



Committee Secretary
Joint Standing Committee on Electoral Matters
PO Box 6021
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Canberra ACT 2600

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Greenpeace Australia Pacific Submission to the Inquiry into the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017

1. Introduction

1.1 Greenpeace Australia Pacific (GPAP) welcomes the opportunity to provide a submission on the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (hereafter referred to as “the Bill”).

1.2 This submission focuses on the aspects of the Bill that relate to not-for-profits (NFPs) and registered charities. As noted below, GPAP is a registered charity. However, this submission addresses our concerns both about the impacts for registered charities and non-registered NFPs as we believe that both types of organisation make an important contribution to Australian civil society and specifically to the protection of the environment.

2. About Greenpeace Australia Pacific (GPAP)

2.1 GPAP is a charity registered with the Australian Charities and Not-for-profits Commission (ACNC).

2.2. GPAP consists of over 500,000 people, including board members, staff, activists, volunteers and supporters who care deeply about protecting the environment in our beautiful home: our precious climate, soaring forests and wide wild oceans. GPAP stands for positive change through action. We investigate, expose and confront environmental abuse in Australia and around the world. We champion environmentally responsible and socially just solutions, including scientific and technological innovation.

2.3 GPAP’s core values are reflected in all of our work. We:

- ‘bear witness’ to environmental destruction in a peaceful, non-violent manner;
- use creative non-violent confrontation to expose problems and promote accountability;
- have no permanent allies or adversaries in exposing threats to the environment and finding solutions;
- ensure our financial independence from political or commercial interests by accepting no money from government, business or political parties; and
- seek solutions for, and promote open, informed debate about society’s environmental choices.



2.4 To protect the environment in accordance with our charitable purposes GPAP has adopted a range of tactics including:

- non-violent direct action;
- conducting and publishing research and investigations;
- producing consumer guides about the environmental credentials of particular products within a sector;
- producing and disseminating targeted communication materials;
- organising and delivering petitions;
- lobbying business, government and other stakeholders; and
- hosting stakeholder conferences about environmental issues.

2.5 GPAP is proudly independent. We are not aligned to any political party and advocate equally to governments of all persuasions. GPAP does not solicit or accept funding from governments, corporations or political parties. GPAP neither seeks nor accepts donations which could compromise its independence, aims, objectives or integrity.

2.6 We are extremely grateful for the trust bestowed on us by our donors to protect and conserve our national environment and accordingly we are committed to high standards of accountability and transparency. We report annually to the Register of Environmental Organisations and ACNC. We also report as required to state charitable regulators as to our annual income and expenditure and prepare audited annual statutory financial statements that are available to the public. In addition, GPAP is a signatory to the International NGO Accountability charter.

3. Why have not-for-profits and registered charities been included in this bill?

3.1 There are legitimate reasons for banning foreign donations to political parties. Many countries around the world already have such measures in place and the public appears to support action to be taken to prevent foreign influence from being exercised over our political system.¹ However, we would note that we agree with Professor Joon Cheong Tham that the fundamental problems with money in Australian politics have less to do with the “foreignness of money and more the corporateness, the use of money to buy access and influence.”² As such, GPAP would prefer to see a broader set of reforms that includes, in particular, tighter restrictions on corporate donations to political parties. Nevertheless, this submission will not delve into this topic and will instead be primarily focused on our concerns around the inclusion of NFPs and charities in the Bill.

3.2 NFPs and charities are fundamentally different to political parties. Most importantly for the purposes of this submission, NFPs and charities do not possess the power to enact legislation.

3.3 Charities are already very strictly regulated, including with regard to their “political” activities. An organisation cannot be qualified as charitable under the Charities Act 2013 (Cth) if its main purpose is to promote or oppose a political party or a candidate for political office. The ACNC has the power to investigate, revoke charitable status and impose other sanctions when a charity is in breach of its obligations. Under the Electoral Act 1918, “third parties” are required to submit a return if they expend a certain amount of funds on, for example, “public expression of views on an issue in an election”. There are penalties for the failure to complete and lodge a return.



3.5 Given the nature of NFPs and charities, and the existing restrictions placed on their activities in Australia, it is clear that foreign donations to these entities cannot directly influence the policy of political parties, or the outcome of elections.

3.6 Given that the aspects of the Bill that cover charities and NFPs cannot be said to address the overall aim of the Bill (preventing improper foreign influence in Australia's political system), and the fact that there has been no demand from the public for action in this area, one is left with questions about the Government's motives. According to Dr. Joan Staples, the Government has employed a "conjuring trick" with its inclusion of NFPs and charities in the Bill in "an attempt to continue conservative attacks on NGO advocacy and 'wedge' Labor into supporting the Bill."³

3.7 This Bill represents only one in a suite of attempts by Coalition/Liberal governments in recent years to limit the ability of charities and NFPs, particularly environmental organisations, to advocate on important issues.⁴

3.8 The origin of many proposals for limitations on the NFP sector can be traced to Institute of Public Affairs (although, notably, they oppose the Bill)⁵ and the Minerals Council of Australia (MCA).⁶ Although the MCA is funded by a number of companies that are entirely or predominantly foreign-owned, this occurs through membership fees, which are technically not donations. The Bill, therefore, does not appear to impact the ability of the MCA to continue to take foreign funding and use it to engage in political advocacy. Unlike GPAP, the MCA regularly makes donations to political parties and pays to attend fundraising events to gain access to politicians.⁷

3.9 Aside from the influence wielded by groups like the MCA, and the issue of domestic corporate political donations, there is also a very clear revolving door between government and the mining industry in Australia.⁸ The Bill does not address these problems with our political system. In fact, in its current form the Bill could exacerbate these problems because it will reduce the ability of NFPs to scrutinize the relationships between politicians and corporations. As Transparency International has recently noted "scrutiny by civil society can play an important role in ensuring revolving doors do not lead to conflicts of interest."⁹

4. Political advocacy

4.1 Our environment is affected by myriad anthropogenic factors. Among the most significant are business and government policies. While 'on the ground activities' by environmental organisations are essential, they can be rendered largely ineffective if they are not complemented by policy change. For example, 'on the ground' conservation of intact ecosystems or biodiversity will be ineffective in the long run unless there is policy action on climate change. While not all environmental NFPs and charities engage in political advocacy, it is absolutely essential that some organisations devote some of their efforts to achieving policy change.

4.2 Polling indicates that 74% of Australians believe that "Environmental groups should be able to publicly criticise the government if it makes decisions that cause environmental destruction."¹⁰

4.3 It is well-established under Australian law that charitable organisations can, and indeed should, engage in political advocacy.



4.4 In the seminal *Aid/Watch Incorporated v Commissioner of Taxation* case in 2010, the High Court recognised the critical importance of advocacy and political activities by charities in Australia.¹¹ The majority of the High Court held that Aid/Watch should not be disqualified from charitable status because of its activities aimed at achieving legislative and policy change. The High Court decision held that such activities support the operation of the Constitution and are beneficial to the community.

4.5 In 2013, the Charities Act codified the definition of charity as inclusive of organisations that advocate in order to influence law, policy or practices in Australia or overseas. The Act makes it clear that charities are permitted to distribute information and advance debate about the policies of political parties and/or candidates for political office.

4.6 The Bill imposes new restrictions on NFPs and charities than engage in political advocacy. It requires them to register as “political campaigners” if they have a certain level of “political expenditure” in a given year.

4.7 There is uncertainty about what constitutes “political expenditure” under the Bill. NFPs and charities already find it difficult to faithfully comply with their existing annual return obligations due to uncertainty about how the phrase “political expenditure” should be interpreted. For example, NFPs and charities have to determine in advance whether an issue that they campaign on will be considered “an issue in an election” held in the future—a nearly impossible task given the rapidly changing nature of politics.

4.8 Additionally, it is not clear whether expenditure incurred well prior to the Bill must be counted when determining whether or not an entity is a “political campaigner”. This makes compliance with this very complex piece of legislation extremely difficult for NFPs and charities.

4.9 The Bill also proposes a change to the definition of an “associated entity”. An associated entity is currently defined under the Electoral Act 1918 as an entity:

- that is controlled by one or more registered political parties; or
- that operates wholly or to a significant extent for the benefit of one or more registered political parties; or
- that is a financial member of a registered political party; or
- on whose behalf another person is a financial member of a registered political party; or
- that has voting rights in a registered political party; or
- on whose behalf another person has voting rights in a registered political party.

The Bill would expand this definition to also include groups that act “to the detriment of one or more registered political parties in a way that benefits one or more other registered political parties”. Such an expansive definition has the potential to capture completely independent organisations that engage in political advocacy on issues where there is substantial disagreement among political parties.

5. Other problems that the bill raises for NFPs and charities

5.1 *Donor privacy*: Under the Bill, NFPs and charities that are registered as political campaigners will be required to comply with the same annual return obligations as political parties. The return must include detailed financial information, political affiliations of senior staff, personal information about donors and an auditor's report. This reporting obligation is in addition to existing and significant ACNC reporting obligations. Australian donors to NFPs and registered charities that are classed as "political campaigners" will also be required to submit annual returns in the same way as donors to political parties. These requirements will have severe impacts on donor privacy.

5.3 *Loss of income from international philanthropy*: As noted by the Community Council of Australia:

Overseas philanthropy makes an important contribution to Australian charities in diverse fields such as health and medical research, Indigenous advancement, terrestrial and marine conservation, poverty alleviation, and education. The work this philanthropy supports has very high public value.¹²

Under the Bill, NFPs that are "political campaigners" will be completely banned from accepting gifts over \$250 from foreign donors. This includes NFPs that pursue objects of public benefit that are not considered charitable by law (such as the promotion of sport). NFPs and charities will also be banned from using foreign donations to support grants to recipients that are "political campaigners", even if the grants program is entirely apolitical (e.g. directed to 'on the ground' environmental conservation projects). Smaller NFPs and charities are likely to be the worst affected by the loss of this income.

5.4 *Difficulties with complex administrative requirements*: Registered charities that are "political campaigners" will have to keep foreign gifts in a separate account that cannot be used for a range of advocacy activities. These charities will have to closely monitor all advocacy activities and communications that may potentially be construed as "political expenditure" and ensure that only domestic funds are used for them. NFPs and charities engaged in advocacy will also need to nominate a "financial controller" who may be subject to significant penalties including a potential prison term or hundreds of thousands of dollars in fines if the entity does not comply with the complex administrative requirements imposed by the Bill. The introduction of new and complex requirements will reverse the progress made by the ACNC and ATO in recent years to reduce red tape for the sector.¹³

6. A healthy NFP sector is critical to Australian democracy

6.1 Bans or restrictions on the use of foreign funding such as proposed in the Bill, and administrative requirements that threaten donor privacy as well as the basic ability for many smaller NFPs and charities to function, serve to limit the capacity of these organisations to engage in the political process. There will inevitably be a chilling effect on political advocacy as NFPs and charities self-censor in an effort to avoid non-compliance. In harming the NFP sector, this Bill does a great disservice to Australian democracy.

6.2 Advocacy by NFPs and charities is widely understood as critical to the functioning of democracy because it ensures "that the most diverse range of views and voices is represented in policy debate."¹⁴ As noted by Chia, Harding and O'Connell (2011) "political speech by

charities enriches the political process by encouraging political debate, facilitating citizen participation and engagement and promoting political pluralism”.¹⁵ Burdon et al. (2015) point out that, “[i]n a robust democracy, a government would expect that the role of these organisations will include the expression of opposition to the government’s own policy agenda.”¹⁶

6.3 Historically, the Australian Government has recognised the importance of NFP advocacy. In a 1991 report the House of Representatives Standing Committee on Community Affairs noted that: “An integral part of the consultative and lobbying role of these organisations is to disagree with government policy where this is necessary in order to represent the interests of their constituencies.”¹⁷ Unfortunately, in recent years, this sensible approach appears to have been forgotten and a new defensiveness from the Government has resulted in “new laws and practices which are slowly but surely eroding [the] independent voice” of NFPs.¹⁸

6.4 In 2016, Michel Forst, UN Special Rapporteur on the situation of human rights defenders, made a fact-finding visit to Australia to examine the experience of journalists, human rights lawyers and NFPs who work to protect human rights. Forst noted that while he had expected to “encounter only laudable implementation” of Australia’s obligations under human rights laws to provide a safe and enabling environment for civil society, instead, he observed “mounting evidence of a range of cumulative measures that have levied enormous pressure on Australian civil society”.¹⁹

6.5 At a broader level, the continued attacks by the Government on the NFP/charity sector result in a considerable drain on resources (e.g. the need to make numerous submissions to government inquiries) that divert attention from the issues that are the central focus of their charitable purpose (e.g. the protection of the environment or human rights).

7. Sending the wrong message to the world

7.1 While international philanthropy has an important role to play in Australia, it is far more significant in less developed countries. In fact, a substantial amount of Australia’s Official Development Assistance is channelled through NFPs that undertake development and capacity building projects.²⁰ It is highly hypocritical for Australia to suggest that international philanthropy to charities in Australia is inappropriate, while at the same time facilitating such philanthropy abroad.

7.2 Unfortunately, efforts to restrict foreign funding and otherwise constrain the ability of NFPs and charities to operate are not confined to Australia. There is an increasing global trend to limit the freedom of NFPs. One third of the restrictive laws adopted in 60 countries between 2012 and 2015 concerned international funding.²¹

7.3 Although the trend is widespread, the most notable examples of repression in the NFP sector are found in countries that rank quite low in indices that measure political rights and civil liberties.²² This is not a club that Australia should be seeking to join, nor should it be sending the message to other countries that curbing the rights and freedoms of NFPs is appropriate. In the words of two professors writing about proposals to strip politically active environmental NFPs of their tax-free status: “How do we stand morally above corrupt or authoritarian states that cause so much suffering in the world today, if we advance policies that are clearly intended to stifle self-criticism?”²³



7.4 In response to increasing restrictions on NFPs worldwide, the Community of Democracies (an intergovernmental body with 30 state members including Canada, Japan, and the US) and the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association developed the 'Protecting Civic Space and the Right to Access Resources' project. One of the key principles that emerged from this project was that: "States must allow associations to seek, receive and use foreign funding as a part of their obligation under international human rights law to mobilize resources available within the society as a whole and from the international community."²⁴ The project report further notes that "Most of the justifications put forward by States to restrict foreign funding do not comply with Art. 22 par. 2 of ICCPR (International Covenant on Civil and Political Rights)" and specifically mentions that invoking the "protection of State sovereignty against external interference" is not a legitimate ground for restricting foreign funding to NFPs.

8. Conclusion

8.1 In summary, Yee-Fui Ng captures the problems with the Bill well when she notes that it is "both too broad and too narrow. It is too broad because it may stifle legitimate public debate by targeting activist groups. It is too narrow because it does not capture all donations that might corrupt our political system."²⁵

8.2 It is the strong view of GPAP that:

- (a) The proposed Bill should be rejected in its current form because it unnecessarily limits the ability of NFPs and registered charities to engage in political advocacy, which has been recognized under Australian law as consistent with a charitable purpose; and
- (b) Donations to political parties and donations to NFPs and registered charities should not be dealt with in the same legislation as these are fundamentally different types of entity.

8.3 If this Bill passes, it will inevitably result in a chilling effect on the advocacy activities of NFPs and registered charities. Some smaller groups that rely more heavily on international philanthropy or simply cannot manage the complex administrative requirements may cease to exist altogether. In turn, this will have a negative impact on democracy in this country.

8.4 In addition to the considerable domestic consequences, the Bill will have a negative impact on Australia's international reputation and ability to promote democracy in other countries.

8.5 GPAP would be delighted to be given an opportunity to appear before the Committee and explain further or expand upon any aspect of this submission.

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Notes

¹ A Guardian Essential Poll taken last June found that 64% of those polled supported a ban on foreign donations to political parties, see: <https://www.theguardian.com/australia-news/2017/jun/27/most-voters-support-real-time-political-donations-reporting-guardian-essential-poll>

² Paul Karp, “Political donations: focus on foreigners ‘misconceived’”, *The Guardian*, 25 January 2018, <https://www.theguardian.com/australia-news/2018/jan/25/political-donations-focus-on-foreigners-misconceived>

³ Joan Staples, “Government targets international philanthropy for civil society”, 6 December 2017, <https://johnmenadue.com/joan-staples-government-targets-international-philanthropy-for-civil-society/>

⁴ Other examples include: inquiries into the tax-deductibility status of environmental groups; suggestions that environmental groups should be required to spend 50% of their funds on “environmental remediation”; attempts to ban environmental boycotts; and anti-protest laws in several states.

⁵ Paul Karp, “‘Potentially very dangerous’: IPA opposes foreign donation ban and ‘GetUp clause’”, 5 Jan 2018, <https://www.theguardian.com/australia-news/2018/jan/05/potentially-very-dangerous-ipa-opposes-foreign-donation-ban-and-getup-clause>

⁶ For example, see the extensive quoting and referencing of the MCA’s submission in the Joint Standing Committee on Electoral Matters’ *Second interim report on the inquiry into the conduct of the 2016 federal election: Foreign Donations*, March 2017, http://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024053/toc_pdf/Secondinterimreportontheinquiryintotheconductofthe2016federalelectionForeignDonations.pdf;fileType=application%2Fpdf

⁷ MCA responses to questions from Senate Select Committee into the Political Influence of Donations, 6 November 2017, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Political_Influence_of_Donations/PoliticalDonations/Additional_Documents

⁸ David Holmes, “The fossil-fuelled political economy of Australian elections”, *The Conversation*, 22 June 2016, <https://theconversation.com/the-fossil-fuelled-political-economy-of-australian-elections-61394>

⁹ Transparency International, (2017) *Combating Corruption in Mining Approvals*, at 28, <https://www.transparency.org/view/publication/8093>

¹⁰ Essential Research, *The Essential Report*, 15 November 2016, http://www.essentialvision.com.au/wp-content/uploads/2016/11/Essential-Report_161115.pdf

¹¹ *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42 (1 December 2010), <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2010/42.html>

¹² Community Council of Australia, Submission to: The Joint Standing Committee on Electoral Matters Inquiry into and report on all aspects of the conduct of the 2016 Federal Election and matters related thereto – including overseas donations and the role of third parties, September 2017, <http://www.aph.gov.au/DocumentStore.ashx?id=1b13dde8-df8e-4e55-ba93-ac8eada50959&subId=515772>

¹³ ACNC and ATO, “The ATO and ACNC Collaborate for Change”, 29 September 2016, https://www.acnc.gov.au/ACNC/Comms/Med_R/MR_181.aspx?TemplateType=P

¹⁴ Sarah Maddison and Andrea Carson (2017) *Civil Voices: Researching Not-For-Profit Advocacy*, PRObono Australia and Human Rights Law Centre, at 15.

¹⁵ Joyce Chia, Matthew Harding and Ann O’Connell (2011) “Navigating the Politics of Charity: Reflections on *Aid/Watch Inc v Federal Commissioner of Taxation*” 35 *Melbourne University Law Review* 353, 365.

¹⁶ Peter Burdon, Alexander Reilly, Anna Olijnyk and Sylvia Villios, Public Law and Policy Research Unit, University of Adelaide (2015) Submission to the House of Representatives Standing Committee on the Environment Inquiry into the Register of Environmental Organisations, <https://www.aph.gov.au/DocumentStore.ashx?id=4c2e5b74-9b82-4709-a546-c8eb904f5af8&subId=351212>

¹⁷ Quoted in Staples, note 3 above.

¹⁸ Chloe Gall and Emily Howie (2017) *Defending Democracy: Safeguarding independent community voices*, Human Rights Law Centre.

¹⁹ United Nations Office of the Commissioner for Human Rights, “Australian Government must rebuild trust of civil society – UN human rights expert”, 18 October 2016,

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20693&LangID=E>

²⁰ Community Council of Australia, note 12 above, at 10.

²¹ Douglas Rutzen, (2015) “Civil society under assault”, *Journal of Democracy*, No 26(4): 28-39. For examples of other restrictions that environmental NFPs increasingly face, see International Centre for Not-for-Profit Law (2016) “Environmental Advocacy: Challenges to Environmental Groups’ Rights to Assemble, Associate and Express their Opinions”, *Global Trends in NGO Law* 7(1),

<http://www.icnl.org/Global%20Trends%20Vol%207%20iss%201.pdf?pdf=trends7-1>

²² For examples, see “Donors: Keep Out”, *The Economist*, 12 September 2014.

²³ Susan Laurance and Bill Laurance, “Australia needs politically active environmental groups”, *The Conversation* 12 June 2015, <https://theconversation.com/australia-needs-politically-active-environmental-groups-42748>

²⁴ Community of Democracies and the UN Special Rapporteur on the rights to freedom of peaceful assembly (2014) “Protecting civic space and the right to access resources”,

<http://www.ohchr.org/Documents/Issues/FAssociation/GeneralPrinciplesProtectingCivicSpace.pdf>

²⁵ Yee-Fui Ng, “Ban on foreign political donations is both too broad and too narrow, and won’t fix our system”, *The Conversation*, 7 December 2017, <https://theconversation.com/ban-on-foreign-political-donations-is-both-too-broad-and-too-narrow-and-wont-fix-our-system-88567>