Committee Secretary
Joint Standing Committee on Electoral Matters
By email: em@aph.gov.au

25 September 2018

Dear Secretary,

Submission to the inquiry of the Joint Standing Committee on Electoral Matters into the Proposed Amendments to the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (Cth)

I broadly welcome the proposed amendments to the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (Cth) ('the Bill'). As indicated by the summary comparing the proposed amendments to the recommendations made by the Joint Standing Committee on Electoral Matters ('JSCEM') in its advisory report to the Bill,[1] the proposed amendments addresses all the recommendations made by JSCEM.[2]

I would like to, however, focus on two highly surprising provisions in the proposed amendments, provisions that were neither discussed by JSCEM nor previously canvassed in public debate. These are the provisions, extracted in Appendix, which propose to insert sections 302CA and 314B into the *Commonwealth Electoral Act 1914* (Cth). As I shall explain, these provisions should be strongly opposed.

These provisions seek to trigger section 109 of the *Commonwealth Constitution* which provides that:

> **109 Inconsistency of laws**
> When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

In seeking to trigger section 109, these provisions should be understood against the background of the 2018 Queensland Supreme Court decision in *Electoral Commission of Queensland v Awabdy*.[3] The case concerned the relationship between sections 290 and 291 of the *Electoral Act 1992* (Qld), which imposed disclosure obligations on political parties registered under the *Electoral Act 1992* (Qld)

[1] Joint Standing Committee on Electoral Matters, *Advisory Report on the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017* (April 2018).
[2] Available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Electoral_Matters/proposedamendmentsbill/Additional_Documents
[3] [2018] QSC 33.

(Queensland provisions), and sections 314AB and 314AC of the *Commonwealth Electoral Act 1918* (Cth) (Commonwealth provisions), which imposed disclosure obligations on political parties registered under the *Commonwealth Electoral Act 1918* (Cth). The key question was whether the Queensland provisions were inconsistent with the Commonwealth provisions and therefore, inoperative by virtue of section 109 of the *Commonwealth Constitution*.

The respondent, who was the agent for the Liberal National Party of Queensland, argued that the Queensland provisions were inconsistent with the Commonwealth provisions when 'the gift was made for the promotion of the election to the Senate or to the House of Representatives of a candidate or candidates endorsed by the political party'.[4]

Jackson J of the Queensland Supreme Court found that the Queensland and federal provisions 'have different but overlapping subject matters'.[5] Nevertheless, his Honour concluded that there was no inconsistency between the Queensland and Commonwealth provisions because 'nothing in that subject matter or the operation of the laws supports a negative implication in the operation of ss 314AB and 314AC, to exclude a State law requiring disclosure of gifts made for the Commonwealth electoral purpose'.[6] In other words, the Commonwealth provisions did not grant immunity from the Queensland provisions.[7]

Central to his Honour's reasoning was 'the absence of express provision' to support the negative implication.[8] It is such express provision that proposed sections 302CA and 314B of the *Commonwealth Electoral Act 1914* (Cth) seek to provide. If enacted:

- *Proposed section 302A will grant immunity from State and Territory laws that impose obligations in relation to the receipt and use of 'gifts' when the gifts are 'required to be, or may be, used for the purposes of incurring electoral expenditure or creating or communicating electoral matter'; and*
- *Proposed section 314AB will grant immunity from State and Territory laws that impose obligations to disclose funds when 'the amount is required to be, or may be, used by or with the authority of the recipient for the purposes of incurring electoral expenditure, or for the purposes of creating or communicating electoral matter'.*

The immunity from State and Territory laws which these sections seek to grant depends on a connection with, broadly speaking, Commonwealth electoral purposes. What is crucial to note is that the sections will be enlivened even when the connection is loose – the immunity from State and Territory laws will apply when 'gifts' or amounts *may be used* for Commonwealth electoral purposes. Such breadth is highlighted by proposed section 314AB(5)(b) which provides that:

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[4] Ibid [26].
[5] Ibid [85].
[6] Ibid [86].
[7] See ibid [44]-[46].
[8] Ibid [87].

(5) An amount is required to be, or may be, used for a purpose if:

(b) the person or entity providing the amount does not set terms relating to the purpose for which the amount can be used.

Hence, amounts to State-based political parties which are made without any conditions would trigger the immunity under section 314AB.

A central point to be made is that funds that end up being used in State and Territory elections may still come within the immunity under the proposed sections because they 'may be used' for Commonwealth electoral purposes - these funds may never used for Commonwealth electoral purposes.

The breadth of the immunity granted by the proposed sections will mean that these provisions, if enacted, will significantly preclude the operation of the following measures:[9]

- caps on electoral expenditure and disclosure obligations under Part 14 of *Electoral Act 1992* (ACT);
- disclosure obligations; caps on political donations and caps on electoral expenditure under *Electoral Funding Act 2018* (NSW);
- disclosure obligations and bans in relation to gifts of 'foreign property' under Part 11 of *Electoral Act 1992* (Qld);
- disclosure obligations and caps on political expenditure under Part 13A of the *Electoral Act 1985* (SA); and
- restrictions on the receipt of political donations under Part 12 of the *Electoral Act 2002* (Vic).

Given this profound impact, there are three serious problems with proposed sections 302CA and 314B. First, the funding and disclosure obligations in the *Commonwealth Electoral Act 1918* (Cth) are amongst the lowest standards set in relation to political funding. This, in turn, gives rise to the risk that political actors, particularly political parties, will change their fund-raising practices to as to come within the scope of the immunity from State and Territory laws, for example, through the simple method of asking contributors to make unconditional contributions.

Second, they undermine efforts on the part of State and Territory Parliaments to protect the integrity of representative government from the dangers of political money. The case of New South Wales is illustrative. The measures now found in the *Electoral Funding Act 2018* (NSW) were the response to the controversies surrounding money in politics, reports by the New South Wales Independent Commission Against Corruption following two major investigations (Operations

[9] There is a difficult question whether these sections, if enacted, will breach the doctrine of intergovernmental immunities by imposing a 'special burden' on the States, see *Austin v Commonwealth* (2003) 215 CLR 185.

Credo and Spicer);[10] and the report by the Expert Panel on Political Donations.[11] The efficacy of these measures will be in doubt if proposed sections 302A and 314B are enacted.

In fact, if these provisions had been in effect at the time of Operation Spicer which investigated political funding made to the New South Wales Liberal Party, there is a chance this investigation might not have had the impact it did. Central to the findings of the New South Wales Independent Commission Against Corruption in this investigation were breaches of the 'prohibited donor' provisions under the *Electoral Funding, Expenditure and Disclosures Act 1981* (NSW) – these breaches might not have been found if sections 302A and 314 were in effect because the 'prohibited donor' provisions might not have applied.

Third, the proposed sections will create a dual system of regulation that is likely to benefit major players and disadvantage lesser ones. The immunity granted by these sections will apply to political actors that engage both in federal elections and State and Territory elections. Political actors that exclusively focus on State and Territory elections will not benefit from this immunity.

For all these reasons, I strongly believe that proposed sections 302A and 314B should not be enacted.

I hope this submission has been of assistance to the Committee.

Yours sincerely,

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[10] New South Wales Independent Commission Against Corruption, *Investigation into the NSW Liberal Party Electoral Funding for 2011 State Election and other Matters* (Operation Spicer) (August 2016); New South Wales Independent Commission Against Corruption, *Investigation into Dealings between Australian Water Holdings Pty Ltd and Sydney Water Corporation and related matters* (Operation Credo) (August 2017).

[11] New South Wales Panel of Experts, *Political Donations: Final Report: Volume 1* (December 2014) (chaired by Dr Kerry Schott).

Appendix: Proposed sections 302CA and 314AB of the *Commonwealth Electoral Act 1918* (Cth)

302CA Relationship with State and Territory laws

Despite any law of a State or Territory dealing with electoral matters (within the ordinary meaning of the expression), a person or entity may:

(a) give a gift to, or for the benefit of, a political entity, a political campaigner or a third party; or

(b) if the person or entity is a political entity, a political campaigner or a third party—receive, retain or use a gift; or

(c) receive, retain or use a gift on behalf of a political entity, a political campaigner or a third party;

if:

(d) this Division does not prohibit the receiving or retaining of the gift, or the using of the gift; and

(e) the gift is required to be, or may be, used for the purposes of incurring electoral expenditure or creating or communicating electoral matter.

314B Relationship with State and Territory laws

(1) This section applies in relation to a law of a State or Territory that deals with electoral matters (within the ordinary meaning of the expression).

(2) A person or entity (the ***provider***) is not required by the law to disclose an amount, or information relating to an amount, (including a gift or loan) if:

(a) the provider provides the amount to or for the benefit of a political entity, political campaigner, third party or associated entity (the ***recipient***); and

(b) the amount is required to be, or may be, used by or with the authority of the recipient for the purposes of incurring electoral expenditure, or for the purposes of creating or communicating electoral matter, in accordance with subsection (5).

Limit on State and Territory power—information on amounts received

(3) A person or entity (the ***recipient***) is not required by the law to disclose an amount, or information relating to an amount, (including a gift or loan) if:

(a) the amount is provided to or for the benefit of the recipient; and

(b) the recipient is a political entity, political campaigner, third party or associated entity; and

(c) the amount is required to be, or may be, used by or with the authority of the recipient for the purposes of incurring electoral expenditure, or for the purposes of creating or communicating electoral matter, in accordance with subsection (5).

Limit on State and Territory power—information on expenditure and debts

(4) A person or entity (the ***debtor***) is not required by the law to disclose an amount, or information relating to an amount, of expenditure or a debt (except a debt incurred as a result of a loan) if:

(a) the debtor is a political entity, political campaigner, third party or associated entity; and

(b) either of the following apply: (i) the expenditure is electoral expenditure; (ii) the debt was incurred for the purposes of incurring electoral expenditure, or creating or communicating electoral matter.

Interpretation

(5) An amount is required to be, or may be, used for a purpose if:

(a) any terms set by the person or entity providing the amount explicitly require or allow the amount to be used for that purpose; or

(b) the person or entity providing the amount does not set terms relating to the purpose for which the amount can be used.

(6) A reference in this section to a law not requiring an amount, or information relating to an amount, to be disclosed applies if:

(a) the amount or information is required to be included in a return provided under this Part; or

(b) the amount or information is not required to be included in a return provided under this Part.

(7) A reference in this section to a law not requiring an amount, or information relating to an amount, (the ***specific amount***) to be disclosed includes a reference to the law not requiring the following to be disclosed: (a) a total amount that includes the specific amount; (b) information relating to the specific amount as it is included in a total amount.

(8) A reference in this section to a person or entity (the ***first person***) being required by a law to disclose an amount or information includes a reference to another person being required to disclose the amount or information on behalf of the first person.