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Submission to the Senate Select Committee on the Political Influence of Donations

Dear Committee

Thank you for your letter of 28 March 2018 inviting me to provide a submission about the regulation of third parties.

I am an Associate Professor of Constitutional Law. This submission deals with the following matters:

1. Proposal for a political activity transparency scheme,
2. Constitutional problems with capping third party political expenditure, and
3. Prohibiting foreign money being used for political expenditure and banning foreign political advertisers.

Introduction

I recommend that generally the Committee focus less on the idea of 'third parties' and more on the idea of 'political activity' regardless of the character of the entity engaging in that activity. The focus of regulation should be on political activity.

Third party campaigners should probably not be singled out for special regulation. Instead, political activity should be regulated and any differentiation in treatment should principally be a result of the amount of money involved. The focus on political activity ensures that any regulation targets the perceived mischief, which will reduce the chances of a successful constitutional challenge on the ground of disproportionate burdens on political communication.

Under this approach, third parties would be subject to regulation to the extent that they engage in political activity. The exception is that foreign political advertisers should be regulated by virtue of their character as foreign.

1 Proposal for a political activity transparency scheme

Any third party, charity, private individual or other entity that chooses to engage in political activity should be subject to transparency requirements. This is the current approach with respect to "authorised by" disclosures messages on electoral material under Part XXA of the *Commonwealth Electoral Act 1918*. The "authorised by" disclosure message regime has broad community acceptance.

I propose an expanded disclosure regime with two new prongs (in addition to the existing 'authorised by' disclosure message requirement):

1. **'Paid for by' disclosure messages:** A "paid for by" disclosure message should be required whenever an "authorised by" disclosure message is required on electoral matter. Political advertising would then include "Authorised by *AB.* Paid for by *CD*."

    a. The identity of the funding source/s should be identified by name or by category (eg, 'Paid for by Jo Citizen', 'Paid for by Getup!', or 'Paid for by funds from multiple sources').

    b. Where

        i. the funding source/s are not identified by name of individual people on the electoral matter, and

        ii. the funds expended on producing and communicating the electoral matter total more than $2,000,

    the person or entity required to authorise the electoral matter should be subject to an obligation to provide the Australian Electoral Commission with details of the funding source/s within 28 days of the electoral matter being communicated. Those details would include the identity of each funding source and the amount of money provided by each source. These details should be made publicly available online.

2. **Full disclosure for large political players:** Any person or entity that spends more than, say, $10,000 in a calendar year on electoral advertising should be subject to the same disclosure regime about funding sources and organisational structures and leadership as political parties.

The legal obligations are enlivened by the entity's free choice to engage in political activity. An entity that chooses to engage in political activity makes a conscious choice to do so and knows where it gets its money from.

Requiring paid for disclosure messages would bring Australia into line with practice overseas. In the United States, the Campaign Finance Regulations require disclaimers on political advertising indicating who paid for the advertising.[1]

If a person or entity is capable of (1) receiving funds, (2) depositing those funds in the entity's bank account, (3) organising political advertising, and (4) paying the invoices for

[1] For text of the regulation, see: https://www.fec.gov/regulations/110-11/2017-annual-110#110-11. For a summary of its operation, see: https://www.fec.gov/help-candidates-and-committees/making-disbursements/advertising/

that political advertising, then that entity is more than capable, and for very little additional effort, of providing details of the funds used for the political advertising to the Australian Electoral Commission. The entity is already in possession of that information.

The Committee should not accept arguments that this type of reporting is impractical. A 28 day reporting period is reasonable and practical. Centrelink welfare recipients are required to report any income within 14 days of receipt. The *Canada Elections Act* requires reporting of the source of funding by third parties:

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> (1) Every third party that is required to be registered in accordance with subsection 353(1) shall file an election advertising report in the prescribed form with the Chief Electoral Officer within four months after polling day.
> (2) An election advertising report shall contain
> (a) in the case of a general election,
> (i) a list of election advertising expenses referred to in subsection 350(2) and the time and place of the broadcast or publication of the advertisements to which the expenses relate, and
> (ii) a list of all election advertising expenses other than those referred to in subparagraph (i) and the time and place of broadcast or publication of the advertisements to which the expenses relate; and
> (b) in the case of a by-election, a list of election advertising expenses referred to in subsection 350(4) and the time and place of the broadcast or publication of the advertisements to which the expenses relate.
> (3) If a third party has not incurred expenses referred to in paragraph (2)(a) or (b), that fact shall be indicated in its election advertising report.
> (4) The election advertising report shall include
> (a) the amount, by class of contributor, of contributions for election advertising purposes that were received in the period beginning six months before the issue of the writ and ending on polling day;
> (b) for each contributor who made contributions of a total amount of more than $200 for election advertising purposes during the period referred to in paragraph (a), subject to paragraph (b.1), their name, address and class, and the amount and date of each contribution;
> (b.1) in the case of a numbered company that is a contributor referred to in paragraph (b), the name of the chief executive officer or president of that company; and
> (c) the amount, other than an amount of a contribution referred to in paragraph (a), that was paid out of the third party's own funds for election advertising expenses.
> (5) For the purpose of subsection (4), a contribution includes a loan.
> (6) For the purposes of paragraphs (4)(a) and (b), the following are the classes of contributor:
> (a) individuals;
> (b) businesses;
> (c) commercial organizations;
> (d) governments;
> (e) trade unions;
> (f) corporations without share capital other than trade unions; and
> (g) unincorporated organizations or associations other than trade unions.
> (7) If the third party is unable to identify which contributions were received for election advertising purposes in the period referred to in paragraph (4)(a), it must list, subject to

paragraph (4)(b.1), the names and addresses of every contributor who donated a total of more than $200 to it during that period.

I am confident that a measured transparency regime such as I have proposed would be constitutionally valid.

2 Capping third party political expenditure

The implied freedom of political communication sets constitutional limits on the ability to cap political expenditure.

For a law to survive an implied freedom of political communication challenge, the law must:

1. Serve a legitimate purpose; that is, a purpose that is compatible with Australia's system of representative and responsible government, and

2. Be reasonably capable of being seen as appropriate and adapted to serving that purpose in a manner that is compatible with Australia's system of representative and responsible government.

In *Unions NSW v New South Wales* (2013) 304 ALR 266, the High Court struck down legislation capping political expenditure by political parties. The High Court held that the law did not serve a legitimate purpose; indeed, the High Court held that the law served no purpose at all.

Unions NSW poses a serious obstacle for any attempt to cap third party political expenditure. Capping political expenditure by political parties for no particular reason is unconstitutional. It follows that, for the same reasons, capping political expenditure by third party campaigners for no particular reason would also be unconstitutional.

3 Prohibiting foreign money being used for political advertising

In *McCloy v New South Wales* (2015) 257 CLR 178 the High Court held that appropriate caps on the value of donations a donor may make and bans on certain categories of donor making donations are not inconsistent with the implied freedom of political communication because they are appropriate and adapted to the purposes of (i) preventing corruption and undue influence in the administration of government, (ii) preventing perceptions of corruption and undue influence, and (ii) preventing wealthy donors having an unequal opportunity to participate in the political process. The High Court considers that these purposes are consistent with the maintenance of the system of representative and responsible government prescribed by the Australian Constitution.

The focus should not be on banning foreign donations to entities that engage in political activity. Third party campaigners often engage in other non-political activities such as research and community work. There may be little or no justification for prohibiting the receipt and use of foreign funds for those non-political activities. For example, an Australian research organisation may receive foreign donations to fund parts of their research. That same organisation may engage in political advocacy in relation to its

field of research. It is only in respect of political activities that there would be any justification in prohibiting the receipt and use of foreign funds.

Accordingly, any ban on foreign donations should involve:

(i) an outright ban on the receipt of foreign donations by any political party or candidate, and
(ii) a ban on the use of foreign funds for political advertising by all individuals and entities.

Political advertising should be defined in terms of the circumstances in which an "authorised by" disclosure message is currently required.

In my earlier submission of 8 October 2017 to this Committee I suggested that the Committee recommend a ban on foreign donations to political parties. In that earlier submission, I also explained my view that bans on foreign donations to political parties would be constitutionally valid:

> In broad terms, prohibiting a class of donor from making political donations will be valid where there is something 'sufficiently distinct' about that class of donor to 'warrant specific regulation' especially in light of the nature of the public powers that class of donor may seek to influence in their interest.
>
> Foreign entities and individuals are in a distinct category. They may be considered 'sufficiently distinct' from other classes of donor. The self-interest pursued by foreign donors in making political donations to Australian candidates and parties is likely to qualitatively different to the self-interest pursued by Australian donors. The implied freedom of political communication arises partly from sections 7 and 24 of the *Australian Constitution* requiring that Senators and members of the House of Representatives be chosen by 'the people of the State[s]' and 'the people of the Commonwealth' respectively. Section 44 of the *Australian Constitution* also forbids foreign nationals (including indeed dual citizens) from being elected to Parliament. The implied freedom is not an individual right: there is no question of any individual's 'right' to political communication being burdened. However, the textual source of the implied freedom of political communication puts foreigners in a different category to Australians. The purpose of ensuring the 'Australianness' (for want of a better word) of the Australian electoral process is likely to be considered compatible with the system of government prescribed by the *Australian Constitution*.
>
> The next question is whether an outright ban on foreign donations is reasonably capable of being seen as appropriate and adapted to serving that purpose. Answering that question involves a three step test. The outright ban must be:
>
> - *suitable* — as having a rational connection to the purpose of the provision
> - *necessary* — in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;
> - *adequate in its balance* — a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.
>
> In my view, an outright ban on foreign donations would pass each of these tests. A ban on foreign donations (ie, that is from a source that is not an Australian citizen or resident

or an entity registered in or operating in Australia) is likely to be constitutionally valid and a ban on foreign donations should be legislated.

For the same reasons, my view is that banning the use of foreign money for political advertising generally is also likely to be valid. A general ban on the use of foreign money for political advertising generally targets the mischief (namely, the influence of foreign money in the Australian political process) in a proportionate manner.

For international experience, the Committee may wish to look to Canada. The *Canada Elections Act* (SC 2000 c 9) prohibits foreign third party campaigners and the use of foreign funds for political advertising:

> 331 No person who does not reside in Canada shall, during an election period, in any way induce electors to vote or refrain from voting or vote or refrain from voting for a particular candidate unless the person is
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> (a) a Canadian citizen; or
>
> (b) a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*.
>
> 351.1 A third party shall not incur election advertising expenses of a total amount of $500 or more in relation to a general election or a by-election, or, if the election periods of two or more by-elections overlap with each other in whole or in part, in relation to those by-elections, unless
>
> (a) if the third party is an individual, the individual
>
> (i) is a Canadian citizen,
>
> (ii) is a permanent resident as defined in subsection 2(1) of the *Immigration and Refugee Protection Act*, or
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> (iii) resides in Canada;
>
> (b) if the third party is a corporation, it carries on business in Canada; and
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> (c) if the third party is a group, a person who is responsible for the group
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> (i) is a Canadian citizen,
>
> (ii) is a permanent resident as defined in subsection 2(1) of the *Immigration and Refugee Protection Act*, or
>
> (iii) resides in Canada.
>
> 358 No third party shall use a contribution for election advertising purposes if the contribution is from
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> (a) a person who is not a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*;
>
> (b) a corporation or an association that does not carry on business in Canada;
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> (c) a trade union that does not hold bargaining rights for employees in Canada;
>
> (d) a foreign political party; or
>
> (e) a foreign government or an agent of one.

I trust this submission is of assistance.

Yours sincerely

Luke Beck