

Rebecca Schneider

[REDACTED]

[REDACTED]

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

I have recently completed a research internship in the office of Dr Helen Haines MP as part of the Australian National Internships Program as a student of the Australian National University, with a focus on the widespread issues present in the Federal Political Donations & Disclosure regulatory scheme and ways these issues may be remedied.¹ In this submission I will outline some of these identified issues, alongside the ways in which Australian state schemes, particularly that of New South Wales, provide for a preferable regulation of the donation context. As the proposed change is likely to create a situation where a greater proportion of donated funds will be funnelled through the Federal, as opposed to State, donation disclosure schemes, this submission will recommend that those sections relating to modifying the relationship between Federal and State electoral finance laws should not be passed.

ISSUES WITH THE FEDERAL SCHEME

A substantial proportion of the widely identified issues with the Federal political donation disclosure scheme relate to the domain of transparency. At a theoretical level, transparency is desirable to enable for a democracy to function fully and properly: if voters and political participants do not have access to the requisite information to analyse the influences and views of their potential or actual political representatives – including their sources of campaign funding –², democracy cannot function as intended.³

¹ The full report produced from this research can be provided upon request.

² Lindy Edwards, 'Political Donations in Australia: What the Australian Electoral Commission Disclosures Reveal and What They Don't' (2017) 77(3) *Australian Journal of Public Administration* 392, 392.

³ *Ibid.*

The current Federal political funding disclosure system does not in any real way achieve a transparent disclosure of information. The substantial time lag between the receipt of a donation and its public disclosure, which ranges from 8 to 19 months under the current Federal system,⁴ does not provide any opportunity for an electoral participant to be fully informed of competing candidates' funding sources before making a vote.⁵ Alongside this, any issue which may bring forward concerns of certain donors' influence is likely to be raised in the Parliamentary or public sphere well before the existence of the donation becomes public – if, indeed, it ever does.⁶ Although it is difficult, due to the lack of available information, for regular assessments of the total funding pools of major political contestants to be made,⁷ analysis from the 2013-14 financial year demonstrates only 25% of each of the Liberal National Party and Labor Party's fundraising sources were published as disclosable donations.⁸

Concern about the lack of transparency in the Federal donation disclosure regime has been raised from a number of perspectives. Transparency International has recorded a fall in Australia's overall transparency ranking relative to other nations over time, in their 2020 Report identifying our Federal donation disclosure scheme as the major area of concern.⁹ Alongside this, Australians' trust in democracy has continued to fall, reaching a low of 25% at the 2019 election,¹⁰ while the belief that Government is run for the benefit of a few large interests has risen to 56%.¹¹ The opaque and secretive treatment of donations thus, alongside theoretical concerns as to the achievement of a functional democracy, has significant risks to Australia's democratic legitimacy both at a local and international level.

A number of other key concerns are also raised in relation to this Federal donation regulation regime. The Australian Electoral Commission, as administrators of these laws, have previously identified a culture of evasion whereby there is considerable effort made by

⁴ Melissa Clarke, 'Political donations data raises the question: 'What is it that Government doesn't want us to know?', *ABC* (online, 2 February 2019) < <https://www.abc.net.au/news/2019-02-02/calls-for-political-donation-reform/10773118>>.

⁵ Lindy Edwards (n 2).

⁶ Bret Walker, 'The Information that Democracy Needs' (Whitlam Oration, 5 June 2018).

⁷ Lindy Edwards (n 2).

⁸ *Ibid.*

⁹ Transparency International, 'Spotlight on Money in Politics' (Media Release, 23 January 2020).

¹⁰ Sarah Cameron and Ian McAllister, *Trends in Australian Political Opinion: Results from the Australian Election Study 1987-2019* (2019), 99.

¹¹ *Ibid* 100.

candidates and politicians to avoid meeting their obligations under the scheme.¹² Paired with the limited extent of enforcement activities undertaken or available,¹³ this creates a situation whereby the scheme is minimally effective in achieving any of its purported aims and purposes. Alongside this lack of effectiveness, the minimalist nature of regulation of donations at the Federal level is thought to contribute to the inefficient and unsustainable exponential increases in the cost of electoral campaigns.¹⁴

STATE SYSTEMS IN COMPARISON

While there has been limited reform to the Australian Federal donations regulation scheme for over a decade – despite significant suggestions for reform arising from a number of inquiries –¹⁵ other jurisdictions, including Australian states, have moved to modernise and tighten their laws in this area. New South Wales, as the longest running of these schemes, provides a key case for analysis, although similar systems also exist in Victoria and Queensland, among others.¹⁶

New South Wales' political funding system reforms have had substantial benefits in areas where the Federal scheme is lacking. With much quicker disclosure of donations and a lower donation threshold, greater proportions of information on campaign funding sources are available to support the achievement of a truly informed, well-functioning democratic system.¹⁷ Reforms taken as a whole have been found to reduce both the total value of donations overall and the average value of each donation.¹⁸ This has directly addressed the problems associated with rising costs of elections by controlling these to a certain level (largely through the imposition of spending caps), while also evening the playing field

¹² Joo-Cheong Tham, 'The Crisis of Political Money' (2015) 74(3) *Meanjin* 69.

¹³ Australian Electoral Commission, Supplementary Submission 19.1 to Joint Standing Committee on Electoral Matters, *Inquiry into the Funding of Political Parties and Election Campaigns* (6 September 2011) ('AEC 2011 Inquiry Supplementary Submission').

¹⁴ Interview with Anthony Albanese (David Speers, *Insiders*, ABC, 23 February 2020).

¹⁵ Joint Standing Committee on Electoral Matters, Parliament of Australia, *Inquiry into the Funding of Political Parties and Election Campaigns* (Final Report, 9 December 2011).

¹⁶ Damon Muller, 'Election Funding and Disclosure in Australian States and Territories: A Quick Guide' (Research Paper, Parliamentary Library, Parliament of Australia, 28 November 2018).

¹⁷ Zim Nwokora et al, 'Political Finance Regulation and Reform in New South Wales: Towards a Fairer System?' (2019) 65(1) *Australian Journal of Politics and History* 115.

¹⁸ Malcolm Anderson et al, 'Less Money, Fewer Donations: The Impact of New South Wales Political Finance Laws on Private Funding of Political Parties' (2018) 77(4) *Australian Journal of Public Administration* 797.

between political participants.¹⁹ With a lower overall value of donations, candidates with less access to wealth and resources have gained an improved ability to compete, while potential donors with less accrued wealth have gained the ability to make increased numbers of and relatively more influential donations, as their lower-valued donations are not as significantly below the average value of donation.

Alongside these reforms, bans on donations from certain industries with high potential for corrupting influence have seen success. Particular industries such as property development are in unique positions to improperly influence government or be perceived as doing so due to their close connection with regulatory policy, and as such are likely to have disproportionate impacts on public perceptions of the excessive influence of certain interests.²⁰ In New South Wales, the choice to ban some key industries from making political donations has successfully kept this money out of the political system, with analysis of potential alternative avenues – such as related industries – not showing significant indication this money has continued to enter politics.²¹

THE ROLE OF THIS BILL

While the aim of clarity between state and federal schemes is positive, clarity should not be achieved by undermining the substantially more successful and effective state schemes, as this Bill is likely to do. Purely by the nature of the alternatives, with the Federal scheme as permissive and minimalist where State schemes are generally more structured and restrictive, the application of Federal rules to a greater section of political funding has the potential to undermine the restrictive aims of these State schemes such as New South Wales' – for example, through permitting donations from industries with no continuing involvement in State political campaigns.

Alongside this, the nature of our political system renders drawing distinctions between Federal and State campaigning problematic and artificial. Indeed, the High Court's line of cases extending the Implied Freedom of Political Communication to State contexts rests on the assumption that there is no clear delineation between issues which relate to State or

¹⁹ Jennifer Rayner, 'More Regulated, More Level?: Assessing the Impact of Spending and Donation Caps on Australian State Elections' in Anika Gauja and Marian Sawer (eds), *Party Ryles?: Dilemmas of Political Party Regulation in Australia* (ANU Press, 2016) 147.

²⁰ Joo-Cheong Tham, 'The Problems with Money in Australian Politics' (2019) 90(2) *Australian Quarterly* 20.

²¹ Zim Nwokora et al (n 17).

Federal political campaigns and activities.²² As political funding relates significantly to the creation and distribution of the political communication which this Constitutional right protects, it would be misguided to assume similar logical reasoning could not be extended to the political funding context. Indeed, the nature of party-based political campaigning and the existence of political parties active at both Federal and State levels create a situation where it is practically difficult, if not impossible, to draw clear lines between what campaign activity is in support of Federal, or alternatively State, purposes.

The Bill as it stands does not provide a clear attempt to resolve this difficulty in any meaningful way. It is likely that the proposed Federal law would substantially step into areas where State law otherwise operates. This would have the impact of substituting the effective, beneficial, and pro-democratic operation of the relevant state schemes with the opaque, inefficient, and otherwise ineffective Federal scheme. As such, it is recommended that:

Recommendation 1: The Sections of this Bill relating to the relationship between Federal and State political funding schemes not be passed.

Recommendation 2: Further investigation be taken into the political funding contexts with the aim of reforming the Federal system to match the success of schemes in States and other national jurisdictions.

REFERENCES

²² *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.

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