



7 October 2017

Dr Yee-Fui Ng  
Lecturer in Law  
RMIT Graduate School of Business and Law  
Emily MacPherson Building 13  
Cnr Russell & Victoria Sts  
Melbourne VIC 3000

Mr Gerry McInally  
Committee Secretary  
Select Committee into the Political Influence of Donations  
Parliament House  
Canberra ACT 2600

Dear Mr McInally,

### **Submission to the Senate Select Committee into the Political Influence of Donations**

Thank you for the opportunity to provide a submission to this inquiry.

As a legal academic, my submission will focus on how to improve the integrity of political decision-making through our political donations regime and the public funding of elections, and address constitutional issues regarding banning foreign political donations.

#### **Item (d): how to improve the integrity of political decision-making through our political donations regime and the public funding of elections**

Any regulation of political donations has to balance two competing interests. First, there is the freedom of individuals and corporations to express their political preferences, including giving money to political parties they support. This has to be counterbalanced with the pernicious influence of money in politics. The key here is whether large political donations secure greater access to politicians than ordinary people have. Another issue is whether large donations sway politicians to bestow illegitimate favours or adopt policies that directly benefit donors.

As then US presidential candidate [Donald Trump put it](#):

*I gave to many people before this – before two months ago, I was a businessman. I give to everybody. When they call, I give. And you know what, when I need something from them two years later, three years later, I call them. They are there for me. That’s a broken system.*

Trump suggests it is possible to “buy” political access and influence through political donations. In Australia, the managing director of Transfield Holdings, Luca Belgiorno-Nettis, [has likened](#) political donations to the Latin saying *do ut des*: “you give in order to have given back”.

According to the democratic principle of political equality, Australians are entitled to equal representation by their elected representatives. We can also expect politicians to be transparent and accountable in exercising their public duties. In particular, politicians should not engage in corrupt behaviour, such as bartering with a wealthy donor to make decisions in their favour in exchange for a large sum of money.

But it is not just actual corruption that is the issue; even the perception of corruption can damage trust in the political system.

As such, increasing the equity and transparency of political donations through legal regulation is beneficial for democracy. The current political donations disclosure regime at the federal level is inadequate and riddled with loopholes. I believe that there are several ways that this system can be improved:

- introduce caps on donations by individuals, unions and corporations of \$1,000 a year;
- public disclosure of donations above \$1,000;
- introduce real time disclosures of political donations;
- introduce a federal anti-corruption body; and
- ensure that the Australian Electoral Commission enforces the rules and prosecutes any breaches.

Each proposal will be elaborated upon below.

#### *Caps on donations*

To entrench equity, the best way to reform the system is to have a yearly cap on donations from each individual, union and corporation of, say, \$1,000.

[NSW has a yearly cap](#) of \$5,800 per party and \$2,500 for candidates, which the High Court [has ruled](#) as constitutionally valid, and Victoria is [proposing](#) to introduce a cap on donations by individuals, unions and corporations of \$4,000 over a four-year parliamentary term.

With caps on donations, we can ensure people do not have a larger voice just because they have a larger wallet. In addition, caps that equally target individuals, unions and corporations mean that money cannot be channelled through shady corporate structures or 'associated entities' to evade the rules.

#### *Public disclosure of donations above \$1,000*

Disclosures add to transparency. They allow us to follow the money and scrutinise who has made large donations.

The current disclosure threshold at the Commonwealth level of \$13,000 for 2015/16 is too high. This should be reduced to \$1,000 to increase the transparency of the system. In [Queensland](#) and [NSW](#), donations above \$1,000 must be disclosed and Victoria is [proposing](#) a disclosure threshold of \$1,000 as well.

#### *Introduce real time disclosures of political donations*

Disclosures should be published in real time to avoid a large time lag between donations and disclosures. Currently at the federal level donations are published only once a year, long after elections are over.



Queensland has implemented real-time disclosures of political donations through an [electronic disclosure system](#) and Victoria is [proposing](#) to introduce real-time disclosures as well.

Real-time disclosures will increase the transparency of the system.

#### *Introduce a federal anti-corruption body*

To uncover and investigate allegations of corruption, a federal anti-corruption body modelled on NSW's Independent Commission Against Corruption should be introduced. In this way, any illegal donations can be thoroughly investigated. All States have anti-corruption bodies, and the federal government is lagging behind in this crucial area.

#### *Ensure that the Australian Electoral Commission enforces the rules and prosecutes any breaches of the rules*

Having an elaborate set of rules is insufficient. This must be coupled with effective enforcement by the Australian Electoral Commission.

For example, the New South Wales Electoral Commission penalised the state Liberal Party for breaching electoral rules. The party used the Free Enterprise Foundation to [disguise donations](#) from donors banned in the state, such as property developers. Thus, the commission [withheld \\$4.4 million in public funding](#) from the party.

Thus, it is incumbent on the Australian Electoral Commission to vigilantly monitor compliance with the rules and prosecute any breaches.

#### **Item (e): any other related matters**

##### *Constitutional issues regarding banning foreign political donations*

The Joint Standing Committee on Electoral Matters has [recommended](#) that foreign citizens and entities be banned from making political donations to political parties, associated entities (such as trade unions and dedicated fundraising bodies) and third parties (such as GetUp! and various other campaign groups).

However, the proposed ban on foreign political donations may face constitutional issues due to the freedom of political communication embedded in the Australian *Constitution*. The ban on foreign political donations must be a proportionate response to justify limiting the freedom of political communication.

The High Court has previously permitted laws that banned donations from a certain class of people. In [McCloy v New South Wales](#), the court upheld a New South Wales scheme that banned donations from property developers due to the history of corruption in the state. This means it is possible to ban donations from a certain group, such as foreigners, where there is evidence of a serious risk of corruption.

However, in *McCloy*, there was evidence of corruption implicating property developers borne out in [several reports](#) by the NSW Independent Commission Against Corruption. It is unclear whether it can be proven there has been corruption in Australia due to foreign donations.

Australia does not have a federal anti-corruption body that has investigated these issues. Also, the proportion of foreign donations in Australia is small. Foreign political donations amounted to 2.6% of total donations to political parties in 2015-16. In the last seven election periods from 1998-99 to 2016, foreign donations [have amounted to](#) between 0.03% to 6.13% of total donations. As such, there may not be enough proof that foreigners pose a particular threat to the integrity of the Australian electoral system. This means the High Court may strike down a law banning foreign donations as unconstitutional.

A ban on foreign donations to third party groups is even less likely to be constitutional as there is a more tenuous link between such groups and foreign influence on domestic policy, compared to political parties who are elected to government.

My [post](#) on the AusPubLaw blog elaborates on these issues.

### **Final Remarks**

It is commendable that the government and Parliament are considering holistic reform to the political donations system.

I am happy to provide further details or evidence on any of the points made.

**Expertise:** The author is a Lecturer at RMIT's Graduate School for Business and Law. I research in the area of law and politics, focusing on issues of political integrity and the law. I regularly comment in [The Conversation](#) on issues relating to public law and politics, including political donations reform.