within actually existing democracies, else it will backfire.\(^{752}\) The politician who makes a public promise is, to borrow the hallmark of modern definitions of corruption, not privatising her office. She may be acting in large part out of electoral self-interest, but only disconnected idealism could will such self-interest out of politics. Minson’s

\(^{751}\) Ibid. Emphasis in original.

\(^{752}\) Minson, above n 23, 137 (‘actually existing democracies’) and (‘moral idealism … likely to backfire’).
conception of office however bypasses a simple public duty versus private interest dichotomy. His is a search for an ethics of responsibility that will civilise electoral behaviour, rather than a search for a black and white code in which particular forms of conduct are forbidden. Adopting this approach, hip-pocket appeals are not forbidden, but a set of civilising constraints can be intuited.

For instance, the language and selling of such appeals should not be crude. Out of responsibility for the fact that political discourse like public office is ultimately about collective interests and not just individual greed, such appeals should be justified by public policy analysis. Since electors vote, by and large, for parties and not candidates, such promises should be integrated with and harmonious with a party platform, rather than isolated or demagogic appeals. And finally, in making them, albeit to win an election, politicians have a responsibility to electoral competition. Such competition should be robust, but not dog-eat-dog, if nothing else for reasons of enlightened self-interest. (The holder of an office today could just as easily be the candidate seeking such office tomorrow.) Indeed, as we saw in Chapter Six, incumbents who exhaust surpluses with a raft of metaphorical bribes, to deny opposition parties the ability to make meaningful alternative promises are not just risking fiscal good governance: they also risk perpetuating a system that will come back to haunt them when they fall into opposition. Fair competition is a measure of civility in the sense of respect between electoral opponents, who may be rivals for election but nevertheless are members of an overall political ‘profession’.

7. **Distorting, by ‘Transactionalising’, the Relationship of Representative and Represented.**

Karlan makes a claim that vote-buying transactionalises the relationship between politicians and electors. It is an interesting claim, and one, as we saw earlier, that can be extended into a claim that a market in votes may increase disengagement.
The reasoning behind the ‘transactionalisation’ thesis is that as the deal is complete once the support is obtained, then this militates against an ongoing relationship of service on the part of the political representative. It is not easy to see why this should necessarily be so. The politician and the person selling their support might well form reciprocal allegiances, and the former come to rely on latter’s counsel. The more illicit the act, the more conducive the environment may be to such allegiances forming deeply. Far from taking their support for granted, the representative might realise that such sellers’ allegiances are always up for grabs, and hence in need of constant whether through ongoing transactions (bribes at each election) or pandering (eg to median and swinging voters).

Further, the nature of representation itself is quite contested, with models as diverse as the legislator as delegate of those who elected him versus the legislator as free-agent, committed to acting in the public or national interest (a dichotomy immortalised in Burke’s speech to his Bristol electorate). On its face, the delegate model is consonant with the vote-buying tradition, whether crude or metaphorical. The legislator owes his election, and chances of re-election, to those he bribed and in particular to fulfilling any promises to them. In contrast, the Burkean championing of the agency of each parliamentarian appears to echo the civic republican tradition (Burke used the terminology of ‘deliberation’ long before the ‘deliberative democracy’ movement).

But this dichotomy between models of representation is overly simplistic, not least in the age of party, when promises and policy are in the hands of party leaders, and any real deliberation occurs in the cabinet or shadow cabinet, rather than amongst individual representatives in parliament. Nor is the Burkean ideal easy to apply to plural societies, where dreams of a public or national good transcending that of the

---

753 Karlan, above n 618, 1711, restating her argument in Karlan, above n 616, 1469-70. The problem of ‘transactionalisation’ is most obvious in the case of bribery of public officials, especially those required to exercise impartiality, such as judges.

754 For a thorough study of the different conceptions, see Hannah Pitkin, The Concept of Representation (1967).

755 Edmund Burke, ‘Speech to the Electors of Bristol’, Burke’s Works (vol 1, 1854) 442.
Chapter 7: Rights and Wrongs

various interests in society tend to break down. In any event, Burke’s high-
minedness would not necessarily establish an absolute rule against vote-
buying. On the contrary, his disjunction between his electorate’s or supporters’ interests and the higher business of parliamentary governance suggests that he could have bought votes to his heart’s content, provided he truly believed that he would make the best parliamentarian, ie best deliberator of the national interest, of the candidates on offer. Lowenstein similarly considers the Burkean contrast between ‘mandate’ and ‘trusteeship’ theories of representation, before concluding that such an opposition is inadequate as a guide to ‘determining what political pressures are corrupt. Each theory begins and ends with an abstract conception of the representatives duty.’

A concern for the relationships between politicians and electors, and the effect of vote-buying on such relationships can be better understood not by searching for an ideal of ‘representation’ but by trying to understand the practical relationship between the two ‘offices’ concerned. That is, can we find natural congruities between the duties and roles of elector-as-elector and politician-as-campaigner? Note here that the focus is not on the elected official-as-official. That characterisation of the politician’s role would invite the Burkean answer, namely that the office of an individual parliamentarian is a public trust to exercise freedom of conscience in the search for the public or national interest. And this would close down debate before it began.

Instead, we can apply Minson’s idea that a modern understanding of office should generate an ethic of civility and responsibility, rather than an ethic of mere

---

756 Lowenstein, above n 477, 831-7; quote is from 836. Similarly, Thompson tries to induce legislative ethics from the Burkean dichotomy, but concludes that his ‘mandate’ model of representation leaves such discretion to politicians that ‘[t]he primary focus of legislative ethics [must] be the legislative process itself.’ Dennis F Thompson, Political Ethics and Public Office (1992) 98.

757 This much is revealed, eg, in the purpose of the ancient parliamentary privileges such as freedom of speech within parliament, and the rule that it is contempt to improperly influence a member (eg through a bribe) or for a member to be bound to vote a certain way or follow the dictates of a particular body. See, eg, Harris (ed), above n 318, ch 19. Note, a little curiously, that this is not enshrined in the oath of say a federal parliamentarian. That oath, as scheduled to the Constitution, is merely a declaration of allegiance to the Crown, and does not even mention the Constitution, let alone the Commonwealth.
transaction, without demanding unrealistic standards of either electors or politicians. This insight can also offer us civilising insights into the relationship between governors and the governed in modern democracies.

Clearly, conceiving of the ballot not as a cashable right, but as the exercise by an elector of an official role, gives strong reasons to prohibit vote-selling, since that involves a virtual abdication of the elector’s role. Vote-swapping, on the other hand, which we discussed at the end of Chapter Five, is not equal to vote-selling. Although it introduces an horizontal relationship – elector to elector – alongside the vertical one of elector to politician, the public choice that an elector must ultimately make in casting her vote is no more distorted by tactical vote-swapping than a parliamentarian’s vote on a legislative proposal is distorted by log-rolling. Moreover, to the extent that vote-swapping brings thoughtful electors together, it enhances civil relationships among electors, helping in a small way to break down the wall between voters that the secret ballot has created.

Since the notion of office cannot be cleansed of all self-interest, and since metaphorical vote-buying remains a public act, its legality is not in doubt, as explained in the previous section. However, if a mutually respectful relationship between electors and politicians is to be fostered by the notion of office, lessons do arise. Electors may be presented with tax ‘bribes’, but a truly civil relationship requires that politicians not simply offer them in the form of a crude transaction (eg ‘vote for me for a tax break worth SX’). Rather they should be open with electors about what they stand to lose, as well as gain, for example, by spelling out what government funded programmes will be curtailed or long-term debt incurred as a result of the tax reductions.

More broadly, such promises need to be rooted in a dialogue, if the nexus between government and the governed is to be in any sense a relationship. Otherwise, we have a conception of elected office as simply a governmental functionary, devoted to the making of political decisions. Insisting on a link between the two roles of voter and parliamentarian is not to demand a thoroughly deliberative democracy, but simply to claim that absent such a link, an election truly would amount to no more than
Schumpeter’s reduction of them to a mere ‘political method’ to legitimate governments.\footnote{Schumpeter, above n 704, 242.} In that withered conception, the office of elector has no particular part to play, except as a symbolic pretence to some notion of citizen-equality.

Nor is this to assume any necessary ideal of representation. Political office might well be conceived and played out \textit{primarily} as a role in the business of government. But such office, in an elective democracy, cannot be so limited, or else we might as well choose parliamentarians by lot. But elections are a process by which politicians assume and renew their offices: they are liminal events. At such moments of transition, if not throughout their term, elected offices are inescapably connected to the ‘office’ of the ballot, and in that connection there must be a form of dialogue and relationship between these offices.

Of course insisting that there be some dialogue and relationship between government and the governed is no easy task in a mass electorate, but in a civilised form it obviously involves more than party apparatchiks studying opinion polls or focus groups. It extends to politicians and electors organising or participating in community forums, interactive media and the like. Further, metaphorical vote-buying should not focus only on narrow target groups, particularly for generalist as opposed to special interest parties, because in aspiring to executive government, the former’s relationship must be with the electorate as a whole rather than a mouthpiece for a subset of the whole. Finally, hip-pocket considerations ought not overwhelm the relationship. In part because such considerations enshrine a supplicant-provider relationship. But most particularly because an excessive focus on self-interest crowds out those aspects of democratic dialogue that are not based in raw self-interest, such as expressing visions, senses of identity and ideological commitments.

\textbf{THESIS CONCLUSIONS}

The foregoing part of this chapter developed and categorised, a set of abstract, conceptual themes analysing the buying of electoral support. It surveyed the
contemporary, American literature about what is wrong – or right – with vote-buying. The themes identified were mostly in the nature of broad-sweep reflections on electoral deals and lures, speculation in large part informed by philosophical positions and assumptions drawn from law and economics, essentialism and theories of political equality and democracy. The purpose of engaging in such an endeavour, on the part of the authors considered, was invariably to try to find comprehensive rationales to understand electoral bribery in the abstract, in the hope of stabilising normative judgements drawn from the concept.

As an act of reflection, in particular of questioning why, using theoretical language, we maintain intuitively and historically strong prohibitions on crude vote buying, the exercise is interesting. Lehoucq’s comment that normative reflection reveals that vote-buying is not always a ‘bad’ activity can be read two ways. One, constructively, is that intuitive repulsion to the idea of trading in votes may give way to a realisation that some such trades may be empowering: vote-swapping for instance, or metaphorical vote-buying when it deals marginalised groups seats into the policy game.

A second way to read Lehoucq’s comment, however, is that normative reflection may be too abstracted for its purpose. For example, if one starts from the narrow efficiency-oriented premises of classical law and economics, one might well conclude, as Kochin and Kochin do, that even crude-buying ‘can only improve the welfare of voters’, if only organisational and transactional costs of building broad-based coalitions of vote-buyers to counter wealthy and power special interests could be covered.759 That this offends both our intuitions, and several centuries of stable law, is not a guarantee that such conclusions are untenable, but at least a clear sign of how abstract reasoning can fail to intersect with practical reasoning.

For all that it illuminates in terms of a philosophical exercise, high-level normative reflection of the kind outlined in this chapter does not do the work that its authors ultimately hope for, which is to resolve the paradoxes about why some forms of vote buying are accepted and others are not (though it does generate the – unsurprising -

759 Kochin and Kochin, above n 609, 647.
consensus that crude vote-buying is invariably wrong but metaphorical vote-buying generally ok). Such theorising raises plenty of interesting questions, but few answers. For instance, it seems uncertain if voters targeted by vote-buying are exploited, or favoured, or whether metaphorical ‘bribes’ are disastrous for good government or a fair way of resolving competing interests. Nor does normative reflection provide clear signposts to the practical or law reform quandary at the intersection of law and politics in this area, namely where to draw the line in relation to new and evolving practices, such as preference and lobby-group deals, vote-swapping and so on. In short, such theories fail to give a complete and satisfying explanation of the field of electoral bribery, because they are too removed from the legal framework and contingencies of political development in which the field has evolved and must work.

Electoral bribery, as the judges have reminded us for several centuries, is a species of corruption, where the term ‘corruption’ is not to be understood in a reified way. Corruption, in the sense of an evil in itself, the corruption of some higher ideal (of good governance, or of the sacred nature of the ballot) is in fact neither an element of the law, nor its quest. A sense of guilt or absolute shame, is not a requisite of the wrong of electoral bribery. The wrong simply lies in the fact of bribery, meaning an inappropriate benefit, unduly influencing or ‘buying’ electoral support. To reprise Lowenstein, the requirement that the benefit be ‘corruptly’ offered is not entirely a legal redundancy, but it is certainly not a true element of the offence. Rather it is a reminder to focus judgement on the need for a finding of ‘wrongfulness’, so that the offence is not found whenever one finds a benefit being offered to influence electoral conduct. It ‘requires the application, implicitly or explicitly, of normative political standards.’\(^{760}\) In short, it is stigmatic, but not necessarily in the sense of an absolute or moral judgement or condemnation.

My scepticism about the value of abstracted philosophical or econometric normativism shorn of attention to contextualised political and legal standards should not be mistaken for a common lawyer’s head-in-the-sand particularism. Rather, it is recognition that the interest of the law, together with the interest of the realm it is intervening in, namely the art of politics, is more pragmatic than the interests of

\(^{760}\) Lowenstein, above n 477, 798-9. Emphasis added.
abstract theory. Theory, by contrast, is engaged in the search for deeper moral (much liberal political philosophy and constitutionalism is essentially moralising) or scientific (inasmuch as economics lays claim to this) ground to which to tether both law and politics.

Nor is my position anti-theoretical. Jurisprudence, understood as the working through of legal concepts, is not a game of doctrinal leap-frog, of judges muddling from case to case intuiting the winds of ‘common sense’ and academics seeking to plot, or force, those scattered judgments into neat grids. Legal reasoning, to amount to reasoning at all, whether it be the analysis of a court’s judgment, discussion of the outer contours of a legal concept such as ‘electoral bribery’ or the critique of the practical interplay of law and politics, needs to have a strong sense, if not a complete theory, of its disciplinary purposes and limits, and of the terrain of regulation. In this sense however, legal reasoning is distinct from the approaches adopted in most of the literature reviewed earlier in this chapter; which is a priori analysis, rooted in assumptions drawn from political philosophy, economic analysis or essentialist ontologies, that is drawn from outside legal and political history and practice.

**Law’s Judgement and Method at the Intersection of Law and Politics**

The disciplinary purpose of electoral bribery as a legal question is, ultimately, to judge political conduct, specifically the behaviour and activities of political actors when they seek to attract electoral support or gain electoral advantage. The first limit in this regard which the law must recognise is that it is not a product of, let alone a sensible conduit, for either the normative conclusions or reconceptualisation of elections that is a hallmark of the abstract thinking I have just described.

Nor is the law, in its relationship to politics, a micro-manager of the ethicality of electoral conduct. It is rarely even a direct prescriptor of such conduct. The central concern of electoral law, taken as a whole, is to secure a framework for the independent administration of ‘free and fair elections’, and not to prescribe a code of electoral conduct. (To do otherwise, the law would risk impinging on political freedom.) In regulatory terms, campaign offences are, properly understood, at most a
backstop. Electoral bribery law becomes a stoplight with three modes, red, amber and green. Red for ‘no go’, amber for ‘dubious, proceed with caution, expect some ethical criticism’, green for ‘ok’.

The methodological theme underlying this thesis, therefore, is the realisation that law is to be understood primarily as an instrument of judgement of conduct. It evolves over time, in tandem with such conduct, in the context of particular circumstances and forces. Hence, throughout in this thesis, we have attended very closely to the detail of political events and legal debates in the evolution of electoral bribery regulation as it was received and as then developed in Australia.

Through the mist of shifting electoral rules, campaign practices and technologies and even conceptions of the purpose of elections and democratic ideals, the ultimate role of the law has remained as a cipher for assessments of political activity that unacceptably offends contemporary understandings of what can or cannot be ‘bought’ or ‘sold’ in the electoral sphere. This will seem a modest aim for an area of law that most people assume is a marker of a serious form of ‘corruption’, in the sense of political immorality.

In method and tenor, this thesis is closer to Lowenstein’s ‘intermediate theory of politics’, and Minson’s rendering of ‘office’ as a question of civility, than to the more abstract analyses in the foregoing part of this chapter. Lowenstein’s topic is ‘political bribery’ rather than electoral bribery. He cites as illustrations, to define his field of study, examples of pressure on politicians as such (although there is an overlap with examples discussed in Chapters Four and Five of this thesis to the extent that such pressure can occur in the context of parliamentary or lobby group deals in which the politician is seeking to win electoral support or advantage.) The parallel between this thesis and Lowenstein’s article however is not in any overlap between Lowenstein’s topic and mine, but in method and more particularly the level of focus. Lowenstein’s concept of the intermediate embraces questions such as:

Given that most public officials are neither saintly nor depraved, how should we like them to behave? Given that public officials have ambitions,
desires for security, and other personal goals, to what reasonable standards should we like them to adhere? [What pressures are tolerable or improper?] To what extent does the structure of incentives and disincentives created by our political system channel official behavior in the preferred direction?\textsuperscript{761}

In doing so, he explicitly eschews ‘loftier questions of political theory’ such as ‘What are the ends of the state? When is authority legitimate? What is a representative, and how should a representative act?’\textsuperscript{762} Lowenstein’s project thus differs from those surveyed in this chapter, in being less of a quest for generalised understandings and solutions in normative theories of political representation and governance, and more grounded in what he dubs an ‘intermediate theory of politics’ (akin to what Professor Twining has called ‘middle-order’ theorising).\textsuperscript{763} In doing so, I accept, along with Lowenstein, the inescapability of normative judgements, but not those grounded ‘in comprehensive political and ethical theories’.\textsuperscript{764}

Minson, in a not dissimilar manner, resurrects the concept of political ‘office’ as a useful way of understanding public roles and the desire to regulate them, but bases this on notions of civility, rather than a set of absolute, and potentially unattainable duties, derived from abstract political philosophy and morality. As we have seen in this chapter, this notion is not unduly abstract. Indeed it has a practical orientation. It gave us numerous suggestions as to how metaphorical vote-buying should be restrained.

\textsuperscript{761} Ibid, 784-5.

\textsuperscript{762} Ibid, 784. In saying this, Lowenstein’s project is more ambitious, in the sense of constructionist, than this thesis. He is not engaging in historical jurisprudence or case analysis, but a search for a ‘coherent law of bribery’ (at 788).

\textsuperscript{763} William Twining, ‘General Jurisprudence’, Tilburg Lectures 2000-1
<http://www.ucl.ac.uk/laws/jurisprudence/docs/twi_til_1.pdf>

\textsuperscript{764} Lowenstein, above n 477, 844.
Summary of Thesis Insights

The core of the thesis began with a lengthy survey of the historical development of electoral bribery law, in their heyday of crude vote-buying. It was discovered that trafficking in votes and widespread treating arose as an alternative to the outright buying and selling of seats. It did not arise in a cultural vacuum, however, but out of paternal, even feudal senses of reciprocation. Such conduct was always subject to a legal cloud, in the name of ‘free and fair elections’, but for centuries legislative prohibitions had little effect on vote-buying. Over time, however, practical considerations such as its cost and effect on electoral competition (something that itself had to evolve as parliamentary service became less a burden and more an honour and opportunity) came to bear. A concerted ‘war’ on bribery was waged in the second half of the 19th century, harnessing various reforms, notably the secret ballot, independent election courts that developed a substantial body of doctrine, the mass franchise, and expenditure limits. Combined with changes in electoral culture, including attitudes towards and emancipatory hopes for the ballot, this helped bury the practice of widespread crude bribery.

From the perspective of Australian electoral history, it was then shown that vote-buying was not a problem on such a scale as in Britain, however treating and wagering in particular were at least of regionalised concern. Federation in 1900 was accompanied by reforming electoral legislation, but although electoral bribery rules featured heavily in numerical terms in the first Commonwealth Electoral Act, debates tended to assume that vote-buying was dead. Very few cases arose in Australia in the first three-quarters of last century, and attention focussed on curios such as the degree to which the black-letter law still impugned treating – an issue of judgement of electoral conduct, but closer to questions of the ‘manner’ (or style) of electioneering than any judgement about the legality of the substance of campaign practices. Although the legal prohibition in Australian law was modernised and re-written so that it clearly applied to all manner of electoral conduct (eg influencing preference, candidature and electoral support decisions) and not just individual voting decisions, for much of the last century the legal imagination slumbered. It seemed to assume
that the 19\textsuperscript{th} century paradigm of bribery – individual vote-buying – was the only way in which electoral support was bought and sold.

But electoral politics reshapes itself, not to adapt to legal norms but to changing technologies and dynamics of campaigning. The ‘buying’ of electoral support moved from the ‘retail’ to the ‘wholesale’. The mass electorate and media, centralised professionalised party structures, and the importance of preferences to Australian elections are all key elements in the framework that shapes those dynamics. Unsurprisingly, as a result a variety of deals that implicate electoral bribery law have come to light and prominence. These range from inter-party conduct involving preferences, to arrangements between politicians and the media and lobby groups, and arrangements and even payments involving parties, the media and candidates. These deals are linked by the fact involve horizontal relations between electoral actors, rather than vertical relations between political actors and electors directly.

An analysis of parliamentary deals designed to achieve electoral advantage however informs the development of ‘political currency’ as a conceptual tool to help rein in the offence of electoral bribery. Political conduct that involves trading like-with-like (eg preference swaps, or parliamentary office for parliamentary support) does not amount to the unlawful purchasing of support. This allows the law to respect the political sphere, and has some philosophical justification in theories about commensurability. It enables politicians to be politicians, a point missed by the sometimes faux distinction between public-mindedness and private gain found in the modern notion of corruption, which is drawn more from a traditional public service ideal than one sensitive to the art of politics, infused as it is with deal-making and political ambition.

The thesis then expanded its focus to the mass swaying of votes through pork-barrelling and metaphorical ‘bribes’. Whilst acknowledging the legal and political science arguments why public policy promises are not electioneering offences, the rhetorical critique of such practices as the functional equivalent of vote-buying was identified and unpacked. Such activity was found to be linked, in practical terms, to broader concerns about the misuse of the spoils of office and campaign finance more generally. The irony that the secret ballot may have done much to encourage voters
to accentuate self-interest, and hence encourage metaphorical bribery, was identified. This insight was then linked to concerns that an over-emphasis on elections as a market, where voting is transactionalised, risks accelerating certain trends, such as towards voter disengagement or to the down-playing of expressive and ideological aspects of electoral conduct.

**The Potential for Future Research and Law Reform versus ‘Fuzzy Law’**

It might be theoretically possible to devise social-science projects to empirically test some of the claims made or mentioned in this thesis, but self-reporting about electoral motivations is notoriously unreliable. Certainly studies, for instance, of the prevalence, timing and content of things like preference deals, would be a valuable addition to our understanding of contemporary campaigning, and a basis for any law reform consideration of that issue. Or, we could seek to chart the degree to which campaigning - and electors’ responses to campaigning - oscillates between metaphorical ‘bribery’ in times of peace or prosperity, and say ideology or national identity at times of insecurity or change.

What I would like to see, however, is not so much an agenda for future research, as a greater awareness and sensitivity of the question of electoral bribery. That would involve a realisation on the part of public law scholars, media commentators, political actors and the electorate generally, of the nuances of the concept and its centrality (rather than marginality) to questions of political conduct. Its importance lies in the fact that it captures our sense of unease with the tendency for electoral competition to slide into patterns of influences and lures which amount to ‘buying’ support. In doing so, it highlights not so much our aversion to market forces in political activity, as the fear that such forces will overwhelm other values in electoral politics and lead to conduct which leaves little room for real respect or civility between the governed and those who seek to govern.
This thesis is not a law reform exercise, although occasionally within it I have noted areas deserving of clarification,\textsuperscript{765} or strengthening.\textsuperscript{766} In attending to the details of case studies, readers will likely identify particular areas where the law’s application may warrant clarification.\textsuperscript{767} Electoral authorities could also be less timid in respect of investigating and petitioning or prosecuting examples of the buying of electoral support. Without case law, the judicial apparatus cannot cast light on the line between acceptable and improper influence, for example, in instances of cash-for-preferences, or secret deals with lobby-groups or undue media pressure.

A thesis masquerading as a law reform exercise in an area such as this would, in any event, be otiose. Parliament ultimately controls electoral reform; indeed Federal Parliament has a standing committee to monitor and report on legislative amendments. Parliament is full of politicians. Politicians work under the shadow of electoral bribery law more than anyone else. If politicians believe, say following the Swan imbroglio that electoral bribery law needs to be clarified in its application to preference deals, they can do so at the stroke of a pen. Indeed there are fewer legislative impediments in this area of the law than any other, since the conduct being regulated is just as likely to be that of one side of politics as another: ie there is little partisan difference between politicians in how they would conceive of the issues.

However it is undertaken, any such reform would in any event be piecemeal. There is no magic ingredient to the age-old black letter law definition of electoral bribery as the wrongful offering of an undue benefit to influence electoral conduct. One lesson from this thesis is that new questions will arise as new political practices evolve or come to light, not least as ‘deal-making’ is central to politics. Any law reform exercise would be never-ending.

\textsuperscript{765} Eg, that the law should explicitly deter inducements to non-enrolment and non-voting (Chapter Three above, text at nn 319-20 and following).

\textsuperscript{766} Eg higher maximum penalties may be warranted at the Federal level, including automatic disenfranchisement of offenders (cf discussion in Chapter Three above, text at nn 294-300) and that the law should extend bribery to party pre-selections (cf Chapter Four above, text at nn 447-8).
The AEC, interestingly, has recommended it may not be worthwhile tinkering with the legal definition of electoral bribery, even though its legal formula at times seems vague. This recommendation was made in relation to treating, something about which it would be easy to find a political and social consensus today (refreshments at a modest level, even including alcohol, are acceptable tokens of hospitality and should not be deterred by bribery law). The recommendation was informed by a conservative approach to law reform, ie don’t change anything if you can’t be certain how the amendment will be read.\textsuperscript{768}

There is a broader, pragmatic reason to not try to reinvent the definition of electoral bribery, which has been averted to in this thesis, especially in Chapter Six. This is what I have elsewhere dubbed as ‘fuzzy law’.\textsuperscript{769} Whilst practising lawyers and politicians alike crave bright-line rules to give certainty to their work, rules of that sort may constrain more than they enlighten. Even in the ‘war’ on bribery in the 19\textsuperscript{th} century, as we have seen, whilst a mountain of doctrine grew up, there were still key issues on which the law necessarily vacillated. One of these was the extent to which the action of another was to be attributed to a candidate via ‘agency’ (it is less of an issue today, as parties and campaigns are highly centralised and professionalised). A corollary of this is the remedy – whether the seat is necessarily lost if the bribery were minor in nature or extent. A third is what types of advantages are too diffuse or intangible to be ‘benefits’. Without flexibility in these definitions, however, the justice of individual cases could not be easily embraced. And if, as argued here, electoral bribery is not so much a condemnation of heinous corruption, but an adaptable legal concept that works in tandem with evolving conceptions of propriety in political conduct, such fluidity in legal definition is essential.

Such ‘fuzzy law’ may, in the end, play a role in the extra-legal work that a concept such as electoral bribery does. It can act as a leavener, a marker of the seriousness of debates about campaign ethics and as an element in self-regulation. (Self-regulation

\textsuperscript{767} Compare Hughes, above n 3, 222-3, which presents a list of ‘objectives’ that a committee reviewing the law in Australia might adopt.

\textsuperscript{768} See discussion in Chapter Three above, text at nn 364-6.

\textsuperscript{769} Orr, above n 27, 141-2.
is ultimately the primary form of regulation of bribery, given the enforcement difficulties of gathering evidence,\footnote{Most inducements being done privately. And even when the offeror and offeree are not in cahoots, the offeree may be reluctant to give evidence or ‘dob’ in someone with whom they have had previous political relationships (cf the Windsor claims, Chapter Four above, n 524.)} of authorities being reluctant to bring prosecutions,\footnote{Consider the lack of official action in the deals and arrangements discussed in Chapter Four, extending even to a reluctance to investigate allegations made publicly (such as in the Jones/Laws’ imbroglio).} and the difficulties in mounting civil petitions.\footnote{Such as cost, highly truncated time limits (eg see Chapter Three above, text at nn 258-9) and judicial attitude (cf McGrath’s comments at n 337.).} If not misused as a cynical rhetorical weapon, it may act as a civilising influence on electioneering. Electoral bribery understood as a legal concept – rather than as a serious but rarely prosecuted offence - encapsulates the fears of electoral politics being unduly reduced to a market where electoral support is bought and sold. In this role, the purpose is not to neatly define what types of deals or offers are legal or not, but to draw attention to questions about the desirability of our conduct as either political actors or electors.
Appendix One

Current Australian Provisions

Extracted below is a sample of three provisions circumscribing electoral bribery or treating in Australia. They illustrate the different drafting styles from modern (Commonwealth) to traditional (NSW) to spartan (SA).

Following that are tables listing the key provisions in relation to such offences covering both parliamentary elections and referenda in Australia.

Commonwealth Electoral Act 1918 (Cth)

Bribery

326 (1) A person shall not ask for, receive or obtain, or offer or agree to ask for, or receive or obtain, any property or benefit of any kind, whether for the same or any other person, on an understanding that:

(a) any vote of the first-mentioned person;
(b) any candidature of the first-mentioned person;
(c) any support of, or opposition to, a candidate, a group of candidates or a political party by the first-mentioned person;
(d) the doing of any act or thing by the first-mentioned person the purpose of which is, or the effect of which is likely to be, to influence the preferences set out in the vote of an elector; or
(e) the order in which the names of candidates nominated for election to the Senate whose names are included in a group in accordance with section 168 appear on a ballot paper;

will in any manner, be influenced or affected.

Penalty: $5,000 or imprisonment for 2 years, or both.

(2) A person shall not, in order to influence or affect:

(a) the vote of another person;
(b) any candidature of another person;
(c) any support of, or opposition to, a candidate, a group of candidates or a political party by another person;
(d) the doing of any act or thing by another person the purpose of which is, or the effect of which is likely to be, to influence the preferences set out in the vote of an elector; or

(e) the order in which the names of candidates nominated for election to the Senate whose names are included in a group in accordance with section 168 appear on a ballot paper;

give or confer, or promise to offer to give or confer, any property or benefit of any kind to that other person or to a third person.

Penalty: $5,000 or imprisonment for 2 years, or both.

(3) This section does not apply in relation to a declaration of public policy or a promise of public action.

The New South Wales legislation, in contrast, reeks of antiquated drafting, and even retains two long-winded sections dealing separately with treating:

Parliamentary Electorates and Elections Act 1912 (NSW)

Offence of ‘treating’

149 Every candidate at an election who corruptly, by himself or herself or by or with any person, or by any other ways or means on his or her behalf, at any time either before or during any election, directly or indirectly gives or provides, or causes to be given or provided, or is accessory to the giving or providing, or pays or allows any person to pay on his or her behalf wholly or in part any expenses incurred for any meat, drink, entertainment, or provisions to or for any person, or horse or carriage hire or conveyance for any voter whilst at such election or whilst engaged in coming to or returning from such election, in order to ensure or forward his or her election, or for the purpose of corruptly influencing such person or any other person to give or refrain from giving his or her vote at such election, or on account of such person having voted or refrained from voting, or being about to vote or refrain from voting at such election, shall be deemed guilty of the offence of treating; and every elector who corruptly accepts or takes any meat, drink, refreshment, or provisions, horse or carriage hire or conveyance, so paid for, given, or provided shall be incapable of voting at such election.

Penalty for ‘treating’

150 Any person who is guilty of the offence of treating as defined in section 149, or who gives or causes to be given to any elector during any election on account of such election
having voted or being about to vote, any meat, drink, or entertainment by way of refreshment, or any money or ticket to enable such elector to obtain refreshment, shall be liable to a fine not exceeding 100 penalty units, or to imprisonment for a term not exceeding 3 years, or to both such fine and imprisonment; and shall also be incapable of voting at such election.

By contrast, the South Australian provision is a paragon of succinctness:

_Electoral Act 1985 (SA)_

**Bribery**

109. (1) A person must not offer or solicit an electoral bribe.

Maximum penalty: Imprisonment for 7 years.

(2) In this section—

"bribe" does not include a declaration of public policy or a promise of public action;

"electoral bribe" means a bribe for the purpose of—

(a) influencing the vote of an elector; or

(b) influencing the candidature of any person in an election; or

(c) otherwise influencing the course or result of an election.

**Anti-Bribery Provisions Currently Governing Parliamentary Elections in Australia**

The following table sets out the current provisions concerning bribery and treating at parliamentary elections in Australia, by jurisdiction. The ‘Other’ provisions are specific sections concerning the powers of courts of disputed returns when bribery or treating involving a successful candidate is involved, and the effect of a finding or

---

773 In those jurisdictions whose criminal law was codified along the lines of Griffith’s criminal code (Queensland, Western Australia, Tasmania and the Northern Territory), electoral offences were originally contained in those codes, as a species of offences against the administration of law, justice and public affairs (akin in the case of bribery to corruption of public officials). In Queensland, those provisions were removed to the electoral act, but have now been restored to the code. In Western Australia and Tasmania, the code provisions remain, but have no application to parliamentary elections.
conviction of corrupt practices on a candidate or member’s qualifications to sit or stand.

<table>
<thead>
<tr>
<th>Jurisdiction and Head Legislation</th>
<th>Bribery</th>
<th>Specific anti-Treating provision</th>
<th>Explicit Public Policy exception</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commonwealth</td>
<td>s 326</td>
<td>-</td>
<td>s 326(3)</td>
<td>s 362 (court power). s 386 (disqualification)</td>
</tr>
<tr>
<td>Commonwealth Electoral Act 1918</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New South Wales</td>
<td>s 147</td>
<td>ss 149, 150</td>
<td>-</td>
<td>s 164 (court power). ss 13A, 14 Constitution Act 1902 (disqualification)</td>
</tr>
<tr>
<td>Parliamentary Electorates and Elections Act 1912</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Victoria</td>
<td>s 151</td>
<td>-</td>
<td>s 151(4)</td>
<td>s 140</td>
</tr>
<tr>
<td>Electoral Act 2002</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Queensland</td>
<td>s 98C Criminal Code</td>
<td>-</td>
<td>-</td>
<td>s 64 Parliament of Queensland Act 2001 (disqualification)</td>
</tr>
<tr>
<td>Electoral Act 1992</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Western Australia</td>
<td>ss 181, 182</td>
<td>s 182</td>
<td>s 185</td>
<td>s 164 (court power).</td>
</tr>
<tr>
<td>Electoral Act 1907</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

774 These do not relate specifically to electoral offences, but to ‘infamous crimes’ or offences punishable by 5 years or longer. The latter does not catch electoral bribery, but the former probably does, for as the NSW Attorney-General suggests, ‘infamy’ is aimed at ‘dishonesty and breach of public trust’: Jeff Shaw, ‘Disqualification of Members of Parliament’ (2002) 11 Public Law Rev 83, 85.

775 There is no specific direction to a court of disputed returns in Queensland regarding corrupt practices, nor conversely a rule that ‘the result was likely to have been affected’. But since the candidate would be disqualified if convicted, and following the common law rule that a single act of bribery attributable to a candidate would oust her, a court of disputed returns would most likely exercise its broad equitable jurisdiction to unseat.
<table>
<thead>
<tr>
<th>State</th>
<th>Section</th>
<th>Section</th>
<th>Section</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>South Australia</td>
<td>s 109</td>
<td>-</td>
<td>s 109(2)</td>
<td>No special court power. s 133 (disqualification)</td>
</tr>
<tr>
<td>Electoral Act 1985</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tasmania</td>
<td>s 206</td>
<td>s 207</td>
<td>s 206(3)</td>
<td>ss 222 (court power), 224 (votes to be struck off). s 250 (disqualification)</td>
</tr>
<tr>
<td>Electoral Act 1985</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(nb being superseded by</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Electoral Act 2004 ss</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>187-188 (offences))</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Australian Capital Territory</td>
<td>s 285</td>
<td>-</td>
<td>s 285(2)</td>
<td>ss 266, 267 (court power). s 103(4) (disqualification)</td>
</tr>
<tr>
<td>Electoral Act 1992</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Anti-Bribery Provisions Currently Governing Referenda in Australia

Nb the ‘Other’ column is absent in relation to referenda. At a referenda, questions of disqualification cannot arise, as there are no candidates. In theory a referenda can be challenged on petition, but a court is likely to accept that only if the result was likely to have been affected. Given that referenda are held across the widest possible electorate (ie the whole jurisdiction voting as one) such an outcome is very unlikely, as the result would have to have been perilously close, or the bribery exceedingly widespread.

<table>
<thead>
<tr>
<th>Jurisdiction and legislation</th>
<th>Bribery</th>
<th>Treating</th>
<th>Explicit Public Policy exception</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commonwealth Referendum (Machinery Provisions) Act 1984</td>
<td>s 119</td>
<td>-</td>
<td>s 119(3)</td>
</tr>
</tbody>
</table>

---

776 Someone convicted of bribery at a referenda may thereby disqualify themselves from standing at a later election: this would depend on whether the disqualification provisions in the table above covered only electoral bribery, or bribery at referenda.

<table>
<thead>
<tr>
<th>State/Region</th>
<th>Act/Provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>New South Wales</td>
<td>Constitution Further Amendment (Referendum) Act 1930 s 5 (picks up Parl. election provisions)</td>
</tr>
<tr>
<td>Victoria</td>
<td>Electoral Act 2002 Part 9A s 177B (picks up Parl. election provisions)</td>
</tr>
<tr>
<td>Queensland</td>
<td>Referendums Act 1997 Criminal Code s 64</td>
</tr>
<tr>
<td>Western Australia</td>
<td>Referendums Act 1983 ss 41, 42</td>
</tr>
<tr>
<td>South Australia</td>
<td>No standing legislation (referenda dealt with ad hoc)</td>
</tr>
<tr>
<td>Tasmania</td>
<td>Referendum Procedures Act 1994 s 106</td>
</tr>
<tr>
<td>Australian Capital Territory</td>
<td>Referendum (Machinery Provisions) Act 1994 s 17 (picks up Parl. election provisions)</td>
</tr>
<tr>
<td>Northern Territory</td>
<td><em>Referendums Act 1998</em></td>
</tr>
</tbody>
</table>
Appendix Two

Illustrations

List of illustrations:

- William Hogarth, *An Election I: An Election Entertainment*
- William Hogarth, *An Election II: Canvassing for Votes*
- Liberal Party advertisements, 1977 Federal Election

(Nb these illustrations are not reproduced in the electronic version of this thesis.)
Table of Authorities

LEGISLATION

Australia

Aboriginal and Torres Strait Islander Commission Act 1989 (Cth).
Broadcasting Services Act 1992 (Cth).
Commonwealth Electoral Act 1902 (Cth).
Commonwealth Electoral Act 1905 (Cth).
Commonwealth Electoral Act 1911 (Cth).
Commonwealth Electoral Act 1918 (Cth).
Commonwealth Electoral Act 1946 (Cth).
Commonwealth Electoral Act 1949 (Cth).
Commonwealth Electoral Act 1962 (Cth).
Commonwealth Franchise Act 1902 (Cth).
Constitution (Cth).
Constitution Act 1902 (NSW).
Constitution Act 1934 (SA).
The Constitution Act Amendment Act 1956 (Vic).
The Constitution Act Amendment Act 1958 (Vic).
Constitution Further Amendment (Referendum) Act 1930 (NSW).
Criminal Code (Cth).
Criminal Code (NT).
Criminal Code (Qld).
Criminal Law Consolidation Act 1935 (SA).
Crimes Act 1914 (Cth).
Electoral Act 1856 (Tas).
Electoral Act 1856 (Vic).
Electoral Act 1895 (WA).
Electoral Act 1896 (SA).
Electoral Act 1896 (WA).
Electoral Act 1899 (WA).
Electoral Act 1907 (WA).
Electoral Act 1985 (SA).
Electoral Act 1985 (Tas).
Electoral Act 1992 (ACT).
Electoral Act 1992 (Qld).
Electoral Act 2002 (Vic).
Electoral Act 2004 (NT).
Electoral Act 2004 (Tas).
Electoral Act and Other Acts Amendment Act 2001 (Qld).
Electoral (Amendment) Bill 1880 (SA).
Independent Commission Against Corruption Act 1988 (NSW).
Local Government Act 1934 (Qld).
Parliament of Queensland Act 2001 (Qld).
Parliamentary Electorates and Elections Act 1912 (NSW).
Parliamentary Entitlements Regulations 1997 (Cth).
Referendum Procedures Act 1994 (Tas).
Referendums Act 1983 (WA).
Referendums Act 1997 (Qld).
Referendums Act 1998 (NT).
Secret Commissions Act 1905 (Cth).

United Kingdom (chronologically ordered)

The Statutes of Westminster, 1275  (3 Edward I, c 5).
7 Henry IV, c 15.
8 Henry VI, c 7.
23 Henry VI, c 14.
An Act for preventing Charge and Expence in Elections of Members to serve in Parliament, 1695 (7 & 8 William III, c 4).

An Act for the more effectual preventing of Bribery and Corruption in the Elections of Members to serve in Parliament, 1729 (2 George II, c 25).

An Act for better securing the Independence and Purity of Parliament, by preventing the procuring or obtaining of Seats in Parliament by Corrupt Practices, 1809 (49 George III, c 118).

An Act to amend the Representation of the People in England and Wales 1832 (2 William IV c 45); An Act to amend the Representation of the People in Scotland 1832 (2 & 3 William IV c 45); An Act to amend the Representation of the People in Ireland 1832 (2 & 3 William IV c 88) aka The (Great) Reform Acts.

An Act for better Discovery and Prevention of Bribery and Treating at the Election of Members of Parliament, 1842 (5 & 6 Victoria, c 102).

An Act for the Disfranchisement of the Borough of Sudbury, 1844 (7 & 8 Victoria, c 53).

An Act to Disfranchise the Borough of Saint Alban, 1852 (15 & 16 Victoria, c 9).

Corrupt Practices Prevention Act 1854 (17 & 18 Victoria, c 102).

An Act to continue and amend the Corrupt Practices Prevention Act 1854, 1858 (21 & 22 Victoria, c 87).

The Representation of the People Act, 1867 (30 & 31 Victoria, c 102); The Representation of the People (Scotland) Act, 1868 (31 & 32 Victoria, c 48); The Representation of the People (Ireland) Act, 1868 (31 & 32 Victoria, c 49) aka the Second Reform Acts.

The Parliamentary Elections Act 1868 (31 & 32 Victoria, c 125).

An Act to disfranchise the Boroughs of Bridgewater and Beverley, 1870 (33 & 34 Victoria, c 21).

An Act to disfranchise the Boroughs of Sligo and Cashel, 1870 (33 & 34 Victoria, c 38).


Parliamentary Elections and Corrupt Practices Act 1879 (42 & 43 Victoria, c 75).

Corrupt and Illegal Practices Prevention Act 1883 (46 & 47 Victoria, c 51).
Redistribution of Seats Act, 1885 (48 & 49 Victoria, c 23).
The Representation of the People Act 1918 (7 & 8 George V, c 64).

**CASE LAW**

**Australia**
(including Parliamentary Records of Petitions)

Aubigny Election Petition; Cooke v Perkins (1883-4) Queensland Legislative Assembly, Committee of Elections and Qualifications.
Bowen Election Petition; Long v Beor (1877) Queensland Legislative Assembly, Committee of Elections and Qualifications.
Bowning v Wells (Unreported, South Australian Court of Local Government Disputed Returns, No 1 of 1978).
Bray v Walsh (1976) 15 SASR 293.
Bridge v Bowen (1916) 21 CLR 151.
Brighton Election Petition; Mugliston v Dillon (1891) 13 ALT 44.
Briginshaw v Briginshaw (1938) 60 CLR 336.
Cameron v Fysh (1904) 1 CLR 314.
Cairns Election Petition; Kingsford v Wimble (1888) Queensland Legislative Assembly, Committee of Elections and Qualifications.
Chanter v Blackwood No 1 (1903) 1 CLR 39.
Re Collins; ex parte Hockings (1989) 167 CLR 522.
Crafter v Webster (No 2) (1980) 23 SASR 321.
Crittenden v Anderson (Fullagar J, High Court as the Court of Disputed Returns, unreported, 23/8/1950).
Crouch v Ozanne (1910) 12 CLR 539.

Cumberland Election Petition; Brown v Urquhart (Tasmanian Supreme Court, The Mercury (Hobart), 15/2/1894, 4).

East Moreton Petition; Brookes v Edmondstone (1863) Queensland Legislative Assembly, Committee of Elections and Qualifications.


Flinders Electoral Petition; Forde v Lonergan [1958] Qd R 324.

Re Forrest [1993] 1 Qd R 378.

Greiner v ICAC (1992) 28 NSWLR 125.


Hudson v Lee (1993) 177 CLR 627.

Ithaca Election Petition; Webb v Hanlon (1939) St R Qd 90.


Kean v Kerby (1920) 27 CLR 449.


McIlwraith v Grimes (Interlocutory Appeal, Queensland Supreme Court, The Brisbane Courier, 3/10/1888).

Malone v Bird (unreported, Supreme Court of Queensland, 30/4/1994, GN Williams J).

R v Boston (1923) 33 CLR 386.


R v Etteridge and Hanson (Sentencing Remarks, Queensland District Court, Wolfe CJ, 20/8/2003).

R v Hanson [2003] QCA 488.

R v Rouse [1990] 1 Tas R 408.

R v Ward; ex parte Bowering (1978) 20 SASR 424.

R v White (1875) 13 SCR (NSW) 322.


In re Rapken; ex parte Stewart (1888) 14 VLR 317.

Scott v Martin (1988) 14 NSWLR 663.

Smith v Lavarch, High Court as the Court of Disputed Returns, petition noted in Commonwealth Parliament, Votes and Proceedings, VP 1987-89/98.


Tanti v Davies (No 3) (1996) 2 Qd R 602.


West Moreton Petition; Foole v O’Sullivan (1867) Queensland Legislative Assembly, Committee of Elections and Qualifications.

Wilkinson v Osbourne (1915) 21 CLR 89.


United Kingdom

Borough of Beverley (1869) 1 O’M & H 143.

Borough of Bewdley (1869) 1 O’M & H 16.

Borough of Blackburn (1869) 1 O’M & H 198.

Borough of Bradford (1869) 1 O’M & H 35.

Borough of Boston (1874) 2 O’M & H 161.

Borough of Cheltenham (1869) 1 O’M & H 62.

Borough of Gravesend (1880) 3 O’M & H 81.

Borough of Launceston (1874) 2 O’M & H 129.

Borough of Maidstone (1906) 5 O’M & H 200.

Borough of Plymouth (1880) 3 O’M & H 107.

Borough of Salford (1869) 1 O’M & H 132.

Borough of Salisbury (1883) 4 O’M & H 21.

Borough of Sandwich (1880) 3 O’M & H 158.

Borough of Shrewsbury (1870) 1 O’M & H 36.

Borough of Tamworth (1869) 1 O’M & H 75.

Borough of Taunton (1869) 1 O’M & H 181.

Borough of Wakefield (1874) 2 O’M&H 100.

Borough of Westbury (1869) 1 O’M & H 47.
Borough of Wigan (1869) 1 O’M & H 189.
Borough of Windsor (1873) 2 O’M & H 88.
Borough of Worcester (1906) 5 O’M & H 212.
East Division of the Borough of Nottingham (1911) 6 O’M & H 292
Eastern Division of Dorsetshire (1910) 6 O’M&H 22.
R v Jones (1999) 2 Crim App R 253
R v Tronoh Mines [1952] 1 All ER 697.
R v Vaughan (1769) 4 Burr 2494.
St George’s Division of the Borough of Tower Hamlets (1895) 4 O’M & H 89.
Simpson v Yeend (1869) LR 4 QB 626.
Woodward v Sarsons (1875) 10 LR CP 733.

New Zealand

The Bay of Islands Election Petition (1915) 34 NZLR 578.

United States

Porter v Bill Jones, Secretary of State 319 F 3d 483 (2003).
References

Monographs, Research Papers and Articles, Inquiry Submissions and Reports


Blackstone, 1 *Commentaries*. 


Edmund Burke, ‘Speech to the Electors of Bristol’, *Burke’s Works* (vol 1, 1854) 442.

WL Burn, ‘Electoral Corruption in the Nineteenth Century’ (1951) 4 *Parliamentary Affairs* 437.


Coke, 4 Inst 10.


Nancy Fraser, ‘Re-thinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy’ in Craig Calhoun (ed) *Habermas and the Public Sphere* (1992) 109.


Nick Greiner, ‘Statement of Nicholas Frank Greiner, AC, Bec (Hons) (Syd.), MBA (Harv.)’ to Queensland, Criminal Justice Commission, *Investigation into a Memorandum of Understanding between the Coalition and QPUE and an Investigation into an Alleged Deal between the ALP and the SSAA*, admitted as Exhibit 393 (21/8/1996).


Cedric Hampson QC, Submissions by Counsel Assisting to Queensland, Criminal Justice Commission, *Investigation into a Memorandum of Understanding between the Coalition and QPUE and an Investigation into an Alleged Deal between the ALP and the SSAA* admitted as MFI-A (26/8/1996).


Seymour M Lipset, Political Man (1960).


Amy McGrath, The Fraud of Votes (undated, approx 2002).


Queensland, Criminal Justice Commission, *Report on an Investigation into a Memorandum of Understanding between the Coalition and QPUE and an Investigation into an Alleged Deal between the ALP and the SSAA* (Dec 1996).


Queensland Legislative Assembly, *Report from the Committee of Elections and Qualifications in the Matter of the Petition against the Election and Return of the Sitting Members of the Electoral District of West Moreton* (17/10/1867).

Queensland Legislative Assembly, *Report from the Committee of Elections and Qualifications in the Matter of the Petition of Certain Electors of Aubigny against the Election and Return of Patrick Perkins Esquire, the Sitting Member for the Electoral District of Aubigny* (21/2/1884).

Queensland Legislative Assembly, *Certificate and Report by the Elections Judge in the Matter of the Petition of Richard Ash Kingsford against the Election and Return of Frederick Thomas Wimble, the Sitting Member for the Electoral District of Cairns with the Minutes of the Evidence Taken before the Tribunal*, (13/11/1888).


Tasmania, *Report of the Royal Commission into an Attempt to Bribe a Member of the House of Assembly; and Other Matters* (1991).


United Kingdom, Report of the Commissioners appointed to inquire into the existence of bribery in the borough of St Albans, Parliamentary Paper # 1431 (1852).

United Kingdom First Report of the Committee on Standards in Public Life, Cmnd 2850 (1995) (‘The Nolan Committee’).

United Kingdom, The Electoral Commission, Political Advertising: Report and Recommendations (June 2004).


**Media Releases, Reports and Programmes**


<http://www.abc.net.au/pm/content/2004/s1098936.htm>

<http://www.abc.net.au/pm/s217701.htm>

ABC Television, ‘Allegations of Bribery as Whale Sanctuary Vote Falls Short’,  
*Lateline*, 25/7/2001  
<http://www.abc.net.au/lateline/s335643.htm>

28/4/2004  
<http://www.abc.net.au/7.30/content/2004/s1096935.htm>

ABC Television, ‘Liberals Caught up in Tit-for-tat Electoral Rort Claims’, *The 7:30 Report*,  
4/12/2000  
<http://www.abc.net.au/7.30/s220123.htm>

ABC Television, ‘Preferential Treatment’, *The 7:30 Report*,  
27/11/2000  
<http://www.abc.net.au/7.30/s217353.htm>

<http://www.abc.net.au/mediawatch/transcripts/s1095116.htm>


Anon, ‘ATSIC Candidate Accused of Offering Cash for Votes’, *The Australian*,  
2/2/2000, 6.

Anon, ‘Ballot on the Box for Wannabe Politicians’, *The Canberra Times*, 30/6/2004,  
18.

Anon, ‘Electoral Commission Investigates Claims into Vote Buying in NT’, *ABC Online*,  
15/11/2002  

Anon, ‘Free Beer and Sausages could have Rigged Election’, *Ananova*, 27/3/2004


Mary-Louise O’Callaghan, ‘Solomon’s Bad-Penny PM’, *The Australian*, 18/12/01, 1.


**Other Sources**

Commonwealth, *Parliamentary Debates*.
South Australia, *Parliamentary Debates*.

*Matthew* 6, i-iii.
Discussion between the author and Antony Green, ABC Election Analyst, 27/7/2004.
Email communication from Professore Carlo Fusaro (Dipartimento diritto pubblico, Firenze) to the author, 6/4/2004.


Vote-swapping websites (not currently operational): <www.votexchange.com>,
<www.virtualvotesforNader.com>

Vote-swapping websites (operational at time of finalisation of thesis):
<http://www.votepair.org/>

Edible Ballot Society of Canada <http://edibleballot.tao.ca>