Professor Anne Twomey
Professor of Constitutional Law

3 July 2020

Senator the Hon James McGrath
Chair
Joint Standing Committee on Electoral Matters
Parliament House
Canberra, ACT, 2600

Dear Senator,

Submission – Inquiry into *Electoral Legislation Amendment (Miscellaneous Measures) Bill 2020*

Please accept this submission to the Committee's inquiry on behalf of myself and my Honours student, Giacomo Rotolo-Ross, who is undertaking his Honours thesis on the *Spence* case.

This submission is directed solely to the proposed new ss 302CA and 314B of the *Commonwealth Electoral Act 1918* (Cth). These provisions have been drafted in response to the High Court's judgment in *Spence v Queensland* [2019] HCA 15; (2019) 367 ALR 587.

Section 302CA

Operation: This provision seeks to exclude certain political donations from being affected by State or Territory electoral laws, such as laws imposing caps on political donations or prohibiting certain categories of donors, including property developers. Section 302CA applies this protection from State and Territory laws to the offering, seeking or giving of political donations where it is done expressly for 'federal purposes'. Section 287 defines 'federal purpose' as meaning 'the purpose of incurring electoral expenditure, or creating or communicating electoral matter'. 'Electoral matter' and 'electoral expenditure' are, in turn, the subject of complex definitions in ss 4AA and 287AB of the *Commonwealth Electoral Act.* In short, they apply where the matter is communicated, or the expenditure incurred, for the 'dominant purpose' of influencing the way electors vote in a federal election, such as promoting or opposing a political party or MP in relation to a federal election.

Faculty of Law
New Law Building F10
Eastern Avenue
The University of Sydney
NSW, 2006
Australia

[redacted]
http://sydney.edu.au/law
http://ssrn.com/author=808822

ABN 15 211 513 464
CRICOS 00026A

Constitutional validity: It would appear that s 302CA is drafted with the intention of giving effect to the observation in *Spence* by Kiefel CJ, Bell, Gageler and Keane JJ at [55] that a Commonwealth provision will be within power if it 'operates to protect from any impediment arising from the operation of a State electoral law the giving, receipt and retention of a gift earmarked from the outset to be used in creating or communicating matter intended to be communicated for the dominant purpose of influencing voting at a federal election' [emphasis not in the original].

Subsections 302CA(1) to (3), which deal with the offering, seeking and giving of political donations (described coyly as 'gifts'), would appear to fall within the scope of their Honours' description in paragraph [55]. But the key issue is how the donation is actually used. In practical terms, it would not matter if a political donation was offered, solicited or given for federal purposes if it could then be used to fund State electoral campaigns.

This has now been dealt with in the new sub-sections 302CA(4) to (6). They are drafted differently from sub-sections (1) to (3). Sub-section 302CA(4) allows political donations to be received and kept (eg by a political party), free from the application of State or Territory electoral laws, unless they are kept or used for non-federal purposes. Sub-section 302CA(5) ensures that if the donation is initially received and kept for federal purposes, but is later kept or used for other purposes, the exclusion from State or Territory laws is taken not to have applied. What is notable about these sub-sections, however, is that they do not require a federal purpose to be indicated by the donor – or in the words of Kiefel CJ, Bell, Gageler and Keane JJ, the donations have not been 'earmarked from the outset' for federal purposes.

The consequence of this is that a prohibited donor could make unlawful donations to a political party, or donations could be made that exceed the donation cap, with the intention that they be used for State purposes, breaching an applicable State electoral law, but the donations could still be validly received, kept and used by a political party, as long as this was done for federal purposes.

Given that the provisions seem to be quite deliberately drafted to achieve this end, it does make one wonder why. Are political parties aware of the existence of large amounts of donations that are unlawful under State laws, which they want to ensure they can keep? Is this a means of also avoiding any State laws that would not only require the return of unlawfully received donations but also penalise the party that adopts them (such as the NSW provision that requires a party to return double the value of the donation if it knew the donation was unlawful)? Are political parties hoping to be able to attract and retain such donations in the future, despite the application of State law, perhaps gambling on a State failing properly to police or enforce its laws, while still protecting the recipient parties if the donors are caught?

It is apparent that the drafters of this Bill were not only conscious of this problem, but also concerned that it might be unconstitutional, given that the purpose of the donation is not required to be 'earmarked from the outset'. Accordingly, the drafters have included

sub-section 302CA(6) which seeks to ensure that a court could read down the provision, if it were otherwise invalid, so that it only applies to political donations expressly given for federal purposes. This suggests that the constitutional risk was raised with the Government, but that the Government was determined to allow parties to accept and keep donations that had been made for non-federal purposes in breach of State and Territory electoral laws, despite the constitutional risk.

The deliberate nature of this drafting extends to sub-sections 302CA(7) and (8). These clarify that a political party can still use a political donation for federal purposes, even though a State law has validly prohibited the offering, seeking, giving, receiving or keeping of that political donation (eg because it breaches a cap on donations or comes from a prohibited donor).

The Committee might wish to inquire of the Government why it is seeking to ensure that political parties can retain political donations made for non-federal purposes in breach of State laws if they are received, kept and used for federal purposes. This might give rise to a constitutional issue (although the extent of the effect of such unconstitutionality has been mitigated by the reading down provision in s 302CA(6)). More importantly, however, it gives rise to a policy issue about the appropriateness of the provision.

Laundering of political donations: From a policy point of view, a concern also arises in relation to the facilitation of the laundering of political donations under s 302CA. The effect of it appears to be that a Member of a State Parliament could solicit donations from a prohibited donor, but ask the prohibited donor to tick a box on a form stating that the donation is for 'federal purposes'. This would allow the soliciting, making and receipt of the donation in a manner that avoids the application of the State law. The party could then reallocate other funds that it holds, to ensure that the equivalent amount was available for the use of the State MP to fund his or her election campaign or his or her party's campaign (subject to any limits in State laws regarding the sources of electoral expenditure and the use of dedicated campaign accounts).

The potentially malign influence of the donation could still affect the State MP, who may directly or indirectly gain an advantage from the donation and may feel obliged to reciprocate with support for governmental decisions that favour the interests of the prohibited donor. One could imagine, for example, functions being held where access to State government ministers was sold to prohibited donors, who when paying for a seat at the Minister's table, ticked a box stating that the amount paid is a donation for 'federal purposes'. This would render ineffective the laudable efforts by some State Governments to reduce the potentially corrupting influence of political donations upon ministerial decisions.

Administrative complexity: While it would be relatively easy for donors to indicate that donations are for federal purposes, it will be more administratively complex for political parties, political campaigners and third parties to ensure compliance, especially in determining what expenditure or electoral matter has the 'dominant purpose' of influencing voting in a federal election.

THE UNIVERSITY OF SYDNEY

Section 314B

This section would exclude from the disclosure laws of the States any political donations or loans given for federal purposes. This is significant, because disclosure thresholds in the States tend to be significantly below that of the Commonwealth (eg $1000 in NSW and Qld and $1040 in Victoria, as opposed to $14,300 federally) and State disclosure may also be more contemporaneous (eg in Queensland, where declarations must be made within days). The effect of s 314B will be to reduce transparency concerning potential political influence. It will most likely have the effect of encouraging donors who propose to make donations above the amount of the State threshold for disclosure, but below the level of the much higher federal level for disclosure, to funnel such donations into 'federal purposes' to avoid public scrutiny.

Again, there is a disjunct between the purpose for which a political donation is made and the way it is treated by a political party. Under s 314B(2), a political party could simply decide that regardless of the purpose of the donor, it would keep and use all donations in amounts under the federal threshold for 'federal purposes', to avoid transparency, and then use equivalent amounts from other sources for State campaigns (subject to any State laws that may impede such action).

Removing public access to records of donations under the federal threshold of $14,300 would also hinder accountability and could undermine public confidence in government. For example, in NSW applicants for certain types of planning approvals are required to reveal reportable political donations on application forms, so that there is full transparency. The aim is to support public confidence in the decision-making process, after a number of corruption scandals had undermined that confidence. At present, failure to make such declarations can be identified by using published records of political donations. (See, eg: Christopher Knaus, 'Seven companies unlawfully hid political donations from NSW planning authorities', *The Guardian,* 2 July 2020: https://www.theguardian.com/australia-news/2020/jul/03/seven-companies-unlawfully-hid-political-donations-from-nsw-planning-authorities.) This would be impeded if no such records were publicly available and such donations ceased to be reportable.

Attached, for the further assistance of the Committee, is a note written by Mr Rotolo-Ross, analysing these two provisions. Please do not hesitate to contact me if the Committee needs further assistance.

Yours sincerely,

[redacted]

[redacted]

Anne Twomey
Professor of Constitutional Law

Giacomo Rotolo-Ross

THE UNIVERSITY OF SYDNEY

Electoral Legislation Amendment (Miscellaneous Measures) Bill 2020 (Cth) Analysis – Giacomo Rotolo-Ross

Section 302CA

1. One of the core purposes of this Bill is to respond to the High Court's decision in *Spence v Queensland* [2019] HCA 15.[1] In that case, the current version of s 302CA *Commonwealth Electoral Act 1918* (Cth) was held to be invalid by reason of overreaching the limits of s 51(xxxvi) *Constitution*, which includes the power to legislate in respect of federal elections.
2. The cause of invalidity of s 302CA in *Spence* was the fact that the provision purported to provide immunity from State and Territory electoral laws for donations that merely 'may' (or, therefore, may not) be used for federal electoral purposes. The section therefore had the potential to capture donations eventually used for State, Territory or local elections, as well as donations used for purposes wholly unrelated to elections, such as party overheads, conferences and so on.[2] It was held that there was an insufficient and in fact tenuous connection between regulating such donations and the legislative power over the federal electoral process.[3] The present amendments remove this language and provide for a narrower form of regulation,[4] and are to a certain extent commendable in their response to the *Spence* decision.
3. The new s 302CA only provides immunity from State and Territory electoral laws for donations expressly offered, sought or given, or received, kept or used, for 'federal purposes'. The definition of 'federal purpose' is inserted in s 287(1), and refers to two further defined terms, namely 'electoral expenditure' and 'electoral matter'. From these terms, which are defined in ss 4AA and 287AB respectively, it can be seen that s 302CA essentially applies to donations offered, sought, given, received, kept or used in a manner whereby federal electoral purposes are 'dominant'.
4. As such, the new s 302CA captures donations with solely federal purposes, as well as donations where there is some State, Territory or local government purpose which is not dominant relative to the federal purpose. Importantly, in respect of the acts of offering, seeking or giving donations, the federal purpose(s) must be expressed by the donor or donee (as the case may be) at the time – this further narrows the circumstances in which immunity will operate, and avoids the issues of subjectivity and uncertainty that might otherwise arise if such purposes could be merely implied or adopted later on.
5. The circumstances in which State or Territory laws continue to apply are thus significantly expanded from the current provision, which only disables the Commonwealth legislation's effect where a donation is wholly or partly required by State or Territory electoral law to be, or is actually, kept or identified separately in order to be used only for State or Territory electoral purposes.[5]

[1] Explanatory Memorandum, Electoral Legislation Amendment (Miscellaneous Measures) Bill 2020 (Cth) 3.
[2] *Spence v Queensland* [2019] HCA 19 [36] (Kiefel CJ, Bell, Gageler and Keane JJ) ('*Spence*').
[3] Ibid [56], [80]–[83] (Kiefel CJ, Bell, Gageler and Keane JJ).
[4] Explanatory Memorandum, Electoral Legislation Amendment (Miscellaneous Measures) Bill 2020 (Cth) [67].
[5] *Commonwealth Electoral Act 1918* (Cth) s 302CA(3).

6. This new extent of operation of s 302CA provides the requisite connection to s 51(xxxvi) *Constitution* which was partly lacking in *Spence*, without going further and regulating donations with predominantly or wholly non-federal purposes. The new s 302CA strikes an appropriate balance, noting also that to be even more restrictive and limit the section's operation to donations with *only* wholly federal purposes would be impractical in view of the intermingled nature of Australia federal and State, Territory, and local politics.
7. The above indicates, however, that there is still some scope for funds to be used at the State, Territory or local level without being subject to the more stringent legislation operative in most States and Territories, so long as the donation embodies a dominant federal purpose. This may be problematic, as the potential exists that the threshold for what constitutes a 'dominant' federal purpose may be gradually lowered over time, allowing increasingly more funds to flow back to State, Territory and local elections. The fact that the definition of federal purpose relies, as aforementioned, upon two further definitions in ss 4AA and 287AB, both of which are very detailed if not convoluted, may enhance this risk, as it creates the potential for many donations to fall into a grey area that could be argued either way as having or not having a dominant federal purpose.
8. Furthermore, the reality of a political donation is that even if it must be used for federal purposes, an amount of money equivalent to the donation, which was previously allocated for such purposes, might therefore be 'freed up' and redirected to State, Territory or local electoral purposes. This raises a serious question regarding the extent to which State and Territory laws will still operate effectively, and whether they will be undermined by donors and political parties shifting their behaviour in respect of the allocation of funds.
9. Ultimately therefore, and to avoid the potential exploitation of the Commonwealth scheme, it is more desirable that comprehensive reform is undertaken so that the *Commonwealth Electoral Act* becomes aligned with the restrictions on political donations currently provided for by State and Territory law. This would certainly be more representative of community expectations. While the proposed s 302CA does, for the most part, react appropriately to the legal implications of the *Spence* case, the practical operation of the new provision may nevertheless occasion the inappropriate subversion of State and Territory laws.
10. A handful of additional technical issues also arise in respect of s 302CA. The first relates to sub-s (4), insofar as it is inconsistent with sub-s (3). While this prior subsection only provides immunity to donors for donations expressly given for federal purposes, sub-s (4) is broader and provides immunity to a donee so long as the donation is not kept or used for purposes other than federal purposes. This means the donee could be immune from State or Territory laws even if the donation was expressly made for State, Territory or local purposes (meaning the donor is *not* immune), so long as the donee does not abide by the donor's express intent. A donee may also be immune if they simply keep the donation without allocating or using it for *any* purpose, because this is arguably not 'purposes other than federal purposes.'
11. Both of these eventualities are undesirable, and it is preferable that the alternative construction allowed for in sub-s (6) instead becomes the default construction of sub-s (4). This would ensure consistency of treatment between donors and donees. Furthermore, it is desirable that sub-s (4) instead be worded in the same way as sub-ss (1)–(3) – i.e. that immunity only applies if the donation is received or kept for federal purposes – in order to avoid the potential for donations to simply sit in the accounts of regulated entities, immune from State or Territory laws, because they have not been allocated a purpose.

12. Issues are also raised by sub-s (5), which provides for the retrospective non-application of sub-s (4) should the donation in question be kept or used for non-federal purposes. In other words, s 109 *Constitution*, which has to apply in order for sub-s (4) to prevail over any relevant State or Territory laws, is made to have retrospectively not operated. This is the same effect as the existing s 302CA(3)(b)(ii), which was questioned by the majority in *Spence* on account of its retrospective application. The current jurisprudence on s 109 *Constitution* is that a law of the Commonwealth cannot retrospectively avoid its operation, and the High Court in *Spence* did not indicate whether it was willing to reopen and overrule this approach, seeing as it was not necessary to do so.[6] Three members of the Court, admittedly, did not characterise the provision as retrospective,[7] but the majority did so, hence there is clear uncertainty as to the validity of proposed sub-s (5). However, the subsection should remain, as it is an important safeguard to ensure that State and Territory laws cannot be undermined by regulated entities reallocating donations to State, Territory or local elections despite having been given them, and having initially kept them, for federal purposes.

Section 314B

13. The new s 314B provides for a disclosure scheme that is streamlined with s 302CA. Subsection (1) is the main operative aspect, as it provides for immunity from State or Territory electoral laws governing disclosure if the donor expressly gives the donation for federal purposes. Accordingly, much of the same analysis of s 302CA above applies again – while the provision is likely to be a sound legal response to the issues raised in *Spence*, the practical reality is that many donations with either a direct or indirect impact on State, Territory and local elections are likely to nevertheless become immune from State and Territory disclosure laws, and this is again undesirable. Additionally, sub-ss (2)–(4) mirror sub-ss (4)–(6) of s 302CA, and so again the same analysis applies as has been espoused for those subsections above.
14. In effect, the combination of the proposed ss 302CA and 314B has a dual effect in terms of diminishing the operation of State and Territory laws. Not only may various restrictions on donations not apply, but, furthermore, disclosure might also not be required. The concepts of immunity from restrictions and disclosure should be in tension with each other, not streamlined, and so it should at least be the case that if donors and donees have the benefit of immunity from restrictions via s 302CA, that immunity is tempered by a requirement to disclose, as opposed to having the double benefit of also not needing to disclose their donations due to s 314B. This approach is of much greater benefit to the integrity of the federal electoral system, as the public will at least be able to know which donations have become immune from State or Territory laws, without representing the more extreme option of aligning s 302CA with State and Territory laws on donation restrictions as well.

[6] *Spence* (n 2) [34] (Kiefel CJ, Bell, Gageler and Keane JJ), citing *Western Australia v Commonwealth* (1995) 183 CLR 373 and *University of Wollongong v Metwally* (1984) 158 CLR 447.
[7] Ibid [146] (Nettle J), [237] (Gordon J), [374] (Edelman J).