



AUSTRALIAN LABOR PARTY (NATIONAL SECRETARIAT)
SUBMISSION TO THE JOINT STANDING COMMITTEE ON ELECTORAL MATTERS
INQUIRY INTO THE CONDUCT OF THE 2016 FEDERAL ELECTION

PART A: ELECTORAL LAW REFORM

1. The ALP believes that elections and voting are essential to democracy.
2. Ensuring all Australians can exercise their democratic rights regardless of social class, race or background is an enduring Labor value.
3. The ALP supports reforms to strengthen Commonwealth electoral laws including:
 - a) Reducing the donation disclosure threshold from the current level of \$13,200 (indexed to inflation) to a fixed \$1,000;
 - b) Banning 'donation splitting' where donations are split between different branches of political parties and associated entities to avoid disclosure obligations;
 - c) Prohibiting the receipt of foreign donations;
 - d) Banning the receipt of anonymous donations above \$50;
 - e) Linking public funding to genuine campaign expenditure to prevent serial candidates making a windfall from standing for elections; and
 - f) Introducing new offences and increased penalties for abuses of the political disclosure regime.
4. The Rudd and Gillard Labor Governments introduced the Commonwealth Electoral Amendment (Political Donations and Other Measures) Bill into the Parliament to implement these commitments; however the Coalition blocked that legislation in the Senate.
5. Labor also attempted to amend the Commonwealth Electoral Amendment Bill 2016 to deliver these commitments in the 44th Parliament. These amendments were blocked when the Greens political party shamefully joined with the Coalition to defeat them in the Senate.
6. Labor supports in principle the implementation of 'real time' disclosure, subject to its feasibility being investigated by this Committee. Enhanced transparency and greater openness mitigates the risks of undue influence, and can increase public confidence in our electoral system and institutions.

7. Labor also believes that consideration should be given to tighter regulation of associated entities such as the Free Enterprise Foundation and the Millennium Forum.

PART B: CONDUCT OF 2016 FEDERAL ELECTION

Ensuring every citizen can exercise their democratic rights

8. In 2015 the AEC announced its intention to reduce the number of polling places by almost 10 per cent, with 730 polling booths closing.
9. One of the rationales for this change was the increase in number of electors casting their ballot prior to Election Day.
10. Whilst it is true that the proportion of the electorate accessing early voting is increasing, the ALP cautions against overstating the significance of this trend. Just as the proportion of electors who vote early is increasing, the enrolled population and the total number of voters is also growing.
11. To demonstrate this point, on Election Day the ALP received reports that at some booths voters queued for over two hours to cast their ballots.
12. The ALP encourages the committee to examine whether the AEC receives an adequate level of support and resources to ensure that every citizen can exercise their democratic rights.

Prioritising the count in close electoral divisions

13. Unsurprisingly given the outcome of the 2016 election, the time that elapsed between the close of polls and the conclusion of the count attracted significant public comment.
14. The ALP supports the efforts of the AEC to maintain and protect the integrity of the election process, and accepts that robust processes and systems are critical to this.
15. We note that this was even more the case in 2016 given the changes to the *Commonwealth Electoral Act* passed by the 44th Parliament barely three months before Election Day, which necessitated changes to the counting procedure for the Senate.
16. The ALP believes that in the days immediately following the election the AEC should consider prioritising the allocation of AEC staff and resources towards electoral divisions where the result is close or uncertain.

Scrutiny of provisional votes

17. The Committee will be aware that following the election, the AEC conducted a recount in the Division of Herbert.

18. During this process it became clear to the ALPs scrutineers that in certain circumstances the AEC rejected provisional votes of certain electors, despite there being no question that the person who claimed the provisional vote was the person on the roll and no evidence that the person had already voted.
19. The ALP will raise this issue directly with the AEC, as we believe that the *Commonwealth Electoral Act* does not permit the rejection of provisional votes in these circumstances.

PART C: TERMS OF REFERENCE

20. The ALP makes the below submissions in relation to the inquiry's specific terms of reference.

1(a): Authorisation requirements

21. The ALP complies with all current authorisation requirements.
22. Authorisation rules have been developed over time and in a piecemeal fashion. As a result, the rules are confusing and difficult to administer. There is an arguable case that the rules have not kept up with technological change, and are unfit for the digital age.
23. The ALP believes that any changes to authorisation requirements should be informed by some key principles:
- The purpose of authorisation requirements are to allow electors to identify the person responsible for printing or broadcasting electoral advertisements.
 - As far as possible, authorisation requirements should be 'format neutral' and should not vary in an arbitrary fashion depending on medium through which an advertisement is communicated.
 - Authorisation requirements should not interfere with the purpose of the advertisement, which is to communicate with electors.

Printed material

24. For example, if the ALP prints an electoral advertisement in hard copy it must be authorised according to the printed material rule under sub-section 328(1) of the *Commonwealth Electoral Act 1918*:

Authoriser's name + authoriser's full, day-time street address (not a post-office box), with suburb or locality + name of printer + printer's place of business (a full street address with suburb or locality of place where printing occurred, not a post-office box) at the end of the material.

25. However, if an identical advertisement is published online by uploading a PDF file of the advertisement to Facebook it does not need to be authorised, providing the ALP does not pay for the advertisement to be broadcast, pursuant to the internet rule under section 328A.

26. If the text of that advertisement is broadcast in an SMS message, it is not necessary to include an authorisation.

27. If that same advertisement is published in a newspaper it must instead be authorised according to the newspaper authorisation rule under sub-section 328(1)(a) and section 331 of the *Commonwealth Electoral Act 1918*:

Authoriser's name + authoriser's full, day-time street address (not a post-office box), with suburb or locality at the end of the ad + a headline stating "Advertisement" in letters no smaller than 10 Point above the advertisement.

28. If the newspaper advertisement is spread across two pages, then pursuant to subsection 328(1AB – 1AC) and section 331 of the Commonwealth Electoral Act, it must also carry the following on both pages:

Authoriser's name + authoriser's full, day-time street address (not a post-office box), with suburb or locality + a headline stating "Advertisement" in letters no smaller than 10 Point above the advertisement.

29. But that additional requirement will not apply if the advertisement:

a) Is contained within:

- i. A broken or unbroken border;
- ii. Broken or unbroken lines extending across, or partly across, the top and bottom of the advertisement; or
- iii. A broken or unbroken line extending along, or partly along, each side of the advertisement;

b) Or is printed so that to read one or more lines of the text of the advertisement it is necessary to read across both pages.

Audio visual material

30. If an electoral advertisement is broadcast on television, it must be authorised according to the television rule under sub-clause 4(2) of Schedule 2 to the *Broadcasting Services Act 1992*:

(Spoken): Name of the authoriser + name of the political party + town, city or suburb in which the principal office of the political party is situated.

(Printed on Screen): Name of the authoriser + name of the political party + town, city or suburb in which the principal office of the political party is situated + name of every speaker.

31. If an identical advertisement is broadcast at a cinema, it must instead be authorised according to the recorded video material rule:

(Printed on Screen) Authoriser's name + authoriser's full, day-time street address (not a post-office box), with suburb or locality at the end of the recording.

32. But if the same advertisement is broadcast online, it must instead be authorised according to the internet material rule under section 328A of the Commonwealth Electoral Act:

(Printed on webpage) Authoriser's name + authoriser's full, day-time street address, with suburb or locality that is located in Australia (not a post-office box).

Uniform authorisation rule

33. The ALP supports the implementation of a uniform authorisation rule which is format neutral.
34. A format neutral uniform authorisation rule would reduce the regulatory burden of authorisations on candidates, political parties and regulators such as the AEC and would be easier to understand and more predictable for electors.
35. The purpose of authorisation rules is to allow electors to identify the person responsible for printing or broadcasting the electoral advertisement.
36. The ALP believes that this requirement could be satisfied if all electoral advertisements should be authorised according to the following rule regardless of the medium in which the advertisement is published or broadcast:

Name of authoriser + Name of political party + full day time street address.

eg Authorised by Noah Carroll Australian Labor Party 5/9 Sydney Avenue Barton ACT

37. If the advertisement is broadcast in audio or audio visual format, the authorisation should also be "read out".
38. Authorisation requirements should not interfere with the purpose of the advertisement, which is to communicate with electors. Arbitrary rules which dictate the prominence or placement of an authorisation within an advertisement should be avoided.
39. The ALP believes it is unnecessary for printer details to be included in the authorisation. While in years past the details of the printer may have been necessary, this information

is no longer relevant in the digital age, when many advertisements are communicated electronically, and much physical printing is done in house.

40. Further, it is unlikely that electors would contact the relevant printing company if they were aggrieved by an electoral advertisement. In the ALP's experience, they are much more likely to contact the AEC or the political party responsible for the advertisement in question.

1(b): Truth in advertising laws

Constitutional validity is doubtful

41. The ALP has serious doubts about the constitutional validity of any proposed 'truth in advertising' law and has grave concerns about the potentially chilling effect on democracy.
42. There is a significant risk that any 'truth in advertising' laws may contravene the implied guarantee of free political communication first acknowledged by the High Court of Australia in *Australian Capital Television and Ors v Commonwealth* (1992) 177 CLR 106.
43. In *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, the High Court explained (at 560) that 'the *Constitution* necessarily protects the 'freedom of communication between the people concerning political or governmental matters which enables the people to exercise a free and informed choice at elections'.

Undemocratic and unworkable

44. Further, a truth in advertising law would have the potential to exclude some members of the Australian community from fully participating in the democratic process and have a generally chilling effect on democracy.
45. 'Truth in advertising' laws may become a 'lawyers' picnic' and create the risk that only well-resourced actors with access to expert legal counsel and professional communications advice will be free to participate in election campaigns.
46. This would be a repugnant state of affairs which is elitist and offends the universal franchise; a fundamental tenet of Australian democracy. The ALP believes that all Australians should have the same opportunity to participate in political debate – even if some may view their contributions as inarticulate or even irrational.
47. There are also serious questions about the basis upon which the 'truth' of a claim in an electoral advertisement would be determined'. Many claims in electoral advertisements constitute comment about the potential impact of a political party's policies on the Australian community, rather than purely factual statements.
48. For example, suppose the ABC Party published an electoral advertisement which claimed that "the XYZ Party's policies on childcare will make life more difficult for working

families". Whether or not an individual elector would agree that this statement was 'true' would depend on his or her subjective assessment of the impact of the XYZ Party's policy, and reasonable electors would reach differing views.

49. Other electoral advertisements make value judgments. For example, "the ABC Party has a positive vision for Australia's future which will make our country more prosperous". Or alternatively, "the Leader of the XYZ Party is out of touch". Value judgments such as these are a matter of legitimate opinion and are not capable of being assessed as simply 'true' or 'false'.

50. Adequate remedies exist for those who are aggrieved by electoral advertisements. For example:

- a) A person who believes that false claims in electoral advertisements have damaged his or her reputation may sue in defamation;
- b) A person who believes that an electoral advertisement vilifies another person or class of persons on grounds of race, gender or sexual orientation etc may pursue a claim under Federal and State/Territory anti-discrimination laws; and
- c) A person who believes an electoral advertisement breaches the criminal law may complain to the Police, as the Prime Minister famously did in his midnight press conference on election night in relation to the SMS messages concerning Medicare, although this was a peculiar development in the Australian context.

51. In a modern, strong, successful democracy such as Australia, political parties and those who have the ambition to lead our nation should have the wherewithal to withstand the rough and tumble of an election campaign.

52. Moreover, in a leading democracy such as Australia, political contests should not be determined by lawyers in courtrooms or by experts sitting in Government tribunals.

53. Rather, elections should be decided by ordinary Australians, exercising their democratic rights, voting at the ballot box. This is the principle that has guided our democracy since Federation and we should be loath to depart from it.

1(c): Consistent application of electoral rules to all campaigners

54. The ALP believes in a 'level playing field' where all participants in an election campaign are subject to the same rules.

55. We would be extremely concerned by any proposal to impose stricter regulations on any individual participant or class of participants in an election campaign, for example grassroots organisations such as GetUp!, trade unions or stakeholder groups such as the Business Council of Australia.

56. Any such proposal has the prospect of creating an uneven playing field where one group of campaigners is advantaged over another group of campaigners. This is anti-democratic and potentially unconstitutional.

1(d): New technologies

57. The ALP supports any innovations that make it easier for Australians to participate in the electoral process, providing that the integrity of the election and public confidence in the electoral process are not put at risk.

58. We believe that the unfortunate maladministration of the 2016 census has likely caused significant damage to public support for electronic voting and the use of new technologies in the electoral process.

59. It is incumbent upon the Government to satisfy the Australian people of the integrity of any new technologies proposed to be utilised in the electoral process, well before it is rolled out.

60. Given the unfortunate impact of the 2016 census on public confidence in use of new technologies by the Australian Government, the ALP believes that the Parliament should proceed very cautiously in relation to any proposal to utilise new technologies in the electoral process.

2. Donations rules

61. We repeat our remarks at Part A of this submission.

62. We also reiterate our belief in the 'level playing field'.

63. Any new proposal to regulate campaign donations to exclude certain participants or classes of participants from making donations, as a matter of law, has the ability to advantage one group of campaigners over another group of campaigners. This is anti-democratic and potentially unconstitutional.

64. We refer to the decision in **Unions NSW v State of New South Wales**, in which the High Court of Australia found that a law which sought to impeded trade unions from donating to political parties was invalid because it impermissibly burdened the implied freedom of political communication.

65. There is nothing to stop political parties from voluntarily declining to accept political donations from certain groups. For example, the Australian Labor Party refuses to accept political donations from tobacco companies.

3. Current donations and disclosure regime

66. We refer to our remarks at Part A of this submission.

4. Campaigning by third parties

67. We repeat our remarks at Part A, and Part C (1(c) and 2) of these submissions.

5. Any matters related to the terms outlined above

68. The ALP believes that JSCEM should consider recommendations to make changes to the system of party registration to ensure that candidates representing themselves, or a minority of interests are not able to abuse party registration to misrepresent or over-state their agendas, intentions or status.

69. There are a number of existing requirements for registration and nomination that operate in state jurisdictions that are more rigorous than existing federal requirements. The ALP has previously outlined our views on this question, most recently in our submission to the Committee's Inquiry into the 2013 Federal Election, made during the 44th Parliament, and we refer the committee to those comments.