

From the desk of Gideon Rozner, Research Fellow

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Committee Secretary  
Joint Standing Committee on Electoral Matters  
PO Box 6021  
Parliament House  
Canberra ACT 2600  
  
25 January 2018

Dear Ms Agostino

**Submission to the inquiry into the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017**

I refer to the above inquiry, and provide a submission to the Joint Standing Inquiry on Electoral Matters (the Committee) on behalf of the Institute of Public Affairs (IPA), with a view to appearing before the Committee at a public hearing should the opportunity arise.

The IPA believes that freedom of speech is fundamental to a free society. Political communication is obviously an important mode of speech. Accordingly, the IPA is concerned about regulatory proposals that seek to restrict it, including the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (the Bill).

About the Institute of Public Affairs

The IPA is an independent, non-profit public policy think tank, dedicated to preserving and strengthening the foundations of economic and political freedom. The IPA supports the free market of ideas, the free flow of capital, a limited and efficient government, evidence-based public policy, the rule of law, and representative democracy. Throughout human history, these ideas have proven themselves to be the most dynamic, liberating and exciting. Our researchers apply these ideas to the public policy questions which matter today.

Views on the Bill

The IPA has substantial concerns about the Bill and its consequent limitations on political communication. In particular, we are concerned about the scope and effect of provisions in the Bill that seek to regulate ‘political campaigners’ and ‘third party campaigners’.

The apparent intention of the government in introducing the Bill is to extend current electoral laws to entities that engage in political campaigning activity identical to political parties, but do not run candidates for office themselves and are hence ‘unregulated’.

The IPA does not accept the argument that further regulation of political communication is necessary or desirable – if anything, existing regulations should be wound back.

However, even if it is accepted that the regulation of ‘non-party actors’ is a valid objective, the way in which the Bill is currently drafted will have an effect that will go substantially beyond this aim. By extending the Commonwealth’s funding and disclosure regime to entities with even a tangential relationship with the political process, the Bill may have adverse consequences for a range of charities, community groups, religious bodies, service clubs and other organisations.

**Conclusion**

To assist the Committee in its deliberations, I enclose a recent report by the IPA, *Freedom of speech and political communication in Australia*. The report explores general principles relating to freedom of speech and communication and provides specific observations on the Bill.

The IPA trusts that this submission will be of assistance to the Committee. Once again, we would be grateful for the opportunity to present our views on this matter at a public hearing of the Committee.

Yours faithfully

 **Gideon Rozner**  
Research Fellow  
Institute of Public Affairs

Encl.

January 2018

# FREEDOM OF SPEECH AND POLITICAL COMMUNICATION IN AUSTRALIA

Gideon Rozner, Research Fellow

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# FREEDOM OF SPEECH AND POLITICAL COMMUNICATION IN AUSTRALIA

Gideon Rozner, Research Fellow  
January 2018

## About the Institute of Public Affairs

The Institute of Public Affairs is an independent, non-profit public policy think tank, dedicated to preserving and strengthening the foundations of economic and political freedom.

Since 1943, the IPA has been at the forefront of the political and policy debate, defining the contemporary political landscape.

The IPA is funded by individual memberships and subscriptions, as well as philanthropic and corporate donors.

The IPA supports the free market of ideas, the free flow of capital, a limited and efficient government, evidence-based public policy, the rule of law, and representative democracy.

Throughout human history, these ideas have proven themselves to be the most dynamic, liberating and exciting. Our researchers apply these ideas to the public policy questions which matter today.

## About the author

**Gideon Rozner** is a Research Fellow at the Institute of Public Affairs. He was admitted to the Supreme Court of Victoria in 2011 and spent several years practicing as a lawyer at one of Australia's largest commercial law firms, as well as acting as general counsel to an ASX-200 company. Gideon has also worked as a policy adviser to ministers in the Abbott and Turnbull Governments, including in the area of electoral matters. Gideon holds a Bachelor of Laws (Honours) and a Bachelor of Arts from the University of Melbourne .

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## Executive summary

A stable and functional democracy obviously requires laws governing the conduct of elections. Clear and objective rules in accordance with principles such as free and regular elections, the universal franchise and fair voting systems are critical to maintaining confidence in the integrity of the electoral process.

However, Australian electoral law has over time exceeded the core function of ensuring free and fair elections. Governments have increasingly sought to regulate the broader political debate, through laws such as authorisation requirements for political material, media 'blackout' periods and funding and disclosure requirements on candidates and political parties.

Freedom of speech is fundamental to a free society. Political communication is obviously an important mode of speech and accordingly, the laws and regulations that seek to restrict it are inherently concerning.

Supporting candidates and political parties that share one's values – financially or by any other means – is a form of political expression. It should be governed with a view to maximising free speech. The right to privacy is also important to enable the full exercise of freedom of political communication, protecting supporters of candidates, political parties and advocacy groups from fear of retaliation and harassment.

Concerns about the 'undue influence' of campaign funding – including that from 'foreign sources' – are misguided. Further, experience suggests that 'crackdowns' on political funding and disclosure tend to fail in solving perceived problems and often incur unintended consequences.

In light of these principles, the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (the Bill), recently introduced into Parliament by the Turnbull Government, is a cause for significant concern. One particularly worrying aspect is its extension of funding and disclosure regulations to entities with no actual relationship with the political process beyond mere speech.

As a matter of principle, the Bill should be opposed. However, even as a matter of practicality, the expanded reach of funding and disclosure laws would impose unreasonable regulatory burdens on a substantial number of community groups with minimal involvement with the political process.

The government's intention appears to be extending the regulations governing political parties and similar entities to groups that behave like 'conventional' political parties but do not run candidates at elections.

It is arguably not necessary or desirable to regulate any political entities to the extent that is currently the case. However, even if such an objective is accepted as valid, the Bill as currently drafted goes way beyond its apparent aims, and should be redrafted.

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# General principles

## Free speech and political donations

Freedom of speech is a liberty that is arguably the most fundamental to a free and open society. As the IPA has previously noted, '[f]reedom of speech is not merely one value among many'.<sup>1</sup> It is fundamental to the relationship between the state and the individual. Liberty of thought, speech and conscience forms the basis of the liberal democracy. Dutch philosopher Benedict de Spinoza wrote that:

The most tyrannical governments are those which make crimes of opinions, for everyone has the inalienable right to liberty over his thoughts.<sup>2</sup>

Freedom of speech is therefore an indispensable prerequisite of a genuine democracy. If we do not have unfettered autonomy over our thoughts and their expression, we cannot validly exercise our freedom of choice within the democratic process.

Within an Australian context, the High Court has long recognised that freedom of speech is essential to the system of representative government established by the Constitution:

Freedom of communication as an indispensable element in representative government. Indispensable to that accountability and that responsibility is freedom of communication, at least in relation to public affairs and political discussion. Only by exercising that freedom can the citizen communicate his or her views on the wide range of matters that may call for, or are relevant to, political action or decision. Only by exercising that freedom can the citizen criticize government decisions and actions, seek to bring about change, call for action where none has been taken and in this way influence the elected representatives... Absent such a freedom of communication, representative government would fail to achieve its purpose.<sup>3</sup>

Obviously, freedom of political communication includes direct forms of speech and activism, such as publishing material articulating a particular policy position or verbally criticising an elected representative.

However, this principle also extends to indirect expression – activity which assists others in promoting or advancing a particular political perspective. Donating money to candidates, political parties or issues-based groups that share one's values or policy positions is therefore a form of political communication, which should be afforded the appropriate freedoms.

The IPA has consistently defended financial contributions as a form of political expression, as well as criticising laws that attempt to manipulate political debate by limiting the freedom to donate to political parties.

For example, the IPA was a vocal critic of the O'Farrell Government's short-lived ban in NSW on political donations from various organisations, most notably trade unions.<sup>4</sup> As Senior Fellow Chris Berg wrote at the time:

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1 Chris Berg, *In Defence of Freedom of Speech: From Ancient Greece to Andrew Bolt* (Melbourne: Institute of Public Affairs), 2012, 3.

2 Benedict de Spinoza, *Theological-Political Treatise*, (New York: Dover), 1955, quoted in *ibid*, 4.

3 *Australian Capital Television Pty Ltd & New South Wales v Commonwealth* (1992) 177 CLR 106, [37]-[38].

4 See Election Funding, Expenditure and Disclosures Amendment Bill 2011 (NSW).

The [O'Farrell Government's] reforms intend to restrict participation in political activism solely to individuals, rather than corporations, unions, and peak bodies. Is our right to freedom of speech and participation rescinded when we form groups? Surely not. But that is the basic assumption behind the NSW reforms.

Yet there is a deeper philosophical disagreement here, and it concerns how we understand 'democratic' political debate. Broadly, there are two models.

The first imagines democratic debate as a free-for-all. People and organisations should be allowed to say and advocate whatever they want, support whoever they want through words or donations, and argue their case as publically as they can. The rough and tumble of such a debate is natural – the sign of a healthy liberal democracy sustained by a broad freedom of speech.

The second model argues that governments should 'manage' the debate. The parliamentary inquiry said the reforms sought to 'promote fairness and equality'. As Kristina Keneally said back in 2010, 'those with the most money have the loudest voice and can simply drown out the voices of all others'. In the name of democracy, loud voices need to be quietened.

But this second model is puzzling. Free debate informs the decisions made by voters to elect representatives and change governments. Free debate is at the heart of democracy. So what right does a government have to manipulate that debate? How can it legitimately suppress and restrain participants that it has determined are excessively loud, or decide what constitutes a 'genuine' – rather than political – campaign?<sup>5</sup>

Openness and freedom of speech is paramount in a democracy. The right to engage in political debate – whether directly or indirectly – should be as hindered as little as possible by the state.

## The right to privacy

As with free speech, privacy is a cornerstone of a functional electoral system. True freedom of speech requires the person exercising it to do so without fear of retaliation or harassment. As courts in other jurisdictions have noted, '[a]nonymity is a shield from the tyranny of the majority'.<sup>6</sup>

Australian democracy has a proud tradition of upholding the right of citizens to participate without being forced to publicly declare their positions. The secret ballot, pioneered by Australian colonies in the 1850s, is perhaps our greatest democratic innovation. It was introduced in elections for the Victorian Legislative Council in response to the scourge of voter intimidation and even violence that routinely occurred after the open ballots that were then held in Britain and its colonies.<sup>7</sup>

The possibility of victimisation and coercion makes privacy in political activity an enduring and relevant electoral imperative. This extends beyond anonymity in the act of casting a vote, but also to privacy in other forms of political activity.

Privacy in the specific context of funding and disclosure has been recognised as a legitimate objective by numerous parliaments and governments. During its 2011 inquiry into funding and disclosure issues, Parliament's Joint Standing Committee on Electoral Matters conceded that privacy was one of the principles that 'should be taken into account when designing a regulatory

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<sup>5</sup> Chris Berg, 'O'Farrell's campaign finance reforms are abominable', ABC News, 22 February 2012, accessed 24 January 2018, <http://www.abc.net.au/news/2012-02-15/berg-behavioural-economics/3842514>.

<sup>6</sup> *McIntyre v Ohio Elections Commission* (1995), 514 US 334.

<sup>7</sup> See John Hirst, *Making Voting Secret: Victoria's introduction of a new method of voting that has spread around the world* (Melbourne: Victorian Electoral Commission), 2005, 21.

framework for funding and disclosure'.<sup>8</sup> In its dissenting report, the Coalition argued against compelling a greater proportion of political donors to be publicly revealed:

Coalition members of [the Committee] do not agree with the reduction in the [donations] disclosure threshold, noting that it increases compliance costs for political parties, third parties and individuals and will lead to potential intimidation of small donors... [It] will significantly impact the ability of individuals to give donations to political parties without the potential for intimidation and harassment.<sup>9</sup>

### The question of 'undue influence'

The notion that the actions and policy positions of politicians can be distorted by the interest of donors is not a new one. Though it has rarely, if ever, been substantiated, the spectre of 'undue influence' has motivated a suite of restrictions on freedom of speech and the right to privacy for political donors.

Current legislative proposals are predicated on the latest incarnation of this notion. Legislation currently before the parliament (discussed in the next section) has been introduced on the basis that '[f]oreign-sourced political funds amount to undue influence in a domestic public political debate'.<sup>10</sup>

Supporters of more stringent funding and disclosure regulations point to the fact that companies and wealthy individuals donate largely to political parties and candidates with policies that are favourable to business. However, there is no meaningful evidence that the policies of the latter are a result of donations by the former. In fact, the causal relationship is arguably the opposite: Political donors – large and small – support candidates and parties that share and espouse their values.

Obviously, it is the number of votes that a candidate receives that determines the result of an election. Financial resources do matter, but only to the extent that they enable candidates and parties to promote their policies. Accordingly, as a matter of common sense, even the most generous donation is highly unlikely to induce a candidate or politician to adopt a position or make a decision that will translate into the loss of votes.

Similarly, 'foreign' donations will only have an impact on public policy if they allow for the promotion of views and policies which are acceptable to the Australian public. Policies that are not deemed to be in the national interest – whatever the motivation for their adoption – will be rejected by ordinary democratic means.

This point is demonstrated by the recent Sam Dastyari affair – ironically the apparent catalyst for the introduction of the Bill by the Turnbull Government. Then-Senator Dastyari's defence of China's actions in the South China Sea, allegedly made in deference to a high-value donor, clearly failed the 'pub test', culminating in Dastyari's eventual resignation. Rather than demonstrating the need for a 'crackdown' on foreign donations, the Dastyari episode proves that the system, such as it is, works.

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<sup>8</sup> Joint Standing Committee on Electoral Matters, *Report on the Funding of Political Parties and Election Campaigns* (2011), accessed 14 December 2017, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=em/political%20funding/report/final%20report.pdf](https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=em/political%20funding/report/final%20report.pdf), 42.

<sup>9</sup> *Ibid.*, 217-218.

<sup>10</sup> Explanatory Memorandum, Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017, 7.

## Unintended consequences

Legislative reforms designed to restrict campaign funding often incur unintended consequences. Campaign funding is vital in a healthy democracy. Effective political communication requires resources to 'get the message out'.

Funding is particularly important for challengers in political contests. Without sufficient financial resources, political parties and candidates are not able to compete against the substantial advantages enjoyed by incumbents, such as the electoral and communications allowances of parliamentarians and taxpayer-funded advertising by the government of the day. Minor parties and 'new entrants' are particularly disadvantaged, as they lack the 'free media' and public electoral funding available enjoyed by established political parties.

Limiting the resources available to political parties and other advocacy groups may also lead to a more narrow range of ideas and perspectives in public debate by depriving 'bold ideas' of vital 'seed capital'. As American law professor Bradley A Smith argues:

[I]n an unregulated system [of funding and disclosure], a candidate might be able to propose bolder solutions and rely on a handful of donors to provide 'seed funding' for the campaign. The candidate could then use this seed money to try to persuade voters that his or her approach to issues is a good one. Contribution limits cut off this option, driving all candidates away from bold solutions; campaigns become efforts to pander to what the largest number of voters think, rather than to debate issues on the merits, and create support for new ideas.<sup>11</sup>

By erecting barriers to entry for minor parties and new ideas, overly restrictive funding and disclosure regulations reduce the plurality of voices upon which a free and democratic society depends.

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<sup>11</sup> Bradley A Smith, *Unfree Speech: The Folly of Campaign Finance Reform* (Princeton: Princeton University Press), 2001, 75.

# Current legislative proposals

The Turnbull Government introduced the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (the Bill) into the Senate on 7 December 2017.

If implemented, the Bill would make substantial changes to the *Commonwealth Electoral Act 1918* (the Electoral Act). As with previous changes, these amendments would restrict free speech and limit privacy in relation to funding and disclosure matters with a purported aim to addressing ‘undue influence’ in the political process.

## Implications for civic groups

The most concerning aspect of the Bill is its expansion of the ambit of funding and disclosure laws to a wide range of ‘non-party political actors’.<sup>12</sup>

Currently, the Electoral Act imposes a suite of funding and disclosure obligations on candidates, political parties and their associated entities. If implemented, the Bill would impose these same obligations, for the first time, on organisations whose only engagement with the political process is the expression of views.<sup>13</sup> This is an unprecedented and dangerous proposal.

Political parties are unique entities that play a unique role in our democratic system. They preselect candidates, work to have them elected and, in turn, have representation in the parliament and executive. Political parties also enjoy privileges that other organisations do not, most notably public funding (which at the 2016 election, amounted to over \$62 million).<sup>14</sup>

The proximity to government decision-making and privileges enjoyed by political parties forms the basis of the rationale for funding and disclosure laws. By widening the application of these laws, the Bill dramatically exceeds this rationale. Subjecting rules designed to regulate political parties to groups that merely comment on political matters is impractical and inappropriate.

Under the Bill, entities would be subject to the full funding and disclosure regime of the Commonwealth Electoral Act merely for incurring a certain amount of expenditure for ‘political purposes’, which can include:

[T]he public expression, by any means of views on an issue that is, or is likely to be, before electors in an election (whether or not a writ has been issued for the election).<sup>15</sup>

This is an extremely wide and poorly-drafted definition. The range of matters it could cover is essentially unlimited, given that issues that are ‘before electors’ at an election is wholly subjective and dependent on the concerns and priorities of the voters themselves. Voters cast their votes at federal elections for all manner of reasons; every issue imaginable is ‘before voters’ at every election.

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<sup>12</sup> Above n 8, 3.

<sup>13</sup> Although third parties are currently required to disclose details of electoral expenditure in some circumstances, the range and standard of information disclosable is much more limited than that of candidates, political parties and associated entities. See Commonwealth Electoral Act, ss 314AEB and 314AEC.

<sup>14</sup> ‘Final 2016 federal election payment to political parties and candidates’, Australian Electoral Commission, accessed 23 January 2018, <http://www.aec.gov.au/media/media-releases/2016/08-17e.htm>.

<sup>15</sup> Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017, sch 1, item 7 (emphasis added).



In effect, this amounts to the regulation of the discussion of any discussion of any issue whatsoever. Every entity that expresses 'a view' on 'an issue' will potentially come under the remit of the Act.

While the Bill does contain several 'carve-outs' – namely the news media, satirists, academia and the arts – these are far too limited, and ignore various organisations to which the Bill may still apply, including industry associations, charities, service clubs, religious organisations, community organisations and other advocacy groups.<sup>16</sup> 'Political activity' under the Bill could therefore include, for example, comments made by such organisations regarding:

- homelessness, in the case of charity organisations;
- childhood literacy, in the case of educational advocacy groups;
- the state of remote communities, in the case of indigenous organisations;
- bushfire preparedness, in the case of volunteer firefighting organisations; and
- the adequacy of parks and leisure facilities, in the case of sporting organisations.

Legal advice commissioned by the IPA, included in this report at Appendix A, confirms this view:

[T]he nature, type or description of the person or entity would largely be irrelevant to deciding whether or not they must be registered as a political campaigner or third party campaigner. Generally speaking, it would not matter why the entity originally was created, and the normal or everyday activities of the person or entity would not matter.

[...] Thus, if the minimum amount of political expenditure was incurred... the civic group would be obliged to register as a political campaigner or third party campaigner as the case may be. It would make no difference whether the expenditure was incurred, for example, by a peak body or industry association for the purpose of expressing views on the desirability of tax reform, by a charity for the purpose of expressing views on social welfare or the treatment of refugees, or by a religious or community organisation for the purpose of expressing views on the level of funding to schools.<sup>17</sup>

The consequences of these provisions are as extensive as their application. Compliance costs on community groups could be significant and it is difficult to see how, in the absence of a massive increase in funding, the Australian Electoral Commission would have the resources to enforce such a regime.

Advocacy groups play an important role in our democracy. They monitor the actions of our elected representatives, analyse the position of political parties in relation to matters of interest to their members and provide vital information and feedback to policy-makers. Reforms that would reduce the proliferation of such groups in Australia would be deeply regrettable.

Further, by imposing legal restrictions on such a broad suite of civic groups, the Bill will inadvertently favour other participants in the public debate, which in many cases are more prominent, entrenched and well-funded. There is no reason why civic groups should be subject to restrictions on expressing political views that will not apply to, for example:

- broadcasters, such as the ABC;
- public sector agencies, such as the Australian Human Rights Commission; and
- academic organisations, such as universities.

The exemption of media organisations in the Bill is particularly problematic. Excluding media organisations from the funding and disclosure regime and including other organisations is a

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<sup>16</sup> Ibid.

<sup>17</sup> See Appendix A, 3-4.

double standard. Under the Bill, opinions on public policy expressed by, for example, religious organisations would be subject to funding and disclosure laws, but those expressed by news organisations, such as *Breitbart News* or *Lenny Letter* – or in an Australian context, *Quadrant* or *New Matilda* – would not. An article calling for a change in government policy would be captured by the Bill if it were published on the website or blog of an industry association, but exempt if that same article appeared in the opinion pages of a newspaper. Beyond the nebulous and opaque notion of ‘undue influence’, no justification for this arbitrary distinction has been given.

### **Purpose of the Bill and recommendations**

It is doubtful that the Turnbull Government intends or desires for the Electoral Act to apply to such a wide range of civic groups. In fact, the current Chair of the Joint Standing Committee on Electoral Matters, in her foreword to the report examining the issues that the Bill is seeking to address, stated that any expansion of funding and disclosure requirements:

[M]ust not impose unnecessary burdens or restrictions on the majority of non-government organisations and charities the use both domestic and foreign funds to undertake charitable work and policy advocacy in accordance with their deductible gift recipient status.<sup>18</sup>

Rather, it appears that the objective of the Bill is to regulate what we may call ‘quasi-political parties’: Entities that focus largely or even entirely on political campaigning, but unlike political parties do not run candidates for public office. The explanatory memorandum to the Bill confirms that its intended focus is limited to quasi-political parties:

Election campaigning has radically changed through the professionalisation of politics and the proliferation of media advertising. New political actors neither endorse candidates nor seek to form government, yet actively seek to influence the outcome of elections.<sup>19</sup>

As explained in the first section of this report, it is arguably not necessary or desirable to regulate any political participants to the extent that the Electoral Act currently does. For this reason, the Bill should be rejected in its entirety.

However, even if it is accepted that the regulation of quasi-political parties is a valid objective, the way in which the Bill is currently drafted – as explained in the above section – will have a range of unintended consequences. It is therefore strongly advisable that, short of withdrawing the Bill outright, the government substantially redraft it.

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<sup>18</sup> Joint Standing Committee on Electoral Matters, *Second interim report on the inquiry into the conduct of the 2016 federal election: Foreign Donations* (2017), accessed 20 December 2017, [http://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024053/toc\\_pdf/Secondinterimreportontheinquiryintotheconductofthe2016federalectionForeignDonations.pdf;fileType=application%2Fpdf](http://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024053/toc_pdf/Secondinterimreportontheinquiryintotheconductofthe2016federalectionForeignDonations.pdf;fileType=application%2Fpdf), xi.

<sup>19</sup> Above n 8, 3.

# Appendix A – Legal advice

**IN THE MATTER OF THE ELECTORAL LEGISLATION AMENDMENT  
(ELECTORAL FUNDING AND DISCLOSURE REFORM) BILL 2017**

**OPINION**

1. In December 2017, the Australian Government introduced the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (**the Bill**) into the Senate.
2. The Bill is for an Act to amend the *Commonwealth Electoral Act 1918* (**the Act**) and for related purposes. If passed in its present form the Bill would, *inter alia*, insert a new Division 1A of Part XX of the Act. The new Division 1A would impose obligations upon persons and entities to be registered as “political campaigners”, “third party campaigners”, and “associated entities” in certain circumstances.
3. Against this background, we have been asked by the Institute of Public Affairs (**IPA**) to answer the following question: is there a risk that the proposed Division 1A to Part

XX of the Act could apply to civic groups such as industry associations and peak bodies, charities, and religious or community groups?

4. We would answer “yes” to the question.
5. For convenience, when explaining the reasons for our answer below, we refer to provisions in the Bill by reference to their proposed numbering in the Act. Further, we direct our attention below only to the provisions relating to political campaigners and third party campaigners, but not to those relating to associated entities.
6. As set out in the Bill, the object of Division 1A to Part XX would be to provide for the registration of certain persons or entities – that are not registered political parties or candidates in elections – in order to support the transparency of the schemes in the Act that relate to donations, the disclosure of donations or electoral expenditure, and the authorisation of electoral matter (s287E).
7. Under Division 1A to Part XX, a person or entity would be defined as a “political campaigner” or a “third party campaigner” if registered as such by the Electoral Commissioner (s287(1), s287L). Once registered as a political campaigner or a third party campaigner, the person or entity would then be subject to various substantive provisions, including provisions relating to the nomination of a financial controller (s292E), donations (s302E, s302L), foreign donations (s302K), loans (s306A), annual returns (s314AEB), and record-keeping (s317).
8. Under sections 287F and 287G, persons or entities would have to be registered as a political campaigner or a third party campaigner if a prescribed amount of “political expenditure” was incurred by or with the authority of the person or entity within a prescribed period of time.
9. The phrase “political expenditure” would be defined to mean expenditure incurred for one or more political purposes (s287(1)). In turn, the phrase “political purpose” would be defined to mean any of the following purposes (s287(1)):
  - (a) the public expression by any means of views on a political party, a candidate in an election or a member of the House of Representatives or the Senate;

- (b) the public expression by any means of views on an issue that is, or is likely to be, before electors in an election (whether or not a writ has been issued for the election);
  - (c) the communicating of any electoral matter (not being matter referred to in paragraph (a) or (b)) for which particulars are required to be notified under section 321D;
  - (d) the broadcast of political matter (not being matter referred to in paragraph (c)) in relation to which particulars are required to be announced under subclause 4(2) of Schedule 2 to the Broadcasting Services Act 1992;
  - (e) the carrying out of an opinion poll, or other research, relating to an election or the voting intentions of electors.
10. Expenditure would not be taken to have been incurred for one or more political purposes if (s287(1)):
- (a) the sole or predominant purpose of the expression of the views, or the communication, broadcast or research, is the reporting of news, the presenting of current affairs or any editorial content in news media; or
  - (b) the expression of the views, or the communication, broadcast or research, is solely for genuine satirical, academic or artistic purposes.
11. As can be seen, provided the person or entity is not a political entity or a member of the Federal Parliament, the nature, type or description of the person or entity would largely be irrelevant to deciding whether or not they must be registered as a political campaigner or third party campaigner. Generally speaking, it would not matter why the entity originally was created, and the normal or everyday activities of the person or entity also would not matter. Instead, the obligation to be registered as a political campaigner or third party campaigner would depend entirely upon whether a certain amount of expenditure was incurred for one or more political purposes by or with the authority of the person or entity. The only qualification to this general proposition is that if a person or entity is in the business of news media, academia, comedic entertainment, or art, we would expect that fact to be relevant to establishing the sole

or predominant purpose of a view, communication, broadcast or research, and therefore whether any expenditure constituted “political expenditure” as so defined.

12. Thus, if the minimum amount of political expenditure was incurred by or with the authority of an industry association, peak body, charity, religious group or community group, the civic group then would be obliged to register as a political campaigner or third party campaigner as the case may be. It would make no difference whether the expenditure was incurred, for example, by a peak body or industry association for the purpose of expressing views on the desirability of tax reform, by a charity for the purpose of expressing views on social welfare or the treatment of refugees, or by a religious or community organisation for the purpose of expressing views on the level of funding to schools. All that would be relevant would be whether or not the expenditure was incurred for one or more political purposes.
13. We have not been asked, and therefore do not consider, the potentially complicated question as to how an entity characterises expenditure for the purposes of deciding whether it is to be regarded as being “for” one or more particular purpose, bearing in mind that – aside from, for example, instances of taking out a paid advertisement – civic groups may not have specifically allocated expenditure as being “for” any particular purpose at all, particularly when it comes to the salary of staff who may have a range of functions falling within their position description.

**19 January 2017**

**Edward Gisonda**

**Ben Jellis**

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Public Affairs**

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